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Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects

PART II: PROBLEMS OF INTERSTATE COOPERATION*

CHARLES M. HASSETT**

Solutions to air pollution problems in metropolitan areas are often frustrated by the competing and conflicting interests of the political subdivisions within those areas. These conflicts are exacerbated when the urban region includes more than one state. In this Article, the author suggests that regional agencies must be established to deal with regional environmental problems and that the interstate compact device should be employed in the multistate, metropolitan setting. In noting both the advantages and disadvantages of the interstate compact, the author reviews the history of the device, analyzes deficiencies that frequently have prevented such compacts from operating successfully, and suggests remedies for those deficiencies. The Article concludes with a detailed model for an interstate compact capable of dealing with multistate, metropolitan air pollution problems.

The burden of the air pollution crisis falls most heavily upon metropolitan areas, where it is exacerbated by the confusion and tension inherent in the attempts of a highly fractionated political system to confront that which is, in essence, a regional problem. To cope with such a regional problem, regional agencies must be established. In multicounty single-state metropolitan areas, the single-function special district—with constituent unit representation, a broad array of enforcement powers, and a jurisdiction coterminous with an air quality control region established pursuant to federal legislation—is the most promising governmental device.1 It is difficult to design political


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1. For a discussion of the problem of intrastate pollution generally and for an
mechanisms capable of transcending political fragmentation in intra-state metropolitan areas. This difficulty is but a trifle, however, in comparison with the difficulties encountered when two or more states are entangled in the urban web.

I

DIMENSIONS OF THE PROBLEM

A. The Scope

The sweep and scale of these difficulties are demonstrated by the 36 Standard Metropolitan Statistical Areas (SMSA's), containing 23 percent of the population of the United States, that include parts of two or more states or are contiguous with SMSA's in other states. Of the first 57 air quality control regions designated under the 1967 and 1970 federal air pollution control acts, 17—including such population centers as the New York, Chicago, Philadelphia, St. Louis, and Cincinnati regions—were interstate in nature. In addition, many other urbanized regions suffer from air pollution problems with interstate ramifications.

One of the reasons for the apparent federal preoccupation with the problem of interstate pollution control is that the interstate metropolitan area is an ineffective areal division of power within the federal system. Since the basic problems are differing standards of quality and differing degrees of dedication to enforcement among neighboring states, the question is one of coordination of efforts. Failure to coordi-

explanation for the conclusion set forth here see Hassett, Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects, State and Local Problems, 19 Wayne L. Rev. 1079 (1973) [hereinafter cited as Hassett].

2. Beckham & Ingraham, The States and the Urban Areas, 30 Law & Contemp. Prob. 76, 85 (1965). Within the next generation, more people will live in such interstate metropolitan areas than in all intrastate metropolitan areas. R. Connery & R. Leach, The Federal Government and Metropolitan Areas 200 (1960) [hereinafter cited as Connery & Leach].

3. T. Murphy, Metropolitics and the Urban County 44-46 (1970) [hereinafter cited as Murphy].


nate interstate efforts engenders both inequity and waste as the “receiving” state seeks to protect itself from contaminants emanating from a neighboring state.

The extension of a special-district approach to interstate regions might appear to be an appropriate method of dealing with the problem of interstate pollution control. Such a solution, however, must take account of the political reality that the customary method of dealing with interstate problems has been the interstate compact. States, nevertheless, traditionally neglect the problems of their urban step-children and lack motivation to create interstate compacts for this purpose.

B. Interstate Solutions—Some Possibilities

Statutes enumerating duties of the state control body often specify consultation and cooperation with other states, interstate agencies, and the federal government. Some authorize the control body to enter into negotiations for compacts. Within five years of the passage of the first federal air pollution control act, 16 states attempted to employ some form of interstate arrangement in their efforts to achieve air pollution control.

Informal administrative agreements and formal interstate compacts, planning by private or quasi-public organizations, and various forms of interlocal-interstate arrangements virtually exhaust the possibilities from which any viable regional alternative to federal control will be selected. Many surmise that the next few years will determine whether or not the federal government will intervene “reluctantly” to set and enforce standards for the interstate air quality control regions.

Such intervention might occur in several forms. A federal department could operate independently in interstate areas on a functional basis. Alternatively, an independent federal corporation could be

8. Grant, The Government of Interstate Metropolitan Areas, 8 W. POL. Q. 90, 97 (1955) [hereinafter cited as Grant].
9. Green, State Control of Interstate Air Pollution, 33 LAW & CONTEMP. PROB. 315 (1968) [hereinafter cited as Green].
10. The matter is complicated by the fact that the pressing multistate functional problems involve matters within the domain and competence of urban-suburban units. And yet it is the state power structure which must be motivated initially to create the interstate compact which is a necessary prelude to functional interlocal cooperation across state lines.
11. Interstate Agreements, supra note 6, at 268-69 nn.69, 70.
12. Id. at 269.
13. Id. at 261.
14. Green, supra note 9, at 329.
established in each major interstate metropolitan region, although such a geographical, TVA-type approach would be less suited to the control of air pollution, which is not confined by political boundaries.\textsuperscript{15} Another comprehensive federal approach would be invocation of the commerce clause to prescribe establishment of interstate federal districts.\textsuperscript{16} Such districts would not be removed from their states but would remain part of the states' territory under a federal "home-rule" arrangement.\textsuperscript{17} Indeed, model metropolitan areas legislation, following the model cities approach, could be designed by gaining waivers from the concerned state governments and by providing a package of federally authorized enabling powers to allow development of autonomous regional governments.\textsuperscript{18} Other radical approaches include establishing a general-function urban government in an interstate metropolitan area through an interstate compact, and even more apocalyptic, detaching such metropolitan areas from their present state orientations and declaring them independent city-states eligible for separate admission to the Union.\textsuperscript{19}

If, as many have concluded, the federal government alone is not capable of effectively enforcing air quality throughout the nation, federal intervention would be impractical and, therefore, less ambitious possibilities should be explored. In addition to interstate cooperation formalized in the interstate compact, states can seek to resolve minor irritations through informal cooperation. Informal cooperation, even with the spur of federal interest and the threat of federal intervention, likely cannot achieve continuing effective control and, eventually, more formal and stable arrangements would become necessary.\textsuperscript{20} An alternative is the enactment of uniform state laws. This approach has been successful in matters requiring both uniformity of result and adherence to a single legal pattern. Uniformity, however, is at the mercy

\textsuperscript{15} Tobin, \textit{The Interstate Metropolitan District and Cooperative Federalism}, 36 \textit{TUL. L. REV.} 67, 69-71 (1961) [hereinafter cited as Tobin].

\textsuperscript{16} MURPHY, \textit{supra} note 3, at 251.

\textsuperscript{17} Id. at 48-49.

\textsuperscript{18} Id. at 251.

\textsuperscript{19} Engdahl, \textit{Interstate Urban Areas and Interstate "Agreements" and "Compacts": Unclear Possibilities}, 58 \textit{GEO. L.J.} 799, 801 (1970) [hereinafter cited as Engdahl]. The latter would entitle each new "polis" to two United States Senators, but considering the deafening silence which greeted the late Senator Robert Kennedy's proposal for a "regional Senator" or "Senator Plenipotentiary" elected from a specific state to represent Megalopolis, such an approach seems quixotic. Dixon, \textit{supra} note 7, at 55 n.24.

