

# ELECTRIC HOLDING COMPANY REGULATION BY MULTISTATE COMPACT

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*Regional organizations are the excrescences on the constitutional system, unusual things that must be superimposed on the universe of functionally specialized federal and state agencies. The odds are against their being formed and, if formed, against their flourishing.*<sup>1</sup>

Even though regional organizations are often unsuccessful, scholars and politicians have discussed the use of interstate compacts<sup>2</sup> to regulate the sale of electricity<sup>3</sup> since a definitive article by Frankfurter and Landis in 1925.<sup>4</sup> That year, for example, representatives of New York, New Jersey, and Pennsylvania met to discuss a compact for water and electric power production and distribution, and New York authorized a study commission in 1931 for the same purpose.<sup>5</sup> Since then, government reports have suggested that some regulation occur through interstate regional compact.<sup>6</sup> The most recent example is a proposal by the Arkansas Public Service Commission and Entergy Corporation<sup>7</sup> incorporated into Senate Bill 2607 (S. 2607),<sup>8</sup> to create regional organizations to provide integrated resource planning.<sup>9</sup>

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1. MARTHA DERTHICK, *BETWEEN STATE AND NATION: REGIONAL ORGANIZATIONS OF THE UNITED STATES* 4 (1974).

2. Interstate compacts are authorized by the Compact Clause of the Constitution. U.S. CONST. art. 1, § 10, cl. 3. Section 10 of Article I provides in relevant part, "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."

3. Two events in 1920 suggested the use of a compact for this type of regulation. That year Congress approved the creation of the Port Authority of New York and New Jersey and the Colorado River Compact. The first provided substantial financial and operating authority, the latter solved a complicated water apportionment question. Each suggested a broader scope to compacting than had previously been envisioned. PAUL T. HARDY, *INTERSTATE COMPACTS: THE TIES THAT BIND* 4 (1982). Frankfurter and Landis surveyed the limited scope of the compact's use in their 1925 article. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695-708 (1925).

4. Frankfurter & Landis, *supra* note 3.

5. William J. Donovan, *State Compacts as a Method of Settling Problems Common to Several States*, 80 U. PA. L. REV. 5, 14 (1931).

6. U.S. DEP'T OF ENERGY, *THE NATIONAL POWER GRID STUDY* at 71 (1980); STEPHEN G. BREYER & PAUL W. MACAVOY, *ENERGY REG. BY THE FED. POWER COMM'N* 89-121 (1974) (summary of the findings of the 1967 National Power Survey).

7. Entergy is a public utility holding company governed by the Public Utilities Holding Company Act. See 15 U.S.C. §§ 79-79z-6 (1988).

8. S. 2607, 102d Cong., 2d Sess. (1992).

9. See *infra* part V.A. Twentieth century compacts have expanded into many areas of continuous interstate relationships and expanded the authority of the regional officers. Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1425-27 (1966). For a listing of various compacts by subject area, see COUNCIL OF STATE GOVERNMENTS, *INTERSTATE COMPACTS AND AGENCIES* (1983). The

The proposal, however, runs counter to widespread criticism of the compact as a form of regulation.<sup>10</sup> The compact has come to be seen as a device of "last resort" due to the difficulties of implementation and its variable success in practice.<sup>11</sup> Whether for these reasons or others, the use of compacts appears to have declined since 1975.<sup>12</sup> One thus wonders if the use of a compact is appropriate to address such complicated problems as regional planning for electric utility companies.

Before such a far reaching proposal as the creation of a new level of government is undertaken, care must be taken to evaluate the legal and practical consequences of regional regulation. Indeed, a proposal such as S. 2607 suggests the creation of a unique fourth class of political entity presenting its own complex of considerations.<sup>13</sup> Among the various concerns addressed here, the legal problems appear the least significant.<sup>14</sup> On the other hand, both economics<sup>15</sup> and the administrative and political concerns<sup>16</sup> present significant barriers to effective implementation. Thus, despite the ringing endorsements offered by various state and federal officials, regional regulation probably is not an effective approach for electric planning and sales.<sup>17</sup>

To explore this conclusion more fully, this article is divided into five sections. The first discusses the market and regulatory environment of bulk power sales. The second presents the legal framework for compacting and discusses the minimal constitutional barriers presented by the Compact Clause. The next section discusses the economic considerations inherent in attempting to regulate a national activity through regional authorities. The fourth section more fully develops the administrative and political problems that regional regulation must overcome to be successful. Using the legal, eco-

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breadth of regional agencies, created by compact or otherwise, is similarly recognized in the academic literature. See, e.g., BRUCE ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974) (Delaware River Basin Compact conservation program); DERTHICK, *supra* note 1, *passim*; MARTHA RIDGEWAY, *INTERSTATE COMPACT: A QUESTION OF FEDERALISM* (1971); Jo M. Ferguson, *Interstate Agreements*, 39 KY. L.J. 31 (1950) (education); Frank P. Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825 (1963) (Delaware River Basin Compact); Richard H. Leach, *The Interstate Oil Compact: A Study in Success*, 10 OKLA. L. REV. 274 (1957). For an earlier summary of the changes that took place in the use of compacting in the first half of the century, see Alice Mary Dodd, *Interstate Compacts Recent Developments*, 73 U.S. L. REV. 75 (1939) and Alice Mary Dodd, *Interstate Compacts*, 70 U.S. L. REV. 557 (1936).

10. For a sample of that criticism, see *infra* part V.B. For a more theoretical criticism based on an economic approach to regionalism, see *infra* part III.A-C.

11. Richard H. Leach, *Interstate Authorities in the United States*, 26 LAW & CONTEMP. PROBS. 666, 668, 671 (1961).

12. HARDY, *supra* note 3, at 5.

13. James K. Horstman, Note, *Interstate Compact Agency as Regional Legislature—A New Basis for Official Immunity*, 19 URB. L. ANN. 240 (1980) (suggestion that regional agency creates novel problems of sovereignty and immunity).

14. See *infra* part II.A-E.

15. See *infra* part III.A-C.

16. See *infra* part IV.

17. This article does not attempt to suggest an alternative to the formal compact. Less formal or private voluntary alternatives may be possible. Recent proposal for transmission planning comes to mind. For a broader discussion of the alternatives, see DOUGLAS N. JONES ET AL., *REGIONAL REGULATION OF PUBLIC UTILITIES: OPPORTUNITIES AND OBSTACLES* (Nat. Reg. Research Inst. 1992).

conomic, and policy framework developed in the preceding sections, the last section analyzes the proposal encompassed in S. 2607.

## I. THE INDUSTRIAL AND REGULATORY STRUCTURE

The industrial and regulatory structure of the electric industry is a mixture of boundaries. These boundaries seldom coincide with state borders. Moreover, they evolve either by changes in the provision of power, in regulation, or both. Thus, an amorphous notion of regionalism already exists within the industry and is supported by the regulatory structure, but it is often ill defined and clearly incomplete.

### A. *Private Regional Structures*

The provision of electric service by its nature involves the connection of electric power from a source (a generation facility), a line (transmission), and an end user (distribution). These three steps may be fixed mechanically, but the commercial units for their provision are not. Thus, there are both simple and highly complex arrangements for completing this transaction, and they involve literally thousands of private and public entities. In practice, the process for selling electricity to the end customer can be performed by one or through several entities. The smallest single commercial unit is the private or public utility with its own generation and transmission facilities.<sup>18</sup> Various combinations of these functions, however, can and do exist.<sup>19</sup> Moreover, these activities take place through a bewildering array of public and private entities including power administrations, the Tennessee Valley Authority, rural electric cooperatives, municipal authorities, small and large private utilities, and private holding companies.<sup>20</sup>

To coordinate the movement of power among these various entities, the industry has developed several levels of private arrangements. Initially, the industry is connected into control areas. "A control area represents a portion of the bulk power supply system within which all generation and transmission is centrally operated so as to reduce the costs for that area."<sup>21</sup> At the next level of organization, power pools "are formal organizations of utilities or control areas joined together for the purpose of pooling some or all of their electrical service at least cost."<sup>22</sup> At the next level of organization are the National

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18. U.S. DEP'T OF ENERGY, THE NATIONAL POWER GRID STUDY at 9 (1980).

19. The National Power Grid Study noted:

Although many utilities perform all three steps in the process, many others do not. Some only distribute electricity by purchasing generation from other utilities, some rent the use of high-voltage transmission lines from other utilities in order to have electricity transferred or 'wheeled' from the source of generation to their service areas, and still others are only in the generation and transmission business and sell electricity to distribution utilities which ultimately serve end-users.

*Id.*

20. *Id.*

21. *Id.* at 11. According to a 1980 study, there were approximately 130 control areas in the United States. *Id.*

22. *Id.* The 1980 National Power Grid Study reported 26-30 formal or informal pools. *Id.* at 13. For a discussion of power pooling, see W. STEWART NELSON, MID-CONTINENT AREA POWER PLANNERS: A NEW APPROACH TO PLANNING IN THE ELECTRIC POWER INDUSTRY (1968).

