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Transnational Regionalism: Energy Management in New England and the Maritimes

by Ralph W. Howe, III*

I. INTRODUCTION

SINCE 1973 THE New England Governors and the Eastern Canadian Premiers have cooperated in attempting to better manage regional energy resources. This type of cooperation raises constitutional questions of federalism for both the United States and the Dominion of Canada. The aim of this note is to examine the constitutional obstacles to independent regional activity in each nation and the obstacles to transnational regional cooperation. Discussion of constitutional limitations will be followed by a specific inquiry into the scope of relations between the states and the provinces in the field of energy management. These transnational relations will then be analysed in terms of their effect on the relationship between the states and the United States government and on the relationship between the provinces and the Dominion.

Although the actual development of regionalism in Canada and the United States differs, the development apparently coincides with a concept of evolving federalism. The evolution of redefinition of federalism is a process of reallocating problem solving authority. As this note will demonstrate, evolving federalism need not be a challenge to the fundamental constitutional allocation of powers in the two nations. The interaction between the New England Governors and the Eastern Canadian Premiers will serve as an example of how domestic and international regionalism may be accomplished within the constitutional limits of each country.

II. CONSTITUTIONAL PARAMETERS OF REGIONALISM

In Canada, the constitutional basis for interprovincial cooperation is not entirely clear. The legislative power in Canada has been rigidly defined by the subject matter categories listed in the British North American Act (BNA Act), and designated as exclusive by the courts. Therefore, the Canadians have devised three forms of intergovernmental cooperation: (1) the use of intergovernmental conferences; (2) legislation by reference and quotation of other laws; and (3) delegation of executive and administrative powers to the officials of different legislative entities. Regional energy resource management has drawn upon each of these forms of cooperation in Eastern Canada. Careful preservation of the autonomy of the provincial and federal legislative powers has kept this interaction in conformity with constitutional mandate, while the use of the three sanctioned devices for intergovernmental cooperation has helped to expand permissible means of governmental cooperation in Canada.

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1 British North America Act, 1867, 30 & 31 Vict., c. 3 (Can.) [hereinafter cited as BNA Act].
Some authorities contend that the analysis sustaining the domestic forms of intergovernmental cooperation also permit foreign application. Alternatively, scholars have argued that the diplomatic powers of the Crown in Canada were not distributed in the same manner as the legislative powers, but rather were granted to the Governor General of Canada in Council with the federal officials. This dispute remains unresolved in theory, but in practice certain guidelines may be emerging from the limits upon domestic intergovernmental cooperation. Thus, while the maximum provincial power over foreign affairs is not clear, the bounds of legislative autonomy seem to have established practical limits to the power of the provinces.

In the United States the situation is quite different. Regional interaction in energy matters developed in the context of federal sponsorship of the New England Regional Commission (NERC). The federal supervisory power derives from the broad federal power over interstate commerce. Nevertheless NERC also presupposes the existence of state powers to regulate commerce and to enter into new forms of horizontal relations. In the case of both the commerce clause and state interaction, Congress has the power to define the scope of state authority. Through NERC Congress has invited the states to participate in regional regulation of commerce and to create alternative regional policies. So long as the states remain attuned to the federal interest, it would seem that their interaction operates with Congressional consent.

A. Constitutional Limitations on Regionalism in Eastern Canada

Regionalism in Canada is essentially extra-constitutional interaction. In order to evaluate the horizontal relations of the Eastern Canadian Provinces, it is necessary to understand how federal-provincial interaction is limited under the BNA Act.

1. Permissible Federal-Provincial Interaction

Under the BNA Act, power has been distributed to the provinces and federal government to maximize the need for intergovernmental cooperation on matters of primary economic concern. The allocation of exclusive jurisdiction over subjects enumerated in sections 91 through 95 reflects a nineteenth century perception of a more local and regional economy than now exists in Canada. Furthermore, because the BNA Act specifically enumerates classes of subjects over which the provincial and federal governments have mutually exclusive jurisdiction, and since such jurisdiction can be altered only by the Crown, neither the provinces nor the federal government can delegate its authority to legislate.

There have developed, as a result of this situation, three principal modes of intergovernmental cooperation. First, since the early 1960's there has been a proliferation of interprovincial conferences, councils and boards on constitutional and policy issues. Second, the legislatures and Parliament have written into their laws, specific instances of deference to
laws of the other jurisdiction. This enables the more effective coordination and administration of policies. Third, both Parliament and the provincial legislatures have delegated executive powers to interpret and enforce the laws passed under their respective jurisdictions to one another's executive or administrative agencies. These three modes of intergovernmental cooperation operate to partially free the Canadian governments from the rigidly categorized jurisdictional confines imposed by the BNA Act.

In order to apprehend the significance of these three means of intergovernmental cooperation in Canada, it is important to understand the reasons why the BNA Act has been interpreted so narrowly as to force the Canadian governments to resort to these rather circuitous means of cooperation. The chief reason is that the early rulings of the Privy Council and the Canadian Supreme Court are viewed as a constitutional gloss on the BNA Act. They established the requirement that any exercise of power under the BNA Act in the first instance must be traced to its source within that document. Thus, no power is deemed to exist in a legislative body except as specifically distributed by the Crown. This approach has been defended as appropriate on the grounds that the BNA Act is a statute, to be interpreted like any other.

When construed, the language of the BNA Act is read beyond its literal meaning in order that the balance of legislative powers may be strictly observed and the power to legislate over every subject matter area can be allocated to either federal or provincial jurisdictions. This conclusion was reached by the judicial decision that the non obstante provision of section 91, (assigning all powers not otherwise distributed to the provincial legislature, to the federal government), states generally that the specific provisions of provincial authority are exclusive of any federal authority in the areas covered thereby. This theory of autonomy is reflected in the "peace, order, and good government" provision, which has been held to state that federal power extends only to matters that do not fall within those subjects reserved to the provincial legislatures. Thus, in order to give every provision actual effect, the powers of the provinces and federal governments were deliberately balanced by judicial decision. The balance struck leaves the provinces with constitutionally protected enclaves of autonomy.

The question of abuse of power is rarely reached, for as was said in A.G. for Ontario v. A.G. for Canada, "there can be no doubt that under this organic instrument the powers distributed . . . cover the whole area of self-government within the whole area of Canada." In terms of domes-

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3 BNA Act, 1867, 30 & 31 Vict., c. 3 § 91 (Can.).
5 See note 3, supra.
tic legislative power, all power was distributed, but neither the provinces nor the federal government was vested with all powers necessary to the peace, order and good government of the Dominion. Thus, the dominant question which must be addressed in federal-provincial relations is how the powers have been distributed to the Parliament and provincial legislatures, and how they are to be ascertained.7

Nevertheless, the existence of de facto concurrent jurisdiction is recognized, as the natural result of language in the BNA Act which is not mutually exclusive. Thus, it was observed in John Deere Plow Company Ltd. v. Wharton that the language of certain sections "obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme."8 The observation that provincial and federal jurisdictions may in fact overlap is not contrary to the proposition that the two realms of jurisdiction exist. Rather, the mutually exclusive jurisdictions form the foundation for judicial interpretation of legislative powers.9 Most questions of power are derived from this premise;10 it is only in cases where the courts cannot resolve ambiguous language, so as to find an appropriate exclusive jurisdiction, that overlapping jurisdiction is recognized. Justification for this view is found by regarding the first clause of section 91 as a general grant of powers supplemental to the enumerated powers. The second clause is a grant of particular powers.11 The exclusivity of federal jurisdiction runs to the general supplemental grant completely, and to the enumerated powers to the extent that they do not overlap with provincial powers. Similarly, provincial powers are exclusive where they are clearly distinguishable from the federal jurisdiction, but concurrent when the line between the two classes of jurisdiction cannot be drawn. In short, concurrent jurisdiction is not so much a matter of constitutional allocation of power, but a practical accommodation to the imprecision of what is otherwise a mutually exclusive allocation.

Once a sphere of legislative power is found to be concurrent, three results are possible: preemption, supplementation, or duplication.12 Where federal and provincial laws are in conflict, the federal law prevails.13 The federal law preempts the field of legislation.14 In some circumstances, where the provisions of the two laws are contextually separable preemption does not take place.15

When a provincial law supplements federal law by adding distinct

10 E.g., Canadian Pacific Wine Company v. Tuley, [1921] 2 A.C. 417, at 423.
11 See Local Prohibition Case, supra note 4.
12 Lederman, supra note 7, at 188.
14 Lederman, supra note 7, at 192.
and separable provisions, or by duplicating federal law without contradicting it, it is likely that lawmakers have deliberately caused this result. One way in which this cooperative legislative activity takes place is through reference by one legislative body to the legislation of the other.\textsuperscript{16} However, irrespective of whether the supplementation or duplication is deliberate or accidental, any apparent cooperative legislative activity "will have to be carefully framed, and will not be achieved by either party leaving its sphere and encroaching upon that of the other."\textsuperscript{17}

There appear to be two ways in which the federal and provincial governments have supplemented each other's legislation by reference to achieve a regulatory effect which is greater than either could independently achieve. The first is by express deference to another law. The second is by duplication of the original law. Despite attempts to avoid it, the issue of encroachment on the jurisdiction of another legislature continues to hinder such coordination.

As an example of legislative deference, Parliament may declare its law in force except where it is contrary to a provincial enactment on the subject, provided it is within an area of concurrent jurisdiction. In the case of the Lord's Day Act\textsuperscript{18} "we have the federal parliament explicitly drawing back from full occupation of the concurrent field to allow a different provincial provision on the subject to operate without conflict."\textsuperscript{19} The federal lawmakers did not delegate legislative power, but merely permitted the subnational governments to regulate under their own power in an area of potentially conflicting legislation.

There are three possible problems which may arise from legislative deference. There is the danger that legislative reference may be interpreted as attempted delegation.\textsuperscript{20} There is also the danger that the referenced legislation may be expanded by the body which originally enacted it. This expansion may not be in keeping with the intent of the other jurisdiction which made reference to the legislation. Third, this type of legislation is vulnerable if initiated by the provinces, since federal law will preempt it if a conflict develops. However, the last two problems are perhaps more illusory than real, since it is within the power of Parliament to either repeal its reference to provincial laws, or to make reference to existing provincial law in its enactments. Federal dominance by preemption within a legislative field remains clear.

There are also difficulties with legislative incorporation by reference. Parliamentary incorporation by reference enables the Parliament to place greater control over national law in the provinces.\textsuperscript{21} This ensures a greater


\textsuperscript{17} Id. at 695.

\textsuperscript{18} CAN. REV. STAT. c. 171, § 6(1) (1952).

\textsuperscript{19} Lederman, \textit{supra} note 7, at 193.

\textsuperscript{20} See Driedger, \textit{supra} note 16, at 706.

\textsuperscript{21} Id. at 708.
degree of legislative coordination, but it also tends to restrict the scope of provincial experimentation. Constitutionally, the reference has been viewed as simply avoiding unnecessary repetition by one legislative body of the work of another. With it comes the possibility of deliberate coordination of policies, without the danger of ultra vires legislation.

In the case of provincial incorporation of federal law, it is arguable that legislative reference results in duplication of federal legislation and is consequently repugnant to Dominion supremacy. However, those are legislative references which are duplicative but essential to clarify supplemental legislation. They allow the smooth interweaving of provincial provisions with the federal as part of a non-severable law within the province. This means in essence that provincial incorporation by reference may operate only when connected with supplemental provincial legislation.

The practice of incorporation by reference enables Parliament to structure the national law and to permit provincial experimentation. By cooperating and coordinating legislation, the two levels of government are better able to grapple with urgent social and economic problems which they might otherwise be unable to reach. The difficulty with this form of interaction is that presently it is limited to a small range of legislative subjects. Even more significant is the fact that cooperation between the legislatures may still be prevented by judicial interpretation of the BNA Act. The power of the courts to restrict coordination will prevent the practice of incorporation by reference from becoming a major means of intergovernmental cooperation.

A second mode of federal-provincial intergovernmental cooperation that may complement legislative reference is the inter-delegation of executive and administrative functions among the agencies of provincial and federal governments. It has been held that the provinces and federal government cannot delegate legislative functions, but this prohibition has not extended to the delegation of executive and administrative functions. It is suggested that the most persuasive argument in favor of the prohibition comes from the negative inference of the word exclusively as

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23 Id. See also A.G. for Ontario v. Canada Temperance Foundation, [1946] A.C. 193.
26 Lederman, supra note 7, at 195-96; Driedger, supra note 16.
used in section 91 of the BNA Act.\textsuperscript{30} Other scholars have argued that this is really only a prohibition against partial and temporary constitutional amendment legislation tampering with the distribution of legislative powers.\textsuperscript{31}

While interparliamentary delegation has been prohibited, it has long been held that the BNA Act does not bar delegation of executive administration or judicial authority. In the early case of \textit{Hodge v. The Queen}, it was said that the Dominion Parliament or the legislatures are free to delegate "authority to make by-laws or resolutions as to the subjects specified in the enactment (of that delegating body) and with the object of carrying the enactment into operation and effect."\textsuperscript{32} In addition to that case of delegation by the Ontario Legislature to a licensing board, delegations have been sustained where they were made by Parliament to provincial courts,\textsuperscript{33} a provincial marketing board,\textsuperscript{34} and a provincial transportation board.\textsuperscript{35}

The argument has been raised that since legislative delegation is prohibited, regulatory delegation should also be prohibited.\textsuperscript{36} It has been argued that provincial boards exist only as the creatures of provincial laws, and hence, cannot receive duties from Parliament. This was held an insufficient objection to oblique delegation in \textit{P.E.I. Potato Marketing Board v. H.B. Willis}\textsuperscript{37} and \textit{Coughlin v. Ontario Highway Transportation Board}.\textsuperscript{38}

While not the most comprehensive means of ensuring effective coordinated legislation, delegation does increase the likelihood of a coordinated application of the laws, especially in a situation such as \textit{Coughlin} in which there was combined delegation of administrative authority to provincial boards, and both types of legislative references.\textsuperscript{39} One author has suggested that regional differences and federal-provincial conflicts could be reduced through the integration of Canadian bureaucracy with representatives from throughout the country.\textsuperscript{40} However, the diversity of members could cause division and conflict within the bureaucracy.\textsuperscript{41} Al-

\begin{itemize}
\item \textsuperscript{30} Driedger, supra note 16, at 697-99.
\item \textsuperscript{32} [1884] 9 A.C. 117, 132.
\item \textsuperscript{33} Valin \textit{v. Langleois}, [1879] 3 Can. S. Ct. 1.
\item \textsuperscript{36} Ballem, \textit{Marketing Legislation — Delegation by the Dominion Parliament to a Provincial Board}, 30 CAN. B. REV. 1050, 1058 (1952).
\item \textsuperscript{37} [1952] 2 Can. S. Ct. 392.
\item \textsuperscript{38} [1968] Can. S. Ct. 569.
\item \textsuperscript{39} Driedger, supra note 16, at 711.
\item \textsuperscript{40} Smiley, \textit{The Structural Problem of Canadian Federalism}, 14 CAN. PUB. AD. 326, 341 (1971); \textit{Public Administration and Canadian Federalism}, 3 CAN. PUB. AD. 371 (1964).
\item \textsuperscript{41} Gelinas, \textit{Trois modes d’Approche a la Determination de l’Opportunite de la Decen-}
\end{itemize}
though Parliament or a province may delegate authority to a particular board or commission, it is not clear that such delegation will overcome the decentralizing impact of divided loyalty.