\textsuperscript{20} Tobin, \textit{supra} note 15, at 69. The Interstate Commission on the Delaware River Basin (INCODEL), the ineffectual predecessor to the Delaware River Basin Commission, actually was established without a compact and without congressional consent by reciprocal legislation among the concerned states. Perhaps inevitably, given the circumstances, INCODEL was not empowered to regulate and enforce. E. \textit{CLEARY, THE ORSANCO STORY, WATER QUALITY MANAGEMENT IN THE OHIO VALLEY UNDER AN INTERSTATE COMPACT} 223-24 (1967) [hereinafter cited as CLEARY].
of the unilateral actions of state legislatures and of judicial interpretations.\textsuperscript{21} Uniform state laws, therefore, are not a particularly useful device when the problem is not uniformity\textsuperscript{22} but rather the achievement of effective enforcement. As the practical problems of creating a metropolitan government in an interstate area seem insuperable, a frequently suggested approach involves regional planning agencies or councils of governments (COG's) as a pragmatic answer, at least for the interim.\textsuperscript{23} Multi-function COG's however, are incapable of effective air pollution control enforcement in intrastate metropolitan areas; \textit{a fortiori}, they are incapable of such enforcement in interstate metropolitan areas.\textsuperscript{24}

\section{C. Interstate Solutions—Some Problems}

The best arrangement, thus, is a single-function special district operating across state lines and including all of the affected air quality control region. The question, however, is what action, other than putting pressure on their state capitals, local governmental bodies on both sides of the state line(s) can take to effectuate such an arrangement. As informal cooperative action promises to be insufficient to provide effective enforcement, formal agreement is necessary, whether cast in terms of formal interstate compacts negotiated by the states or formal agreements negotiated by the local governments concerned. In view of the cumbersome nature of state involvement in negotiation, some authors have suggested that the localities do the negotiating. The problem then arises whether or not the agreements so reached constitute interstate compacts.\textsuperscript{25} Another difficulty results from the possibility that such activities are a species of international relations conducted on behalf of the states and, as such, are both juridically impossible and politically undesirable.\textsuperscript{26} Contending that this objection should yield to the practical advantages of such arrangements, the Council of State Governments has proposed a model interlocal coop-

\footnotesize
\begin{itemize}
\item \textsuperscript{21} F. ZIMMERMANN & M. WENDELL, \textit{THE LAW AND USE OF INTERSTATE COMPACTS} 41-42 (1961) [hereinafter cited as \textit{ZIMMERMANN & WENDELL}].
\item \textsuperscript{22} Rather than uniformity, diversity in regional approaches should be encouraged.
\item \textsuperscript{23} See, e.g., Bodine, \textit{The Use of Metropolitan Councils in the Urban Community}, 111 U. PA. L. REV. 871, 875 (1963). For a description of the intractability of the problem of securing state agreement to effective control in the Kansas City, Kansas-Kansas City, Missouri Metropolitan Area see \textit{MURPHY}, \textit{supra} note 3, at 222-23.
\item \textsuperscript{24} For the reasons supporting this conclusion see Hassett, \textit{supra} note 1, at 1114-19.
\item \textsuperscript{25} \textit{ZIMMERMANN & WENDELL}, \textit{supra} note 21, at 52. The authors conclude that local agreements should constitute interstate compacts.
\item \textsuperscript{26} \textit{COUNCIL OF STATE GOV'TS, STATE RESPONSIBILITY IN URBAN REGIONAL DEVELOPMENT} 96 (1962). Although the states would not necessarily be parties, the compacts would be judicially enforceable. \textit{Id.}
\end{itemize}
eration act which specifically declares that any agreements so reached enjoy the status of interstate compacts.

If the agreements are deemed interstate compacts, however, the question arises whether they are subject to congressional approval under the compact clause of the Constitution, article I, section 10, which states: "No state shall, without the consent of the Congress, . . . enter into any agreement or compact with another state or with a foreign power . . . ." The Council of State Governments contends that compacts not affecting the political balance of the federal system do not require congressional approval.27 This position rests on Justice Field's dictum in Virginia v. Tennessee.28 The "political balance" test there enunciated has been supported by state cases, but the issue remains open, as the federal government reasonably has an interest in interstate local agreements involving major urban centers. Even if the ancient dictum does state the present law, uncertainty remains over whether interstate-interlocal agreements would be classified judicially among those compacts not requiring congressional assent.29 Moreover, as long as the law remains vague, proposed compacts may be required to run the congressional gauntlet, although such review may not be required.30 Further difficulty could arise if governmental entities enter into interstate agreements on their own. Even if their legislatures have refused or failed to consent, so long as congressional consent has been obtained, the compact might be valid under the "law of the Union" doctrine.31 This doctrine, premised upon the theory that an interstate compact receiving congressional consent rises to the level of federal law by virtue of the supremacy clause of the Constitution, has alternately been endorsed and repudiated by the Supreme Court, contrary to the Council of State Governments' blithe announcement of its demise and burial.32 Because of such difficulties and because of the limitations imposed on many local governments by state organic and statutory law,33 local governments are in no position to establish strong interstate agencies for air pollution control, either formally or informally. Since the state must bear ultimate responsibility under federal air pollution legislation, attempts to exclude the state from a meaningful role in establishing interstate metropolitan air pollution control districts would be

27. Id. at 107.
30. Engdahl, supra note 19, at 812.
31. Id. at 814.
32. Id. at 815. If the "law of the Union" doctrine is accepted, does anything prevent Congress from unilaterally altering the terms of its consent or of the compact itself or from repealing its consent? See id. at 817 n.88, 818.
33. Tobin, supra note 15, at 85.
futile. Utilization of the states' power to enter into interstate compacts and agreements, therefore, is inevitable.\textsuperscript{34}

II

THE INTERSTATE COMPACT DEVICE

A. An Appropriate Device

Interest in the interstate compact as a device to cope with the continuing problem of adjusting the power balance within the federal system dates from Frankfurter and Landis's classic article, \textit{The Compact Clause of the Constitution—A Study in Interstate Adjustments},\textsuperscript{35} in which the authors traced the roots of the clause deep into colonial history. While showing that its use largely had been limited to settlement of border and water allocation disputes, the authors tried to breathe new life into the clause to meet twentieth century realities in the field of regional interstate public utilities regulation.\textsuperscript{36} Although the settlement of boundary disputes, and to a lesser degree the allocation of water resources, could be described as “one-shot” compacts, compacts have been concluded which established more continuing relationships, such as advisory or investigatory bodies and operating agencies.\textsuperscript{37} Such agencies frequently are designated “authorities”\textsuperscript{38} to operate revenue-producing properties or activities; on occasion, however, agencies have been established by interstate compact for regulatory purposes.\textsuperscript{39}

As urban and metropolitan problems have become more apparent and more widely discussed, use of urban interstate compacts also has become widely discussed. The number of such compacts, however, has not matched the interest in them, and most existing compacts only

\begin{itemize}
  \item \textsuperscript{34} Few interstate agencies have been born without an interstate compact (and perhaps a little federal midwifery). \textit{J. Winters, Interstate Metropolitan Areas} 78 (1962) [hereinafter cited as \textit{Winters}].
  \item \textsuperscript{35} 34 YALE L.J. 685 (1925).
  \item \textsuperscript{36} \textit{Id.} For a very detailed case study of one of the “older” types of interstate compacts see \textit{R. Olson, The Colorado River Compact} (1926), describing the formation and structure of a compact allocating the waters of the Colorado River. For a thorough examination of existing interstate water pollution compacts see \textit{Curlin, The Interstate Water Pollution Compact—Paper Tiger or Effective Regulatory Device}, 2 ECOLOGY L.Q. 333 (1972).
  \item \textsuperscript{37} \textit{Interstate Agreements, supra} note 6, at 263.
  \item \textsuperscript{38} While there is no single uniformly accepted definition of the word, [s]tudents of the authority agree generally that the device is to be used “for the management of public enterprise,” which, defined specifically, includes ports, bridges, tunnels, toll roads, terminals, markets, airports, housing projects, and public utilities.
  \item \textsuperscript{39} Leach, \textit{Interstate Authorities in the United States}, 26 LAW & CONTEMP. PROB. 666, 676 (1961) [hereinafter cited as \textit{Leach, Authorities}].
  \item \textsuperscript{39} For example, the Ohio River Valley and New York Harbor Compacts. \textit{Zimmern & Wendell, supra} note 21, at 46.
\end{itemize}
recently became effective. Although some of the problems they might be expected to tackle may be the subject of direct federal legislation, further use of the device in metropolitan areas is anticipated. Air pollution control is the type of urban problem which could be the subject of an interstate agreement. Moreover, merely because the problem and the agency established are local in nature does not mean that the agency should be a local or metropolitan entity, since the state has a direct, vital interest in air pollution control in its urban areas. In sum, an interstate compact is appropriate.