Electric Reliability Council Regions (NERC). "NERC regional councils do not develop initial plans for power systems but they do evaluate in varying degrees of detail the regional effects of plans developed by individual utilities or groups of utilities."<sup>23</sup> Finally, the regional councils meet in a national council which attempts "to improve planning and engineering between regions."<sup>24</sup> As a result of the increased integration of the various systems, three synchronous electric systems exist: the Eastern, Western, and Texas Interconnected Systems.<sup>25</sup>

The notable feature of each level of this structure above the integrated company or holding company is the lack of facility planning that is really involved. Most of these structures address issues of operational integrity: the provision of power on a daily basis. In this regard, issues of construction and its need are left to the lowest levels of organization.<sup>26</sup>

### B. Regulatory Structure

Theoretically, regulation could assist in the coordination of regional planning, but the regulatory structure, as much by historical accident as by any apparent plan, is not designed to accomplish that task. Quite simply, no agency has the power to coordinate the various activities necessary to perform multistate regional planning.

The reason for this lack of authority arises from legal developments occurring in the 1920s. In 1927, the Supreme Court decided the *Attleboro* case<sup>27</sup> in which it held that the sale of power at wholesale across a state line was in interstate commerce, and thus beyond the regulatory authority of a state. In that case, the Rhode Island commission sought to set wholesale rates of electricity sold by a Rhode Island generating company to a Massachusetts distribution company.<sup>28</sup> The Court concluded that the transaction was in interstate commerce even though the title to the electricity transferred at the state line.<sup>29</sup> This determination precluded state regulation of wholesale transactions. Thus, "if such regulation [was] required it [could] only be attained by the exercise of power vested in Congress."<sup>30</sup>

By this reasoning, Congress could have provided for a federal agency to direct regional planning and development. Politics, however, intervened, and

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23. U.S. DEP'T OF ENERGY, *THE NATIONAL POWER GRID STUDY* at 13 (1980). There are nine regional councils. *Id.*

24. *Id.*

25. *Id.* at 16-18.

26. This is not to say that some generation and planning does not exist:

The interest of utilities in coordinated planning and development of future system additions has evolved more slowly than has day-to-day operational integration because of the many independent systems with diverse local and resource characteristics and many independent managements with differing views of their respective responsibilities, differing policies for meeting those responsibilities, and differing financial constraints.

*Id.* at 13. As a result, regional planning among utilities appears secondary at best. *Id.* at 18.

27. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

28. *Id.* at 84.

29. *Id.* at 86.

30. *Id.* at 88.

the jurisdictional provisions of Title II of the Federal Power Act did not permit the Federal Power Commission (the predecessor to the Federal Energy Regulatory Commission) to involve itself with issues of generation or siting. Section 824(a)(1) of Title 16 of the United States Code provides that "Federal regulation . . . extend[s] only to those matters which are not subject to regulation by the States."<sup>31</sup> Section 824(b)(1) then states much the same thing:

The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electrical energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.<sup>32</sup>

The section then explicitly prohibits the Federal Energy Regulatory Commission (FERC) to impose regulation "over facilities used for the generation of electric energy."<sup>33</sup> Thus, the operative language of the statute separated state and federal jurisdiction, leaving to the states the obligation to set local or retail rates and regulate generation.

The legislative history of the Federal Power Act reinforced the congressional goal to continue local control of retail rates. The Senate Report, for example, stated that the purpose of the Act was to regulate the increasingly large and important interstate market that the states could not regulate constitutionally.<sup>34</sup> The House agreed and repeated this message.<sup>35</sup> The section by section analysis of the House committee report stated, "As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State."<sup>36</sup>

The bifurcated structure complicated another goal of the act, the encouragement of interconnection. Section 824a(a) authorized the Commission to coordinate (but not mandate) interstate sales and transmission.<sup>37</sup> The Senate Report gave an interesting policy justification for structuring the provision this way.

Under this subsection the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The committee is confident that enlightened self-interest will lead the utilities to cooperate with the commission and with each other in bringing about the economies which can also be secured through the planned coordination which has long been advocated by the most able and progressive thinkers

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31. 16 U.S.C. § 824(a)(1) (1988).

32. *Id.* § 824(b)(1).

33. *Id.*

34. S. REP. NO. 621, 74th Cong., 1st Sess. 17 (1935).

35. H.R. REP. NO. 1318, 74th Cong., 1st Sess. 7-8 (1935) states:

[T]he Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce . . . The bill takes no authority from State commissions . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does Title II of this bill.

36. *Id.* at 27; S. REP. NO. 621, *supra* note 34, at 48.

37. 16 U.S.C. § 824a(a) (1988).

on this subject.<sup>38</sup>

After a statement of legislative purpose consistent with the Senate Report's policy statement, the section directed the Commission "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."<sup>39</sup>

At the same time, however, Title I of the 1935 Act<sup>40</sup> directed the creation of regional public utility holding companies. That title, also known as the Public Utility Holding Company Act (PUHCA), was the congressional response to the abuses of holding company structures within the power industry.<sup>41</sup> As part of the breakup of the holding companies directed by Congress, the Act required in most situations that the resulting new entity hold properties in a single or contiguous state.<sup>42</sup> It then gave financial regulatory authority to the Securities and Exchange Commission (SEC),<sup>43</sup> but the FERC retained authority over rates and utility practices.<sup>44</sup> This split created another curious problem. In a recent case, the Supreme Court concluded the SEC controlled construction financing even though it did not delve into the need for construction or its effect on rates, and the FERC had to accept the results.<sup>45</sup> The states perceived serious problems since the SEC was notorious for its lackluster review under PUHCA.<sup>46</sup>

By itself, the bifurcation of regulatory authority would lead to jurisdictional problems between the states and the national agency, but the Supreme Court in the 1980s created additional concerns. In a series of cases, the Court concluded that FERC determinations concerning allocations of power and the

38. S. REP. NO. 621, *supra* note 34, at 49.

39. 16 U.S.C. § 824a(a). The section continues:

It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

In 1978, as part of the major overhaul of federal energy legislation, interconnection studies were moved to the Department of Energy and the FERC received additional authority to order interconnection. The interconnection authority, however, is highly circumscribed and generally perceived as ineffective. See Megan A. Wallace, *A Negotiated Alternative to Mandatory Wheeling*, 10 ENERGY L.J. 99, 100-03 (1989).

40. Codified at 15 U.S.C. §§ 79-79z-6 (1988).

41. LEONARD S. HYMAN, *AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE* 71-83 (3d ed. 1988); CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES, THEORY & PRACTICE* 573-83 (2d ed. 1988).

42. 15 U.S.C. §§ 79b(a)(29), 79k(b) (1988); *Engineers Pub. Serv. Co. v. SEC*, 138 F.2d 936 (D.C. Cir. 1943), *cert. granted*, 322 U.S. 723 (1944), *vacated as moot*, 332 U.S. 788 (1947); DOUGLAS W. HAWES, *UTILITY HOLDING COMPANIES* § 2.06 at 2-19 (1987).

43. 15 U.S.C. §§ 79s, 79t (1988) (hearings and rules and orders).

44. See HAWES, *supra* note 42, Ch. 3.

45. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990).

46. *Regulation of Registered Electric Utility Holding Companies: Hearings on S. 2607 Before the Senate Comm. on Energy and Natural Resources*, 102d Cong., 2d Sess. 31-36 (May 14, 1992) [hereinafter *Senate Hearing*] (statement of Sam I. Bratton, Jr., Chairman, Arkansas Public Service Commission). A related problem is the use of forum shopping and creative corporate structuring that arguably results from the perceived gap and differential levels of regulatory effort. *Id.* at 36-42 (statement of Ashley C. Brown, Commissioner, Public Utility Commission of Ohio).

inclusion of construction costs by a member of a holding company precluded subsequent state review of those costs in determining the appropriate state retail rate.<sup>47</sup> While the Court's decisions apparently were subject to some exceptions,<sup>48</sup> they nonetheless continued the devolution of power from states to the central government that began in the 1920s.

Recent amendments add further concerns to the regulatory mix. Title VII of the Energy Policy Act of 1992<sup>49</sup> provides for a new form of generating company that is not subject to the provisions of PUHCA.<sup>50</sup> These companies then would sell to public and private utilities under new authority.<sup>51</sup> Provisions spelling out jurisdiction for these transactions, however, retain the two tier regulation.<sup>52</sup> States retain authority over the generation facility's siting<sup>53</sup> while the FERC retains authority over transmission and wholesale pricing.<sup>54</sup> While the latter agency has enhanced authority to order transmission, this change does little to rectify the division among states or among states and the FERC concerning the construction and incorporation of new facilities into the national grid.

Given this crazy quilt of regulatory authority, it is little surprise that there is frequent support for regional forms of regulation. Constitutional law precludes direct state action. Federal statutes, however, do not permit the primary agency in charge of interstate sales of electric power to plan construction and siting. States have the power to site new facilities but no control over the effects of out-of-state actions by other members of a pool or holding company that may affect rates. The natural response when problems emerged with this structure was an attempt to fill the gap, and regional regulation by interstate compact seems at first blush to solve the problem.

