Alberto López-Basaguren
Leire Escajedo San Epifanio *Editors*

The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Volume 2

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Alberto López-Basaguren • Leire Escajedo
San Epifanio
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ISBN 978-3-642-27716-0 ISBN 978-3-642-27717-7 (eBook)
DOI 10.1007/978-3-642-27717-7
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013938613

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Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

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Part I
Intergovernmental Relations: The Experience in Federal Countries and in Spain

Intergovernmental Relations in the Architecture of Federal System: The United States

Carol S. Weissert

The term intergovernmental relations originated in the United States in the 1930s and was motivated by a strong concern for the effective delivery of public services to clients. The term has come to mean the activities and interactions among governmental units within a federation and includes local general purpose and special governments and nongovernmental units (Agranoff 2004)—often working in intergovernmental networks. For comparativists, intergovernmental relations are the workings of governmental representatives at various levels usually in institutional settings.

Comparative federalism scholars have embraced the notion of multilevel governance or MLG (Hooghe and Marks 1996, 2001, 2003) in analyzing the EU, but now it is used widely outside this domain. The touchstone of MLG is flexibility where governance is disbursed across multiple jurisdictions, often in overlapping and task-driven capacity. U.S. network scholarship may be viewed as a first cousin to this work, although it is often conducted at the local level (Feiock and Scholz 2010; Peterson and O'Toole 2001). Earlier work by Ostrom and Ostrom and others also highlighted flexible governance arrangements and overlapping jurisdictions (see for example, Ostrom et al. 1988).

In U.S. scholarship, the focus has been primarily on state–federal relationships, and it is those relationships that I wish to speak to today, for in the United States, those relationships are prickly if not downright contentious today.

Minutes after President Obama signed the Patient Protection and Affordable Care Act, the major health reform measure that has become known derisively as "Obama Care," a handful of state attorneys general, led by my own attorney general in Florida, filed suit in federal court arguing that the measure was unconstitutional. This is clearly a federalism issue. As the Virginia Attorney General put it, his state's challenge to the PPCA "is not about health care, it's about our freedom and about

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A. López-Basaguren and L. Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, Vol. 2,
DOI 10.1007/978-3-642-27717-7_1, © Springer-Verlag Berlin Heidelberg 2013

standing up and calling on the federal government to follow the ultimate law of the land—the Constitution" (cited in Joondepth 2011, p. 449). The focus of the states' complaint is the provision in the PPACA that calls for all citizens to have health coverage by January 1, 2014. Anyone failing to do so would pay a penalty. At issue was the clause in our constitution giving the Congress (the federal government) the responsibility to regulate interstate commerce.

The states contend that the provision is not interstate commerce because health care insurance is not an economic activity covered by interstate commerce. They note that the provision penalizes inactivity—not activity. The federal government, in contrast, argues that anyone choosing to not buy insurance is making an economic decision made more important by the fact that in the aggregate these individual decisions could result in billions of dollars in costs to others, including the federal government through our safety net programs. A 2005 Supreme Court decision finding that growing marijuana for personal use medically affected interstate commerce would tend to have us predict that the Court would support the broader definition of interstate commerce (*Raich v. Gonzales*). However, we also know that the court is not immune to public opinion and political statements (witness *Bush v. Gore* in 2000 that essentially decided the presidential race for George W. Bush).

There was a great deal of uncertainty until recently when the Supreme Court would consider the PPACA case. The Obama Administration could have delayed the decision through appeals until after the 2012 election but chose not to do so. It will now be decided in this term that ends in June 2012—prior to our November 2012 election. One might say that this means that the Obama Administration thinks the decision of the court will be positive for its case. Perhaps they know something we don't. Nonetheless, the case will be decided in the next few months and the decision will be a pivotal one for federalism and intergovernmental relations.