Several other limitations attend the use of legislative referencing and cross-delegation of executive and administrative function. Foremost of these is the underlying limitation that the use of legislative referencing is restricted to situations in which concurrent jurisdiction has been established. Parliament and the provinces cannot interact so as to alter the scope of legislative powers distributed to each of them.

While this problem is obscured when referencing is combined with cross-delegation, the delegation is also subject to the charge that the constitutional allocation of powers has been altered. In this case the alteration would not be done by the legislature per se, but rather by the individuals assigned to carry out legislative command. A government by bureaucrats cannot theoretically alter the allocation of legislative power, but it could in practice, ameliorate the inconvenience of that allocation in such a manner as to raise this complaint.

Together delegation and referencing offer substantial opportunities for intergovernmental cooperation, despite these problems. Nevertheless, it is a fact that the use of delegation and legislative reference techniques has not substantially alleviated the need for coordination that has led to the use of intergovernmental conferences and councils. As part of an overall attempt to circumvent the strictures of the constitutional allocation of legislative powers, conferences and councils provide a means of delegating decision-making power.

This points to the underlying cause for the use of conferences, referencing and delegation in Canada: the structural insufficiency of existing arrangements of decision-making powers to deal effectively with social and economic issues. The existence of the Tidal Power Review Board is another indication that the division of powers between Ottawa and the provinces has proven insufficient to meet economic demands for institutional response to alternative energy resource management techniques, this body being composed not only of provincial officials but federal representatives. No single government participating on the Board pledges legislative competence beyond its constitutionally circumscribed powers, but collectively the Board facilitates centralized planning which no one of the governments including the federal government can otherwise provide and effectuate. To do this the governments utilize mutual delegation of executive and administrative powers. With governmental planning centralized for the economic development of a region or a specific energy resource, the legislative bodies represented are required to enact the app-
appropriate legislation to fulfill their respective roles in the development plan prepared by the intergovernmental board. This final act of cooperation is facilitated by the parliamentary system for selecting the executive leadership taking part in the intergovernmental councils. The leadership thus has the power to obtain uniform laws among the provinces and appropriate legislative references. In short, the use of intergovernmental councils and conferences provides the coordination which the constitutional distribution of powers does not otherwise permit.

2. Permissible Interprovincial Interaction

Given the rigid subject matter distribution of legislative power among the provinces and federal government, and the limited methods of cooperation in the regulation of areas which do not fit conveniently into either jurisdiction, it is not surprising that the provinces have developed additional alternatives for interaction. Perhaps the most sophisticated of these is the Council of Maritime Premiers (CMP). The CMP reflects the use of the same three devices discussed in the preceding part of this section; legislation by reference, delegation of executive and administrative powers, and intergovernmental councils.

The CMP was formed by the legislative action of the three provinces involved. The enactments by the legislatures are identical. Thus there is here a legislative technique parallel to federal-provincial legislative referencing. The enabling legislation purports to structure what in its early stages was an informal arrangement between the Premiers. Not only does the legislation authorize the Council itself, but it also authorizes the Council to submit to the respective legislatures concrete proposals for common delegations of authority to the Council. Thus, each of the mechanisms employed in federal-provincial cooperation is readily apparent in the formation and operation of the CMP.

The enabling legislation for the CMP in no way compromises the legislative autonomy of the provinces. While the executive and administrative functions of the individual provinces may be in part transferred to the CMP, any such transfer would seem to require the approval of each provincial legislature. Similarly, the Council is required to submit its budget, annual report, and any subsequent agreements to the legislatures. No agreement can become effective without the same legislative approval required for the creation of the CMP. The CMP does not have any legislative powers. Consequently, if the use of delegation, referencing and

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councils is appropriate for federal-provincial relations, there seems to be no objection to their use in interprovincial affairs as well.

It is not as clear that the creation and operation of the CMP is consistent with the distribution of legislative powers under the BNA Act. To the extent that the CMP operates to establish uniform laws it may infringe upon federal authority under Section 94 of the BNA Act. This provision authorizes Parliament to "make Provision for the Uniformity of all or any laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick... [if the provision] is adopted and enacted as law by the legislature" of each province involved. Since Prince Edward Island was admitted to the Confederation shortly after 1867, it is reasonable to assume that this authority may extend to that province as well. An inference could be drawn from this that the provinces are not permitted to make provision for uniformity of law in the region. However, since CMP suggestions may fall within a subject area in which the BNA Act allows the provinces to legislate, the provinces should be free to choose uniformity. Furthermore, Parliament's power to obtain uniform laws is limited by the requirement of legislative approval from the provinces themselves.

Even if the form of legislation arising from the interaction of the CMP provinces will not encroach upon federal authority, the substance of the legislation may. However, the enabling legislation states that the CMP is empowered to assist the legislatures only in "such things as the [provinces] are otherwise empowered to do." Its objectives include the "maximum coordination of activities of the Governments," the promotion of "unity of purpose," and the establishment of a "framework for joint action and undertakings," consistent with the Premiers' agreement of May 25, 1974. This agreement calls for the initiation, discussion, and coordination of economic, social and cultural studies and programs. Such broadly defined goals and the limitation included in the enabling legislation indicate legislative intent to remain within the constitutional allocation of legislative powers.

It is arguable that the section of the enabling legislation authorizing agreements between the Premiers on "such other provisions as may be necessary or desirable to provide for the administration of the Council and for its operations," is an attempt to authorize the CMP to exceed the powers of the individual legislatures. This is not plausible however, given the limitation mentioned above and the orientation of this clause toward the "operations" of the CMP. Thus, it is not likely that this clause
will be interpreted as attempting to enlarge the legislative power of the provinces.

With respect to the specific subject matters over which the provinces and federal government have exclusive jurisdiction, it is essential that the activities which the CMP has attempted to regulate fall within provincial authority. Under section 92(10)(c) of the BNA Act, Parliament is empowered to authorize the exercise of provincial legislative powers for public works of advantage to two or more provinces. In reviewing the resource management potential of the CMP the critical question is whether the formation of the CMP by the provinces is inconsistent with this provision.

Public works affecting more than one province\(^5\) are within federal jurisdiction under section 92(10)(c) of the BNA Act.\(^6\) However, to the same extent that Parliament can prohibit provincial legislation in matters of public works\(^6\) it can also authorize provincial legislation.\(^6\) There has been some debate on whether the endeavor authorized must involve some "works" specifically\(^7\) or whether the authorization need only involve "undertakings"\(^8\) declared by Parliament to be of advantage to two or more provinces. And, in certain circumstances the jurisdiction of Parliament is established even where the undertaking does not immediately extend beyond the provincial boundaries.\(^9\) There has also been some dispute as to whether the authorization of power extends to services as well as to physical works.\(^10\) The prevailing view today appears to be that it extends to the authorization or prohibition of services which are at least incidental to public works.\(^11\)

The CMP does not clearly require Parliamentary authorization under section 92(10), since it appears to be empowered to engage in joint action of every sort which is within the legislative competence of the provinces individually.\(^6\) However, if the CMP develops plans for a public works project, such as a project of cooperative energy resource management, the language of the provincial authorization seems to restrict the powers of the CMP to those within the competence of the provinces individually. This being the case, any specific energy resource management project un-

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\(^8\) E.g., A.G. for Ontario v. Winner, [1954] 2 W.L.R. 418.

\(^9\) Id.

\(^10\) Id. at 431.

The purpose of section 92(10) clearly appears to be the imposition of limits upon interprovincial relations. This policy is made explicit by section 92(16) of the BNA Act which limits the sphere of legislative autonomy distributed to the provinces to "matters of a merely local or private nature." However, the limitations of the enabling legislation which restrict the CMP to the will of the provincial legislatures provide adequate safeguards for constitutional integrity. Cooperation by the CMP would not seem to be precluded since this interaction is actually a form of administrative delegation, which is supported by those cases sustaining oblique delegation of executive and administrative powers.

Although planning by the CMP of energy resource management policies and programs would not seem prohibited by the BNA Act, the development of public works projects affecting more than one of the provinces may require federal approval. Thus, to the extent that energy resources constitute "property" within the individual provinces, the CMP can request provincial legislation governing its use and development. However, the formation of the Maritime Integrated System (MIS) for coordinating electrical power in the region has required federal involvement pursuant to federal powers to regulate "trade and commerce" under section 91(1) of the BNA Act. This involvement has come through the National Energy Board. By working with the Board, the provinces through the CMP have articulated regional energy policy and programs within the constitutional parameters of the BNA Act. In addition, the Tidal Power Review Board, in order to review construction of power generating facilities, has also expanded federal-provincial and regional cooperation, because the construction projects involved require the approval of the Parliament and each province.

This piecemeal approach to regional economic cooperative development is perhaps the most practicable form of intergovernmental interaction at this time. Although there are urgent economic demands for regional action, the debate over the manner of distributing benefits, if pressed too quickly could result in negative economic consequences and a constitutional crisis.

3. The International Power of the Canadian Provinces

Bearing heavily upon the distribution of Canadian international diplomatic powers are the social and economic pressures resulting from re-
regional inequalities within the Confederation. In the face of a highly rigid allocation of legislative powers, the social and economic interests of the various provinces have led provincial leaders to search for alternative solutions within their permitted sovereign powers. Although the BNA Act does not specifically allocate international diplomatic powers, this field has been open to provincial innovation and experimentation.77

The significance of provincial activity in the international sphere lies in (1) the burdens which it may impose upon domestic federal-provincial relations; (2) the benefits which it offers the provinces in the pursuit of matters within their exclusive jurisdiction; and (3) the potential dangers and options it opens for Canada’s integrated international posture. Nevertheless, it appears that the burdens of New England-Maritime cooperation are not great and the potential benefits are surely worthwhile. General Canadian-American relations may also be improved and both countries may benefit from the proper management of resources.

Canadian accession to full diplomatic power came in 1947,68 but it did not pass to any single legislative body in Canada. Rather, the power of self-direction in foreign affairs passed to the Governor General of Canada in Council, in the form of delegation of royal prerogative “declared to be continued and be vested in” the Crown.69 Before this, however, Canada was not without some guidance as to the distribution of powers in the area of foreign affairs. The Labour Conventions Case70 of 1937, which was primarily concerned with legislative power and treaty-implementation, indicated that the federal government of Canada could not legislate within the sphere of exclusive provincial power.71 Thus, although the Statute of Westminster, 1931 states “that the Parliament of a Dominion has full power to make laws having extra-territorial operation,”72 Lord Atkin held that “no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase of its executive functions.”73 The result which makes the decision notable is that it explicitly applied the proposition above in the face of provincial activity in international matters, but did not address the question of the allocation of executive treaty-making powers.74

With the executive power to deal with foreign affairs vested in the Crown’s Delegate in Canada, the Governor General in Council, the ques-

72 Statute of Westminster, 1931, 22 Geo. 5, c.4 § 1(3).
74 Id. at 349.
tion which faced law makers was which ministers should be deemed to have the power to advise the Governor as to the disposition of that power with regard to treaty-making, those of the Dominion or those of the provinces. This question remains an area of deep controversy, in which the existence of international diplomatic power in the provinces, rather than the scope of that power is the center of debate.

Since the source of executive power over all matters international has been vested in the Governor General of Canada, the provinces have attempted to establish a basis for their exercise of international executive power, by tracing the power from its source to their respective Lieutenant Governors. Under the BNA Act these are the Governors' delegates to the executive position in each provincial government. In this much, all sides of the debate will agree.

The federal position on the existence of this power in the Lieutenant Governors is that since the power was delegated only to the Governor General to act for the Dominion through and upon the advice of his ministers, the provinces through their Lieutenant Governor possess no executive power over international matters unless expressly granted to them by letters patent from the Governor General. According to this view, the sovereign power to execute international agreements is denied to the provincial executive, since no letters have issued. The question of legislative competence to enact laws pursuant to the purported agreements entered into on behalf of the provincial legislatures by the Lieutenant Governors is never addressed. Accordingly, "Canada has the power to enter agreements on matters falling within the provincial legislative competence," even though the federal government may not be able to enact domestic law to effectuate the international agreement.

The fundamental consideration here is that the executive power to enter into international relations is not determined by the distribution of powers under the BNA Act, but rather by the delegation of the sovereign authority of the British Crown. This presupposes that the treaty-making capacity is not in any other way delegated or distributed to the provinces.

Some of the provinces (particularly Quebec) have asserted claims to foreign affairs powers on the premise that the sovereign executive power automatically passed to the Lieutenant Governors for the provinces when it was passed from the King to his delegate, the Governor General according to the subject matter jurisdictions of the provinces and federal government. This manifests itself in the argument that since the provincial governors, prior to confederation, had certain powers over international matters, and since the BNA Act transferred the power to deal with the

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75 BNA Act, 1867, 30 & 31 Vict., c.3 § 58-65 (Can.).
77 HON. P. MARTIN, SEC. EXT. AFF., FEDERALISM AND INTERNATIONAL RELATIONS 16 (1968).
78 Id. at 14.
obligations imposed by imperial relations to the Parliament, there is no implication that all treaty-making power held by the provinces prior to confederation passed to the federal government. This is buttressed by the contention that the BNA Act merely recorded existing arrangements of authority in Canada, and with the exception of a few specific provisions, did not grant any new powers. According to this view the executive and legislative powers are concommitantly derived.

Quebec asserts certain authority for this position. In the 1892 case, *Liquidators of the Maritime Bank v. Receiver General of New Brunswick*, it was stated that the BNA Act did not disturb the then existing relations between the sovereign and the provinces, because the Act distributed executive as well as legislative powers. Further, it has been held that "the Lieutenant Governor is as much the representative of His Majesty as is the Governor General for all purposes of Dominion government." In another case relied upon by the Quebec government in its Working Paper on Foreign Relations, *Bonanza Creek Gold Mining Co. v. The King*, it was asserted "that executive power is in many situations . . . conferred by implication in the grant of legislative power . . . and the prerogative affected." Resting upon this, Quebec has maintained (with regard to educational and cultural affairs which are under the exclusive jurisdiction of the provinces), that only the Quebec Government is competent to undertake international agreements in these areas.