## II. THE MINIMAL CONSTITUTIONAL RESTRAINTS OF THE COMPACT CLAUSE

As noted previously, regional as opposed to national regulation has frequently been touted as the solution to the jurisdictional problem.<sup>55</sup> The solution is premised on the application of the Compact Clause to create multistate authorities assigned with either planning or other regulatory authority. There

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47. *Mississippi Power & Light Co. v. Mississippi, ex. rel. Moore*, 487 U.S. 354 (1988) (state may not review the prudence of the decision to continue construction of nuclear power plant owned by member of interstate holding company); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (state commission may not reallocate the power sales ordered by the FERC).

48. For a discussion of the literature and the apparent expansion of exceptions, see Frank P. Darr, *Mitigating Costs and the Preemptive Effect of Federal Rate Orders*, 13 ENERGY L.J. 61 (1992).

49. Energy Policy Act of 1992, 16 U.S.C.A. § 2621 (1992).

50. The Act defines a new entity called an exempt wholesale generator. *Id.* § 711. The EWG is a generating facility that may be affiliated with another utility or a holding company without triggering the registration requirements of the Public Utilities Holding Company Act.

51. *Id.* §§ 721, 722.

52. States retain whatever authority they currently have to review the transaction's compliance with state law and its fairness to competition. *Id.* § 711.

53. *Id.* § 731.

54. *Id.* § 724.

55. See *supra* notes 2-9 and accompanying text.

are several historical problems that emerge with the use of a compact, but none is a real impediment to implementation.

#### A. *A Little Legal History*

The Compact Clause is rooted in colonial history. In this country's pre-constitutional era, colonies used compacts to settle boundary disputes.<sup>56</sup> The practice continued with the adoption of the Articles of Confederation and the Constitution.<sup>57</sup> The language contained in section 10 of Article I of the Constitution is taken largely from the Articles of Confederation with almost no debate<sup>58</sup> and cursory discussion in the Federalist Papers.<sup>59</sup>

Without any guidance from the Constitution's promoters, early constitutional scholars developed competing views of the kinds of compacts within the Clause's coverage.<sup>60</sup> While the argument concerning scope has become largely academic, the more interesting trend in the literature and discussion of the Compact Clause is the changing role it plays in the federal system. Following the lead of Joseph Story, courts and commentators frequently referred to the clause as a protection against state efforts to frustrate federal authority.<sup>61</sup> The direction of the discussion, however, has reversed with the extension of the central government authority into so many areas that were traditionally exclusive state enclaves of regulation.<sup>62</sup> Thus, the more recent commentary

56. Frankfurter & Landis, *supra* note 3, at 692. Numerous legal histories discuss the general development of the Clause and its constitutional roots. In addition to the various articles and cases discussed in this section, see also Grad, *supra* note 9, at 834-35; Herbert H. Naujoks, *Compacts and Agreements Between States and Between States and a Foreign Power*, 36 MARQUETTE L. REV. 219, 222-24 (1953); H.B. Rubenstein, Note, *The Interstate Compact—A Survey*, 27 TEMPLE L.Q. 320 (1953); Note, *A Reconsideration of the Nature of Interstate Compacts*, 35 COLUM. L. REV. 76 (1935); Comment, *Some Legal and Practical Problems of the Interstate Compact*, 45 YALE L.J. 324 (1935).

57. Frankfurter & Landis, *supra* note 3, at 693-94.

58. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 169, 187 (1966). See *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461-62 n.11 (1978).

59. Federalist No. 44 contains the one brief discussion of the clause. After a discussion of the limitations on state authority over exports and imports, it concludes, "The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark." THE FEDERALIST NO. 44, at 302 (James Madison) (Jacob E. Cooke ed., 1961).

60. Compare 1 HENRY ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES* APP. 309-10 (1803) with 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1397 (1833). This debate has been largely, though arguably incorrectly, resolved in favor of Story's position. See David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact not a Compact?* 64 MICH. L. REV. 63 (1965); Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?* 3 U. CHIC. L. REV. 453 (1936).

61. Frankfurter & Landis, *supra* note 3, at 694; Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. JOHN'S L. REV. 1, 5 (1985); W. Michael Reisman & Gary J. Simson, *Interstate Agreements in the American Federal System*, 27 RUTGERS L. REV. 70, 78 (1973); VINCENT V. THURSBY, *INTERSTATE COOPERATION A STUDY OF THE INTERSTATE COMPACT* 4 (1953).

62. Grad, *supra* note 9, at 829; James P. Hill, *The Great Lakes Quasi Compact: An Emerging Paradigm for Regional Governance of United States Water Resources?* 1989 DET. C. L. REV. 1, 9; Marlissa S. Brigggett, Comment, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751, 767 (1991); Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989).



addresses the Clause not as a means of protecting the central government from the states but as a means of protecting state prerogatives from the central government.

Apart from the academic discussion, one method by which issues of scope and purpose of the Clause are played out is in litigation. Four issues exploring the tension repeatedly emerge in the cases. First, the debate addresses the question of whether the states in particular matters may act without congressional approval. Next, if congressional approval is necessary, the debate moves to the form of approval. Third, issues arise concerning the proper venue and law for interpreting compacts. Finally, the courts have struggled over the authority of Congress to amend or change a compact it has already approved. What emerges from this debate are some potential legal or constitutional hurdles that must be addressed by a compact's promoters and some doctrinal questions about the continuing vitality of an agreement that Congress subsequently opposes.

### *B. Does the Compact Need Congressional Approval?*

The need for congressional approval apparently turns on two factors.<sup>63</sup> First, there must be an agreement. In the *Northeast Bancorp* case,<sup>64</sup> the Court listed four factors in concluding that parallel state legislation that had the effect of permitting regional banking did not constitute a compact. The Court found that there was not any joint organization, no state's action was conditioned on action by another state, each state was free to modify its position, and there was no limit on reciprocity by any state.<sup>65</sup> Thus, compacts apparently require some formal undertaking by the affected states.

Second, the agreement must infringe on the federal government's political prerogatives. As developed through a series of Supreme Court cases, the Clause does not require approval of all agreements among states.<sup>66</sup> The doctrine defining the kinds of the compacts requiring congressional approval has developed into a relatively narrow area.<sup>67</sup> According to the Court, the Clause applies only to a set of agreements that impinge on federal sovereignty: "[T]he prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere

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63. Leslie W. Dunbar, Note, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753, 762-63 (1950) (suggesting that consent turns on the complexity, relative importance, and range of activities contained in the compact).

64. *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985).

65. *Id.* at 175.

66. *Virginia v. Tennessee*, 148 U.S. 503 (1893) (seminal case). In that case, the Court offered several examples of agreements not needing congressional approval such as the purchase of a building site in another state, contracts for transportation, and activities undertaken for mutual safety such as clearing wetlands. *Id.* at 518. Ironically, this portion of the decision was dicta.

Likewise, the Clause does not define what a compact or an agreement is. In practice, the terms may encompass a wide range of relationships. Reisman & Simson, *supra* note 61, at 75; Note, *Legal Problems Relating to Interstate Compacts*, 23 IOWA L. REV. 618, 622-23 (1938).

67. Indeed the notion of what constitutes a compact has been historically narrow. THURSBY, *supra* note 61, at 25.

with the just supremacy of the United States."<sup>68</sup> Despite the changes in the use of the compact (often to counter federal initiatives<sup>69</sup>), the Court has retained that policy position in relatively recent cases. "The relevant inquiry must be one of impact on [the] federal structure."<sup>70</sup> In practice, this interpretation means that most forms of joint state activity are outside the coverage of the Compact Clause.<sup>71</sup>

### C. *What Constitutes Congressional Approval?*

Congressional approval is designed to protect the federal government's interest in its own supremacy, but the timing and process of approval are not significant barriers to initiating a compact.<sup>72</sup> Case law establishes that Congress may grant its approval after<sup>73</sup> or before the states have entered into an agreement among themselves.<sup>74</sup> Approval also may be either direct or indirect.<sup>75</sup> For example, the approval may be through congressional actions that are consistent with adoption rather than formal adoption itself.<sup>76</sup> As the Court explained in *Virginia v. Tennessee*,<sup>77</sup> Congress consented to a boundary agreement between the states by its subsequent approval of federal elections, appointments, and taxing for an extended period of time. Moreover, historically Congress nearly automatically gives its approval when requested.<sup>78</sup> Thus, congressional approval, while constitutionally required, has not been a significant check on the use of compacts.

### D. *Is a Compact to be Treated as Federal or State Law?*

One of the more perplexing issues is whether the compact constitutes state or federal law for purposes of establishing federal court jurisdiction and

68. *Virginia v. Tennessee*, 148 U.S. at 519. See *Heron*, *supra* note 61, at 5. But see Engdahl, *supra* note 60, at 102 (reason for congressional approval is to encourage federal assistance and participation and to prevent preemption). But see *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 597 (1937) (states may enter an arrangement with the federal government that does not impair essence of statehood).