B. Compact History To Date

1. Previous Attempts

Some interstate agreements for air pollution control were only informal administrative agreements aimed at the exchange of data and plans; some represented only an afterthought to compacts drafted for other reasons. Only four proposed compacts were concerned primarily and exclusively with the problems of controlling interstate air pollution. None of them is in effect. The four orphaned compacts are the Illinois-Indiana Air Pollution Control Compact, the Interstate Compact on Air Pollution (between West Virginia and Ohio), the Kansas-Missouri Air Quality Compact, and the Mid-Atlantic States Air Pollution Control Compact (between Connecticut, New Jersey, and New York, with Pennsylvania and Delaware invited to join).

The reasons these proposed arrangements failed to win both congressional approval and widespread support are instructive. The Department of Health, Education, and Welfare (HEW) determined that the Illinois-Indiana Compact and the Ohio-West Virginia effort were too weak. In fact, the Illinois-Indiana compact has been censured for containing such "glaring deficiencies" that it will never obtain approval.

40. Engdahl, supra note 19, at 800.
41. Dixon, supra note 7, at 56.
42. Interstate Agreements, supra note 6, at 270-71. For example, air pollution control was a secondary function of the Minnesota-Wisconsin Boundary Compact and the North Carolina Interstate Mining Compact, and the duties were only advisory or recommendatory. Id. at 271-72.
43. Id. at 272.
44. Id. at 279.
45. Id. at 273. For example, the definition of "air pollution" is open to the interpretation that actual harm must occur before air pollution legally exists; this would create obvious problems in any attempt to control emissions. Morse & Juergensmeyer, Air Pollution Control in Indiana in 1968, A Comment, 2 VAL. L. REV. 296, 308-09 (1968). Compare the Morse & Juergensmeyer definition to the proposed Harvard Draft for an interstate air pollution control compact which would cover the emission of any substances which "may tend to be injurious . . ." 4 H ARV. J. LEGIS. 369, 373 (1967). Further, the only enforcement power which the proposed compact agency would enjoy would be the power to seek an injunction. Morse & Juergensmeyer, supra, at 311-12.
HEW objected to the Kansas-Missouri Air Quality Compact and the Mid-Atlantic States Air Pollution Control Compact because both provided for a federal representative with voting power, and objected further to the Mid-Atlantic Compact because it encompassed too broad a regional area: the total states, as distinguished from air quality control regions. Pennsylvania's Governor Shafer also had reservations about the statewide commitment, fearing it might prevent inclusion of western parts of Pennsylvania in a more logical interstate agreement, the Ohio River Basin Air Pollution Compact.

2. HEW's Prescription for Success

HEW preferred that all interstate compacts for air pollution control have the following characteristics:

(1) where an air quality control region has been designated, all states located in whole or in part within that region should be included in the compact and only states within the region should participate;

(2) there should be federal representation, but not voting participation, on the governing body of the compact agency;

(3) each state should have one vote;

(4) any agency established by the compact should have broad standard-setting, air-monitoring, and enforcement powers;

(5) "air pollution" should be defined by the compact instrument to permit preventive activities by the agency; and

(6) the compact should enhance the states' ability to meet their obligations under federal law.

Presumably, both HEW's successor in the regulatory area, the Environmental Protection Agency (EPA), and the Congress would find proposals with the above characteristics acceptable.

3. Congressional Support

The 1963 Clean Air Act showed minimal congressional intention to encourage use of the interstate compact device, for it granted blanket advance approval subject, however, to the vitiating requirement

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46. Interstate Agreements, supra note 6, at 279-80.
47. Id. at 277-78. Some conclude that there should be three compacts in the proposed area—one for the New York City area, one for the Delaware River Valley, and one in the Susquehanna River Valley. Zimmerman, Political Boundaries and Air Pollution Control, 46 J. URBAN L. 173, 194 (1969) [hereinafter cited as Zimmerman]. Despite these fears of giantism, the six New England states have evinced an interest in joining the compact. Id. at 196.
48. Interstate Agreements, supra note 6, at 279. The last characteristic may sound superfluous, but experience with existing compact agencies in other fields has demonstrated that they can be merry bands of intransigents. See the ORSANCO experience discussed at text accompanying note 83 infra.
of specific approval of any compact which evolved. The Air Quality Act of 1967 retained this provision but added a provision authorizing creation of regional advisory commissions on air pollution under federal authority.\(^4\) Some interpreted this addition as undercutting the use of interstate compacts in the air pollution field, a suspicion made credible by congressional inaction on pending compacts.\(^5\) However, the 1970 Clean Air Amendments failed to change the rules of the game, thereby supporting the impression that interstate compacts remain, in theory, congressional favorites. Moreover, practical aid was offered. Section 106 of the 1967 Act authorized HEW to pay up to 100 percent of the costs of air quality planning programs for two years for any interstate agency designated by the affected states. After this initial period, the agency could receive federal funding up to three-quarters of such costs.\(^6\) These represent higher portions of reimbursable expenses than were provided for intrastate agencies under the Act. Such an agency, however, was to concern itself with recommending both standards of ambient air quality and plans for implementing and enforcing emission controls rather than with setting standards or implementing and enforcing them.\(^7\)

Although it may seem logical that interstate agreement and cooperation is the natural way to attack air pollution problems in interstate areas, especially urban areas, that such cooperation still is confined to paper inevitably must raise doubts as to the efficacy of the interstate compact. Many writers question whether the compact device even should be used in the air pollution field:

[C]ontrol and prevention of interstate air pollution may be best left to the federal government. Historical considerations point to this conclusion. Water pollution control compacts have been only minimally effective . . . . Another persuasive argument for federal pre-emption . . . is the existence of greater financial and technical resources. State governments have traditionally been more susceptible to pressure from economically powerful interests opposed to extensive emission controls.\(^8\)

Others, relying for support on the necessity of federalism and the inability of the federal government to administer effectively the requisite solutions on its own, conclude that such doubts only indicate the need for greater efforts to develop a more effective compact mech-

\(^{50}\) Engdahl, supra note 19, at 799 n.1.
\(^{52}\) Id.
\(^{53}\) Interstate Agreements, supra note 6, at 282; see also Green, supra note 9, at 325, who concludes that "[T]he air pollution control is an extremely difficult subject to handle by way of an interstate compact . . . ."
anism. They also conclude that if the states are to have any role in regulating interstate air pollution, the interstate compact or federal-state compacts along the lines of the Delaware River Basin regional arrangement constitute the only available device. If this be true, the real and imagined flaws described in the sizable body of literature indicting the interstate compact must be examined in hopes of eliminating, alleviating, or avoiding them.

III

FLAWS OF THE INTERSTATE COMPACT DEVICE

A. Delay Time

The first criticism of the interstate compact device is the time period for bringing a compact to fruition. The process has been attacked for "glacial slowness," and the elapsed period as "geological." In the water resources field, for example, the average compact prior to 1961 required 8½ years to proceed from enactment to approval, and the Ohio River Valley Water Sanitation Compact, involving eight states, required 20 years from the first interstate negotiations to its effective date.

Obvious reasons for the tortoise-like progress of most proposed compacts include:

First of all, interstate negotiations must be pursued to the stage of an agreed text; then the document must be approved by the legislatures and the governors of the states involved and by Congress. This can be a delicate and hazardous task. It usually takes a long time to get the consent of Congress to any document laid before it, even in the absence of controversy. Then, too, the infrequency of legislative sessions, the shortness of gubernatorial terms, and the likelihood of party antagonisms between houses are added obstacles to what at best must be arm's-length bargaining.

54. See, e.g., Green, supra note 9, at 326, quoting Dixon.
55. Id. at 320.
56. Interstate Agreements, supra note 6, at 264.
60. Mansfield, Intergovernmental Relations, in The 50 States and Their Local Governments 158, 173 (J. Fesler ed. 1967) [hereinafter cited as Mansfield]. For discussion of the necessity of congressional approval of interstate compacts and of subsequent amendments to the compact see text accompanying notes 27-32 supra. Such approval is necessary if the compact potentially conflicts with federal laws or the doctrine of federal preemption. Zimmermann & Wendell, supra note 21, at 23. Unfortu-
Settled usage has accorded the President a right to participate in the approval process, too, although presidential consent probably could be circumvented by an approving concurrent resolution by Congress.\textsuperscript{61} Formally avoiding a presidential role would be illusory, however, in view of the strong influence exerted by executive agencies on congressional opinion in such matters.