This position is directly countered by the federal argument set forth in a 1968 White Paper, that "Canada has the power to enter into agreements on matters falling within the provincial legislative competence." And so the arguments are mounted on both sides of an indistinct line defining the allocation of the treaty-making powers in Canada.

One commentator, McWhinney, has suggested that there are three alternative means of allocating Canadian foreign affairs powers. There could be a federal monopoly in treaty-making powers, with a division of implementation power along the usual lines, or the provinces might be allowed to join with the federal government in treaty-making on matters within provincial jurisdiction, or the whole matter could be dealt with in a pragmatic piecemeal fashion as is currently being done. In the last analysis, according to McWhinney, the solution to the treaty-making power controversy depends upon political considerations.

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80 In re Initiative and Referendum Act, [1919] A.C. 935.
83 BNA Act, 1867, 30 & 31 Vict., c.3 § 93 (Can.).
84 Hon. P. Martin, supra note 77, at 14.
85 The Court was evenly divided in the Labour Conventions Case.
86 McWhinney, supra note 71, at 8-10.
The inability of scholars to locate the proper delegation of foreign affairs powers means that their exercise lacks a solid and legitimate basis. Quebec supporters contend that since the founders of the Confederation sought to divide legislative power according to the ability of the legislative body to meet the needs of an ordered society, the allocation of foreign affairs powers ought to reflect the same views on the competence of the governments.\textsuperscript{87} Others have stressed the importance of a strong unitary federal government in international affairs, arguing that provincial activity in this sphere violates principles of "federal comity or federal fidelity."\textsuperscript{88} Both sides have relied upon comparative studies of other federations and confederations.

Those favoring provincial involvement have suggested there may be a positive correlation between provincial involvement in international relations in matters within provincial competence, and the degree to which local interests are satisfied.\textsuperscript{89} Those opposing provincial involvement have contended that involvement does not comport with existing notions of relations between nation-states.\textsuperscript{90}

B. Constitutional Limitations on Regionalism in New England

Unlike the Canadian arrangement, the Constitution of the United States vests in the federal government the power to define the scope of the intergovernmental relations of the states.\textsuperscript{91} This power explicitly prohibits\textsuperscript{82} or permits\textsuperscript{83} interaction among the states and between the states and foreign governments. It is clearly limited by the sanctity of state borders,\textsuperscript{94} the right to representation in Congress,\textsuperscript{95} and to some extent, the commercial regulatory power of the states.\textsuperscript{96} Where Congress has given its consent expressly\textsuperscript{87} or impliedly\textsuperscript{88} either before\textsuperscript{90} or after\textsuperscript{100} an intergov-

\textsuperscript{88} McWhinney, The Constitutional Competence within Federal Systems for International Agreements, in ONTARIO ADVISORY COMMITTEE ON CONFEDERATION, 1 BACKGROUND PAPERS AND REPORTS.
\textsuperscript{89} Jacomy-Millette, L'Etat Fédéré dans les Relations Internationales Contemporaines; Le Cas du Canada, 14 CAN. YEAR BOOK INT'L L. 3 (1976).
\textsuperscript{90} McWhinney, supra note 177; Head, The "New Federalism" in Canada: Some Thoughts on the International Legal Consequences, 4 ALBERTA L. REV. 389 (1966).
\textsuperscript{91} U.S. CONST. art. I, § 10.
\textsuperscript{93} Id. § 10, cl. 3; e.g. James v. Dravo Contracting Co., 302 U.S. 134 (1937); DeVeau v. Braisted, 363 U.S. 144, (1960).
\textsuperscript{94} U.S. CONST. art. IV, § 3, cl. 1.
\textsuperscript{95} Id. art. I, § 2, cl. 3.
\textsuperscript{96} Id. art. I, § 9, cl. 6.
\textsuperscript{97} Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85 (1823).
\textsuperscript{98} Virginia v. West Virginia, 78 U.S. (11 Wall) 39 (1871).
\textsuperscript{100} Wharton v. Wise, 153 U.S. 155, 173 (1894).
ernmental interaction of the states, Congress does not relinquish any of its powers to revoke consent or alter the form of permissible interaction.\textsuperscript{101}

Congressional power to define the intergovernmental relations of the states does not preclude the states from initiating cooperation among themselves.\textsuperscript{102} The states are free to engage in mutually advantageous interaction provided it is not inconsistent with federal supremacy.\textsuperscript{103}

While relations of the states with one another and with foreign powers remain relatively unlitigated, the relationships between the federal and state governments have been extensively interpreted, particularly those in the area of the commerce power. These areas of constitutional law are definitionally interdependent. Together they articulate the consensual balance of central-local interests and the legitimate allocation of governmental decision-making powers. Unlike the situation in Canada, the Constitutional parameters of state interaction with other states are not terribly different from state interaction with foreign powers.\textsuperscript{104}

The Public Works and Economic Development Act of 1965 (PWDA), the enabling act for the creation of the New England Regional Commission (NERC), was an exercise of federal power to regulate interstate commerce. However, it had the unusual characteristic of authorizing multistate interaction as a means to achieving the Congressional ends set forth in the Act. Out of this interaction have come other multistate and state-province interactions. All are subject to federal control under the compact regulatory power, but presuppose the power of state initiative.

1. The Allocation of Powers Under the Commerce Clause

Since Gibbons \textit{v. Ogden},\textsuperscript{105} the United States Supreme Court has examined the commerce clause\textsuperscript{106} in search of the dividing line between exclusive federal power and permissible state action. The commerce clause has served as the vessel from which legitimacy has been poured into Congressional legislation governing a wide variety of subjects somehow related to commerce. This broad interpretation of the commerce clause has encouraged the allocation of regulatory power to suit national needs.

As Justice Frankfurter contended, the doctrine developed by Justice Marshall in \textit{Gibbons v. Ogden} was an "audacious" one, "bound to provoke its antithesis."\textsuperscript{107} It is the doctrine of the commerce clause which frequently raises the conflict between state authority and Congressional

\begin{itemize}
\item \textsuperscript{101} Pennsylvania \textit{v. Wheeling & Belmont Bridge Co.}, 59 U.S. (18 How.) 421, 433 (1856).
\item \textsuperscript{102} Virginia \textit{v. Tennessee}, 183 U.S. 503 (1893).
\item \textsuperscript{103} United States \textit{v. California}, 332 U.S. 19 (1947).
\item \textsuperscript{104} But cf. United States \textit{v. California}, 332 U.S. 19 (1947).
\item \textsuperscript{105} 22 U.S. (9 Wheat.) 1 (1824).
\item \textsuperscript{106} U.S. Const. art. I, § 8, cl. 3.
\item \textsuperscript{107} F. Frankfurter, \textit{The Commerce Clause Under Marshall, Taney and Waite} 18-19 (1937).
\end{itemize}
legislative supremacy. Frankfurter saw a historical dialectic in the allocation of power within the United States federal system, mirroring the classical balance of powers model upon which the United States Constitution was framed, and producing "the dispassionate verdict of history."\textsuperscript{108} To Frankfurter it is this verdict of history that legitimates the allocation of powers between the Congress and the states. It is not born of a rigid classification of power, but rather of a process of adjustment in which the law is made to accommodate to the practical demands of government.\textsuperscript{109} It is this process which resolves concrete issues drawn between federal supremacy in the regulation of commerce and the principle that federal power is limited by the Constitution.

The dynamism of this process of allocating power proceeds from the underlying presumption that both Congress and the states possess the power to regulate commerce.\textsuperscript{110} Through the exercise of these powers in commerce, the bounds of state and federal power frequently have been redrawn. The guiding principle in the process of definition has been the promotion of a national economic structure, free from unnecessary burdens and designed to protect the general welfare of the nation.

Under this approach, constitutional debate has necessarily focused on who should make the ultimate determination of what is the general welfare. Thus, the exercise of state or federal power over commerce has been decided by an analysis of ability to regulate the specific subject matter in accordance with the interests of the national economy. In \textit{Cooley v. Board of Wardens of the Port of Philadelphia}, Justice Curtis explained this approach, which has been followed more or less since that time:

\begin{quote}
Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.\textsuperscript{111}
\end{quote}

It follows from this that the federal exclusive sphere will depend on the effect which state regulation, as compared to federal regulation, would have on the ends of a unitary national economy. There seems to be no state or federal autonomy left which is free from the influence of other attempts to regulate. The fundamental criterion for determining the scope of power is the ends to which its exercise are set. This means that

\textsuperscript{108} \textit{Id.} at 112.
\textsuperscript{110} V. MACKINNON, COMPARATIVE FEDERALISM 172 (1964).
all originally exercised powers of government are allocated according to the needs of a national economy.

Under PWDA, Congress determined that in order to combat unemployment and the economic decline of certain regions of the country, the Secretary of Commerce should have authority, with the concurrence of the states affected, to designate economic development regions. Thus, it was Congress which asked the states to join in regional cooperation with the federal government to solve regional economic problems. The NERC was born of this invitation and charged with taking "effective steps in planning and financing . . . public works and economic development." Thus, it was Congress which asked the states to join in regional cooperation with the federal government to solve regional economic problems. The NERC was born of this invitation and charged with taking "effective steps in planning and financing . . . public works and economic development."

This broad grant of power to the states acting through NERC can be construed as a denial of federal preemption in a field of commercial regulation. In fact, however, Congress has restricted its grant of power to NERC by retaining the power to supervise the affairs of NERC and other regional commissions. The problem with interpreting this grant as a denial of federal preemption is that since the decision in Gibbons v. Ogden, federal law generally must prevail. Congress always has the right to legislate and preempt state law where that legislation affects the national economy. Furthermore, where the courts have found Congress intended to legislate an entire field, they have held that even complementary state legislation is preempted.

However, Congress may provide for state legislation as in Prudential Insurance Co. v. Benjamin where the Court stated:

This broad authority Congress may exercise alone, . . . or in conjunction with coordinated action by the states, in which case limitation imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.

Although Congress may permit state regulation, the rule laid down in Cooley still requires that states regulate only where their regulation will not be adverse to the national interest in a unified economy.

Two theories of Congressional power may be advanced to determine the scope of its regulatory power. According to the first, federal consent to state laws might be considered a delegation of federal power. But this is not likely, given the manner in which the scope of federal power is interpreted under Cooley. Federal power is a function of the constitutional scheme for a national economy. In McCullough v. Maryland it was

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116 328 U.S. 403 (1946).
117 Id. at 434-35.
said that federal power proceeds from the people of the nation, and state power from the people therein.\textsuperscript{118} The people of the nation mandated Congressional control over the national economy, and the people of the states presumably have granted to their state governments regulatory power over commerce. Therefore, it would be incongruous for the federal government to permit its power to be wielded by the state governments. This suggests the alternative view of federal consent to state laws. This view presumes that Congress may find the interests of national uniformity less important than the diversity of state regulation.

Through the regional commission Congress established a means to coordinate state and federal regulation of the economy. NERC operates through the exercise of concurrent state and federal powers over commerce with federal supervision. Because any NERC action requires the approval of the federal co-chairman, federal consent to state legislation is a matter of bureaucratic functions. Accordingly, when state regulation is pursuant to NERC approval there should be no issue of state-federal conflict.

However, this problem of conflict does surface in the context of state action which does not have federal approval through NERC. In terms of regional energy management in New England, the exercise of state power could infringe upon federal supremacy if the decision involved only state executive power in entering into joint agreements or legislative action to implement those agreements. Nevertheless, it is important to note that these agreements do not call for independent state action, but rather for the exercise of state powers to secure federal cooperation and approval of regional policy-making by the states.\textsuperscript{119} This means that the executive action of the states, while potentially hostile to federal interests, does not lead to legislative enactments inimical to federal supremacy. The political conduct of the governors is sensitively crafted to avoid confrontation with federal authority, while at the same time designed to assert state interests.

The existence of state power to regulate interstate commerce does not hinder federal power to regulate in the same field. In \textit{United States v. Darby}, for example, it was stated that “the power of Congress over interstate commerce [can] neither be enlarged nor diminished by the exercise or non-exercise of state power.”\textsuperscript{120} There, as in \textit{Gibbons}, the Court recognized the power of Congress to be “plenary,”\textsuperscript{121} subject only to the requirement that the means of Congress be appropriate and plainly adapted to permissible Constitutional ends.\textsuperscript{122} Thus, the Tenth Amend-
ment to the Constitution would seem to be little more than a truism, in the area of commerce.

Accordingly, redress for federal excesses "must proceed from the political rather than from judicial processes." The states must solicit the Congress for self-restraint. This solicitation of Congressional self-restraint has followed the form that Congress approved by the enactment of the PWDA and the studies and programs of the NERC forum. The states have used NERC resources to develop proposals for energy management in the region. In doing so they have obtained federal supervision and cooperation which casts a cloak of Congressional approval over the entire effort.

Regionalism in New England has developed through cooperation with the federal government. It demonstrates that regional interaction strengthens the federal structure. By developing lines of communication and intergovernmental accountability, regionalism in New England has encouraged greater state initiative and responsibility for economic development. Concurrently, it has made federal regulatory processes more sensitive to local interest, more representative of the regional consensus, and so has limited the exercise of federal power, without encroaching upon federal supremacy. By making the national interest a question which the states, as well as Congress and its bureaucrats may help determine, the allocation of the commerce power is given a meaning in which the states are not empty forms, but more truly the agency of local government.

2. The Allocation of Powers under the Compact Clause

The significance of alternative state and federal interaction was not lost to Justice Frankfurter. In the study done by him with Landis on interstate compacts, the following passage appears: "The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action . . . . Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests." As this passage was written, the United States was laboring under a restrictive interpretation of the federal commerce power, which demanded the generation of alternative forms of intergovernmental cooperation. With the 1937 "retreat" of the Supreme Court, the demand for creative intergovernmental

\[\text{124 United States v. Darby, 312 U.S. 100, 124 (1941).}\]
\[\text{125 Id.; Wickard v. Filburn, 317 U.S. 111, (1942).}\]
\[\text{126 Wickard v. Filburn, 317 U.S. 111, 120 (1942).}\]
\[\text{127 See e.g. Shipman, Electric Power Interconnections Between Eastern Canada and the Northeastern United States, New England Governors and Eastern Canadian Premiers Meeting 28-31 (June 7-8, 1976).}\]
\[\text{128 Frankfurter & Landis, supra, note 109, at 687-88.}\]
\[\text{129 E.g., United States v. E.C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918).}\]
cooperation was transformed into a quest for centralized power.  