69. See *supra* notes 60-62 and accompanying text.

70. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

71. *Massachusetts v. Missouri*, 308 U.S. 1 (1939) (more than parallel state action necessary to establish a compact); *Wharton v. Wise*, 153 U.S. 155 (1894) (conservation of fishing on Potomac River); *Arkansas v. Tennessee*, 246 U.S. 158 (1918) (parallel action of state courts and legislatures do not evidence agreement); *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (adoption and foster care traditional state functions); *Stewart v. McManus*, 924 F.2d 138 (8th Cir. 1991) (prisons—same); *People v. Trans World Airlines, Inc.*, 728 F. Supp. 162 (S.D.N.Y. 1989) (coordinated state enforcement of state deceptive advertising laws—same); *Breest v. Moran*, 571 F. Supp. 343 (D.R.I. 1983) (corrections—same); *Blaine v. Murphy*, 265 F. 324 (D. Mass. 1920) (remarking state line—same); *Frederick L. Zimmerman & Mitchell Wendall, Bridging State Lines*, 46 NAT'L MUN. REV. 71, 72 (1957) (suggesting that approval not necessary for interstate municipal water treatment agreement).

72. *Frankfurter & Landis*, *supra* note 3, at 695.

73. *Virginia v. Tennessee*, 148 U.S. at 521.

74. *Id.*; *Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987); *Heron*, *supra* note 61, at 16.

75. *Heron*, *supra* note 61, at 13-14.

76. *Virginia v. Tennessee*, 148 U.S. at 521; *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 59-60 (1870); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 86-87 (1823); *Naujoks*, *supra* note 56, at 227.

77. *Virginia v. Tennessee*, 148 U.S. at 522.

78. *Reisman & Simson*, *supra* note 61, at 79.

issues of compact interpretation. The law in the area before *Cuyler v. Adams*<sup>79</sup> was confused because the Supreme Court was inconsistent in its approach.<sup>80</sup> First, authority existed for conflicting decisions over whether a federal question was presented by a compact.<sup>81</sup> Second, it was not clear whether the compact constituted federal law for purposes of interpretation of the agreement.<sup>82</sup> In its most recent rendition of the issue, however, the Court concluded that congressional consent turned an agreement into federal law and thus presented a federal question as a basis for independent federal review.<sup>83</sup> Thus, the Court appeared to adopt the law of the Union doctrine for interpreting and enforcing interstate compacts.<sup>84</sup>

Yet the Court does not appear to recognize the conflicts within its own decisions. Two years prior to its decision in *Cuyler*, it concluded that a regional planning authority created pursuant to a compact was a state agency subject to section 1983 civil rights requirements.<sup>85</sup> Under the statute, the agency would have to be acting under the color of state law to be liable. Apparently, then, the law of the Union does not apply in all cases.<sup>86</sup>

### *E. Binding Effect and Enforceability of a Compact*

The final area of repeated litigation may be generally classified as dealing with the effect and enforcement of compacts. Several themes emerge. First, compacts create both positive and negative contractual effects on the citizens of the signatory states.<sup>87</sup> Presumably, therefore, a state could not adopt a statute impairing those rights without also impairing contractual rights.<sup>88</sup> Nonetheless, several authorities urge that Congress may renege on its approval by

79. 449 U.S. 433 (1981).

80. *Washington Metro. Area Transit Auth. v. One Parcel of Land in Montgomery County*, 490 F. Supp. 1328, 1331 (D. Md. 1980), *aff'd*, 706 F.2d 1312 (4th Cir. 1983).

81. *Compare* *Continental Terminals, Inc. v. Waterfront Comm'n of N.Y. Harbor*, 486 F. Supp. 1110, 1112 (S.D.N.Y. 1980) *and* *Beebe v. Vaughn*, 430 F. Supp. 1220 (D. Del. 1977) *with* *Yancoskie v. Delaware River Port Auth.*, 528 F.2d 722 (3d Cir. 1975).

82. *Compare* *United States ex rel. Esola v. Groomes*, 520 F.2d 830 (3d Cir. 1975) (issue not resolved) *and* *Williams v. State*, 445 F. Supp. 1216 (D. Md. 1978) (congressional approval converted compact into federal law) *and* *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977) (compact created agency acting under federal law that was not subject to state takings provisions) *with* *California v. City of South Lake Tahoe*, 466 F. Supp. 527 (E.D. Cal. 1978) (state reserved right to apply state law) *and* *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7 (D. Or. 1964), *aff'd*, 343 F.2d 911 (9th Cir. 1965) (state does not waive immunity by joining compact).

83. *Cuyler v. Adams*, 449 U.S. 433, 438, 442 (1981).

84. For a critique of the law of the Union doctrine as applied to compacts, see David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965).

85. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

86. Another curious problem that the Court has not yet addressed is the effect of congressional consent for a compact that does not require consent. *Washington Metro. Area Transit Auth. v. One Parcel of Land in Montgomery County*, 706 F.2d 1312 (4th Cir. 1983) (congressional approval creates federal law).

87. *Poole v. Lessee of Fleegeer*, 36 U.S. (11 Pet.) 185, 209-10 (1837) (boundary decision between states created rights in land of affected state citizens).

88. In a similar vein, see *Naujoks*, *supra* note 56, at 226 (compact may not be used to divest individual sovereign rights).

preempting the actions of the compact.<sup>89</sup> Additionally, one authority argues that Congress may amend its approval.<sup>90</sup>

Court decisions and practice authorize three other federal checks on interstate compact agencies. First, Congress as part of its approval may attach conditions to its approval for the operation of the compact that are not stated in the original agreement.<sup>91</sup> Second, Congress may provide for a federal presence in the regional agency.<sup>92</sup> One case also supports the conclusion that the creation of a regional agency does not transfer authority over federal property within the compact region, but was reversed on a complicated reading of two federal statutes as complementary.<sup>93</sup>

The status of less blunt means of federal supervision of a regional agency, however, is less certain. In one celebrated case, *Tobin v. United States*,<sup>94</sup> a congressional committee sought to cite a regional authority director with contempt of Congress for failure to turn over the internal records of the agency. On technical grounds, the appellate court refused to cite the director, but indicated that Congress may have the authority to supervise "operational" compacts "to insure that no violence is done by these compacts to more compelling federal concerns."<sup>95</sup>

#### F. Interim Conclusions

Underlying the Compact Clause cases is a policy to protect federal pre-

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89. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1855); *Washington Metro. Area Transit Auth. v. One Parcel of Land in Montgomery County*, 490 F. Supp. at 1333; Rubenstein, Note, *The Interstate Compact—A Survey*, *supra* note 56, at 324-25; Note, *Congressional Supervision of Interstate Compacts*, *supra* note 9, at 1431. When approval is not necessary, Congress' authority to preempt is even clearer. Dunbar, Note, *Interstate Compacts and Congressional Consent*, *supra* note 63, at 760. Finally, Congress theoretically could revoke its consent through a retraction or subsequent inconsistent legislation. Note, *Legal Problems Relating to Interstate Compacts*, *supra* note 66, at 628.

90. *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 270 F. Supp. 947, 950 (S.D.N.Y. 1967).

91. In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281-82 (1959), the Court stated: The states who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached. So if there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States.

As a result, the Court concluded that the states were subject to Jones Act liability.

92. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27-28 (1951); *Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364 (1986). *But see Bickerstaff v. Thornburgh*, 755 F. Supp. 977 (D. Kan. 1991) (same); *Joyner v. Henman*, 755 F. Supp. 982 (D. Kan. 1991) (same); *Miller v. Thornburgh*, 755 F. Supp. 980 (D. Kan. 1991) (same); *Venable v. Thornburgh*, 766 F. Supp. 1012 (D. Kan. 1991) (Compact Clause does not contemplate agreements with the federal government). These decisions do not appear consistent with the development of the modern compact agency although they are correct in stating that the language of Compact Clause does not provide for agreements between a state and the national government.

93. *Executive Limousine Serv. Inc. v. Adams*, 450 F. Supp. 579 (D.D.C. 1978), *rev'd*, *Executive Limousine Serv. Inc. v. Goldschmidt*, 628 F.2d 115 (D.C. Cir. 1980).

94. 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

95. *Id.* at 273. For a discussion of *Tobin*, see Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682 (1961) and Richard H. Leach, *The Federal Government and Interstate Compacts*, 29 FORDHAM L. REV. 421 (1961).

rogatives from intrusion by the states. The need for congressional approval serves as a check against those regional actions that might have untoward effects on states with similar regional interests that are not included in the compact and those outside the region that might nonetheless be injured by the compact. (As the next section suggests, the possibility of injury is real.) Nonetheless, the check on compacts is narrowly defined. The frequent decisions indicating either implicit approval or no need for approval suggest that the Court is not willing to engage in the economic and political review necessary to assess the appropriateness of a compact for a particular problem. Thus, the constitutional problems associated with compacting are minimal.