The states are also fighting in court over environmental protection, specifically against federal regulations issued by the Environmental Protection Agency on air pollution, mercury and air toxics standards for power plants, water pollution controls, and greenhouse gas regulations. Of course, these suits are not new—Democratic governors sued the EPA during the Bush Administration to get the agency to adopt regulations prescribed in law. Now Republican governors are fighting against the regulations that have been promulgated from the law. However, it is striking that many of these suits include a majority of the states in the effort.

Other cases include the following:

– Arizona is suing the federal government "to force the federal government" to do its job on immigration.
– Arizona and Florida are suing over the federal Voting Rights Act of 1965, which requires those states to seek prior approval from the Justice Department before making any changes in the state's election laws, saying that the law exceeds Constitutional authority.

The Republican Party—which hopes to take the White House in 2012—espouses states' rights and pretty much thinks that the federal government can do

no right, although they are desperate to control that federal government. They are piling on the states' concerns—whether it is to embarrass the White House or be really in sympathy with the states is not clear. For example, a few months ago, the House passed a bill that would bar the EPA from overruling state decisions on water quality (Cappiello 2011).

Nevertheless, apart from the court case, the states—including my own—have pushed back in ways other than the courts. My state governor has refused to accept any federal dollars offered to it by the PPAC, something like cutting off your nose to spite your face. He also refused other federal grants—anything that represents a commitment that the state might be "stuck" with after the federal dollars end.

As I write this, the governor has said that he will not accept any of the president's proposed new job program—we don't call it a stimulus anymore—even though it amounts to over $6 billion for a state very much needing the money.

Other examples include:

– Texas has refused to participate in a federal permitting system on greenhouse gas regulation that every other state now follows (Broder and Galbraith 2011).
– Three states have refused to participate in a fingerprint-sharing program that the Obama Administration wants to impose nationwide. The proposal would send fingerprints of every person booked by state or local police to federal databases to be checked for immigration violations.
– In 2011, six states adopted 10th Amendment Resolutions asking the federal government to "cease and desist any and all activities outside the scope of their constitutionally-delegated powers."

States have pushed back on the implementation of the No Child Left Behind law—a George W. Bush-era education reform. It is very prescriptive, and this year—the ninth year of the law—called for 100 % of students in a state to be proficient in English and Math by 2014. Essentially, states have refused to meet the standards in the law. What happened? Nothing. The Feds blinked, saying that the states don't have to implement the controversial parts of the law.

The feds similarly "blinked" over a 2005 law that would have imposed tough requirements for driver's licenses. The law provided that if states did not comply, their citizens would not be able to board airplanes or enter federal buildings. None of the states had complied with the law by 2009, and 13 states had enacted laws prohibiting compliance with the act. A compromise measure was proposed but stalled. Real ID is in limbo and not likely to be resuscitated.

What's going on here, and how is it important to our discussion of intergovernmental relations? These relationships might best be understood by a simple causal model:

State preferences -> Federal actions (political safeguard)
State preferences <- Federal actions (compliance)

The first stage is the states successfully obtaining the federal public policies they desire. I've labeled this political safeguard since the notion that states can impact national policy through institutional means is very limited in the United States.

Rather, as summarized by a U.S. Supreme Court justice, states must rely on political safeguards—basically a means of lobbying the Congress for their desired policy.

The second stage kicks in after the policies have been put into law. Most domestic policies require intergovernmental cooperation in implementation. In short, the federal government simply cannot put the programs in place on its own but must get the states and localities to comply with their wishes. The literature here—largely called implementation research—is vast and useful.

Political Safeguards

The first relationship might be called political safeguards. The framers of the U.S. Constitution thought that the states could be a check on federal power. In the earliest years of the United States, states were represented in the upper house—our Senate—and were selected by their state legislatures. This changed with the 17th amendment (we only have 27) adopted in 1913, which provided for popular election of the U.S. Senate. Thus, senators are elected statewide but are politicians in their own right—not delegates of the state legislature or the state. It seems amazing that 3/4 of the states would vote to take away this linkage, but their choices were so poor that even they voted to take the power away. So we have few institutional safeguards.