The possibility remains that Congress could grant advance approval to interstate air pollution compacts. An analogy might be drawn to the Civil Defense Act of 1951, under which proposed compacts filed with Congress are deemed approved unless specifically disapproved by concurrent resolution within 60 days.\textsuperscript{62} A bill which would have eliminated the necessity of specific congressional approval for environmental compacts was considered by the Senate in 1971, but it encountered stiff opposition from major environmental groups.\textsuperscript{63} Specifically, the bill would have eliminated the need for approval of "supplemental" agreements made pursuant to an overall Interstate Environmental Compact. Advocated by Southern governors, the bill aroused fears that the powers of more active states would be undercut and that no controls over the composition of agencies established to administer joint programs under the supplementary agreements would be specified. These doubts were exacerbated when only under administration pressure from the EPA was a provision added permitting Congress to veto supplemental arrangements within 60 legislative days. Success in obtaining advance approval from Congress has, in the past, been very rare.\textsuperscript{64} Moreover, if the federal government is to become an active, formal partner in compact arrangements,\textsuperscript{65} changes in the existing requirement of specific approval possibly could impede progress toward rational regional programs.

### B. Unanswered Questions

One of the more troublesome impediments to wider use of the compact device is the "still primitive and confusing" state of the law

\textsuperscript{61} Tobin, \textit{supra} note 15, at 87 n.126.

\textsuperscript{62} Celler, \textit{supra} note 60, at 686-87.

\textsuperscript{63} The bill was S. 970 (H.R. 5446). For an interesting discussion of its merits, drawbacks, and prospects see \textit{Pollution Compacts: Governors vs. Environmentalists}, 29 \textit{Cong. Q.} 1444 (1971).

\textsuperscript{64} Celler, \textit{supra} note 60, at 686.

\textsuperscript{65} If Congress is earnest in encouraging interstate or interstate-federal compact
of interstate compacts. Among the unanswered questions are: whether difference in meaning exists between the words "compacts" and "agreements" as used in the compact clause, whether arrangements between subdivisions of different states or only arrangements between states themselves are covered by the clause, and whether the terms encompass all possible varieties of consensual interstate patterns. These questions seem a trifle jejune in light of federal determination to have some dominion over air pollution control attempts in interstate areas, but the answers might determine whether or not interstate-interlocal agreements must be subjected to congressional scrutiny under either the Constitution or existing federal legislation. Until such questions are resolved, the wiser course is to assume that the federal interest in interlocal-interstate arrangements is sufficient in the air pollution area and that the responsibility of the state is sufficient under the federal acts to require negotiation of a true interstate compact, subject to congressional approval.

Assuming that such compacts are negotiated for major urban areas with interstate pollution difficulties, serious legal questions remain. One is the problem of state constitutional or statutory limitations upon state or local action. Some contend that the issue was settled by Dyer v. Sims, in which West Virginia sought to avoid its obligations under an interstate compact on the ground that its provisions contravened the state constitution, a defense which the Supreme Court refused to accept. It is argued that Dyer held delegation of power to an interstate agency to be an irrevocable commitment which will be sustained when attacked on the grounds of "technical defects" under the constitutional law of a member state, if the defects were not apparent at the time of congressional approval. The more common interpretation—and the more defensible on the basis of the language of the decision—is that Dyer does not eliminate state constitutions as barriers to interstate compacts, but that it does reserve to the Supreme Court the right to interpret state provisions which affect the rights of states in a compact situation. Dyer thus strengthened the compact device by inter-

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66. Engdahl, supra note 19, at 802.
67. Id. at 804.
68. Tobin, supra note 15, at 77. The author's examples, however, indicate that such obstacles can be overcome, in practice, because of sympathetic courts.
69. 341 U.S. 22 (1951).
70. Leach, Authorities, supra note 38, at 671. Such an interpretation could be based on an analogy to treaties as the supreme law of the land or on a theory of federal supremacy emanating from congressional approval. For another generally favorable view of the primacy of the compact over state limitations see Miller, Metropolitan Regionalism: Legal and Constitutional Problems, 105 U. PA. L. Rev. 588 (1957).
71. Tobin, supra note 15, at 79.
interpreting the disputed restrictions so as to reinforce the binding quality of the compact, permitting the inference that the Court will seek to uphold compact provisions.\textsuperscript{72} If such an inference is warranted, only an unmistakable constitutional limitation could restrict an otherwise properly created compact arrangement. In the unlikely event of an insurmountable constitutional provision which cannot be interpreted away, an interstate agency might either be required to await constitutional revision or be created under the aegis of the federal laws.

C. Structural Problems

Existing agencies established pursuant to interstate compacts frequently are criticized as indecisive and ineffective. One reason for the criticism is that many operate under a rule of unanimity; decision-making by a simple majority generally is limited to purely recommendatory votes.\textsuperscript{73} The agency, therefore, remains vulnerable to the charge that any standards set or actions taken will be minimal, so that the most backward or recalcitrant of the member states will not object.\textsuperscript{74} Another reason for the alleged ineffectiveness of such agencies is that the agency traditionally is only a study group, devoid of meaningful operational or enforcement powers. Moreover, the configuration of political power within the agency usually insures removal of effective enforcement or operating powers at an early stage in negotiations,\textsuperscript{75} so that compact agencies are weak in controversial fields. In sum, the compact device is most effective where a question can be settled without establishing a continuing, effective interstate entity.\textsuperscript{76}

It is ironic that states deprive interstate agencies of the crucial power to enact and enforce regulations and penalties because, in practice, the problem traditionally has been the failure of the agencies to employ even the powers they do enjoy.\textsuperscript{77} This anomaly, coupled

\textsuperscript{72} Zimmermann & Wendell, The Interstate Compact and Dyer v. Sims, 51 COLUM. L. REV. 931, 949 (1951). A further problem is the possible unconstitutionality of delegating taxing or eminent domain powers to an interstate agency. For a view that only retention of a legislative veto over the exercise of any such delegated powers would be sufficient see WINTERS, supra note 34, at 22. Neither power would seem essential to an interstate air pollution control agency.

\textsuperscript{73} ZIMMERMANN & WENDELL, supra note 21, at 48-49.

\textsuperscript{74} Grad, Federal-State Compact: A New Experiment in Cooperative Federalism, 63 COLUM. L. REV. 825, 835 (1963) [hereinafter cited as Grad].

\textsuperscript{75} Hart, Creative Federalism: Recent Trends in Regional Water Resources Planning and Development, 39 U. COLO. L. REV. 29, 44 (1966) [hereinafter cited as Hart].

\textsuperscript{76} THURSBY, supra note 57, at 142, 147.

\textsuperscript{77} LEACH & SUGG, supra note 59, at 35; W. BARTON, in INTERSTATE COMPACTS IN THE POLITICAL PROCESS 180-81 (1967) [hereinafter cited as BARTON]. Barton notes that the agencies themselves usually shy away from the more pressing social problems, and instead seek revenues.
with the states' host of neglected controls, demonstrates such lack of serious interest that one wonders whether the states want their interstate stepchildren to succeed. Perhaps there is some truth to the frequent charge that the states do not want compact agencies to be effective—that they are interested only in establishing a barrier between their regional problems and federal control. Two agencies which have some enforcement powers, ORSANCO and the Interstate Sanitation Commission, perhaps reflect the views of their creators in "put[ting] their badges in their pockets" and depending upon the "compulsion of facts."

Furthermore, parent states have been reluctant to pry loose their fingers from the purse strings, leaving the agencies inadequate appropriations with which to execute their duties. Consistent with this less-than-benign neglect, the agencies fail to coordinate their activities with parallel state authorities. Rarely is anyone designated as a liaison to the various agencies—a fact which does not inspire confidence in either the motives or administrative abilities of the officials concerned.