After forty years of federal supremacy in commerce, and the erosion of de facto state autonomy, the need for constructive alternatives in cooperation has re-emerged. As the history of the commerce clause indicates, the way is not blocked for the development of new forms of intergovernmental cooperation. There is now greater cooperation among the New England Governors reflected in the increasing number of conferences, agreements and compacts among them and the Eastern Canadian provinces. 

These three devices fall under the Constitutional rubric of Article I, section 10.131 Except as provided in Article IV concerning full faith and credit, privileges and immunities, and extradition, the Constitution contains no other provisions covering the law of state interaction. Significantly, interstate agreements have come to serve as a vehicle for federally initiated alternatives to existing federal relations. These agreements have also become an important means for the states to experiment with different combinations of the sovereign powers, all within the spirit if not the letter of the Constitution. Thus, interstate agreements have become a safety valve for state-federal tensions. In addition to NERC which has been analyzed in terms of the commerce power, the states have held an interparliamentary conference and annual conferences of the New England Governors and Eastern Canadian Premiers. Further, an interstate planning commission and foreign trade offices are in the planning stages. With respect to energy management, the most salient characteristic of this state interaction is that it has revolved around state involvement in NERC. By drawing upon the NERC and obtaining federal cooperation through it, the states have received what could be called federal approval for their alternative pattern of interstate relations. 

The Constitution contains two clauses dealing with state government interaction, Article I, section 10, clauses one and three. Through a comparison of these two clauses the maximum extent of state power becomes more clearly defined. The language of clause three, which permits interstate compacts with Congressional consent is to be juxtaposed to the flat prohibition on state made "Treaties, Alliances, and Confederations," in clause one. It was held in Williams v. Bruffy that the entity known as the Confederate States of America was null as contrary to this last provision.132 Beyond this decision, however, the distinction remains unclear. Justice Taney in Holmes v. Jennison stated that treaties with foreign powers are to be distinguished from compacts and agreements. The for-

130 See United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).
131 "No State shall enter into any Treaty, Alliance, or Confederation . . .;" U.S. Const. art. II, § 2, cl. 1. "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." Id. cl. 3.
132 96 U.S. 176, 182 (1877).
mer are denied to the states because their existence is by definition repugnant to the Union. The latter are permitted at the discretion of the Congress, where the state interaction is not inimical to the national interest.

Justice Taney concluded that a treaty is generally thought to "mean an instrument written and executed with the formalities customary among nations." The term agreement includes any "written or verbal, formal or informal, positive or implied . . . mutual understanding" of two sovereign powers. Accordingly, Taney was drawn to the conclusion that "any intercourse between a state and a foreign nation was dangerous to the Union, that it would open a door of which foreign powers would avail themselves, to obtain influence in separate states." Such intercourse could be prohibited by Congress or by the operation of the Constitution itself.

The concern for the integrity of the Union which underlies both the prohibition on treaties and the limitation on state power to enter into less divisive compacts and agreements did not lead Taney to hold that the states had expressly surrendered their diplomatic powers. He did hold that "where an authority is granted to the Union, to which a similar authority in the state would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive." The decision is based on the premise that the distinct wills of federal and state government can not operate compatibly in the same field. So firm was he in this conviction that Taney reasoned that even where the power of Congress could be viewed as "dormant," the states were without the right to act. It would seem then, that to Taney the states' rights to engage in diplomatic affairs, though not surrendered, can not be exercised because they would violate federal supremacy.

The exercise of state diplomatic powers in the international sphere, as in *Holmes v. Jennison*, arguably could, by its mere exercise, prove imical to federal power. An agreement between a state and a foreign power would not be subject to nullification by American courts or by Congress. The federal government could suffer international embarrassment by the state's nonperformance. Merely a state act of comity with a foreign power, in Taney's view, is contrary to national integrity, because it supplants the will of the people of the whole nation with the will of the people of one state.

This analysis does not stand in the case of domestic compacts or

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139 39 U.S. (14 Pet.) 540, 574 (1840).
140 Id. at 578-79.
141 Id. at 573.
142 Id. at 571.
143 Id. at 572.
144 Id. at 574.
agreements among the states, although the issue remains unclear. Some cases, in dicta, have rejected the Taney conclusion that federal power is exclusive by implication. Justice Story adamantly announced in *Poole v. Fleeger*, that "so far from there being any pretense of such a general surrender of the right [of interstate compact] it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress." Story's perspective seems framed by the long history of recognized state agreements and compacts, which have remained a fact of national institutional evolution, even without Congressional consent. Therefore, most court decisions have focused on whether interstate action comports with national unity.

Although Taney's analysis indicates that state government interaction is *per se* incompatible with federal supremacy, such state relations as do not in fact conflict with federal interests are permissible under the Constitution. The flat prohibition applies to only those forms of interaction which are in fact repugnant to federal interests. Other forms of interaction are permitted subject to Congressional approval. The issue becomes whether all such forms of interaction must be specifically approved by Congress.

If it is abuse of power which must be avoided, then it would seem that express Congressional approval of each interaction is not needed as long as the exercise of this power does not conflict with federal interests. Only state relations with the provinces which attempt to help mold the national interest require the involvement of federal authorities. Where there is federal policy involved, there seems to be a constitutional mandate that there be federal supervision.

Through curious pyramiding of dicta the Supreme Court has toyed with various formulations of the Constitutional requirement of Congressional consent. Two questions presented themselves: (1) How must Congressional consent be given, and (2) when, if at all, is such consent required. In *Green v. Biddle*, the Court stated:

> [T]he Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question . . . is, has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity?

142 See Frankfurter & Landis, supra note 109.
144 Dutton, *Compacts and Trade Barrier Controversies*, 16 Ind. L.J. 204, 207 (1940).
Thus, the determination of Congressional consent is not based on any constitutional standard. Rather, the form of consent is derived from congressional acts and their implications. A second issue addressed in Green, was the time at which Congressional consent is required. The Court held that Congressional consent is a formality of lawmaking, but, that Congress has the right to determine what formalities are necessary for consent. By deferring to Congressional judgment, the Supreme Court ruled that the Constitutional language, "No State shall, without the Consent of Congress . . .", means only that Congressional consent may be required for effective interstate agreements.

In Green the Court located a positive act of Congress in granting Kentucky admission to the Union, by which it inferred consent to previous agreements entered into by that territory. Similarly, during the height of Reconstruction, the Court was able to find this Congressional consent by "inference clear and satisfactory." This form of consent was seen as acceptable on the following rationale:

Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between States without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement.

By 1893, the Court went beyond the holding of consent by inference:

There are many matters upon which different States may agree that can in no respect concern the United States. . . . If, then, the terms "compact" or "agreement" in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compact or agreements does the Constitution apply?

This unsupported question completely casts aside the mandatory language of the Constitution. It provides the states with the opportunity to redefine the federal structure of the nation. The Court, speaking through Justice Field determined that Article I, section 10 should be interpreted in light of Justice Story's Commentaries, in which he said that the first clause of Article I, section 10 prohibiting treaties, alliances and confederations was aimed at interaction of a political character. The third clause relating to compacts and agreements was aimed at mere private rights of sovereignty in which "cases the consent of Congress may properly be re-

146 See Engdahl, Characterization of Interstate Agreements: When is a Compact not a Compact? 64 Mich. L. Rev. 63 (1965).
149 Id. at 59.
quired, in order to check any infringement of the rights of the national government." Justice Field reasoned that an agreement between states may require Congressional consent if the agreement will lead "to the increase of the political power or influence of the States affected, and thus encroach . . . upon the full and free exercise of Federal authority." The Court thus removed the presumption of required consent from the Constitution and strove to find either Congressional consent or independent state power for interaction. Congressional consent may come before or after state action and may even be inferred from Congressional silence. The Court's predominant consideration appears to have been the chance of Congressional disapproval. In short, the constitutional requirements recognized by the Supreme Court are not textual, but political.

This follows from the deferential position adopted in Green, if not from the text of the Constitution itself. As one author, Dunbar, has noted, it does not seem consistent with the intent of the framers of the Constitution to reach the conclusion that they meant to decrease the restrictions on state interactions by adding them to a list of absolutely prohibited activities, and by supplementing them with other modes of interaction requiring Congressional consent. Nevertheless, it is important to comprehend the efforts of the Court to balance deference to the congressional right to determine the scope of interstate interaction and the pressure of the states to resolve disputes and make agreements to deal with common problems. By establishing a loose set of standards, the Court has acted like a substitute legislature meting out the will of Congress interstitially only where it is clear that, had Congress acted, it would have denied its consent. This has enabled the Court to fill the gaps between de facto interstate agreement and the necessary political considerations left by the Constitution to Congress.

This result has been criticized as improper for two reasons:

[F]irst, the reserved powers of the state are not and cannot be well defined; second, the purpose of the compact clause is not only to prevent state interference with national powers, but to enable Congress to supervise employment of powers, even legitimate and usual state powers, in a common undertaking by two or more states, and thus to supervise any concentrations of power within the nation, and to scrutinize interstate agreements in the light of its conception of national policy.

These are problems which could as easily be identified with the com-

183 Id. at 521.
184 Cf. Stearns v. Minnesota, 179 U.S. 223, 244 (1900).
185 Dunbar, supra note 140, at 758-59; See also Weinfield, What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"? U. Chi. L. Rev. 453 (1936).
186 Id. at 763.
merce power as it was interpreted prior to 1937. Undeniably, the constitutional language used to define the compact powers of the states, on the one hand, and the commerce power of the federal government on the other, are significantly different. The former clearly tips the balance of control over the scope of state action to the federal government, while the latter is not explicit as to how state and federal regulations are to interface. Nevertheless, in each case the Court has been faced with the question of how to balance the scope of state sovereignty against federal interests in national integrity. Since 1937, the Court has left these questions to Congress for its determination. Similarly, the Court has left the determination of compact issues to Congress, while allowing the states broad discretion for initiating compacts.

As the analysis of state sovereignty in the area of commerce regulation indicates, where Congress is given the power to determine the scope of federal-state relations (1) it does not follow, except by negative inference, that the states may not also attempt to define the scope of their sovereign powers, and (2) it is arguable that this right in Congress ought to be respected as part of the guarantee to the people of republican government. The mechanism of congressional control truly allows for the generation of constructive alternatives to existing federal relations, from which the federal government could select a course of action.

The framers more clearly spelled out Congress' supervisory role in interstate compacts than in the commerce power, where the domain of state sovereignty had acquired considerable historical precedent. It is in the area of congressional supervision that the Supreme Court has taken a stricter view of state regulations, and initiatives for alternative interaction. This concern is the same as that voiced in *Holmes v. Jenkinson*. The tendency of the Court to reject state regulation and interaction where it interferes with federal supervisory interests is a strong one, especially in the area of foreign relations. Since 1855, it has been clear that Congress did not, by consenting to a compact, restrict its own powers to regulate. To hold otherwise would allow “Congress and two States... the power to modify and alter the constitution itself.” Furthermore, it is clear that the exercise of congressional consent power where it may incidentally benefit some states over others is not barred.

However, where state regulation of matters may have international ramifications the situation is quite different. In the *Holmes* case it was

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128 For a recent argument on this rationale, see National League of Cities v. Usery, 426 U.S. 833 (1976).
191 Id. at 433.
192 Id. at 433-34.
suggested that the exercise of international diplomatic powers by the
states was inimical to federal supremacy.\textsuperscript{163} In cases dealing with transna-
tional agreements made by states, the Court has held that any evidence
of interference with that federal paramountcy is grounds for striking
down the state regulations.\textsuperscript{164} These rulings turn on the preemption of
national over state laws as indicated by Justice Black in \textit{Hines v. Davidowitz}:

\begin{quote}
[T]he power to restrict, limit, regulate, and register aliens as a distinct
group is not [a] . . . concurrent power of state and nation, but that
whatever power a state may have is subordinate to the supreme national
law.\textsuperscript{165}
\end{quote}

It is clear that in the field of international affairs state action runs the
risk of federal preemption, unless it is specifically consented to by the
Congress.

As one scholar has said:

The difference between consent to avoid pre-emption and consent to
satisfy the compact clause . . . deserves emphasis. When consent is
needed only to avoid pre-emption, denial or repeal of congressional con-
sent to state action in the federal sphere can occasion only \textit{pro tanto}
invalidity, conditions attached to congressional consent to avoid pre-
emption can affect only those activities within the federal sphere, and
congressional investigative power relative to such consent cannot extend
to joint state activities beyond the federal sphere. To the extent that
federal powers are affected, but no further, all interstate arrangements
must be recognized as voidable by congressional action.\textsuperscript{166}

It is consistent with the intent of the Constitution to treat federal
interests as preempting state compact powers and to view Congress as
capable of extensive investigative activity, and even participation in in-
terstate arrangements.

If compacts and agreements by the states with foreign powers are
viewed as voidable by federal legislation, is there any reason to prohibit
them entirely? In this respect, it is worthy of note that state regulatory
action in a matter not regulated by Congress has been upheld. The court
said:

When its action does not conflict with federal legislation, the sover-
eign authority of the State over the conduct of its citizens upon the high
seas is analogous to the sovereign authority of the United States over its
citizens in like circumstances.\textsuperscript{167}

\begin{footnotesize}
\begin{itemize}
\item[163] 39 U.S. at 578.
\item[164] See Zschernig v. Miller, 389 U.S. 429 (1967); United States v. California, 332 U.S. 19
(1947); Hines v. Davidowitz, 312 U.S. 52 (1940); Chy Lung v. Freeman, 92 U.S. (20 How.)
275 (1875).
\item[165] 312 U.S. at 68.
\item[166] Engdahl, supra note 146, at 102-03.
\end{itemize}
\end{footnotesize}
It would seem that this logic would also apply to transnational relations of the states, like that in *Holmes v. Jennison*, but if the change in the Court’s outlook on matters of state action in the international sphere has occurred, it is *sub silentio*.

If we may speculate that the preemptive doctrine will be applied to state international agreements then it is likely that the conclusions of the Supreme Court with regard to state regulation of international matters will be applied to compact cases as well. In the recent case of *Zschernig v. Miller*¹⁶⁸ the Court found “unconstitutional as applied” a state intestacy law. Three principles can be derived from the holding:

(1) that a state law was unconstitutional if it had adverse effects upon international relations; (2) that a state could not constitutionally interfere with the national government in carrying out an existing foreign policy; and (3) that the statute revealed an intent and purpose on the part of the state which was appropriate only for the national government.¹⁶⁹

This being the case, “congressional consent is required whenever the national government has an inherent interest in supervising or controlling state operations under the agreement” with a foreign power.¹⁷⁰ Under this interpretation, transnational agreements involving state obligations would require federal consent to avoid preemption or a violation of the compact clause.