Rather, what we have today are political safeguards. According to the U.S. Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* in 1985, the courts should not use the 10th amendment to limit congressional power to regulate state and local government. Rather, the court should trust that state interests will be protected by political safeguards of federalism (Pittenger 1992). It is the states working through the political process that protects federalism. It is the states as lobbyists. States have a collective interest in protecting their autonomy, but they don't do such a good job in this area, for often the states have a parochial interest as well—and a political interest (i.e., Republican governors may see an issue such as health care reform as very differently from Democratic governors).

How do the states obtain their preferences at the national level? We don't have the institutional components of an upper house representing states. We don't have the nice cooperative executive federalism of Canada. We don't have intergovernmental entities identifying problems and coming up with solutions. There was once a group called the Advisory Commission on Intergovernmental Relations, set up by statute and made up of federal, state, and local elected and appointed officials, which did just that. However, it was abolished in a money-saving effort (interesting since it was quite cheap) and was not replaced. Congress once had committees assigned the tasks of overseeing intergovernmental relations but no longer. Federal agencies and the Government Accountability office no longer have intergovernmental units. The White House maintains an office with intergovernmental in the title, but it is largely a political and favor-dispensing office (Kincaid 2012).

What we have left are associations representing states and localities that try to get their policies enacted in the U.S. Congress. How well do they do that?

Most researchers will say not so well. One reason might be institutional—or lack of institutions. A second reason is that collective action is a difficult one for the states. Smith (2008) and Dinan (2011) found that this individual state vs. collective action is a thorny one where the collective does not generally work well because state officials from the most populous states are tempted to "go it alone" in lobbying Congress, weakening the states' collective interests represented by groups like the National Governors Association. There are also political and ideological divides that make bipartisan organizations of states less effective in highly salient issues. The case in point is the Patient Protection and Affordable Care Act mentioned earlier. There was much at stake intergovernmentally in this bill. This was also an area where there was much state innovation—including the well-known Massachusetts health reform bill adopted when now presidential hopeful Mitt Romney was governor. The National Governors Association and National Conference of State Legislatures had much at stake but simply were not players in the discussions. As Dinan (2011) notes, the NGA and NCSL were unable to reach consensus on a state position, and partisan groups such as the Republican Governors Association were able to step in their place. Individual states stepped up their efforts. Dinan documents that individual states advanced universal state interests, as well as their own particularistic concerns largely to their own delegations. He also demonstrates that state officials attempted to mobilize public opinion and concludes that this mechanism was influential when states elevated state concerns in public consciousness to the point that congressional leaders had to take account of these concerns. The states' influence was most likely to succeed when the Members think it is in their interest to support states' preferences.

Nevertheless, it is not simply the problem of the states. There is also a lack of interest on the part of the Congress in federalism and intergovernmental issues. Kincaid (2012) quotes one senator—Carl Levin from Michigan—as saying, "there is no political capital in intergovernmental relations." So the politics aren't there and neither is much sympathy for states' problems. Ray Scheppach, long-time director of the National Governors Association, summarized his experience with the Congress by noting that it 'had few concerns' regarding financial burdens on the states." Indeed, recent scholarship supports this claim (Scheppach 2012).

Scheller and Weissert (2011) examined the potency of "state roots" or the value of state experience on the policymaking tendencies of Members of Congress. They posit that Members of Congress who have served in state legislatures will be more positively attuned to state interests. The rationale is that these state legislative veterans will sponsor state-friendly legislation because they have both political and policy knowledge that will lead them to recognize the importance of intergovernmental relations and state capacity. Weissert and Scheller examined major health legislation over six congressional sessions and whether Members with state experience were more likely to support state-friendly legislation, state-unfriendly legislation, or no mention of states. Surprisingly, they found that state legislative veterans were equally likely to sponsor state-friendly and state-unfriendly legislation.