### III. TWO ECONOMIC VIEWS OF THE APPROPRIATE LEVEL OF REGIONALIZATION

#### A. *The Concept of Externalities*

The economic and political problems of administration, however, are significant. The economic problem associated with a compact is partly (or arguably totally) one of externalities. Whether a state joins a compact or can convince its neighbors in the federal legislature to consent to the compact will turn on the intraregional and interregional effects of the agreement. This notion of externalities infects much of the debate concerning the appropriateness and effectiveness of the approach to regional regulation.<sup>96</sup>

An externality is a cost or benefit that is not borne or received by the person who causes it.<sup>97</sup> A classic example of an externality is pollution. The utility polluter, absent regulation, causes the cost of its activity to fall on individuals outside its service area. Thus, the customer who causes the generation by its demand for energy does not incur the cost that is shifted to the downwind victim. This unrecognized cost may also result in increased consumption since the customer does not see the product's full cost and thus purchases more than he might otherwise.<sup>98</sup>

The problem of externalities emerges in discussions concerning the choice of the appropriate governmental unit to regulate an activity. The externality occurs because of "the incentive each state has to improve its own position by imposing costs on residents of other states."<sup>99</sup> They may attempt to impose these costs through taxes or regulations borne by out-of-state citizens or by attracting capital or labor through incentives.<sup>100</sup> At first glance, at least, the proper governmental unit to address a particular problem would be large enough to encompass all the costs within the region.<sup>101</sup> The problem, how-

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96. See THURSBY, *supra* note 61, at 6.

97. JAMES C. BONBRIGHT ET AL., *PRINCIPLES OF PUBLIC UTILITY RATES* 167 (2d ed. 1988).

98. Peter H. Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J. L. & POL. 247, 250-52 (1990).

99. Susan Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152, 152 (1981).

100. *Id.*

101. Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, 19 (1969) ("the governmental unit chosen to deal with any given activity should be large enough to 'internalize' all of the externalities

ever, becomes more difficult with analysis. At least two views of the importance of externalities emerge.

*B. Externalities as a Barrier*

In the first view (advanced by Joseph Spengler in 1937), the problem of externalities presents a practical barrier to the effective use of regional compacts.<sup>102</sup> Spengler identified three potential negative effects to compacting. First, compacting may injure citizens in noncompacting states.<sup>103</sup> The economic injury occurring in noncompacting states arises from the cartel effects of the compact. If production is decreased in compacting states, prices rise both in compacting and noncompacting states. At the same time, resources are redirected in both compacting and noncompacting states in competition with existing resources in both. Both of these factors in turn affect the income distribution of persons both within and outside the compacting area.<sup>104</sup>

Second, the desired control may not be possible unless all states are joined, thus obviating the need for a compact.<sup>105</sup> The second problem occurs because the economic benefits of control may not result. If the cartel forces prices up, migration of new labor or capital into the region will occur. If the cartel forces prices down, the migration will move in the other direction. The only check would be some sort of prohibition of the migration or a cartel price that did not exceed the cost of migration.<sup>106</sup>

Third, there may be ethical constraints that suggest the use of national decision making and controls.<sup>107</sup> In this final argument, Spengler suggests that the need for adequate representation of various interests is best found in a national regime.<sup>108</sup> "Conflict between states, or between groups of states, while not wholly avoidable, could presumably be reduced by relegating to the national legislature all economic controls whose effects necessarily transcend the area of any group of states that might establish an economic control by means of interstate compacts."<sup>109</sup>

In general, compacting is likely to have these adverse effects on noncompacting states unless one of three rather unlikely conditions occurs: the effects of the compact are limited to the compacting states; the net effect on the noncompacting states is positive; or the noncompacting states are compensated for the losses they incur by the compacting states.<sup>110</sup> As a practical matter, none of these conditions is likely to occur. Thus, the solution to

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which the activity generates."'). For a similar assumption, see Joseph J. Spengler, *The Economic Limitations to Certain Uses of Interstate Compacts*, 31 AM. POL. SCI. REV. 41, 43 (1937).

102. Joseph J. Spengler, *The Economic Limitations to Certain Uses of Interstate Compacts*, 31 AM. POL. SCI. REV. 41, 43 (1937).

103. *Id.* at 42.

104. *Id.* at 44-45.

105. *Id.* at 42.

106. *Id.* at 46-47.

107. *Id.* at 42.

108. *Id.* at 48-49.

109. *Id.* at 49.

110. *Id.* at 43.

regional problems cannot be addressed effectively within the context of regional compacts because of the existence of uncompensated externalities.

*C. Externalities as a Necessary but Insufficient Cause*

In a discussion of the choice between federal and state levels of regulation that appears equally relevant to the adoption of a regional compact among states, Gordon Tullock argued that externalities are important to the decision as a cost that must be factored into the equation of the optimum level of regulation, but they are not decisive. The argument is premised on the assertion of an ever-extending ripple of externalities. Tullock begins by breaking down the costs of regulation into the costs created by adding a layer of government (operating costs) and externalities. Tullock then demonstrates that the optimal size of a unit based on total costs is greater than the operational cost of the unit because the unit must attempt to internalize some of the external costs.<sup>111</sup> Because the operating costs of a program can be mitigated by privatizing them (thus there are theoretically no costs associated with another layer of government), the operating costs may be dropped from the equation for judging the optimal size of a unit for regulation. The effect of doing that, however, leaves the factor of external costs which, because they are constantly decreasing as the size of the region increases, cannot form an objective basis for a decision. As Tullock noted, since even street cleaning has some external costs, the argument for the appropriate governmental unit eventually might be for a global street cleaning authority.<sup>112</sup>

Given Tullock's premise that all governmental activities have some external cost, he then must deal with the common assumption that certain relatively small sizes for governmental entities are justified. He notes that other economic reasons account for the small size of governments. First, voters desire smallness for the increased value that results from greater voice in their own affairs. In essence, voters suffer less cost from unwanted policies as the unit becomes smaller and homogeneity of preferences increases.<sup>113</sup> Second, and inversely, satisfaction decreases as the unit becomes larger. This result is due to the fact that the larger unit can provide fewer choices and has fewer informational opportunities for the seller to make an appropriate adjustment to citizen preferences.<sup>114</sup> Finally, as the region increases in size, bureaucratic costs in the form of agency effects will increase.<sup>115</sup> But this argument leads to a logical problem as well. Pursued to its logical conclusion, the argument would reduce government into an impressively large and uncontrollable number of small and overlapping political units. The practical and economic solution to the logical problem is the appointment of agents to deal with clusters of problems at particular levels of geographic inclusion. The appropriate size (i.e. local, state, regional, or national) for these units depends on the point at which the costs and inefficiencies associated with agency control are mini-

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111. Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, at 19-20 (1969).

112. *Id.* at 19.

113. *Id.* at 21-22.

114. *Id.* at 23.

115. *Id.* at 25.

mized.<sup>116</sup> The optimal solution then is one that best clusters the various costs for a particular type of regulation.

#### *D. More Interim Conclusions*

The economic approaches of Spengler and Tullock do not provide a definitive answer concerning the appropriateness of regional regulation. Spengler suggests that the problem of externalities precludes their effective use in all but a small class of cases in which costs can be internalized or compensating payments can be made from the compacting to the noncompact states. His approach, however, ignores the likely fact that externalities are a constantly diminishing function. Recognizing that problem, Tullock argues that the existence of these uncompensated externalities need not be the controlling factor in deciding to adopt a regional organization for rate making or planning. Instead, the determination would turn on whether regional clustering is the appropriate or cost efficient mechanism. This determination rests on a comparison of the legally available alternatives.

Three options would appear to be relevant to the regulation of electricity. First, the states could each attempt to regulate in parallel with one another, but the problems with that approach are readily apparent. There are constitutional constraints that prohibit a state from taking action regarding interstate transmission and wholesale rates; and the dimensions of the concerns exceed the geographic boundaries of any one state, raising clear problems of externalities. The second approach would be to federalize the task. On the positive side, the problem of externalities would be minimized because the basic units of transmission would be encompassed within the regional authority. On the negative side, federalization may lead to decreased accountability, the same kinds of concerns that lead to the division of authority found in the Federal Power Act. The third alternative would be that suggested by S. 2607, the creation of regional authorities. Again there are both positive and negative effects. Increased accountability accompanies increased externalities. On an initial examination, therefore, there is little to recommend either of the latter alternatives over the other.

The analysis, however, would not be complete without a further examination of potential administrative costs and unique political problems associated with regional organizations. As Tullock notes, these costs must be factored into the determination of the most efficient clustering of the regulatory effort. Given the history of political failures associated with regional policy regulation, this cost may provide a determinative reason for rejecting it as an approach to electric regulation.

#### IV. POLITICAL AND ADMINISTRATIVE CONSTRAINTS TO REGIONAL REGULATION

There are several costs or problems that may frustrate implementation of regional regulation. First, regional regulation creates another layer of political friction. That friction may arise both externally and internally as states com-

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116. *Id.* at 26-28.



pete for authority. Second, regional regulation is notorious for the number and degree of administrative concerns inherent to this form. As a practical consequence, the range of circumstances in which compacts have succeeded is relatively narrow.

#### A. Political Constraints

The same notion of externalities that makes the economic underpinnings of compacting so difficult also results in political constraints. Injury may occur to noncompacting states by the compacting states and result in a lack of cooperation.<sup>117</sup> To the extent that the compact needs national political approval, strong coalitions may form among states within the region that are not satisfied with the compact arrangement being proposed and those states outside the region willing to trade their support on other issues. Likewise, these coalitions might be used to frustrate the activities of the compacting group by either failing to approve the compact or enacting preemptive legislation.<sup>118</sup> The solution to these political concerns is not easy. At the least, the compact needs to be coincident with the geographic effects of the problem addressed,<sup>119</sup> but electric markets are not likely to be coincident with political ones.<sup>120</sup>

Problems also may emerge among the compacting states even if their interests are economically coincident. First, states may refuse to delegate some of their autonomy of decision making to the compact.<sup>121</sup> Second, states may be unwilling properly to finance the regional body. Numerous studies have noted the need for financial as well as political sovereignty for successful regulatory action.<sup>122</sup> Without that independent financial support, the regional authority is subject to changes in political wellbeing that are even less under its control.