This means that for the states to participate in foreign affairs, their activities must receive some form of congressional consent, most likely express, unless the interaction does not impinge upon federal supremacy. Under these circumstances the states may be free to deal with foreign powers. The Court has imposed upon the states the obligation to act with the national interest, not just with a local interest in mind. If the states act in this way their dealing with foreign powers will be upheld.

### III. THE INSTITUTIONAL DYNAMICS OF REGIONALISM

A review of the regional institutions in Eastern Canada and New England as they have been developed to deal with energy management is necessary in order to determine what powers are being exercised by the provinces and states. Analysis will reveal how federal-local stress is created or alleviated by the programs.

#### A. Regionalism in Eastern Canada

The eastern part of Canada, composed of Quebec, Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island, is culturally and geographically diverse. The cultural and economic position of French-
speaking Quebec has given rise to a separatist movement which, while raising fundamental constitutional questions, remains essentially cultural and not regional in character. Newfoundland has remained in the backwater of regionalism in Eastern Canada. However, it too has raised federal issues in recent years. This note focuses upon the regional developments in the Maritime Provinces of New Brunswick, Nova Scotia and Prince Edward Island.

Because of their cultural, geographic, and economic similarities, the Maritimes have often been thought of as a unit. However, because they are separate provinces, interaction among them must be approached in terms of the institutions which they have created through their respective governments. The chief institution for the interaction of these provinces is the Council of Maritime Premiers (CMP). The CMP, as product of legislative acts of each province, provides a forum for interaction without weakening the integrity of the provincial governments. Essentially it provides for horizontal interaction among equal political entities.

It was in 1971, that the Premiers of Nova Scotia, New Brunswick and Prince Edward Island formally agreed to form the Council of Maritime Premiers in order to coordinate economic and social planning and legislation. [See Appendix I.] This move received approval from the provincial legislatures the next year. [See Appendix II.] Since that time the Council has functioned effectively, coordinating transportation, and the development of uniform laws. In general, this form of interaction has been well received in the Maritimes. The Council is composed of the Premiers of each of the provinces, on behalf of Her Majesty the Queen in the right of each of the provinces represented by their respective Lieutenant Governors in Council. The budget for each year as divided among the three provinces, is prepared by the Premiers and submitted to the respective legislatures for approval. Decisions of the Council must be unanimous. These two characteristics of the Council insure that it will operate on the basis of consensus.

174 An Act to Establish the Council of Maritime Premiers, W.B. REV. STAT. c.10, (1972); W.S. REV. STAT. c.7 (1972); P.E.I. REV. STAT. c.10, (1972).
175 COUNCIL OF MARITIME PREMIERS, supra note 44.
177 An Act to Establish the Council of Maritime Premiers, N.B. REV. STAT., c.10 (1970); N.S. REV. STAT. c.7 (1972); P.E.I. REV. STAT. c.10 (1972).
178 Id. §§ 5-6.
The ability of the Premiers to arrive at a consensus is due, in part, to the fact that the advisory committees to and agencies of the Council are composed of representatives from each of the provinces. The cooperation of officers and advisors from the various planning sectors of the provincial governments insures, at least theoretically, that differences will be articulated in Council committees and agencies before major confrontations develop. However, as the Premier of New Brunswick suggested in 1972 shortly after the formation of the Council, “there is no necessary connection or coordination between one inter-provincial agreement and another agreement even if the same provinces are involved.” Although the Council is designed to make agreements and improve coordination, it remains clear that conflicts can still develop which force debate outside the Council. One example of this came in 1975, when the “president of the Nova Scotia Power Corporation accused the New Brunswick and federal governments of lack of interest in developing Fundy tidal power,” a project which could have significant impact upon the cost and quantity of energy available to Nova Scotian industry.

This accusation reveals that the Council operating as an inter-provincial body, may not fully attune itself to the interests of the federal government. There is the possibility that the provinces, through the Council, may gang up on Ottawa. The other possibility is that the provinces will merely engage in interaction which “effectively strengthens the position of the Maritimes in discussions with the federal authorities or with outside interests.”

The likelihood that the Council will gang up on the federal government does not appear great, although the possibility exists, as was seen after the 1974 energy crisis, and more recently with the oil pricing controversies. Nonetheless, there is room for federal participation in the planning and coordinating of activities of the Council and its committees and agencies.

Federal involvement is taking two chief forms. First, the Dominion is helping to defray the cost and assist in the planning of both the Eastern Canada Power Grid and a national power grid. Second, the federal government has joined with the provinces to develop existing but untapped sources of power, through the Bay of Fundy Tidal Power Review Board. Both programs have involved the National Energy Board.

The Energy Board was not deliberately composed as a representative body, but rather as a clearly federal agency. This is evidenced by the re-

180 See Council of Maritime Premiers, supra note 44.
181 Campbell, Regan & Hatfield, supra note 176, at 603.
183 Campbell, Regan, & Hatfield, supra note 176, at 596.
requirement that its members reside not more than twenty-five miles from Ottawa.\textsuperscript{186} It has broad regulatory powers over the licensing of power utilities,\textsuperscript{187} the prices charged by such utilities,\textsuperscript{188} the location of power lines,\textsuperscript{189} and other planning activities including the means and quality of energy exportation to be permitted.\textsuperscript{190} This last function has proven instrumental in the planning of the Bay of Fundy tidal power project. The Board can insure an adequate secondary market for the initial surplus energy generated by the project by arranging for long-term agreements for export of power to New England.\textsuperscript{191} Also the Board can supply the provinces with vital engineering skills and equipment, the lack of which may have led the provinces to enlist the involvement of the Board.\textsuperscript{192} This aid, along with the relative lack of energy expertise of the provincial officials has the effect of encouraging cooperation among the Council of Maritime Premiers, the individual provinces, the Inter-Provincial Council on Energy and the National Energy Board. This cooperation has helped to bring the representatives of national and provincial interests together in a common decision-making process.

The Maritime Provinces have turned their attention to the problem of developing and managing energy resources in the region on their own.\textsuperscript{193} It was in response to changing economic circumstances that the Provinces of Nova Scotia and New Brunswick initiated an investigation of the Bay of Fundy tidal power potential only five years after a Canadian study found the project unfeasible.\textsuperscript{194} Furthermore, through a series of utility mergers, provincial acquisitions of power utilities, and construction of lines connecting all Eastern Canadian power systems, the provincial governments have achieved the potential for mutual benefit through cooperative energy management. Such cooperation increases interaction with the National Energy Board, which must approve changes in the generation and distribution of power in the region. It also enables greater sharing and collective development of the energy resources. The latter has been further facilitated by the formation of the Maritime Integrated System (MIS).\textsuperscript{195} As will be discussed \textit{infra} this has also facilitated more planned coordination between the New England and Maritime power systems.

On the whole, the Maritimes have responded to the economic condition of the region by developing inter-provincial lines for communication

\textsuperscript{186} CAN. REV. STAT. c. N-6 (1959) as amended by cc. 10, 27, 44 (1973-74).
\textsuperscript{187} Id. § 10 et seq.
\textsuperscript{188} Id. § 50 et seq.
\textsuperscript{189} Id. § 20(1), (2).
\textsuperscript{190} Id. §§ 20(3), 40 et seq.; see also Hon. M. Shar, \textit{infra} note 201.
\textsuperscript{191} Nova Scotia Government, \textit{supra} note 185, at 7.
\textsuperscript{192} See Shipman, \textit{supra} note 127, at 30.
\textsuperscript{193} COUNCIL OF MARITIME PREMIERS, \textit{supra} note 44, at 1. See also Saywell, \textit{supra} note 184, at 55.
\textsuperscript{194} Shipman, \textit{supra} note 127, at 60.
\textsuperscript{195} See Nova Scotia Government, \textit{supra} note 185, at 6.
and decision-making. This has been accomplished through the formation of the CMP, and other formal cooperative ventures such as MIS and the Bay of Fundy Tidal Power Review Board. Although the provinces have been at odds with the federal government at times, a general attitude of cooperation appears to have prevailed. Nevertheless, there is the potential for disintegration of the cooperative spirit among the provinces which might render the operation of the CMP and other ventures difficult, just as there is the possibility that aggressive cooperativism among the provinces may result in antagonism with the federal government. The institutions which have been developed are open-ended, leaving the possibility of stalemate at any moment, while providing different avenues for expanding cooperative interaction.

B. Regionalism in New England

The exercise of state sovereign power in New England over regional energy management is quite different from the process at work in the Maritime Provinces. In New England regional association did not grow from an awareness of strength in the states, but from recognition by the federal government that the states individually were not able to deal with their declining economies. The federal government exercised its supervisory powers to encourage regional regulation of commercial matters. The states responded with vigor, working both within and beyond the federal framework. A common planning forum was employed to coordinate legislative and executive efforts in each state.

In the area of energy management, industry took the lead in New England. Regional energy management became possible in September, 1971 after six years of utility bargaining were finalized, with the filing of the New England Power Pool (NEPOOL) Agreement with the Federal Power Commission.\(^6\) Today this organization is comprised of utility companies generating over ninety-eight percent of all electric power within the region. NEPOOL purports to be a regional planning body for both the development and management of energy systems.\(^7\)

The fate of New England energy management does not rest solely in the hands of the utilities and Federal authorities. NEPOOL planning has come under close scrutiny and criticism from the NERC Energy Research and Policy Formulation Program. NERC "is comprised of the six New England Governors and a Federal Co-chairman appointed by the President."\(^8\) The purpose of the Program is to supply NERC "with reliable baseline information on New England's energy requirements and vulnerability, and to provide the Governors and the region with viable energy policy options and recommendations to guide New England's energy fu-

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\(^7\) Id. at 1-2.

\(^8\) Merriman & Dukakis, Preface to NERC, Energy Program, supra note 196.
In part the Program performs as a watch-dog over the planning of NEPOOL and other energy related industries in the region. In addition, however, the Program has devoted itself to investigations of environmental problems and long term regional energy planning.

The NERC Energy Program is only part of a larger sphere of cooperative regional economic planning taking place in New England. The states have long participated in interstate compacts in the areas of transportation, water resource and flood control management, among others. However, NERC now serves as the focus for cooperation in a variety of these areas, especially economic planning.

NERC was formed pursuant to the provisions of Title V of the Public Works and Economic Development Act of 1965 (PWDA). Specifically PWDA was enacted by Congress because:

[S]ome of our regions, counties, and communities are suffering substantial and persistent unemployment and under-employment . . . to overcome this problem the Federal Government, in cooperation with the States, should help areas and regions . . . to take effective steps in planning and financing their public works and economic development.

Thus, the Act's policy is to deal with national economic problems by attacking the problems regionally.

For New England to participate under this federal act, it was necessary for the Secretary of Commerce to designate the area an "economic development region." It was also necessary to obtain "the concurrence of the States in which such regions [would] be wholly or partially located." Before this determination could be made, the Secretary of Commerce was required to find:

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199 Id.
(A) that there is a relationship between the areas within such region geographically, culturally, historically, and economically,
(B) that . . . the region is within contiguous States, and
(C) upon consideration of the following matters among others, that the region has lagged behind the whole Nation in economic development:
   (1) the rate of unemployment is substantially above the national rate;
   (2) the median level of family income is significantly below the national median;
   (3) the level of housing, health, and educational facilities is substantially below the national level;
   (4) the economy of the area has traditionally been dominated by only one or two industries, which are in a state of long-term decline;
   (5) the rate of outmigration of labor or capital or both is substantial;
   (6) the area is adversely affected by changing industrial technology;
   . . . and
   (8) indices of regional production indicate a growth rate substantially below the national average.206

New England was designated an economic development region in March, 1966, and upon the request of the states, the Commission was established in March, 1967.207

Under the amended statute, NERC has the following functions:

(1) . . . assist . . . in the identification of optimum boundaries for multistate economic development regions;
(2) initiate and coordinate the preparation of long-range overall economic development programs . . ;
(3) foster surveys and studies . . ;
(4) . . . assist . . . in the initiation and coordination of economic development districts, in order to promote maximum benefits from the expenditure of Federal, State, and local funds;
(5) promote increased private investment . . ;
(6) prepare legislative and other recommendations . . for Federal, State and local agencies;
(7) develop, on a continuing basis, comprehensive and coordinated plans . . giving due consideration to other Federal, State, district, and local planning . . ;
(8) conduct and sponsor investigations . . including an inventory and analysis of the resources of the region . . ;
(9) review . . . Federal, State, and local public and private programs . . ;
(10) formulate and recommend, where appropriate, interstate compacts and other forms of interstate cooperation, and work with State and local agencies in developing appropriate model legislation; and
(11) provide a forum for consideration of problems of the region and

206 Id.
proposed solutions and establish and utilize . . . advisory councils and public conferences.\(^{208}\)

Each of these functions is designed as “encouragement for depressed areas to combine with their prosperous neighbors for the benefit of all.”\(^{209}\) According to the House Public Works Committee, “[e]xperience has shown that economic development efforts can have only limited success when they are confined to local areas . . . .”\(^{210}\)

The Regional Commissions were clearly designed to provide catalysts to the myriad relationships existing between individuals, private enterprises, communities and the various levels of government. The list of Commission functions establishes a broad base for action by NERC. The Commission’s action must meet with the approval of the federal Co-Chairman of the Commission and a majority of the participating states acting through their Governors.\(^{211}\) Such action must come only upon state or local initiative. There must also be a “provision at every point for concurrence by appropriate local and state authorities.”\(^{212}\) It would seem that Congress intended the Commission to function on the basis of state and federal government consensus. The statutory scheme, however, provides that only a majority of states need approve an action. One state cannot block a program because it will not benefit from it. This arrangement provides for a balancing of interests designed to achieve mutual benefit.

The enabling statute indicates federal interest in cooperative regional efforts, including the formulation of interstate compacts. The determination of economic problems and the remedies placed within the jurisdiction of NERC reflect a congressional intent to create effective alternative channels among the federal, state and local governments, and private enterprise. Thus, although NERC was the product of federal experience rather than state efforts,\(^{213}\) Congress has opened the door to state and federal experimentation.