They were not likely to sponsor legislation ignoring states. The authors concluded that there is evidence of state roots, but the roots can work both for and against states. One possible explanation is that their state legislative experience told them that the states are limited in what they can do and the federal government needs to provide considerable guidance—even preemption—to obtain desirable policy. A second possible explanation is that in coming to the Congress, the state legislative veterans build on their past experience but look forward to the rest of their career in Congress, so they sponsor legislation dealing with states but may be just as inclined to promote their new political home—the federal level—compared to their old one—the state.

These findings help explain the difficulty in tracing what has been called "vertical diffusion" where the federal government learns from the states. Researchers have generally found no support or modest support for the idea that the federal government uses state experiences in drafting federal legislation in similar policy areas (Mossberger 1999; Rabe 2007; Thompson and Burke 2007; Esterling 2009; Lowery et al. 2011). For example, Esterling found that the vast experience of state officials in implementing Medicaid programs was not being tapped in congressional hearings in what he called "a failure of federalism." The Members valued the views of lobbyists and academics more in this key intergovernmental program administered by state officials.

So we have problems with interest groups representing the states, with the states undercutting those collective interests and with the lack of recepitivity from Members of Congress. A final problem, recognized by Bolleyer (2009) and not studied among U.S. scholars, is the tendency of the federal government to pick and choose whom to deal with. So this linkage isn't very strong.

Compliance/Implementation

While political safeguards are highly political and involve largely elected officials, compliance relates to both politics and non-partisan administration or, as Kincaid (2012) calls it, policymaking and implementation. On the policymaking side, the usual analogy is carrots and sticks. Carrots are in the form of grants in aid to encourage states to act in the way desired by the federal government.

Federal grants totaled a whopping $624 billion in FY 2011. This amount was boosted by the 2009 stimulus package known as the American Recovery and Reinvestment Act, which provided enormous assistance to states—totaling some $275 billion in grants to states and localities. Much of this funding was intended to help states and local governments finance their own policy agendas (Conlan and Posner 2011). However, the AARA was an aberration—both in the number of dollars and the lack of restrictions. Moreover, in FY 2012, federal grants were expected to fall to $584 billion—much of this dominated by one program—Medicaid—the federal-state program providing health insurance for the poor and elderly.

The sticks are penalties or punishment for not acting in the way so desired. Unfunded mandates, cross-over sanctions, partial preemptions, and preemptions have been documented and analyzed to chart centralization trends in intergovernmental relations (Conlan 1991; Kincaid 1993; Posner 1997, 2007; Zimmerman 1991, 1993, 2007).

Once the carrots and sticks are proffered, the policy component is over and the implementation part begins. The implementation is generally undertaken by administrators and staff who are not ideological or political and is often cooperative in nature. Implementation often involves close working relationships among levels (Deil Wright called this picket fence federalism). As one example, a recent article in the New York Times about Texas Governor Rick Perry and his ongoing antagonism to the EPA contains a brief mention that "EPA officials work cooperatively with lower-level Texas officials, who often seek federal technical guidance and money to address environmental problems" (Broder and Galbraith 2011, A14).

However, in today's highly party-polarized politics, even the cooperation is often at a premium. That leads us to the pushback we are seeing now that I discussed at the beginning. Why is it that states are not "biting" on the federal dollars? The short answer is ideology or, in political science terms, goal congruence—you don't find too many Democratic governors and legislatures turning back federal dollars. Nicholson-Crotty (2004) documented that the level of congruence between states and the federal grant administrators was an important predictor of fund diversion. When the states shared the grant program's goals, the program was more successful at stimulating the desired spending. When the goals were not shared, more grant funding was diverted away from the desired areas.

In tough economic times, the federal government has more incentive to shift costs to state and local governments (Kincaid 2012), and it appears that this is the case today. The Congress today is not so generous. We have a special committee working to "find" $1.3 trillion in cuts or revenues over the next 10 years. One can be sure that these cuts will come in large part from federal grants to states and localities.