Concededly, any even minimally effective agency will produce additional potential for conflict within the federal structure, hindering intergovernmental cooperation. For example, ORSANCO apparently has engaged in more conflict than cooperation with the federal government in enforcement proceedings for water pollution violations. Interstate agencies and authorities frequently are castigated as disruptive of more comprehensive plans and as representing unwarranted departures from the democratic precepts of election, accountability, and representative character. The practice of assigning equal representation to all member states, regardless of each state's population and the specific area or segment of the population affected by a compact, theoretically contravenes current ideas of representation, since, in effect, it undermines such rough equity as congressional representation grants the people of the various states when interstate matters are conducted through federal legislation. The one state-one vote concept subordinates regional policy goals in favor of more parochial state and local interests, since:

78. Tobin, supra note 15, at 81-83.
79. Green, supra note 9, at 324.
80. LEACH & SUGG, supra note 59, at 91. The authors further contend that this approach has proved successful—an assertion which would cause many people living along the Ohio River to smile either cynically or pitifully.
81. BARTON, supra note 77, at 162.
82. Leach, Authorities, supra note 38, at 672.
83. BARTON, supra note 77, at 45-46.
no state member of an interstate commission will feel a region-
wide loyalty buttressed by a politically organized regional constitu-
ency. If compromise is reached it will tend to maximize the particu-
laristic interests at the expense both of regional balance and of the
national interest. The national government, still footing most of the
bill . . . will become the fiscal victim of particularistic pertinacity.86

The question of representation on interstate boards and agencies as-
suredly deserves more consideration than blind adherence to the one
state-one vote concept as a divinely ordained scheme.

With varying degrees of vehemence, ranging from sincere but
mild concern to near paranoia, the people and interests initiating com-
pact negotiations and the motivations for their actions have been dis-
sected and, sometimes, censured. Green, for example, notes that
"[t]he industrial ancestry of some of the presently proposed compacts
[for air pollution control] might raise an eyebrow."87 The United
States Chamber of Commerce has grasped the compact device in a per-
haps debilitating bear hug, avowing that compacts can be used advan-
tageously in providing for multistate action on regional and basin-wide
problems which otherwise might require unilateral action by the fed-
eral government.88 The latter, apparently, is a consummation to be
avoided. For example, although the industrial, mining, and municipal
interests in the Ohio Valley desired federal funds, these groups favored
lodging coercive authority in state and interstate agencies

because they enjoy[ed] more effective access to state and interstate
agencies than to the national government and therefore generally can
avoid enforcement actions by states that would be detrimental to
their interests . . . . [Establishing such agencies] could allay efforts
to invoke national governmental power . . . . 89

Nor have business interests been the sole suspects; interstate
compacts have flowed from the subtle, and not always admirable, moti-
vations of other powerful groups. The Southern Regional Educational
Pact, for example, was inspired by the desire to retain the maximum
degree of segregation permissible in accord with the series of Supreme
Court decisions after 1954. Politicians hoped that the expanding con-
stitutional requirements could be satisfied by extending the use of
available integrated or black schools to blacks from other compact

86. Id. at 345-46.
87. Green, supra note 9, at 329 n.41. The adverse reaction of conservation-
minded groups in Kentucky to a proposed 17-state Southern Regional Environmental
Compact is instructive. Opposition arose almost automatically upon dissemination of
the information that the idea was backed by business interests and the "bad guys"
within the state administration.
88. Leach, The Federal Government and Interstate Compacts, 29 FORDHAM L.
89. Barton, supra note 77, at 34-35.
states, thereby avoiding further integration. Although few would accuse the chief advocates of the recent Compact for Education, Dr. James Conant and former Governor Terry Sanford, of racially inspired ulterior motives, it has been suggested that the compact's speedy acceptance by numerous states demonstrated the states' intention to protect their existing preeminence in educational policymaking from encroachment by the federal government. The conclusion is that special interests prefer state or interstate solutions because power tends to remain in their hands at that level, thereby allowing them to exercise control over regulatory programs.

Special interests' influence in the negotiation and operation of interstate compacts and their agencies, however, is not always coldly and carefully calculated. The very psychology of bargaining permits special interests to masquerade as state patriotism; delegates or members tend unconsciously to press the case for their own states, to the detriment of regional progress. Submission of compacts for congressional approval might mitigate any excesses or excise weak provisions, but the log-rolling inherent in congressional dynamics may forestall scrutiny with either the regional or national interest in mind.

A balanced, overall perspective of both the existing and possible future role of an interstate compact agency in the regulatory field echoes Barton's assessment of the ORSANCO experience—that such an agency, "in combination with national, state, and municipal agencies, can be useful for abatement and control of water pollution." This positive aspect, however, should be weighed against the tendency of compact agencies to hinder federal governmental action in this field. That state and interstate agencies were unable and indisposed to force industries to treat their liquid wastes adequately constitutes a compelling argument for federal enforcement against industrial water polluters. Barton's negative reaction to ORSANCO's enforcement shortcomings likely was exacerbated by its contumacious claim that it and the compacting states shared exclusive jurisdiction over water pollution control in the Ohio River Valley. Equally, he might have been skeptical of the

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90. J. FORDHAM, A LARGER CONCEPT OF COMMUNITY 66 (1956) [hereinafter cited as FORDHAM]; BARTON, supra note 77, at 130. But cf. the naive assertion that this is not the case in LEACH & SUGG, supra note 59, at 204.
91. BARTON, supra note 77, at 145-46.
92. Id. at 164.
93. McKinley, supra note 85, at 346.
94. BARTON, supra note 77, at 185. For an interesting and more favorable assessment of ORSANCO's performance by one closely connected with the organization see CLEARY, supra note 20. Cleary notes that whatever its shortcomings, ORSANCO, at a time when interest in pollution control was miniscule, induced industries and municipalities to spend over $1 billion, nine-tenths of it locally raised, for treatment. Id. at 4.
agency's widespread use of "action committees" composed of industry representatives and its heavy reliance upon industry-sponsored research. In any event, no simple solution exists to the problems which he raises; and the essentially uncritical acclamation of some commentators who seek to strengthen the compact as a contribution to federalism is not edifying.

There is much reason to be skeptical of the likelihood of establishing any form of genuine regional cooperation in interstate areas. As one author has noted,

[the American federal system, in which state boundaries are practically unalterable and both state and national powers highly developed, does not lend itself to the creation of a genuine intermediate regional polity. The interstate compact contrivances thus far suggested . . . appear to be cumbersome, jerry-built structures lacking in region-wide political responsibility, parasitic on national finance, and negative or unduly dilatory in decision-making. In the absence of a bona fide regional polity, our best hope . . . is perfection of the collaborative institution of nation-state-locality already functioning or incipiently developed, and the improvement of the structures and performance of the national and state executive and legislative systems.]

One must remember that the author is summarizing the unsatisfactory performance of interstate compact agencies and the compacts themselves in the management and regulation of regional water resources. Perhaps the federal-state-local "collaborative institution" can be more profitably sought in the air pollution field in view of the federalistic approach adopted by existing legislation, the congressional interest in the problem, and the stringencies of public dissatisfaction.

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95. LEACH & SUGG, supra note 59, at 183, 185. The authors cite the existence of such committees as signs of progress but do not seem to attach sufficient weight to the very real possibility that ORSANCO could well become the "prisoner" of the information and plans supplied by them.

96. See, e.g., id., at 225. The authors aver that compact agencies are not irresponsible because their officials and staffs are responsible and dedicated [I].

97. McKinley, supra note 85, at 347.

97a. As air pollution cannot be confined to one state, it cannot be confined to a single nation. Nor is the problem limited to isolated incidents in sparsely populated areas. International urban concentrations include the Detroit, Michigan-Windsor, Ontario; San Diego, California-Tijuana, Baja California; El Paso, Texas-Ciudad Juarez, Chihuahua; Laredo, Texas-Nuevo Laredo, Tamaulipas; Buffalo, New York-Hamilton, Ontario; and, perhaps, Seattle, Washington-Vancouver, British Columbia areas. J. BOLLENS & H. SCHMIDT, THE METROPOLIS (ITS PEOPLE, POLITICS, AND ECONOMIC LIFE) 22 (1965); CONNERY & LEACH, supra note 2, at 203. None of these areas has adequate institutions for control on a regional basis. In the El Paso area, for example, citizens have resorted to private litigation in attempts to abate pollution problems, whereas on the northern border the International Joint Commission, established by treaty in 1909, so far has proved unable to deal effectively with the water and air pollution. Id. at 205-06. Concededly, the Joint Commission made a gesture toward air pollution con-
IV

THE FEDERAL-STATE COMPACT DEVICE

The federal-state compact is a phenomenon in our federal system in that it marks a move away from separate, and often competitive, use of powers toward a collaborative, or even joint, use of power within that system. Rather than only horizontal coordination of efforts between states, the federal-state compact affords the opportunity for vertical relations in attacking problems. Perhaps the federal-state compact represents a realization that only together do the states and the federal government have sufficient powers to establish an effective regional approach to interstate problems; hopefully, it is not merely a case of states grasping at any straw to foil a feared federal usurpation.