The New England States have engaged in a number of other experimental relationships. Chief among these are the interstate compacts. As of 1970, there were eighteen different compacts exclusively within New England, although four of those compacts were not yet in effect.\(^{214}\) Overall, as of 1970, the six states were participating in the following number of compacts: New Hampshire, thirty-two; Connecticut, thirty-one; Massachusetts, twenty-seven; Maine, twenty-six; Vermont, twenty-five; and

\(\text{\(^{208}\) 42 U.S.C. \S 3183(a) (1976).}\)
\(\text{\(^{209}\) H.R. Rep. No. 539, 89th Cong., 1st Sess. 2793 (1965).}\)
\(\text{\(^{210}\) Id. at 2792.}\)
\(\text{\(^{211}\) 42 U.S.C. \S 3182(6)-(d) (1976).}\)
\(\text{\(^{214}\) COUNCIL OF STATE GOVERNMENTS, supra note 143, at 48-49.}\)
Rhode Island, twenty-four. These are noticeably higher figures than the national average of nineteen per state.\footnote{Id. at 4.}

The New England Interstate Planning Compact not yet in effect and accepted only by Connecticut, New Hampshire, Rhode Island, and Maine,\footnote{CONN. GEN. STAT. ANN. §§ 8-37(c)-(e) (1973); N.H. REV. STAT. ANN. §§ 163-A1-4 (1971); R.I. GEN. LAWS. §§ 42-39-1 to 4 (1956); ME. REV. STAT. 10 §§ 301-317 (1971).} is the most noteworthy of these compacts. This Compact would provide "facilities and procedures for the coordination of the policies, programs and activities of interstate significance in the New England region in the field of physical, social and economic resources . . . ."\footnote{See, e.g., R.I. GEN. LAWS § 42-39-2 (1956).} Enactment of the Compact was rendered insignificant when its intended function was superceded by NERC, which was formed shortly after the first state ratified the Compact.

Another development toward interstate cooperation was the creation in nearly all the New England States of a Commission on Interstate Cooperation. Many of these have existed since the 1930's, and have been associated with the Commission on Uniform Laws. However, they have not produced radical changes in regional planning.

In summary, New England has strong institutional machinery for regional cooperation, and some significant planning is taking place in the area of energy resource management. With a tradition of cooperation, there is a basis for future interaction. Federal involvement in NERC theoretically permits the Commission to integrate federal and state interests, and so reduce federal-state tension. However, the availability of mechanisms of cooperation has not meant that they have been fully employed. The fact that the federal government was able to create regional commissions indicates that it might well accomplish the goals of the Commission itself. The future of cooperation in New England therefore depends upon the initiative taken by the states and their willingness to work closely with federal authorities through NERC.

C. Transnational Regionalism

The states and provinces have cooperated in a variety of programs designed to maximize the energy resources available to the region. This interaction has in turn had an impact on the relationship between the federal governments of the United States and Canada.

1. The Current Range of State-Provincial Interaction: The Swanson Report

The range of direct relations between Canadian provinces and American states is extensive and diverse. According to a report prepared for the United States Department of State by Roger Swanson [hereinafter
referred to as the Swanson Report] there were 766 interactions between
American states and Canadian provinces as of August 1974. A review of
the statistical breakdown of these interactions will establish the context
in which the New England states and Eastern Canadian provinces have
cooperated in resource management.

The Swanson Report categorizes the formality of state-provincial in-
teractions in the following terms: (1) "Agreement is defined as a jointly
signed document setting forth regularized interactive procedures"; (2)
"Understanding is defined as correspondence, resolutions, communiqués,
or memoranda, not jointly signed, setting forth regularized interactive
procedures;" and (3) "Arrangement" is defined as any other interaction
where "there was no reported jointly signed document, nor any non-
jointly signed correspondence, resolutions, communiqués, or memo-
randa." The Report found that there were forty-four Agreements and
181 Understandings among all the reported interactions. The state re-
porting the largest number of interactions was Maine with 110, while the
province reported by the states as having the most interactions across the
border was Ontario with 105. Significantly, the six New England states,
only three of which have a common border with Canada, account for al-
most twenty-eight percent of all state-provincial interaction. This ac-
counts for thirty-five percent of all bilateral interactions between states
and provinces and sixteen percent of the total number of state-provincial
interactions. Accordingly, there is a relatively high degree of state-provin-
cial interaction taking place between the Eastern Canadian Provinces and
the New England States.

The number of bilateral agreements between the Eastern Canadian
Provinces and the New England States is substantial. These agreements
account for twenty-three percent of all bilateral state-provincial interac-
tion found by the Swanson Report. Moreover, this figure does not include
the significant number of multilateral interactions in which the New Eng-
land States and Eastern Canadian Provinces have joined.

In terms of the subject matter of the various interactions, the Swan-
son Report creates eleven categories. The following chart indicates the

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218 R. Swanson, State/Provincial Interaction: A Study of Relations Between U.S.
States and Canadian Provinces Prepared for the U.S. Department of State 55 (Aug.
1974) [hereinafter cited as Swanson Report].
219 Id. at 7. State/provincial interactions are defined as "those currently operative
processes in which there is direct communication between state and provincial officials on
an ongoing basis." Id.
220 Id. at 11-12.
221 Id. at 11-43.
222 Id. at 48-49.
223 Id.
224 Id. "Multilateral refers . . . to those interactions in which there was reported the
involvement of two or more provinces." Id. at 44. "General refers to those interactions re-
ported as having been concluded with such generic designations as 'Canadian Provinces.' "
Id.
numbers of interactions per state in each category prior to 1974:225

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<th>Category</th>
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These figures indicate that the northern states are involved in a broader range of transactions and that transportation, natural resources, education and culture, commerce and industry, and agriculture are the chief areas of state-provincial interaction in New England. It should be noted that the education and culture, commerce and industry, and agriculture categories form a larger percentage of New England interaction than the national average, while transportation and natural resources categories are about the same for New England as for all the states.

These statistics were compiled in 1974. Since that time the New England States and the Eastern Canadian Provinces have continued to expand their relations, particularly in the area of energy resource management.


In recent years there has been a substantial increase in cooperative interaction between Maine and New Brunswick which has set the stage for the overall increase in regional interactions.

In June 1973, the Governor of Maine and the Premier of New Brunswick signed a “Joint Agreement” to foster overall cooperation between their two jurisdictions.226 [See Appendix III for the text of this Agreement.] In May of the same year the Maine House of Representatives initiated a “Joint Order Relative to Interparliamentary Conference.” The Order was approved by the Maine Senate the following year and authorized the Maine Commission on Interstate Cooperation to hold an interparliamentary conference to which New England and Canadian legisla-

225 Id. at 11-43.
tors were invited. [See Appendix IV.] From this initiative has come increasing association throughout the region.

One means by which New England has increased interaction with Eastern Canada is through the establishment of offices and commissions to maintain permanent ties with the governments of other states and the Canadian provinces. The Office of Canadian Relations, formed by the Maine Governor in February, 1973, was created from the Maine Commission on Interstate Cooperation. Similar offices have been created in every provincial capital since 1967. The purpose of Maine’s Office of Canadian Relations and its Commission is to provide the state with information based on existing contacts and new exchanges. This approach to state-province cooperation has taken hold throughout New England, though Maine is still foremost in the development. By 1974, every state in New England, except Connecticut, had formally created offices designed to promote cooperation with the Canadian provinces in particular areas such as North American French culture and language. Vermont established an office for regional economic relations. All the New England states now have some office to handle state-provincial affairs.

In addition to the creation of these offices the states and provinces have engaged in (1) ad hoc meetings of officials; (2) the establishment of offices in major cities; (3) the creation of joint committees; (4) “the development and perfection of a form of ‘summitry’ by state governors and premiers,” and (5) the convocation of interparliamentary conferences.

Personal contacts between officials develop in the ad hoc meetings, thus providing the basis for informal cooperation in the day-to-day affairs of domestic government. This casual cooperation sometimes results in more formal arrangements.

Maine, Vermont and New Hampshire have opened offices in Canadian capitals and the Eastern Canadians have reciprocated. This is particularly true of Quebec and Ontario, which established eighteen trade and investment offices throughout the United States during the early 1970’s. The offices are part of an overall increase in state and provincial involvement in international affairs, particularly in the areas of trade and reciprocal investment. According to one recent study, “at least thirty

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227 Departments of Intergovernmental Affairs exist in Quebec (1967), Ontario (1972), and Alberta (1972), while there are smaller offices in all other Provincial capitals. Levy & Munton, Federal-Provincial Dimensions of State-Provincial Relations, 1976 Int’l Perspectives 23, 26 (Mar./Apr. 1976).
228 Swanson Report, supra note 218, at 62.
229 Id.
230 Id. at 62-63. See, e.g., Joint Communiqué of May 1972, by the Governor of Maine and the Premier of Quebec on the mutual commitment “to increase . . . the exchange of products.” Reprinted in Swanson Report, supra note 218, at 344.
231 Levy & Munton, supra note 227, at 27.
232 Id.
233 Maier, supra note 169; Sabourin, supra note 87; Meekison, Provincial Activity Adds New Dimension to Federalism, 1977 Int’l Perspectives 8 (Mar./Apr. 1977).
states have special international divisions within their development agencies and at least forty-two states employ one or more international trade specialists.\textsuperscript{234} By "August, 1975, seventeen states plus Puerto Rico were operating a total of twenty-four different offices in seven foreign countries."\textsuperscript{235} A similar situation exists with regard to the Canadian provinces.\textsuperscript{236} In New England and Eastern Canada, exchanges often commence with the establishment of tourist information centers.\textsuperscript{237} In a few cases, however, new trade missions were established at the start.\textsuperscript{238}

The formation of Joint Committees and the annual meetings of governors and premiers have been the chief vehicles for increased cooperative interaction in recent years. It is primarily through these vehicles that comprehensive energy management has evolved. Commencing in 1973, premiers and governors have held annual conferences in order to foster cooperation in a broad range of areas. The governors and premiers signed a "Joint Resolution" in that year calling for "the freest possible flow of commerce between the two regions." The resolution also planned for coordinated pressure upon the two federal governments to encourage freer trade and boundary settlements, and for the creation of Energy and Transportation Advisory Committees.\textsuperscript{239} [See Appendix V.]

The following year, the premiers and governors created "a standing committee of officials on Inter-Regional Economic Development to study and make recommendations in such areas as trade, transportation, energy, and tourism."\textsuperscript{240} [See Appendix VI.] In addition, the governors and premiers signed what is titled the Sugarbush Compact. The Compact set forth the existing economic conditions in the region and the importance of the joint development of regional energy facilities. The Compact further declared "[t]hat such cooperation between [the] regions would supplement rather than deter the national policies of the United States and Canada with respect to energy independence in each nation."\textsuperscript{241} They concluded the Compact with a pledge to seek agreement between the two federal governments which would create "a favorable climate for . . . the

\textsuperscript{234} Maier, supra note 169, at 393.
\textsuperscript{235} Id. at 394 (Maier cites statistics of the National Association of State Development Agencies).
\textsuperscript{236} Sabourin, supra note 87, at 5; Meekison, supra note 233.
\textsuperscript{238} Id. at 63.
\textsuperscript{240} Resolution, June 14, 1974, Conference of Eastern Canadian Premiers and New England Governors, reprinted in SWANSON REPORT, supra note 218, at 378 [see Appendix VI for text].
\textsuperscript{241} Sugarbush Compact, June 14, 1974, Conference of Eastern Canadian Premiers and New England Governors, reprinted in SWANSON REPORT, supra note 218, at 350-51 (see Appendix VII for text).
ready flow of energy” in the region. [See Appendix VII.]

The Sugarbush Compact poses no threat to the federal structure of either Canada or the United States. Although there are certain potential dangers in this form of province-state interaction, which will be discussed infra, it is clear that on its face, the Compact does not offend federal integrity. Indeed, it specifically invokes federal involvement in the overall cooperative effort. The unobtrusiveness of the Compact in terms of inter-federal relations is readily apparent from the course of subsequent events.

By 1976, officials from the Canadian and United States federal governments had become active in the preparation of reports, plans and proposals for the Fourth Annual Conference. It was the NERC Energy Program that sponsored the preparation of a report on Electric Power Interconnection Between Eastern Canada and the Northeastern United States. This report outlined the whole range of energy interconnections in the region and the basis for common problem solving. The Canadian National Energy Board, in 1976, prepared a report on Challenges to Electric Service: Reliability in the Next Decade for the North East Power Coordinating Council, Executive Seminar. The Council is a body composed of Canadian and United States utility companies. The report detailed Canadian energy production, development capabilities, and the requirements of national energy policy.

The following year, the governors and premiers received reports from NERC's Energy Program and the Nova Scotian government. The NERC report describes in detail the current levels of energy production in the region, and outlines research on a number of energy resource development projects. The Nova Scotian report sets forth the preliminary findings and recommendations of the Bay of Fundy Tidal Power Review Board, in which the Nova Scotia and New Brunswick governments are cooperating with the Canadian National Energy Board.

The tidal power project represents significant progress toward regional energy interdependence, and through cooperative management increases the opportunity for the provinces and states to develop energy resources. Such developments promote the energy independence of each country by maximizing existing resources. This demonstrates that the cooperation of the Eastern Canadian Provinces and the New England States in the development of energy resources can be consistent with the apparent energy policies of both Canada and the United States. This is supported by the fact that both federal governments have been involved in the planning of the tidal power project.

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242 Id.
243 Shipman, supra note 127.
244 See Bell, Challenges to Electric Service Reliability in the Next Decade: A Canadian Viewpoint, EXECUTIVE SEMINAR, NORTHEAST POWER COORDINATING COUNCIL 20 (1976).
245 Id. at 4-5.
246 Nova Scotia Government, supra note 185.
3. The Effect of State-Provincial Energy Cooperation on Relations Between Federal Governments.

Although it would seem that cooperation between the United States and Canada should preclude friction between the two countries, there are some competing considerations which have raised problems. The 1973 meeting of the governors and premiers calling for free trade in energy took place in the wake of the "Nixon tariff" of 1971, which gave Canada no special treatment as a trading partner of the United States. The 1973 Agreement called upon the governors and premiers to propel their respective federal governments toward a more cooperative position.

Another problem which has been created by the advent of state and provincial international activity and which is likely to continue is the development of "oblique relations" between the United States federal government and the Canadian provinces, and between the states and the Dominion of Canada. Relations between the Canadian provinces and the United States government are clearly on the rise. It is reported that since the United States protectionism of 1971, Ontario and Alberta have considered establishing "mini-embassies" in Washington, D.C., and that several premiers, including a Nova Scotian have visited the United States capital to lobby for and against various measures of concern to their provinces. But the initiative for such oblique relations has not been one-sided, as is evidenced by the invitation extended by the United States Department of State to the provinces for two conferences with Department officials in Washington.