We haven't seen this pushback since the 1960s when we had governors standing at doors of schools to prevent federal officials from walking young African American students into classrooms. Frankly, it was what gave States' rights in the United States a bad name—but I'm wondering if we're about to see more of the same. There remains some racial animosity (much toward our president), and it seems—at least in the Republican debates—as though the animosity is becoming more accepted—at least in some political circles.

Conclusion

Do all these weaken or strengthen intergovernmental relationships? What about our scholarship understanding these relationships?

There are few reasons to think that highly partisan, non-cooperative, lack of concern for intergovernmental issues on the part of the Congress environment coupled with extremely toxic economic times can be positive for intergovernmental

relations in the United States. I can't think of any except that the system will survive as it has for over 300 years. Some scholars have called for a new "blueprint" of intergovernmental relations, taking into account the impacts of globalization and technology shifts and demographic trends (Scheppach and Shafroth 2008). These scholars suggest a better sorting out of intergovernmental responsibilities, especially in health policy, collapsing categorical grants, and a rethinking of how the three levels of revenue systems interact. What are the chances of this rather systematic rethinking occurring? Next to zero. The national government has its hands full with its massive deficit problem, and states have their own fiscal problems as well. Collaboration and far-reaching thinking simply isn't realistic.

There are more reasons to be optimistic on the scholarship side, however. We have moved beyond descriptive accounts of intergovernmental conflict and cooperation and are now looking at the dynamic relationship between the federal and state governments in terms of intergovernmental political competition. Hill and Weissert (1994) looked at the impact the possibility of federal action on the likelihood states would cooperate with each other in interstate compacts on low-level nuclear wastes. Volden (2005, 2007) and Nicholson-Crotty (2011) look at intergovernmental competition as expressed through credit taking. At issue in this work is understanding allocation of responsibilities in terms of efficiency. Volden finds that when one level of government is in a much better position to efficiently provide the service, that government does provide that services. However, when the capacities of the two levels are closer, the quest for political credit entices the less efficient government to join in the provision—thus overproviding the service and overtaxing in doing so. When he expands the work to federal grants in aid, he concludes that the impact of an increase in grant money will be larger when the state has limited ability to raise money through revenue and can claim credit for the production of the goods through the grant. Nicholson-Crotty is not convinced that the assumptions are accurate—particularly relating to credit taking or blame casting. He argues that confusion over proper credit assignment allows state legislators to claim credit for federal production, whether they increase or reduce spending and find empirical support for this "free-rider" notion of credit.

Intergovernmental relations can be informed by this game theoretical work (followed by empirical tests). I think we'll be seeing more theoretical and empirical work, testing some of the activities of pushback and blame casting.

So the conclusion is mixed. There are contextual stresses on intergovernmental relations in the United States that involve serious fiscal difficulties at the federal and state levels. The slow economic recovery has had a huge negative effect on most states, compounded by the fact that they must balance their budgets annually. The federal government does not have to balance its budget and is living with the excess spending that ensued in the past decade. While some optimists think that tough times can lead to meaningful reforms, I don't see it. Intergovernmental relations are in no danger in the United States in terms of survival. Unfortunately, the dysfunctions of that system are also likely to survive and perhaps even thrive in these tough times. The good news is in intergovernmental scholarship. Scholars are examining systematically and theoretically the dynamic and shifting nature of the

system. We can understand how one governmental level's actions affect another. The scholarship may catch up with the actors and their actions. At least we can hope so.

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Intergovernmental Relations in Canada: A Horizontal Perspective

Benoît Pelletier

Abstract Canada consists of two orders of government, each sovereign in its exercise of legislative powers, which stem from the Constitution. Canada is hence a federation, and as in any such state, the division of legislative powers is characterized by a certain constitutional rigidity. It cannot be formally modified except by means of a relatively complex procedure requiring the participation of both orders of government. The particular complexity of the procedure for amending the Constitution of Canada explains, in part, why intergovernmental relations focus essentially on ways to improve the Canadian federation through non-constitutional means.