There is nothing new in the federal government's being involved in interstate problems nor in states' attempted solutions of them. Prior to the first federal-state compact, for example, more than half of the operating interstate compact agencies had federal representatives. What is new is the creation of a formal, lasting partnership.

A. Some Examples

The Delaware River Basin Compact, originally entered into by New York, New Jersey, Pennsylvania, Delaware, and the United

trol in the Windsor-Detroit area as long ago as 1949. Its only concrete achievement, however, is a modest reduction in air pollution from vessels passing through the Detroit River. Id.

Perhaps the excellent International Joint Commission study of air pollution in the St. Clair-Detroit River area, published in 1971, may exert a more marked influence, but the fact that two federal systems are involved does not simplify matters. Another impediment to successful international pollution control derives from the State Department's lack of expertise in the problems of metropolitan life and air pollution. One approach is the interstate compact, which need not be limited solely to agreement between states of the United States. ZIMMERMANN & WENDELL, supra note 21, at 53 (citing McHenry County v. Brady, 37 N.D. 59, 163 N.W. 540 (1917), which upheld a drainage project involving cooperation between a North Dakota drain commission and a Manitoba municipality). Conceivably, an advantageous arrangement could be negotiated similar to the interstate or federal-state compacts described above. Indeed, the federal government sought to encourage international cooperation in the air pollution control field through the 1967 and 1970 legislation. Such efforts must continue, and the environmental interest stirred in the State Department by the 1972 Stockholm Conference on the Human Environment must be encouraged. As Jefferson Fordham noted, the interstate compact, a "frontier in American government," has enormous untapped potential for dealing both with regional interests and "problems which cut across international boundaries." FORDHAM, supra note 90, at 74-76. As such, use of the interstate compact and compact agency in international affairs constitutes terra incognita well worth exploration.


99. Celler, supra note 60, at 691. The right to vote was granted the federal representative in at least four cases.
States, was the first compact to involve full federal participation. Described as representing the "confluence of two previously separate lines of development—federal aid to the states and interstate cooperation through compacts," the compact was enacted within two years of the completion of a study revealing that no fewer than 19 federal, 14 interstate, and 43 state agencies were concerned with the basin. Rather than approving a compact among the states, congressional consent was couched in the phrase "consents to, and joins . . . in" the compact. The compact creates a regional agency, the Delaware River Basin Commission, with jurisdiction over the entire area of the Delaware River Basin. The commission is vested with a wide range of regulatory, administrative, and housekeeping powers to enable it to plan and control development for the common good. Each member state and the federal government has one vote, with a majority of the entire membership required for any commission action.

Even those skeptical of the viability of an interstate approach to river basin development feel the Delaware River Basin Compact has a chance to succeed because of the federal presence, the breadth of the forces behind it, and the thorough organizational planning which preceded it. Another advantage is the likelihood that Congress will deem such a compact to be on a different footing with respect to its duty to oversee. Rather than initial grudging acceptance followed by typical lack of interest or supervision, guidance may be maintained in view of the direct federal partnership interest.

Although such compacts mark a departure in the federal system, no serious doubt arises as to their constitutionality. Absent the violation of any specific constitutional prohibition, Congress may authorize the federal government to join any interstate-federal compact arrangement for the execution of functions in any field in which Congress

100. Grad, supra note 74, at 829.
101. Id. at 827.
102. Id.
103. Id. at 825-29.
104. Barton, supra note 77, at 178-79. But see Ackerman & Sawyer, The Uncertain Search for Environmental Policy: Scientific Fact-finding and Rational Decision-making Along the Delaware River, 120 U. Pa. L. Rev. 419 (1972). Ackerman and Sawyer suggest that the Commission falls short in performance although it was supposed to be a model of "rationality." The authors' chief criticism concerns the division of the "thinkers" and the "doers," whereby policy alternatives were being presented to the decisionmakers by outsiders, not the Commission staff, with many deleterious effects upon the rationality of goals chosen and steps taken. The Commission's failure suggests that "cooperative federalism" requires far more precise analysis than it has been given. If continuing scientific input is necessary, bits and pieces of the enterprise cannot be scattered throughout different bureaucratic structures at different governmental levels, for each loses sight of its proper function. Id. at 493. The point is well taken and merits serious consideration.
105. See, e.g., Dixon, supra note 7, at 77.
may legislate.\textsuperscript{106} No constitutional problem, therefore, should arise in attempting to apply the Delaware River Basin Compact precedent to air pollution control.\textsuperscript{107} In such an attempt, New York, New Jersey, and Connecticut enacted the Mid-Atlantic States Air Pollution Control Compact, which was to become effective upon congressional action.\textsuperscript{108} Because serious objections were raised with respect to the region encompassed,\textsuperscript{109} the proposed compact languishes in congressional limbo. Although the Mid-Atlantic Compact was patterned after the Delaware Basin Compact, it differs in one crucial respect—although the commission established to govern compact activities would be composed of the governors of the signatory states and a federal representative designated by the President, the United States would not be a member of the compact.\textsuperscript{110} Except for the psychological effect on continuing congressional care and scrutiny, however, active federal presence still would make the compact an example of "creative federalism."

The \textit{sine qua non} of the proposed arrangement is that the commission have adequate powers to implement its projected responsibilities. Thus, the agreement would grant the commission blanket authority to establish and enforce, or provide for the enforcement of, standards. The question then becomes the determination and ability of the commission to exercise these powers.\textsuperscript{111}

\textbf{B. Strengths and Weaknesses of Federal-State Partnership}

Among the factors engendering doubt that such determination and ability will exist is the fact that a majority out of four votes is required to take action. Because the commission is to act only if local and state governments have failed to do so, presumptively, one member state will oppose any action automatically and, therefore, one abstaining vote would block action.\textsuperscript{112} Another objection, that a state probably could refuse to appropriate its share of the expenses of the commission without sanctions,\textsuperscript{113} is true of most compacts. Other

\begin{flushleft}
\textsuperscript{106} Grad, \textit{supra} note 74, at 841.
\textsuperscript{107} Note the federal jurisdictional interest in air pollution control under the commerce power and the Supreme Court's specific recognition of compacts as suitable means of safeguarding the national interest. New York v. New Jersey, 256 U.S. 296 (1921).
\textsuperscript{108} The compact provided for the future membership of Pennsylvania and Delaware.
\textsuperscript{109} Zimmerman, \textit{supra} note 47, at 187. See text accompanying notes 46 & 47 \textit{supra}.
\textsuperscript{110} Zimmerman, \textit{supra} note 47, at 187-88.
\textsuperscript{111} \textit{Id.} at 191-92.
\textsuperscript{112} \textit{Id.} This assumes that the commission consists of representatives of the three original party states and the federal government.
\textsuperscript{113} \textit{Id.}
\end{flushleft}
doubtful factors are that members can withdraw upon two years' notice and that the commission was established on a single-function basis, rather than as an outgrowth of the Interstate Sanitation Commission set up to administer water pollution programs in the same area. Moreover, some contend that "where there is national participation [in interstate arrangements], the record also suggests that federal agencies will want a supervisory role, not merely that of one among equals: they are reluctant to tie their hands for the future by accepting the degree of intergovernmental commitment customary when states enter a compact." The contention, however, certainly will be true in the air pollution context in view of the responsibilities delegated to the state and the right to oversee reserved to the federal government.

Several positive aspects of this attempt at interstate federal coordination counter these objections. First, a single basic document regulates the parties' relations. Second, state law and administration are not displaced by federal fiat. Third, questions of pre-emption and conflict between federal and state law would be quieted . . . . State law, courts, agencies and officers—all the administrative and judicial machinery of state government—would be available to the arrangement in a fashion not constitutionally possible under federal statute, nor as readily or effectively fashioned by parallel federal and state legislation.