These relations, born of the diplomatic activity of the states and provinces, have not been conducive to cordial relations between Ottawa and Washington. To the Canadians, at least, this form of international interaction is threatening to national integrity, and leads to the unpleasant suggestion that Ottawa is the little brother government in North America. Washington has been warned of this danger. The Swanson Report states that "any attempt on the part of the United States federal government to deal directly with the Canadian provinces outside channels mutually acceptable to both Canada and the United States is both undesirable and ultimately counterproductive. . . notwithstanding initiatives on the part of the provinces themselves." The primary reason this form of interaction would be counter-productive, according to the Report, is that certain oblique relations can "externalize" what should be a national

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249 See Maier, supra note 169.

250 Levy & Munton, supra note 227, at 27.

251 Id. at 26.

252 SWANSON REPORT, supra note 218, at 55-56.
rather than bilateral debate."

The same danger lies nascent in the horizontal relations of states and provinces. As the Swanson Report notes, modest interaction between the states and provinces in areas of essentially regional concern can "generate issues which not only require the attention and involvement of the United States State Department and federal government [but] become abrasive as. . .bilateral issue[s]." This clearly is possible in an area of increasing delicacy and importance, such as energy independence.

The possibility of friction from oblique relations cannot be underestimated. It has been forcefully argued that the increasing number of state trade missions to foreign nations "creates the possibility. . .of requiring control or regulation by the federal government in order to prevent interference with United States foreign policy which is increasingly tied to questions of economic policy rather than to questions turning on conflicting political ideologies." The mutual problem lies in intentional or inadvertent conflict with national policies and the reduction of federal diplomatic integrity.

The reduction of national prestige is not to be separated from the danger of the disintegration of political processes. The events in New England and the Eastern Canadian Provinces indicate how this is possible. The interaction between the two areas has involved both federal governments, through the agencies of NERC and the National Energy Board. During the initial stages of interaction, however, the states and provinces did not obtain more than tacit approval of the federal governments for their activities. This fact leaves the possibility that the subnational units acting on "the functionally most appropriate basis" could end up detrimentally competing among themselves. The creation of foreign trade missions by the states and provinces has already resulted in "strong competition. . .to attract foreign investment." There is a significant danger that state and provincial diplomatic activity with the tacit approval of the respective federal governments could transform this competition into discrimination against other states and provinces, or establish precedents obstructing the federal governments' powers to take over when there is a chance that competition would be detrimental to national unity.

It seems then, that state-provincial interaction, while not necessarily detrimental to the relations between Canada and the United States or within the federal structures of each country, can create the following potential problems: (1) the danger of inadequate coordination between fed-

253 Id. at 56.
254 Id. at 54.
255 Maier, supra note 169. The State Department did not acknowledge the validity of state treaty-making activities in the late 1960's.
256 SWANSON REPORT, supra note 218, at 54.
257 Maier, supra note 169, at 391. See Meekison, supra note 233 STORY, supra note 151.
258 Levy & Munton, supra note 227.
eral and subnational policies as a result of inadequate consultation between the two levels of government; (2) a reduction in federal flexibility in foreign affairs because of the possibility of embarrassing conflicts between federal and subnational goals; (3) the creation of precedent for increased decentralized pronouncement of foreign policy; and (4) the use of such interaction to heighten competition among the states and provinces so as to weaken the internal integrity of each nation.

However, the provinces are exercising their constitutionally recognized legislative powers in order to fashion policy and programs clearly within provincial jurisdiction. They have also expanded this cooperation into the realm of energy resource management, an area where federal legislative powers must be exercised in conjunction with provincial powers to achieve regional solutions. In cooperating with the New England States the Maritime provinces have merely expanded the regional horizon of the institutions which they have developed to regulate energy resources.

Similarly, it has been seen that regional cooperation in New England has been conducted with deference to the supremacy of the federal government. The states have worked closely with the federal government to fashion new regional economic policies and joint programs, including those dealing with energy resources.

The key to all of these regional developments has been the sensitivity of each level of government to the need for initiative at all levels and deference to the existing allocation of powers. By permitting the states and provinces the exercise of their powers to regulate energy resources, the federal governments have encouraged the articulation of regional interests so that federal policy may not conflict without necessity. The states and provinces, on the other hand, have sought federal involvement in their regional planning processes in order to avoid conflicts with federal plans. Although conflicts have developed, the regional institutional structures have offered a mechanism for resolution. As such these regional institutions are serving to bring both local and national interests into concert, to make decisions of local and national governments reflect broad national interests and the particular concerns of local government. It has made decision-making more representative.

IV. Conclusion

Since 1973, the New England Governors and Eastern Canadian Premiers have joined in a systematic exchange of ideas. They have pledged their mutual concern to achieve a regional approach toward solving economic problems. The primary goal of this united effort is the management of energy resources. The high cost of energy has been the main inhibiting factor in the economic growth of the area. Among the joint

\footnote{See Wilbur, New Brunswick, 169 CAN. ANN. REV. POL. & PUB. AFFAIRS 171 (1976); Frazer, Nova Scotia, 169 CAN. ANN. REV. POL. & PUB. AFFAIRS 166 (1976).}
ventures involving the Canadian Provinces and the Dominion of Canada are the Council of Maritime Premiers (CMP), the Maritime Integrated System (MIS), and the Fundy Tidal Power Review Board. In New England, the states and the United States government have cooperated in the New England Regional Commission (NERC), among other more purely interstate programs. These regional institutions have been partially integrated across the national border through the guidance of the New England Governors and Eastern Canadian Premiers Annual Conference. There is a steady flow of information between both the advisory committees to this conference and also through informal governmental communication. This interaction has resulted in numerous agreements, joint communiques and compacts, which indicate a trend toward regional energy resource management.

Transnational regionalism in this context appears consistent with the constitutional framework of each country and with the orderly conduct of relations between the two countries. The transborder interaction is an outgrowth of domestic regional interaction which fits within the constitutional framework of each nation. In Canada the rigid distribution of legislative powers establishing legislative autonomy has mandated extra-constitutional cooperation between the provinces and federal government, and among the provinces. By carefully maintaining legislative autonomy and striving for greater coordination of policies, the Eastern Canadian Provinces have established mechanisms which, when transferred to dealings with the New England States, have kept those dealings consistent with the framework of Canadian constitutional law.

Interaction between the Eastern Canadian Provinces and the New England States has closely followed the pattern established in domestic Canadian cooperation. Maine's call for an interparliamentary conference in 1973 set the stage for the beginnings of effective northeastern “summitry”—the Annual Conference of Eastern Canadian Premiers and New England Governors. These conferences increasingly have led to more than a specific agenda in the energy resource field, and have come to involve both the Canadian and United States federal governments in separate and joint administrative study and policy recommendation. The delegation of these functions to joint committees again follows the Canadian model for interaction. Similarly, the provinces and states have adopted some uniform laws and laws referring to statutory schemes across the border.

Because these interactions with the New England States have followed the Canadian model, and because there remains a fundamental disagreement as to the proper allocation of power to engage in foreign relations, perhaps the best test of such interaction is whether it has in fact resulted in any encroachment by the provinces upon federal powers over domestic matters.

Recent interaction between the Eastern Canadian Provinces and the New England States has resulted in increasing satisfaction of local inter-
ests, especially in the cooperation for development of new energy resources. It has done so without seriously hindering the Canadian federal government in its dealings with the United States government. Only to a very limited extent have Department of State overtures to the provinces alienated the two federal governments. Rather than irritating relations, cooperation with New England has facilitated the gradual modification of understandings in this area of mutual concern, generating a model for future Canada-United States relations.

Thus, having followed the domestic Canadian model for intergovernmental interaction and having done so without any substantial encroachment upon federal powers, it appears that the transborder interaction poses no additional constitutional problem. However, to the extent that provincial-state interaction does not involve federal authorities at all levels of discussion, the interaction does weaken the international integrity of the federal government. The political sensitivity of the provinces to the interests of the federal government in the area of energy management has avoided such a weakening of federal integrity. This political sensitivity may be attributed, in part, to provincial awareness of the necessity of federal assistance in carrying out these projects.

This successful avoidance of conflict in energy matters is to be contrasted with the result of Quebecois cultural relations with the states. These relations raised considerable debate in Canada because they politicized the dispute over allocation of the foreign affairs powers. Such politicization of the issue externalized the domestic debate to the embarrassment of the Ottawa government. The exercise of diplomatic powers by the provinces is most disagreeable to federal-provincial relations when there is the least degree of domestic cooperation on the subject matter of the transnational relationship as in the case of Quebec in cultural matters. Where there is already a great deal of federal-provincial cooperation with regard to a given subject, international activity is least offensive to federal-provincial relations since political debate is minimal. Because of the fact that the Eastern Provinces resolved the domestic issues surrounding energy resource management or at least tried to find a solution to federal-provincial disagreements, the international dimension of their efforts has not created a serious confrontation. They remain loyal to the Dominion and respect the need for comity in provincial-federal relations.

Looking to the international aspect of New England regionalism, it is necessary to ask the same questions raised above concerning constitutional limitations and the effect of transnational relations on the international integrity of the federal government. Impingement on the constitutional delineation of state and federal powers and on the executive’s foreign affairs powers appears to be minimal. The impetus for the crea-

tion of NERC, the present vehicle for substantive interaction between the Canadian provinces and the American states was federal in origin.

NERC, as the product of federal legislation, sets the limits on New England regional cooperation very broadly. While the Act establishing NERC cannot be said to be an express grant of congressional consent to interstate agreements, it does create a forum for interstate cooperation with federal involvement.

NERC is authorized to develop plans for coordinating state and federal regulation on a region-wide basis. This could be construed as consent to interstate agreements to come in the future but for the fact that the authorizing act contains an explicit reference to interstate compacts and their recommendation to Congress for approval. This provision indicates congressional belief that not all forms of state interaction require federal consent. Alternatively, it may be construed to mean that the authorizing act granted specific rights of interaction among the states, but withheld consent as to some matters, particularly those of a political nature.

It is noteworthy that the authorizing legislation for the Regional Commissions came from federal experience with such interstate compacts as the New York-New Jersey Port Authority Compact. The formats are the same, but here, with federal initiative there has been no need to approach interaction from the perspective of a compact since the approval of Congress is being met in the initiation stage.

It is clear that the structure of NERC is designed to serve both state and federal interests. NERC captures the sense of relevance which the states feel with regard to energy problems, and economic matters in general. It provides a focus for state and national interests through which a more balanced and representative foreign policy can be developed with the Canadians, and the concrete energy problems of the states solved.

Though NERC's authority may be preempted by federal initiatives this is not likely to occur so long as interaction with the Canadians is conducted on several levels in order to work out differences. The danger of embarrassment is not great either to the federal government or the states. The various agreements signed by the governors and premiers all make clear that their dealings are conditional upon the approval of the federal governments.

The interaction between the New England States and the Maritimes has moved beyond the original scope of NERC, but the interaction has drawn upon a pattern of NERC cooperation. Thus, as long as it continues to respect federal interests, it is likely that this form of trans-border cooperation will not exceed state powers. Political sensitivity to the interests of the national government has allowed the states to create mechanisms for permanent interaction on a regional basis.

Evaluating the cooperation of the New England States in light of the conclusion that state interaction is constitutional when it does not conflict with federal interests, it does not appear that the states have ex-
ceeded the bounds of permissible interaction. The annual conferences of
the governors and premiers, and the supporting committee meetings have
resulted in an exchange of information and coordination of policy. Al-
though there is potential for conflict with federal policy, the involvement
of the federal government in NERC has assured that the states will att-
tune themselves to federal interest.

Certain compacts and agreements call for the states to urge the fed-
eral government to adopt policies consistent with their own and those of
the provinces. Such documents raised the specters of foreign governments
gaining influence in the separate states and of the states entering into
alliances against the federal government. This, however, is an illusory
problem. Because the states have involved the federal government
through NERC, the supremacy of the federal interest has never been in
doubt. At the same time the states have been able to help determine the
national interest. Therefore, only where the result of state interaction is
in fact in conflict with federal policy does the form of the interaction ap-
pear repugnant to the Constitution. If this is true, then the states have
not exceeded their powers by interacting as they have in New England,
although there remains potential for abuse of the power to interact. Con-
gressional approval of state legislation in the area of commerce and the
creation of interstate agreements has assured that the federal and state
authorities work together in greater cognizance of one another's interests
and constitutional roles. In their cooperative ventures with the Eastern
Canadian Provinces, the states have maintained their awareness of fed-
eral interests, and extended their interaction with the federal government
so as to avoid conflicts over their trans-border relations. As a result, the
New England States and Eastern Canadian Provinces have created a con-
stitutionally viable alternative to the practice of nation states in interna-
tional relations at the same time as they have fostered the development
of alternative federal relations which increase the representativeness of
the national and local decision-making processes.
This agreement made the 25th day of May, 1971, between Her Majesty the Queen in the right of the Province of New Brunswick as represented by the Premier of the Province of New Brunswick and Her Majesty the Queen in the right of the Province of Nova Scotia as represented by the Premier of the Province of Nova Scotia and Her Majesty the Queen in the right of the Province of Prince Edward Island as represented by the Premier of the Province of Prince Edward Island

Whereas the Premiers of the Provinces of New Brunswick, Nova Scotia and Prince Edward Island are unanimous in their desire to promote unity of purpose among their respective Governments:

and whereas they wish to take steps to improve communication between their respective Governments and agencies thereof:

and whereas the said Provinces wish to establish the framework for joint undertakings:

and whereas at a meeting of the Premiers of the said Provinces held at Halifax on the 26th day of January, 1971, it was agreed to establish the Council of Maritime Premiers:

It is agreed as follows:

COUNCIL OF MARITIME PREMIERS

1.01 There is hereby established the Council of Maritime Premiers, herein referred to as the 'Council.'

1.02 The Council shall consist of the persons from time to time holding the offices of the Premier of the Province of New Brunswick, the Premier of the Province of Nova Scotia and the Premier of the Province of Prince Edward Island.

1.03 The functions of the Council shall include:

(a) discussion of matters of importance to the three Provinces;
(b) initiation of studies on economic, social and cultural programs and policies which affect or concern the Maritime Provinces;
(c) coordination of public policies which affect or concern the Maritime Provinces;
(d) approval of joint submissions of the Maritime Provinces to the Government of Canada or any agencies thereof:
(e) initiation and sustaining of joint programs of the three Provinces;
(f) power to constitute a Maritime Provinces Commission, to define its duties and functions, and to appoint the members thereof.

1.04 The Chairmanship of the Council shall rotate among the three Premiers in each calendar year as the Council may determine from time to time.

1.05 The Council shall meet at least four times in each calendar year and may meet more frequently by agreement of the three Premiers.