Note to the Reader This text was presented in October 2011, long before a sovereignist government was elected in Quebec following the general elections held on September 4, 2012. Needless to say, this election should modify substantially the government of Quebec's position on Canadian intergovernmental affairs. The current text was also presented before the Supreme Court of Canada's decision

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International Conference *The Ways of Federalism and the Horizons of the Spanish State of* Autonomies, Bilbao, Spain, October 2011.

This text is a modified and enriched version of a conference given at an International Seminar held in Zaragoza, Spain, in March 2009. The seminar's theme was *The Federalization of Spain: Deficits of Intergovernmental Co-operation*. The paper then prepared by the author has been published as: Benoît Pelletier, "Las relaciones intergubernamentales en Canadá desde una perspectiva horizontal" in José Tudela & Felix Knuepling (eds.) *España y modelos de federalismo* (Madrid: Centro de Estudios Políticos y Constitucionales: Fundación Manuel Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, 2010), p. 301.

This text results from 10 years of active political life during which the author had the responsibility of intergovernmental affairs as official opposition critic (1998–2003) and as minister (2003–2008) in Quebec. The reader should therefore not be surprised if practical (rather than theoretical) aspects of intergovernmental relations are covered without scientific claim, nor should he or she be surprised if they are presented from a Quebec perspective.

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A. López-Basaguren and L. Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, Vol. 2,
DOI 10.1007/978-3-642-27717-7_2, © Springer-Verlag Berlin Heidelberg 2013

in *Reference re* Securities Act, [2011] 3 SCR 837, which was favourable for the government of Quebec (and Alberta). This decision is linked to note 51 of this text.

Introduction

Canada consists of two orders of government, each sovereign in its exercise of legislative powers, which stem from the Constitution. Canada is hence a federation,[1] and as in any such state, the division of legislative powers is characterized by a certain constitutional rigidity: It cannot be formally modified except by means of a relatively complex procedure requiring the participation of both orders of government.[2]

In a federation, the first order of government is called central, as its jurisdictions extend throughout the State's territory. In Canada, this order of government is composed of the Canadian (or federal) Parliament and government and of the institutions or organizations they have duly created. It exercises its powers over the entire Canadian territory.

The second order of government composing a federation—any federation—is labelled decentralized because it holds jurisdictions only over a limited part of the State. In Canada, it consists of ten provincial parliaments (legislatures) and governments and of the institutions and organizations they have duly created. The institutions pertaining to each province only hold jurisdictions within that province's territory.

In any federation, intergovernmental relations can be examined from a vertical or a horizontal perspective. A vertical perspective studies the relationships between the centralized (or federal) government and the decentralized (or provincial[3]) governments. Intergovernmental relations can also be studied from the angle of the relationships between the entities of decentralized governments. In this case, the analysis is from a horizontal perspective.

In this essay, horizontal federalism in Canada—i.e., relations between provinces—will be discussed. The disparities that exist between Canadian provinces in socioeconomic, demographic, and political terms will be covered. Intergovernmental collaboration as a value in itself will be examined. Some comments on the bicommunal or multinational character of Canada will be

[1] A federation is composed of at least two orders of government. See Anderson (2008) at 3.

[2] In Canada, the division of legislative powers cannot be modified except by agreement of the Parliament of Canada and at least two-thirds of the provinces (meaning seven of them) representing at least 50 % of the total population of the provinces (the *7/50 procedure*). In all federations, the division of legislative powers is relatively rigid as it can only be modified through a complex process; this process nonetheless varies between countries.

[3] In Canada, the federated states are called *provinces*. In other federations, these decentralized entities may be designated under different terms, such as states, regions, communities, länder, cantons, etc.

included, which will naturally lead to discussing the place of Quebec within Canada, as well as the role of Aboriginal peoples in intergovernmental relations. The Canadian system's key players, as well as the forms and modalities of intergovernmental relations, will be highlighted. The institutions and mechanisms that are allowing "interprovincialism"[4] to develop in Canada will be presented, and lastly, the future of horizontal intergovernmental cooperation in this country will be explored. First, the very particular situation of the three Canadian territories (the Northwest Territories, Yukon, and Nunavut) will be introduced. These territories play a significant role in the realm of intergovernmental relations, even though their legal status is highly ambiguous.