Although no compelling reason exists for federal adherence to all interstate air pollution control arrangements as a matter of general policy, numerous advantages may flow from such membership, especially in relation to major urban areas. Congressional oversight might be more regular and better conducted, federal funds could be distributed more easily, and state resources could be utilized more advantageously. With regard to the most perturbing reservation about such arrangements—that interest groups will predominate, that the voting arrangements will ensure inaction, and that states will regard them as buffers against effective federal action rather than as an opportunity for improved air pollution abatement programs—one can only reiterate that all plans for preserving a viable federal system are conditioned upon sudden and unwonted energy and maturity in the states.
Whether such a system of federal-state compacts will succeed in the effective resolution of broad, region-wide problems . . . while bridging the gap in effective state participation in the formulation of policy, will depend on the states' maturity to assume this new role. The states will fail in this effort if they regard compacts like the Delaware River Basin Compact as an affirmation of a narrow concept of state sovereignty. They may succeed if, along with the assertion of legitimate interests of their own, they regard their role as historic, independently functioning parts of a regional polity and of a national union.  

C. Summing Up

In summary, historical experience will not support any hard and fast conclusions concerning the value of the interstate compact in controlling pollution. In fact, it would be "unrealistic . . . to take a position either for or against compacts in the abstract. Interstate compacts have been used both to promote broader interests and to serve to protect special interests."  

Despite apprehensions of the institutionalization of conflict arising from the regularization of interstate relationships, the device possesses philosophical merit in the context of an evolving federal system. Moreover, no acceptable alternative exists to the use of special districts, institutionalized through interstate or federal-state compacts in interstate metropolitan areas. Finally, the appealing possibility remains that, although past experience compels a cautious view, public concern and support may be so extensive in the environmental quality field that compacts will prove successful.

V

ELEMENTS OF A COMPACT DEVICE

A. Jurisdiction and Structure

The first consideration in negotiating a compact and creating a compact agency is the physical jurisdiction of the proposed arrangement. In view of the combination of political and physical boundaries as they should be, "there would be little to fear and much to welcome in a state's interstate operations. There would be scant reason to doubt the continuation of the federal system of government." M. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 310 (1971).

119. Grad, supra note 74, at 854-55.
120. BARTON, supra note 77, at 186.
122. Evidently, no single set of criteria will match every region's needs. For example, many air quality control regions designated by HEW are interstate, but contain no large urbanized areas. Some form of advance approval legislation might be appropriate in such areas, perhaps with guidelines specified in the general approval or perhaps with the EPA Administrator empowered to establish minimum standards for such compacts. In larger interstate metropolitan areas, however, the federal interest
and the impetus to agreement furnished by their very designation, the air quality control regions created pursuant to federal legislation define a logical control area.\textsuperscript{123}

No compact can be expected to succeed if it lacks one specific element: direct authority to set standards and enforce them. "It would appear there is no other way to achieve the essential uniformity of regulation and enforcement."\textsuperscript{124} This granted, the utility of compacts, depends upon their political responsiveness and accountability which are functions of their representational pattern, financial structure, other powers, and staff arrangements. The central questions concerning representation and accountability pertain to whether or not states are to be equally represented in the compact agency, who is to represent them, whether they will be selected through appointment or election, and what checks and balances will circumscribe their actions.

The first question is easily resolved, for regardless of any theoretical ideal, it is well-settled that states ought to possess equal voting power on interstate agencies. Although each member state and the federal government possesses equal voting power, each ought to be permitted more than one representative, thereby affording both a greater range of expertise and greater representation of interested constituent governmental groups. Such multiple representation also grants larger numbers of interests within each state a role in the selection process. Action should not demand unanimity, nor should the majority needed to undertake an enforcement action require the vote of the delegate, or a majority of the delegates, from the state concerned. Whether the state has failed to move against the offender or yearns for "the first crack" at him, either tends to produce a negative vote on the enforcement issue and, hence, needless delay.\textsuperscript{125}

Bromage contends that constituent-unit representation, recognizing both population and governmental units, may be useful in future interstate authorities, preferring the flexibility allowed by permitting persons other than elected officials to be eligible for election or appointment.\textsuperscript{126} He writes, however, in the context of truly local metro-

\textsuperscript{123} See Hassett, supra note 1, at 1119.

\textsuperscript{124} Green, supra note 9, at 327. Under the Clean Air Amendments of 1970, the Administrator of the EPA promulgates certain minimal standards which the states are obliged to implement, but the compact authority still should adopt the standards—or more stringent ones—and enforce them.

\textsuperscript{125} This is the case with ORSANCO. While Cleary claims no complications have occurred, that so few enforcement efforts have been undertaken suggests otherwise. Cleary, supra note 20, at 57-58.

\textsuperscript{126} A. Bromage, Political Representation in Metropolitan Agencies 82 (1962) [hereinafter cited as Bromage].
politicians rather than in the context of regional problems with state and national interests and federal representation. Perhaps the only way to approximate his ideal in the air pollution field is through multiple representation from each state. The compact could specify that certain local officials, such as center city mayors or county executives, or representatives of certain groups be appointed to the governing board or that they be *ex officio* permanent members. Alternatively, the compact could direct appointing officials, often the state governors, to appoint representatives from certain governmental, population, or areal groups. The success of this alternative, however, is conditioned upon the governors' good faith.

Appointment, rather than election of representatives, is the typical and preferable pattern for interstate entities. Because of doubts that an area-wide election in an interstate area is permissible\(^ 1 \) and because of the lack of any organized political constituency in such areas, the appointment process is well-established. Zimmermann and Wendell propose a standard compact clause specifying that each state's commissioners be appointed, serve, and be removed in accordance with the laws of the state they represent.\(^ 2 \) In most cases this would mean gubernatorial selection. Preferable, if it could be achieved, would be some form of joint state-local selection of representatives. For example, rather than being a member himself by virtue of a compact provision, the mayor of a major city could be empowered to appoint one or more of the state's representatives or to veto the governor's selection. This might be a beneficial counterweight to the tendency to constitute special districts so as to decrease the bargaining power of the central city and its interests.\(^ 3 \)

**B. Accountability and Interest Representation**

Assuming that a reasonably representative board can be assembled, a problem persists of ensuring that it remain accountable for its actions and responsive to the public, despite the absence of any significant political base for an interstate agency. Because American political parties are constituted along state lines and because little interaction, except for occasional shifting alliances formed during national elections, occurs between state organizations, problems arise both in creating an interstate agency and in subjecting it to direct popular control.\(^ 4 \) Since the agency is outside the traditional hierarchy of power, neither effective popular enthusiasm nor popular oversight could be

129. BROUSSARD, *supra* note 126, at 85.
counted on to exist. Few metropolitan areas have met the challenge of creating a suburban party-government structure capable of developing meaningful links to the central city. An interstate air pollution control agency thus would be free of the traditional checks and balances; it would be directly responsible to no electorate and to no single governor or legislature. Perhaps it is fear of this autonomy which has led to circumscription of the powers of interstate agencies. If a strong enforcement agency is to be created, however, these fears must be allayed without hamstringing the agency's ability to fulfill its responsibilities. Since such agencies are, in effect, executive, legislative, and even judicial in their roles, some control over their activities is necessary. Broadening the spectrum of interests represented on the board itself to avoid the narrow, business-like perspective all too common in existing compact agencies could assist in achieving such control. An unlikely alternative is to subject the agencies and their boards to formal judicial review, either in the federal courts, in the courts of any member state, or before a special interstate judiciary established for that purpose.

While the courts should, and probably will, be available for ultimate protection in major cases, the accountability problem must be approached through the appointing agencies. Some authority must possess a clearly defined removal power over appointees to interstate commissions. It would be both logical and politically most feasible to make the same officials responsible for both appointment and removal functions. Two major alternatives are: (1) to allow service at the pleasure of the appointing agency or (2) to appoint for specified terms of service, subject to removal for cause. Failure to exercise necessary enforcement measures might constitute sufficient cause for removal; zeal in enforcement likely would not. Therefore, removal only for cause would be preferable, lest, for example, a governor be free to remove an "overly conscientious" enforcement advocate should political pressures so dictate.