1.06 The site of the meetings of the Council shall rotate among the three Provinces.
1.07 Decisions of the Council require unanimous consent of the members.

1.08.1 The fiscal year of the Council shall be from April 1st to the following March 31st.

1.08.2 The Council shall prepare an annual budget for its activities and operations and each Premier shall present it to the Government of his Province for approval.

1.08.3 Each Province shall contribute to the agreed budget amount on a proportionate basis by population as determined by the most recent population census undertaken by the Government of Canada.

1.09 Subject to paragraph 1.08, the Council shall employ such staff as it considers necessary for the proper functioning of the Council.

1.10 The Council shall have authority to appoint committees for the purpose of studying and reporting to the Council on specified subjects.

In witness whereof the Premiers of the Provinces of New Brunswick, Nova Scotia and Prince Edward Island have executed these presents on behalf of the respective Provinces on the day and year first written above in the City of Fredericton, New Brunswick.

Her Majesty the Queen in the right of the Province of New Brunswick as represented by The Honourable Richard B. Hatfield.

Her Majesty the Queen in the right of the Province of Nova Scotia as represented by The Honourable Gerald A. Regan.

Her Majesty the Queen in the right of the Province of Prince Edward Island as represented by The Honourable Alexander B. Campbell.
APPENDIX II

AN ACT TO ESTABLISH THE COUNCIL OF MARITIME PREMIERS

WHEREAS the Provinces of Nova Scotia, New Brunswick and Prince Edward Island are unanimous in their desire to promote unity of purpose among their respective Governments; and
WHEREAS they wish to ensure maximum coordination of the activities of the Governments of the three Provinces and their agencies; and
WHEREAS the said Provinces wish to establish the framework for joint action and undertakings; and
WHEREAS the Maritime Union Study recommended the establishment of a Council of Maritime Premiers as one of the agencies for cooperative action among the said Provinces; and
WHEREAS by an Agreement dated the 24th day of May, 1971, the Premiers of the said Provinces agreed to general principles for the operation of a Council of Maritime Premiers for the purpose of pursuing the objectives herein recited; and
WHEREAS the said Premiers have met several times for such purpose; and
WHEREAS it is desirable to enact legislation in each of the said Provinces respecting a Council of Maritime Premiers;

THEREFORE be it enacted by the Governor and Assembly as follows:

1. In this Act
   (a) "Agreement" means an agreement among the Provinces of Nova Scotia, New Brunswick and Prince Edward Island referred to in Section 2; and
   (b) "Council" means the Council of Maritime Premiers established pursuant to this Act.
   (c) "Parties" means Her Majesty the Queen in the right of each of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island represented by her respective Lieutenant Governors in Council.
2. The Governor in Council may
   (a) enter into an Agreement with the Lieutenant Governors in Council of the Provinces of New Brunswick and Prince Edward Island for the establishment of a body to be known as the "Council of Maritime Premiers" comprised of the Premiers of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island; and
   (b) agree, from time to time, with the Provinces of New Brunswick and Prince Edward Island to amend the Agreement.
3. The Agreement may
   (a) authorize the Council to do or cause to be done, on behalf of the parties, any or all such things as the parties thereto
are otherwise empowered to do and deem necessary or ancillary to the attainment of the objectives set forth in the preamble to this Act:

(b) provide for the financing of the operations of the Council and for cost-sharing arrangements; and

(c) contain such other provision as may be necessary or desirable to provide for the administration of the Council and for its operations.

4. The fiscal year of the Council shall commence on the first day of April in each year and end on the thirty-first day of March in the year next following.

5. The Council shall prepare an annual budget which shall be submitted to the Governor in Council.

6. If the budget is approved by the Lieutenant Governors in Council in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, there shall be introduced in the House of Assembly, a resolution or resolutions for an appropriation or appropriations to enable the Province to meet its share of the budget.

7. Each year the Council shall prepare and publish a report on its activities in the preceding year.

8. (1) Any Agreement or any amendment thereto made under this Act when the House of Assembly is in session shall be tabled during that session.

(2) Any Agreement or any amendment thereto made under this Act when the House of Assembly is not in session shall be tabled at the next following session.

9. The Agreement dated the twenty-fifth day of May, 1971, is deemed to be an Agreement under this Act.

10. This Act comes into force on and not before such day as the Governor Council orders and declares by proclamation.
WHEREAS, the State of Maine and the Province of New Brunswick, along with the remaining Atlantic Provinces, and Province of Quebec and the other New England States, are in the same geographical region; and

WHEREAS, Maine and New Brunswick share a proud tradition of continuous friendship and cooperation; and

WHEREAS, the peoples of Maine and New Brunswick have close social, cultural and economic ties; and

WHEREAS, Maine and New Brunswick hold many common goals and aspirations and share similar needs and problems; and

WHEREAS, there have been frequent contacts among government officials of Maine and New Brunswick over the years; and

WHEREAS, we the signatories hereto met at Campobello Island, N.B. on June 21, 1971 to discuss common problems, and on that day established a Committee of Officials to determine areas where cooperative programs might be to the mutual advantage of both Maine and New Brunswick; and

WHEREAS, at Fredericton, N.B. on October 18, 1971 we agreed to initiate a program of sustained cooperation in Environmental, Energy, Trade, Tourism and Transportation matters; and

WHEREAS, at Fort Fairfield, Maine on July 22, 1972 we agreed to broaden the Program of Cooperation to include Forestry, Fisheries, Recreation and Agriculture; and

WHEREAS, since June, 1971 Maine and New Brunswick officials concerned with these areas of cooperation, as well as our own officials, have met numerous times and continue to meet in implementing the Program of Cooperation; and

WHEREAS, our actions to date in the furtherance of closer ties between Maine and New Brunswick, and, in particular, the Program of Cooperation now existing between Maine and New Brunswick have been mutually beneficial by opening avenues of communication, by stimulating exchanges of information, material, personnel, and ideas, and by producing an increased awareness among both governmental officials and others that each has a vital interest in what transpires in the other's domain and an equally vital interest in working in close harmony with the other in a wide range of concerns.

NOW, THEREFORE, I, Governor . . . and, I, Premier . . . agree as follows: We shall endeavor, in our respective capacities as Premier and Governor, to maintain and foster close cooperation in all relevant areas of concern, consistent with such Canadian and United States federal policies
as may apply, and in particular, we designate the areas of Environment, Energy, Trade, Tourism, Transportation, Forestry, Recreation, Fisheries and Agriculture as appropriate for continued and expanded common effort among the agencies of Maine and New Brunswick, while acknowledging that other areas of mutually beneficial cooperation may emerge from time to time.

Dated at Augusta, Maine this twenty-eighth day of June, 1973.
Governor
STATE OF MAINE

Premier
PROVINCE OF NEW BRUNSWICK
APPENDIX IV

State of Maine
In the Year of Our Lord One Thousand Nine Hundred and Seventy-Three

In House, May 2, 1973

JOINT ORDER RELATIVE TO INTERPARLIAMENTARY CONFERENCE NEW ENGLAND AND CANADA.

WHEREAS, the Legislature of the State of Maine is very proud of the fine relationships which traditionally have been shared with our sister States in New England and our neighboring Provinces in Canada; and

WHEREAS, there are a great many areas of mutual interest and concern which should be discussed by legislators of the States of New England and of the southeastern Provinces of Canada; and

WHEREAS, one means to effect better communications between governments of these areas would be to conduct a week-long conference of legislators from the New England States and the Provinces of Atlantic Canada and Quebec; and

WHEREAS, such a conference is proposed for the summer of 1974 to be held at the University of Maine at Orono under the auspices of the Maine Commission on Interstate Cooperation and the New England-Atlantic Provinces-Quebec Center; and

WHEREAS, a free exchange of ideas and legislative experience, coupled with detailed consideration of topics of shared economic, political and resource interests, could be of direct benefit to each jurisdiction; and

WHEREAS, better communications among legislators cannot help but to lead to broader understanding, thus enhancing a cooperative approach to common problems; now, therefore be it

ORDERED, the Senate concurring, that the Maine Commission on Interstate Cooperation, established under the Revised Statutes, Title 3, sections 201 to 206, is authorized and directed to aid in the organization and sponsorship of an Interparliamentary Conference at the University of Maine at Orono during the summer of 1974; and be it further

ORDERED, that there is appropriated from the Legislative Account to the Maine Commission on Interstate Cooperation the sum of $10,000 for the fiscal year ending June 30, 1973 to carry out the purposes of this Order and any unexpended balance shall not lapse but shall remain in a
continuous carrying account until the purposes of this Order are carried out.

House of Representatives
Read and Passed
May 2, 1973
Sent Up for Concurrence
Clerk of the House

In Senate Chamber
Read and Passed
in Concurrence
May 3, 1974
Secretary of the Senate
APPENDIX V

ENERGY RESOLUTION

of

The New England Governors and Eastern Premiers

WHEREAS, energy supplies, economic development, and environmental control are of paramount importance to both the New England States and the Eastern Provinces; and

WHEREAS, developments relating to petroleum exploration, transportation, and refining have changed and will continue to change the petroleum supply situation in the two regions; and

WHEREAS, developments in nuclear power, hydro-electric power, and tidal power are changing and will continue to change the electric energy supply situation; and

WHEREAS, the freest possible flow of commerce between our two regions is in the best interest of our respective regions; and

WHEREAS, there is no existing mechanism for the continued and rational exchange of energy information between the two regions;

BE IT RESOLVED: that the New England Governors and Eastern Premiers agree to:

1. Exchange information relating to all types of energy supplies and energy needs in both regions on a continuing basis;

2. Exchange information regarding environmental problems and the ways in which they may be minimized;

3. Urge the respective federal governments to permit the freest possible marketing and transportation of energy supplies between the regions, consistent with the national security of Canada and the United States;

4. Urge the respective federal governments to resolve, as quickly as possible, any and all outstanding issues relating to boundaries between the United States and Canada affecting the regions; and

5. Establish a permanent committee, with representatives from each State and Province, as a vehicle to exchange information and to relate the projected energy surpluses of the Eastern Provinces with the energy needs of the New England States, consistent with the environmental standards of both regions.

CONFERENCE OF EASTERN CANADIAN PREMIERS
AND NEW ENGLAND GOVERNORS

Prince Edward Island
August 16, 17, 1973
APPENDIX VI

RESOLUTION OF THE NEW ENGLAND GOVERNORS AND THE PREMIERS OF THE FIVE EASTERN CANADIAN PROVINCES

June 14, 1974

WHEREAS, the Northeastern section of the North American Continent would benefit from closer cooperation between the United States and Canada; and

WHEREAS, the work accomplished by the Eastern Canadian Premiers' New England Governors' Energy and Transportation Advisory Committees during the past year points up the need for closer ties between the two regions;

NOW THEREFORE BE IT RESOLVED THAT the New England Governors and the Eastern Canadian Premiers agree to continue the work of the Advisory Committees and expand it by creating a standing committee of officials on Inter-Regional Economic Development with broad responsibilities to study and make recommendations in such areas as trade, transportation, energy and tourism.

BE IT FURTHER RESOLVED THAT we charge this Committee with the following duties:

1) Take all appropriate action to create conditions whereby the electric power and petroleum projects discussed at the June, 1974, meeting at Sugarbush Inn, Warren, Vermont, are developed to the mutual advantage of both the States and the Provinces.
2) Consider one or two specific projects designed to coordinate existing state and provincial policies as an indication of the potential for further coordination.
3) Undertake to identify certain specific commodities on which tariff barriers might be lowered or eliminated to the overall mutual advantage of the region.
4) Investigate the continuing benefits of tourism exchanges within the region and the impact that the American Bicentennial and the Montreal Olympics in 1976 will have on the provinces and states of the region.
5) Review in detail off-shore continental shelf oil and natural gas development plans as they affect the North Atlantic.
6) Investigate the actions necessary to restore the Atlantic salmon to the entire region.

Premiers of Eastern Canada
Gerald A. Regan
Premier of Nova Scotia
Richard B. Hatfield
Premier of New Brunswick

Governors of the New England States
Thomas P. Salmon
Governor of Vermont
Thomas J. Meskill
Governor of Connecticut
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<th>Name</th>
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<tr>
<td>Alex Hickman</td>
<td>Deputy Premier of Newfoundland</td>
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<td>Alexander B. Campbell</td>
<td>Premier of Prince Edward Island</td>
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<td>Robert Bourassa</td>
<td>Prime Minister of Quebec</td>
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APPENDIX VII

SUGARBUSH COMPACT
June 14, 1974

We, the Premiers, Deputy Premiers, and representatives of the five Eastern Provinces of Canada, and the Governors and representatives of the New England States, meeting in Sugarbush, Vermont, June 13 and 14, 1974, by this compact agree:

(1) That our two nations suffer from the world-wide shortages of reasonably-priced consumable energy;
(2) That the shortage of energy places a grievous economic burden on the people of our respective regions;
(3) That, despite energy conservation efforts, the only practical long-range solution to the problem of energy shortages is to produce from various sources a greater abundance of energy while preserving reasonable environmental safeguards;
(4) That the Premiers of the Provinces of Eastern Canada are aggressively responding to the shortages of energy in several ways, such as undertaking large and costly hydro-electric projects which in time could produce exportable quantities of electricity, the development of deepwater port facilities, refineries, and tidal power development;
(5) That the New England States represent a large consumer market for electricity and petroleum products which is now and will be for the foreseeable future in acute short supply;
(6) That the production of abundant quantities of hydro-electric energy and petroleum products would restrain high prices of fossil fuels in a competitive market;
(7) That the easy flow of all forms of energy across our international boundary must be encouraged by our respective governments to hasten the reduction of our energy shortages;
(8) That such cooperation between our respective regions would supplement rather than deter the national policies of the United States and Canada with respect to energy independence in each nation;
(9) That it would be beneficial to our respective regions to provide maximum utilization of the most efficient and economical forms of energy production and transportation that can be created throughout the two regions.

NOW, THEREFORE, we mutually pledge our individual and collective efforts to persuade our respective national governments that by international agreement they should create a favorable climate for long term, secure private and public contracts governing the energy production and transportation between the regions represented by the five Eastern Provinces of Canada and the New England States.

Premiers of Eastern Canada
Gerald A. Regan
Premier of Nova Scotia
Richard B. Hatfield
Premier of New Brunswick
Alex Hickman
Deputy Premier of Newfoundland
Alexander B. Campbell
Premier of Prince Edward Island
Robert Bourassa
Prime Minister of Quebec

*Governors of the New England States*
Thomas P. Salmon
Governor of Vermont
Thomas J. Meskill
Governor of Connecticut
Kenneth M. Curtis
Governor of Maine
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