The Three Canadian Territories: An Imprecise Status

Canada's federation was created in 1867 with the adoption of the *British North America Act* (later renamed *Constitution Act*, *1867*[5] following the patriation of the Canadian Constitution), which united the four original provinces of Ontario, Quebec, New Brunswick, and Nova Scotia into Canada and laid down the rules to admit other North American British colonies and lands in the newly created Dominion.[6] More precisely, section 146 of the *Constitution Act, 1867*, targeted what was known as the Northwest Territories (which was a Crown possession) and the Hudson's Bay Company's Rupert's Land acquired in 1870 by the British authorities for the Dominion of Canada.[7] These vast lands spread across most of today's Canada and became the provinces of Alberta, Saskatchewan, Manitoba, part of Quebec, and Ontario and, of course, the three territories: the Northwest Territories, Yukon, and Nunavut.

Between 1870 and 1905, the southern part of this land was fractioned into three provinces while the northern part was divided into two territories: Yukon and the Northwest Territories.[8] The creation of Nunavut occurred in 1999 following the 1993 *Nunavut Land Claims Agreement Act*.[9] The principle behind this agreement is to create a land where the majority of the population is Inuit, thus allowing the

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[4] The concept of *interprovincialism* does not exist in dictionaries; it has been invented to describe the intensification of relations between provinces.

[5] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

[6] *Ibid*, s 146.

[7] *Rupert's Land Act, 1868* (UK, 31 & 32 Vict, c 105, reprinted in RSC 1985, App II, No 6; *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada,* SC 1869, c 3, reprinted in RSC 1985, App II, No 7, and *Rupert's Land and North-Western Territory Order (1870)*, RSC 1985, App II, No 9.

[8] *Manitoba Act, 1870,* 33 Vict, c 3 (Can); *Yukon Act*, SC 2002, c 7; *Saskatchewan Act, 1905*, 4–5 Edw VII, c 42 (Can); *Alberta Act*, *1905*, 4–5 Edw VII, c 3 (Can); *Northwest Territories Act*, RSC 1985, c N-27.

[9] *Nunavut Land Claims Agreement Act,* SC 1993, c 29.

promotion of Inuit culture and values.[10] There was a hope that federal involvement in Inuit affairs would decrease, giving Inuit people greater autonomy and control over eastern Arctic policies.[11]

Although the territory's desire to control local affairs (instead of relying solely on federal goodwill) is best illustrated with Nunavut's quest for an Inuit land, its reality mirrors changes occurring in territories' role in intergovernmental relations. Territories, unlike provinces, are not granted legislative powers by the Constitution, but rather these powers are delegated by the Canadian Parliament. Lands that are not included in provinces, such as the territories and coastal waters, fall under the legislative powers of the Parliament of Canada.[12]

The three territories are ruled by similar acts giving them the same powers and political institutions. Each of them has a Commissioner, a legislative assembly, and tribunals.[13] They are under the responsibility of the Minister of Aboriginal Affairs and Northern Development Canada.[14] The Commissioner is appointed by the Governor General,[15] and his role is to be the link between the Minister and the population of the territory. His functions are similar to those of a provincial Lieutenant-Governor,[16] being the chief executive authority.[17]

Territories have virtually the same scope of legislative powers as provinces. The three territories' acts "empower the legislature to make laws for the government of its territory in relation to a long list of subjects roughly corresponding to the list of subjects allocated to the provincial legislature by s. 92 of the Constitution Act, 1867."[18] The difference lies in the fact that provinces are given these powers by the Constitution, whereas territories acts are federal legislation, thus subject to be amended by the Parliament of Canada.[19]

Provinces are created by the Constitution itself; they do not depend on central authorities. However, the federal order of government holds possession of the territories. It is *de jure* entitled to delegate powers to territorial authorities, amend

[10] Légaré (2008).