In short, a regional agency must have some of the attributes of sovereignty to be successful. Without that political independence from the states that created it, it faces too many potentially conflicting forces from without and within; and lacking financial independence it may have the power to do nothing but beg for resources.<sup>123</sup>

#### B. Consequences: What Works, What Does Not

The political factors discussed above have some practical consequences to

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117. Rose-Ackerman, *supra* note 99; C. Ben Dutton, *Compacts and Trade Barrier Controversies*, 16 IND. L.J. 204, 216 (1940).

118. Recent evidence of these kinds of concerns has arisen under the Pacific Northwest arrangement, as states south of the region struggle for cheap Northwest power that is subject to the compact.

119. THURSBY, *supra* note 61, at 138.

120. See *infra* part IV.B.

121. Hill, *supra* note 62, at 13. He further notes a general resistance to regional institutions.

122. Robert G. Dixon, Jr., *Constitutional Bases for Regionalism: Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH. L. REV. 47, 57 (1964); Hill, *supra* note 62, at 13; J.B. Ruhl, *Interstate Pollution Control and Resource Development Planning: Outmoded Approaches or Outmoded Politics*, 28 NAT. RESOURCES J. 293, 308-09 (1988).

123. DERTHICK, *supra* note 1, at 226.

the success of regional regulation.<sup>124</sup> Simply, some types of activities are better suited for regional forms than others. One scholar of compacts, Richard Leach, has noted several bases for success. First, the device must be perceived as a last resort—other forms of regulation are not perceived as options. Second, the agency must stay within its politically defined role. Third, it must have a dedicated management. Fourth, it must have a clear purpose or function. Fifth, it must have federal cooperation and support.<sup>125</sup> Most telling, however, is the often repeated judgment that the regional organization be an administrative rather than a political entity.<sup>126</sup> This conclusion is the natural extension of Leach's second and fourth points. As the agency becomes more amorphous in its goals and political identity, it becomes subject to the "tendency of compacts . . . to encourage particularism, selfishness, and jealousy on the part of individual states."<sup>127</sup> Long term planning and regulation thus have not been the long suits of regional devices. Political and financial constraints prevent successful continuous operation.<sup>128</sup>

A study of the Delaware River Basin Compact provides an example of the political posturing that is likely to occur in a regional planning agency with a broadly defined political mission. The Delaware River Basin Commission is an interstate compact agency with the Department of Interior as a voting member. Its responsibilities include the development of a basin conservation plan. An extensive study of the decision making process of the compact agency showed that the state and federal actors did not avoid taking what were essentially parochial views based on their federal or state positions.<sup>129</sup> The Commission considered five options developed by a team of federal experts.<sup>130</sup> Despite the extensive empirical work demonstrating one clean up proposal superior to the others, the state and federal members voted to adopt a more expensive, but questionably more effective, approach based on political factors.<sup>131</sup> In doing so, the actors looked for advice from their own advisors and ignored that offered by the experts hired to present regional views.<sup>132</sup> In the end, the institutional incentives to secure authority and the resulting polit-

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124. As Martha Derthick suggests, "To win the fight for existence and a significant share of public functions, it must have extraordinary constituency support or extraordinary means of self-support." DERTHICK, *supra* note 1, at 226.

125. Leach, *supra* note 9, at 284. Others have noted some of the same factors. PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* 6 (1986) (dedicated management and broad social support); THURSBY, *supra* note 61, at 137 (dedicated management); Ruhl, *supra* note 122, at 308-09 (same). See also DERTHICK, *supra* note 1, at 192-93.

126. THURSBY, *supra* note 61, at 138. This theme is consistent with an earlier conclusion by the National Resources Committee. It concluded that compacts were appropriate when confined narrowly to problems for which a neatly tailored solution could be devised. NATIONAL RESOURCES COMMITTEE, *REGIONAL FACTORS IN NATIONAL PLANNING AND DEVELOPMENT* 51 (1935). It further concluded the form was not effective for social or economic planning because the agency generally lacked the broad authority for continuous actions. *Id.*

127. NATIONAL RESOURCES COMMITTEE, *supra* note 126, at 52.

128. THURSBY, note 61, at 140-41.

129. BRUCE ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY*, 165-207 (1974).

130. *Id.* at 14.

131. *Id.* at 193-200.

132. *Id.* at 168.

ical credit frustrated regional decision making.<sup>133</sup>

### C. *Countervailing Benefits of Regional Authorities*

While most of the literature suggests some significant limitations for regional authorities, it is not one-sided.<sup>134</sup> One note, for example, suggests that informal compacts can promote decentralization of power, civic participation, and diversity and innovation in regulation.<sup>135</sup> Likewise, there may be a better match of costs and benefits of programs (if one assumes that the problems of externalities is minimal).<sup>136</sup> Each of these benefits, however, depends on the success of the organization within a particular milieu. In practice, the benefits have not been dramatically apparent. Thus, any alleged benefits flow from the success of the device in a particular setting.

### D. *Another Set of Interim Conclusions*

Because of externalities, regional organizations face some difficult limitations. First, externalities define blocs of political interests that are not interested in the development or success of the organization. Second, the organization may face significant pressures from within. Third, these agencies often need a source of independent financing to avoid the vagaries of state politics that may result in fiscal failure. Finally, the compact must be an outgrowth of strong political and administrative support both at the state and federal level. Taken together, Martha Derthick's conclusion that a little luck is necessary for a successful compact is very telling.<sup>137</sup> Absent a very strong political commitment and administrative leadership to make the project work, the regional organization is likely to disappoint its friends and confirm its critics.

## V. LEGAL, ECONOMIC, AND POLITICAL FACTORS AFFECTING MULTISTATE ELECTRICITY PLANNING

These conclusions notwithstanding, scholars and government authorities have suggested regional regulation of electric utilities. The most recent example of this enthusiasm is S. 2607. First proposed in September 1991 by the Arkansas Public Service Commission and Entergy, a regional holding company, it received quick endorsement by influential Senate leaders and early hearings in Washington. As suggested in the preceding sections, the legal problems of the proposed compact are minor when compared to the political difficulties regional electric planning would present.

### A. *S. 2607, 102d Congress*

The bill as originally submitted by Senator Bennett Johnston, chair of

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133. *Id.* at 188-89.

134. See Leach, *supra* note 9; Michael Arny, *The Wisconsin Transmission Interface Study: A Model for Regional Electric Transmission Planning*, ELEC. J. 18 (June 1992).

135. Note, *supra* note 62, at 860-62. In a similar vein, see Dixon, *supra* note 122, at 72.

136. NATIONAL RESOURCES COMMITTEE, *supra* note 126, at 49.

137. DERTHICK, *supra* note 1, at 192.

the Senate Energy and Natural Resources Committee, provides for a basic tradeoff of regional planning for greater certainty in cost recovery. To encourage support for the additional regulation by the states and the FERC, holding companies are assured that prudently incurred investments to carry out the plan would be recovered. The bill accomplishes this tradeoff through several alternatives for planning.

### 1. The Plan

According to the proposal, the goal of any regional effort is the creation of an integrated resource plan. The plan will evaluate various resources and actions including the allocation of existing resources, the construction of new ones, power acquisitions, and conservation.<sup>138</sup> The plan is to set the range of resources at the lowest system-wide costs which balance the interests of shareholders and customers. Further, the plan is to specify which subsidiaries are responsible for purchases, assign risks associated with the acquisitions to customers and shareholders, allocate the costs of resources, and provide a method for periodic updates of the plan at least once every two years.<sup>139</sup> The plan would allow the inclusion of previously included costs, but would disallow costs associated with pre-plan disallowances made by states.<sup>140</sup>

### 2. Approval Process

The proposal contains several ways in which a regional integrated resource plan may be adopted. These include (1) adoption through a regional board; (2) petitions by a state commission or the operating subsidiaries subsequently approved by the FERC; and (3) adoption by the FERC of consistent state plans as a regional plan.

The first alternative is the adoption of a plan by a board pursuant to a multistate compact. The proposal contains congressional approval to form a regional board from the states whose residents purchase from the subsidiaries of a regional electric holding company.<sup>141</sup> The board would consist of at least one member from each state.<sup>142</sup> The board would determine its own organization and procedures<sup>143</sup> and would be authorized to order the operating subsidiaries to propose a regional integrated resource plan which the board could approve or modify within 12 months of filing.<sup>144</sup> The board would be required to hold trial-type hearings unless all parties waived the hearing.<sup>145</sup> After the board approved a plan, the operating subsidiaries would be required to submit the plan to the FERC.<sup>146</sup> The Commission could not modify the plan

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138. S. 2607, 102d Cong., 2d Sess. § 101(1)(A) (1992).

139. *Id.* § 101(1)(B).