132. Barton, supra note 77, at 86.
133. For an interesting treatment of the latter possibility see LaRue, Interstate Cooperation and an Interstate Judiciary, 27 WASH. & LEE L. REV. 1 (1970). The interstate judiciary could consist either of a panel of judges from the various member states or of specially appointed or elected judges, perhaps with federal judges represented on the panel. While such a judiciary might be specially trained in interstate cooperation and sympathetic to the compact idea, attempts to create such a structure likely would be just "one more item on the table" in the negotiations preceding creation of the air pollution control agencies. In such a case it might serve only to hinder more imperative efforts.
134. Ideally, some procedure other than a citizens' suit under section 304 of the Clean Air Amendments of 1970, should exist by which citizens dissatisfied with an agency's performance would be able to question formally their state representatives'
C. Financing

No governmental unit can exist, much less carry out its duties in a creditable manner, unless it has adequate financial support. The provisions for financing interstate air pollution control agencies therefore will be crucial to the success or failure of the compact device. Financing possibilities include: voluntary or contractual appropriations by member states with federal financial contributions; the assessment of agency operating costs against the member states in some equitable manner; revenues from service activities or forfeitures and fines; and taxation, either state or federal, within the affected compact area.

The difficulty with appropriations is the insecurity which their voluntary nature imposes on an agency. It is doubtful that a contractual obligation to appropriate even a fixed sum for an interstate agency would be legal under state constitutional restrictions. *A fortiori*, the same objections would apply to an assessment levied upon the member states by the compact agency itself, even though no federal constitutional objection to such assessments exists.

Financing interstate air pollution enforcement through service revenues is an even less attractive possibility. Unlike port authorities, transit authorities, or toll-bridge authorities, air pollution control agencies own no income-producing properties and provide no income-producing services. Revenue bond financing also is unavailable; even state and federal guarantees of agency bonds would not likely be forthcoming under these circumstances as there is no basis for backing. Fines or forfeitures, albeit valuable for enforcement purposes, are unreliable as sources of revenue and also evoke unsavory overtones of bounty-hunting.

Taxation within the compact area also is fraught with uncertainty. A faintly analogous system is that by which the Waterfront Commission of New York Harbor, a New York-New Jersey compact agency, supports its regulatory activities through assessments levied on employers of persons licensed and registered pursuant to the terms of the compact. Such a procedure, however, is beyond the scope of this Article. Hopefully, the selection process, increasing citizen concern, and the inclusion of federal representatives will have the salutary effect of compelling interstate air pollution control agencies to remain more accountable than precedent in other fields would lead one to expect.

135. Lack of funds may result in an unintended delegation of prescription and enforcement powers from an air pollution control agency to the subjects of regulation themselves, because of their personnel and technical resources. For illustration of this point and an excellent analysis of the variance between the "legal" and the "real" models of air quality regulation see Goldstein & Ford, *The Management of Air Quality: Legal Structures and Official Behavior*, 21 BUFFALO L. REV. 1 (1971).

136. Green, supra note 9, at 329. This system of financing would be similar to that employed by the successful, but entirely intrastate, Bay Area Air Pollution Control District in California.
In essence a limited payroll tax, it is more aptly analogous to a system of license fees imposed to meet the cost of necessary regulation under the police power. The agency could charge a permit fee for all those who must register as pollutant sources under control laws or regulations, thereby assisting the enforcement agency to defray its costs of operation. Polluters seeking a temporary variance from existing standards or regulations also could be charged a fee, although the agency must guard against welcoming variance applications because of their financial contributions. In any event, it is unlikely that such imposts could meet the entire expense of a major enforcement effort; therefore, some other source of funds must be tapped.

One possibility is a “compact district tax” in which the member states impose a tax—income, property, excise, sales, or use—within the portion of the state affected by the compact with the proceeds to go to the compact agency. The list of obstacles to successful imposition of such a tax in most states, however, is so extensive as to remove the idea from the realm of practicality. Among the potential state constitutional objections are uniformity clauses, claims of unconstitutional delegation of the state taxing power, prohibitions against taxation without representation, restriction or segregation of tax subjects between governmental levels, restrictions upon local or special legislation, and—perhaps most crucial—limitations upon state indebtedness and upon the use of state credit on behalf of compact agencies.

Such difficulties prompted Professor Dixon to consider multi-jurisdictional taxing districts as adjuncts to compact agencies, each state establishing a special district to raise its share of the required fund. He rejected even this approach as infeasible under some existing state constitutional limitations. Dixon developed an ingenious proposal to utilize special congressional taxation within the compact area—defined to include all affected parts of member states—to obviate the financing problem for interstate agencies, thereby avoiding “the numerous legal pitfalls of individual states’ constitutional law regarding the state taxing and borrowing powers, and . . . the difficulties inherent in trying to honor the varied provisions of the constitutions and laws of the signatory states.”

Dixon raises problems of special congressional taxation including
claims of unconstitutionality and the drawbacks of a balkanization of the United States into special-benefit districts for taxation purposes, but concludes that interstate compacts coupled with federal regional taxation are capable of achieving "a more rational areal division of power and an effective power to govern in twentieth century America." There are additional difficulties involved in adapting his idea to support an interstate air pollution control district, including the serious question whether balkanization should be embraced for a single-purpose district. A regional taxation system appears more appropriate to the regional government some envision for interstate areas. The time needed to implement such a scheme is time we cannot afford. Therefore, for the foreseeable future, interstate air pollution control and enforcement agencies necessarily will rely on "donation financing" from member state governments and the federal government, supplemented by the imposition of various permit and/or inspection fees. While such reliance is not a perfect solution, increasing environmental concern may insure that funds sufficient to promote effective control are provided. Without such concern and a willingness to utilize the political process to achieve environmental quality, no progress can occur, whatever scheme is employed.

D. Specific Powers

Other than the essential power to set and enforce standards, the agency should possess powers at least as broad as those of the analogous agencies in the member states, minimally, the power to require permits, charge fees, make inspections, issue citations, levy fines or other penalties, and to seek injunctive relief. In order to render meaningful the theoretical power to utilize existing state and local agencies, the agreement should allow the compact agency to delegate its powers to such other governmental bodies as it deems appropriate. The interstate agency should under no circumstances, however, be required to deal with industries and municipalities through the states or to refrain from taking action until other entities have had opportunity to do so. Creation of an interstate agency with these sweeping enforcement powers would mark a salutary departure

142. Id. at 80-85. Dixon concludes that his scheme would be constitutional under Binns v. United States, 194 U.S. 486 (1904).
143. Dixon, supra note 7, at 87.
144. Other long-term possibilities which might prove worthy of investigation include the imposition of effluent fees and/or the creation of a "public utility" approach to the ownership of pollution control devices.
145. See text accompanying note 124 supra.
146. This is the case with the Delaware River Basin Compact. Grad, supra note 74, at 828.
from the current practice of circumscribing agency activities or initially failing to grant them power.147

CONCLUSION

Short of direct federal intervention on an unprecedented scale, the interstate compact appears the most logical device to deal with the problem of metropolitan interstate air pollution. Current citizen concern and federal involvement indicate that new efforts in this field may prove more effective than those of the past. In the more mammoth urban areas, however, a federal-state compact with the United States as an active, fully participating member appears more promising.

Not unexpectedly, the vagaries of the legislative process within different states, the differing historical and geographical determinants of individual regions, variations in negotiating goals and techniques in the interstate context, and changing federal pressures will insure great diversity in approaches. This is proper, as no model can suffice for every area and the broad parameters suggested above permit great flexibility in designing an appropriate control body for any particular area. Regardless of the structure created, however, the indispensable ingredients for successful air pollution control are sustained public awareness and concern coupled with comprehension that the war against air pollution is more likely to be won by a series of small victories on many governmental levels in many geographical areas than at any dramatic Armageddon.

147. The compact document and the member states should provide adequate salaries to attract a staff of high quality. No simple answer exists to the question whether all, some, or none of the agency’s employees should be protected by civil service standing. The usual practice is to exclude them from state civil service regulations. Leach & Sugg, supra note 59, at 115. Such questions, together with those concerning rates of pay, should best be left to the discretion of the compact agency’s board. This would provide insulation from the difficulties inherent in negotiation and from the jealousies of individual states’ employees. Such jealousies might otherwise restrict salary levels to those of the most penurious compacting state. Establishing an employee interchange program between the various state agencies and the interstate agency might diminish problems of competition and contention.