[11] *Ibid.*

[12] *Constitution Act, 1871* (UK), 34 & 35 Vict, c 28, s 4, reprinted in RCS 1985, App II, No 11.

[13] *Yukon Act*, *supra* note 8; *Northwest Territories Act*, *supra* note 8; *Nunavut Act*, SC 1993, c 28.

[14] See the website of Aboriginal affairs and Northern Development Canada for the list of acts for which the Minister has sole responsibility to Parliament: <www.aandc-aadnc.gc.ca>.

[15] Although the Governor General is the official representative of the head of State, the Queen, he always acts under the advice of the Prime Minister. Legally, the Governor General holds every executive powers, but *de facto* these powers belong to the Prime Minister and his cabinet.

[16] Lieutenant-Governors, much like the Governor General, hold every executive powers but always act under the advice of premiers and their cabinets.

[17] See the Commissioner of Nunavut's website: <http://www.commissioner.gov.nu.ca/english/commissioner/role_commiss.html>, the Commissioner of Yukon's website: <http://www.commissioner.gov.yk.ca/about/role.html>, and the Commissioner of the Northwest Territories' website: <http://www.commissioner.gov.nt.ca/role/>.

[18] Hogg (2008) at 332.

[19] See *Yukon Act*, *supra* note 8; *Northwest Territories Act*, *supra* note 8; *Nunavut Act*, *supra* note 13.

their constitutive acts, or reorganize them geographically. Provinces could even be created from these lands (which would obtain the same level of autonomy as other provinces) or be annexed to existing provinces. In order to do so, the consent of at least seven provinces representing at least 50 % of the total population of the provinces would be required, in accordance with what is called the *7/50 procedure*.[20] Still, such an amendment is unlikely to be considered any time soon as there is no appetite in Canada for reopening constitutional negotiations.[21]

Delegation of powers by the central Parliament to the territories is basically the same principle as delegating powers to municipalities or governmental commissions for example. Such delegation is therefore not deemed permanent in essence because it can, theoretically, be revoked by the Parliament at any time.[22] Although amendments to acts creating the territories are usually supported by the legislative assembly of said territories, by law such support is not mandatory.

Even though territories' governments arise from a delegation of powers, it is recognized that, *de facto*, it has become almost impossible to decrease the powers already held by territories. In fact, they have become quasi provinces, and it would be unthinkable for any federal government to alter this status. On this topic, authors David Cameron and Richard Simeon wrote that "the [...] territories [...] are now integrated with the provinces. Meetings are Federal/Provincial/Territorial or Provincial/Territorial despite the fact that the territories remain constitutional offspring of the federal government."[23] In this case, their constitutional status of federal protectorates becomes superfluous and much more theoretical than practical. "This evolution toward provincial status has evoked remarkably little comment, even though it has the potential for changing the dynamic of intergovernmental relations because three more voices are added to the six smaller and poorer provinces."[24] Obviously, this challenges the way intergovernmental relations used to be, for there are three extra entities engaging in intergovernmental discussions with the federal government or joining collaborative interprovincial relations.

This reality further characterizes the ambiguous status of the territories. Their participation in intergovernmental relations greatly departs from their constitutional status. They are said to be acting more like provinces than like federal protectorates, which redefines intergovernmental relations, parting away from the traditional federal–provincial–municipal framework.[25]

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[20] *Constitution Act, 1982*, ss 42(1)e) and 42(1)f), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For the *7/50 procedure*, see *supra* note 2. In addition, other laws complement this procedure, see *An Act respecting constitutional amendments*, SC 1996, c 1. On this topic, see Pelletier (1998), p. 271.

[21] The constitutional amendment procedure is such a heavy undertaking that it makes even the slightest constitutional reform very difficult (see *supra* notes 2 and 20).

[22] *Supra* note 10 at 348.

[23] Cameron and Simeon (2002) at 63.

[24] *Ibid*.

[25] *Ibid* at 70.