140. *Id.* § 101(1)(C). The provision includes a caveat permitting the exclusion of costs that represent excess capacity.

141. *Id.* § 102(b)(1).

142. *Id.* § 102(b)(2)(A).

143. *Id.* § 102(b)(2)(B).

144. *Id.* §§ 102(b)(3)(A)-(B).

145. *Id.* § 102(b)(3)(B).

146. *Id.* § 102(b)(4).

approved by the regional board.<sup>147</sup>

As an alternative to a regional board, the proposal provides that the subsidiaries or a state commission may initiate a plan with the FERC. The subsidiaries are directed to initiate through a petition accompanied with a proposed plan.<sup>148</sup> If a state commission files a petition, the companies must submit a plan within 60 days.<sup>149</sup> The states then have 120 days to submit an alternative.<sup>150</sup> The holding company's right to file a petition with the FERC is conditioned on a filing with the affected state commissions 180 days prior to the FERC petition.<sup>151</sup> If during the 180 day period the states form a regional board, the filing by the subsidiary is suspended until the states certify that they will not complete a plan or for 12 months, whichever is earlier.<sup>152</sup> If the petition is not dismissed, the FERC within 18 months of the filing may approve the plan if it is not unjust or discriminatory, or issue an order explaining why it has not approved the plan.<sup>153</sup> If more than one plan is submitted, the FERC is directed to approve the one that is most likely to minimize projected system cost for the operating subsidiaries as a whole.<sup>154</sup> If the FERC finds that no submitted plan is consistent with the statutory requirements, it shall explain its findings and set a time for the submission of revised plans.<sup>155</sup>

The third potential method for approving a plan is listed as an exemption to the regional board approach. If each state commission with authority to set the retail rates of the operating subsidiaries has approved an integrated resource plan and filed the plan with the FERC and the other commissions, then the plans taken together would be deemed the regional plan unless the FERC determines within 180 days that the plans were not consistent or did not contain the elements of a regional plan.<sup>156</sup>

### 3. Effect of Adopted Plans

Once a plan is adopted, it would be binding on the subsidiaries.<sup>157</sup> State commissions likewise would be bound to issue orders consistent with the plan.<sup>158</sup> Finally, the FERC could not approve any action or rate that is inconsistent with the plan.<sup>159</sup>

On the other hand, the proposal also seeks to protect existing state and federal authority. It would not change the states' authority to set retail rates

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147. *Id.*

148. *Id.* § 102(c)(1).

149. *Id.*

150. *Id.*

151. *Id.* § 102(c)(2).

152. *Id.*

153. *Id.* § 102(c)(3).

154. *Id.*

155. *Id.* § 102(c)(4).

156. *Id.* § 102(b)(5).

157. *Id.* § 103(a)(1).

158. *Id.* § 103(a)(2). Enforcement would be accomplished through actions brought in the federal court of the state commission whose actions an affected party sought to enjoin. *Id.* § 103(b).

159. *Id.* § 103(a)(3).

or disrupt siting authority,<sup>160</sup> but a siting decision inconsistent with the construction needs established by the plan would be invalid.<sup>161</sup> Likewise, the FERC's rate making authority would not be modified except as expressly contained in the proposal.<sup>162</sup>

#### 4. Federal Review

Enforcement and judicial review are controlled by the federal government under the bill. Complaints concerning the failure to comply with a plan are directed to the FERC or a district court.<sup>163</sup> A complaining party may then seek judicial review of regional board or FERC orders in a federal appeals court under the procedures set out in the Federal Power and Administrative Procedures Acts.<sup>164</sup> While the bill does not specifically state that federal standards of interpretation apply, the fact that a Commission order would be involved and the existence of federal involvement probably require that result.<sup>165</sup>

#### *B. A Legal and Institutional Critique of the Regional Planning Proposal*

The framework developed in the preceding sections offers a method for analyzing the Arkansas proposal along legal, economic, and political lines. In general, the proposal solves the conventional constitutional problems associated with the use of the compact clause, but it leaves many practical questions concerning its implementation.

##### 1. Legal Issues

In the prior section discussing the constitutional law issues surrounding compacts,<sup>166</sup> four issues emerged.<sup>167</sup> S. 2607 avoids most of these problems by simply providing a definitive answer to each. First, the bill contains language of congressional approval of the compact. Second, timing is not a problem since Congress may approve a compact in advance. Third, the bill provides that interpretation is to be governed by federal law, and it assigns jurisdiction of claims arising under the bill to federal courts. Fourth, enforcement issues are as murky in this area as they are elsewhere in the discussion of compacts. Presumably, Congress could overrule the effects of a compact by assigning additional authority to the FERC or rescind its approval. This problem, however, is not unique to S. 2607; any proposal would face the same problems. Moreover, the provisions permitting each state and federal agency to retain its general regulatory authority probably go a long way in resolving potential rea-

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160. *Id.* §§ 104(a)(1),(2)(A).

161. *Id.* § 104(a)(2)(B).

162. *Id.* § 104(b).

163. *Id.* § 103(b).

164. *Id.* § 105(a).

165. DAVID E. ENGBAHL, CONSTITUTIONAL POWER FEDERAL AND STATE IN A NUTSHELL 402 (1974).

166. See *supra* notes 55-95 and accompanying text.

167. The four issues are the need for congressional approval, the manner of approval, the applicable law and federal question status of the compact, and the manner of enforcement. *Id.*

sons for quitting a compact (while at the same time making effective enforcement more difficult). In general, then, the bill meets the constitutional requirements of the Compact Clause.

## 2. Economic Constraints

The problem of externalities discussed by Spengler and Tullock presents the first of many more significant difficulties for regional electric planning and regulation than the legal ones. If Spengler is correct in his assumption that regional planning is inappropriate unless either all the externalities are encompassed within the region or compensating allowances are made to noncompact states, then regional regulation is not appropriate. The first condition probably cannot be satisfied because the market and physical structure for electricity sales extends beyond the boundaries of the holding company.<sup>168</sup> The second condition is more likely in that transmission rate structures theoretically could be devised to compensate nonmembers for the external costs placed on them from transmission.<sup>169</sup> The ability to compensate, however, still may not justify the compact if it is not administratively sound or if decisions should be made nationally. In the case of power generation, these are significant concerns.

If Tullock is correct, however, the existence of these uncompensated externalities need not be the controlling factor in deciding to adopt a regional organization for rate making or planning. Instead, the determination would turn on whether regional clustering for electricity regulation is the appropriate or cost efficient mechanism. This determination turns on a comparison of the various alternatives that are legally available. There is no attempt here to suggest a definitive conclusion on this matter, but based on the effectiveness of regional regulatory practices that have been previously studied,<sup>170</sup> regional regulation of the Nation's electric grid does not appear to be an effective means of addressing the asserted problems of the current structure. Indeed, as a political entity, a regional planning authority seems doomed to fail.

## 3. Political Constraints

A previous section identifies several factors necessary for the successful operation of a regional authority.<sup>171</sup> As developed by Derthick and Leach, these factors included a politically defined role, a clearly stated purpose, dedicated management, the exclusion of other regulatory alternatives, and federal cooperation. Flowing from those factors is the conclusion that regional compacts or organizations were ill-suited to continuing political activities. This conclusion followed from the fact that regional agencies do not have a natural constituency in either federal or state governments and thus are driven to success only when there is agreement as to goals, a committed management, and financial independence. The necessary conditions for success thus depend on

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168. See *supra* notes 18-25 and accompanying text.

169. Alfred F. Mistr Jr. & Everard Munsey, *It's Time for Fundamental Reform of Transmission Pricing*, PUB. UTILS. FORT., July 1, 1992, at 13.

170. See *supra* notes 9, 117-137 and accompanying text.

171. See *supra* notes 117-137 and accompanying text.

some element of luck or timing and the perception that regional regulation is a last resort.

In many ways, S. 2607 and the current political environment do not satisfy the conditions necessary for success. First, any interstate commission would have an ill-defined role. For example, there is no attempt to rationalize the confused role of the SEC and the FERC.<sup>172</sup> Likewise, the bill does not rationalize the authority over generation and siting. In the same vein, the bill leaves some very sensitive political and economic decisions to the regional planning agency. Fundamental definitions concerning what constitutes an appropriate plan are at best vaguely defined.<sup>173</sup> Additionally, opponents challenge the workability of the various approaches to regional regulation contained in the bill. For example, the bill lacks procedural definitions. There are not any descriptions of how the board is formed or what powers each member has. Likewise there is no provision concerning the voting power of each state. Nor is there any provision for breaking deadlocks. Some also have complained that the process is likely to be inflexible and protracted.<sup>174</sup> Finally, there are no standards for rule making or provisions for funding.<sup>175</sup> These deficiencies could be troublesome when concerns of one state conflict with those of another.

Opponents also note that regional planning is inconsistent with other federal directives. One concern is the operation of the statute in an environment of increasing reliance on market factors such as the expansion of independent power producers.<sup>176</sup> Another issue raised by the FERC is the effect of the bill on the control of interstate transmission facilities.<sup>177</sup> Coordination among states with different standards for integrated resource planning and for holding companies with responsibilities to power pools also were issues raised during Senate hearings.<sup>178</sup>

Second, commitment on several fronts also appears to be lacking. If federal cooperation is necessary,<sup>179</sup> then this proposal is in trouble from the start. FERC support is at best lukewarm.<sup>180</sup> As an alternative, the FERC would

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172. *Senate Hearing, supra* note 46, at 92 (statement of Larry A. Frimerman, Federal Liaison, State of Ohio Office of the Consumers' Counsel).

173. *See supra* notes 138-140 and accompanying text.

174. *Senate Hearing, supra* note 46, at 99 (statement of H. Allen Franklin, President and Chief Executive Officer, Southern Company Services, Inc.); *Senate Hearing, supra* note 46, at 51 (statement of Charles A. Patrizia).

175. *Senate Hearing, supra* note 46, at 50 (statement of Charles A. Patrizia).

176. *Senate Hearing, supra* note 46, at 20 (statement of William S. Scherman, General Counsel, FERC); *Senate Hearing, supra* note 46, at 50 (statement of Charles A. Patrizia).

177. *Senate Hearing, supra* note 46, at 20 (statement of William S. Scherman, General Counsel, FERC).

178. *Senate Hearing, supra* note 46, at 99 (statement of H. Allen Franklin, President and Chief Executive Officer, Southern Company Services, Inc.); *Senate Hearing, supra* note 46, at 50 (statement of Charles A. Patrizia).

179. And obviously under this legislation it is, since the FERC has substantial control over the adoption of any proposal. *See supra* notes 141-156 and accompanying text.

180. *Senate Hearing, supra* note 46, at 20 (statement of William S. Scherman, General Counsel, FERC); *State Regional Planning Seen Getting Deference, Not Carte Blanche*, INSIDE FERC, Oct. 14, 1991, at 13.



rather see the use of joint conferences to settle regional matters.<sup>181</sup> Thus, it appears that the FERC is not strongly committed to sharing its responsibilities over regional matters. That cooperation will be important both for the adoption of the bill and because the legislation creates new administrative responsibilities for the agency.

Federal intransigence also may arise out of the deregulation movements. As expected, some complain that this proposal is an additional unnecessary layer.<sup>182</sup> A variation on this theme is that the regional board will present the companies with another forum in which they will have to defend themselves from having to buy unwanted power from new unregulated generation facilities.<sup>183</sup> Both arguments have some merit and run counter to the deregulation dogma that is so popular currently. In any case, these sorts of arguments would provide the fodder for a noncommittal approach on the part of the FERC.<sup>184</sup>

It is not clear that the alleged beneficiaries are committed to the proposed changes. There were some objections to the bill from traditional supporters of regulation. For example, one concern was that the standards would become too favorable to the utilities: a consumer advocate argued that the bill could preclude review of certain costs through a form of preapproval.<sup>185</sup> Another suggested that the bill might preclude the use of a "used and useful" standard of review (despite a provision in the bill that does not preclude a state from adjusting rates for excess capacity, the common way the issue is presented).<sup>186</sup> The Louisiana Commission also raised a concern about the ability of state commissions to participate effectively, given resource constraints.<sup>187</sup> In a similar vein, the Ohio Consumers' Counsel urged that consumer advocates be given statutory standing in regional planning efforts.<sup>188</sup>

Finally, the proposal is not perceived as a last resort to regional planning. There is an argument that there is no need for regional planning statutes

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181. Senate Hearing, *supra* note 46, at 20 (statement of William S. Scherman, General Counsel, FERC); *State Regional Planning Seen Getting Deference, Not Carte Blanche*, INSIDE FERC, Oct. 14, 1991, at 13.

182. Senate Hearing, *supra* note 46, at 99 (statement of H. Allen Franklin, President and Chief Executive Officer, Southern Company Services, Inc.); Craig S. Cano, *Terzic Pans Regional Regulation by States, Advocates Joint Boards*, INSIDE FERC, Nov. 18, 1991, at 3.

183. NARUC Official, *FERC Lawyer Differ on Implications of Native Load Issues*, ELEC. UTIL. Wkly, Oct. 14, 1991, at 11.

184. The FERC is not particularly enamored with state participation in its activities in any case. Under provisions permitting it to involve state authorities in its activities, the Commission almost uniformly rejects each such request. See Frank P. Darr, *A Critical Analysis of Joint Board Policy at the Federal Energy Regulatory Commission*, 30 SAN DIEGO L. REV. (forthcoming 1993).

185. Senate Hearing, *supra* note 46, at 93 (statement of Larry A. Frimerman, Federal Liaison, State of Ohio Office of the Consumers' Council).

186. Senate Hearing, *supra* note 46, at 46 (statement of Michael Fonham, Special Counsel, Louisiana Public Serv. Comm'n, New Orleans, LA). Reasonable incurred costs of construction would present a separate issue.

187. Senate Hearing, *supra* note 46, at 46 (statement of Michael Fonham, Special Counsel, Louisiana Public Serv. Comm'n, New Orleans, LA).

188. Senate Hearing, *supra* note 46, at 94 (statement of Larry A. Frimerman, Federal Liaison, State of Ohio Office of the Consumers' Council).

because a certain amount of regionalism is already working.<sup>189</sup> Opponents argued in Senate hearings that there is not any legal barrier to interstate cooperation currently and that de facto regional regulation is underway.<sup>190</sup> Certainly that position appears true when operations are considered, but it is less so when construction and siting are noted. As proponents argue, the bill may be necessary to assure greater certainty in planning and to satisfy a need for more input into the planning process.<sup>191</sup> They point to a gap in federal and state regulation that compounds the concern: the state may not regulate the interstate companies; the FERC lacks siting and planning authority; and the SEC is ineffectual.<sup>192</sup> Additionally, a key to the bill is the sense that regional matters should be decided regionally. Under the current framework, regional problems are presented piecemeal to the states and the FERC. This legislation may offer a stronger voice to the region as a whole than would otherwise be possible. Nonetheless, the existence of de facto regional regulation raises the basic issue of whether this legislation is an appropriate last resort.

Inherent in this debate is the fundamental concern that regional regulation is not the appropriate mechanism for regulating activities that are national in scope. The task being set for this agency invites the kind of interstate rivalry that will make effective planning difficult. The commitments derived today may not survive the difficult problems to come. The current experience in the Pacific Northwest is an important lesson. Despite being in place since the early 1980s, the Pacific Northwest Electricity and Conservation Council may only now be facing the challenges it was designed for. The provisions creating the Council and the ability of the region to cooperate in the Council have not addressed the fundamental problems that lead to its adoption. During its first ten years, the primary rationale for regional planning, energy shortfalls, failed to materialize.<sup>193</sup> Thus the Council did not face the need to plan for the acquisition of resources under real stress nor did it deal with the problem of its own mistakes in planning.<sup>194</sup> That window may be closing and the Council has already divided on some issues responsive to the shortages such as the completion of nuclear power construction.<sup>195</sup>

When power is relatively abundant, decisions come more easily. As scar-

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189. Craig S. Cano, *The Federal-State Partnership: Can Collaborative Jurisdiction Work?* INSIDE FERC, Oct. 7, 1991, at 10.

190. *Senate Hearing, supra* note 46, at 20 (statement of William S. Scherman, General Counsel, FERC); *Senate Hearing, supra* note 46, at 106 (statement of Thomas G. Robinson, Associate General Counsel, New England Electric System).

191. *Senate Hearing, supra* note 46, at 63 (statement of Kent Foster, Vice President, State Regulatory and Government Affairs, Entergy Services, Inc.); *Senate Hearing, supra* note 46, at 126 (statement of Carl D. Simpson, Director of Resource Management, Riceland Foods, Inc.).

192. *Senate Hearing, supra* note 46, at 31 (statement of Sam I. Bratton, Jr., Chairman, Arkansas Public Service Commission); *Senate Hearing, supra* note 46, at 29 (statement of Jim Singleton, Council Member, City of New Orleans, La.).

193. Alan S. Larsen & Fredrick Hitz, *Overview of the Conference on Regional Regulation of Electric Utilities: Northwest Power Act—Model or Mistake*, 38 ADMIN. L. REV. 315, 324 (1986).

194. Charles G. Stalon, *Regional Supply Planning, Federal Authority and State Regulation—Thinking Through the Jurisdictional Maze*, 38 ADMIN. L. REV. 327, 333 (1986).

195. ENR, Nov. 8, 1990, at 34; Loberstein, *Power Council Runs Out of Time*, THE PORTLAND OREGONIAN, Oct. 22, 1990, at E12.

city emerges, competing demands, valid in themselves, make cooperation difficult. Leadership and luck then take over the decision making process. Given the high stakes involved in the regulation of electricity, this set of potential (and arguably likely) outcomes is not appealing.

#### CONCLUSION

Regional regulation has always been something of an outcast in American law and politics. In a federal system, regionalism occurs often, but its place within the system is uncertain. Uncertainty leads to criticism, and apparently some of that criticism is warranted. The May 1992 Senate hearings on S. 2607 gave some inkling of the kinds of complaints and pressures a regional electric planning authority is likely to face.

To address some of these concerns, the original proponents of the bill circulated a compromise proposal prior to the May hearings. Surprisingly, the major change in the proposal was the elimination of the regional board as a means for securing an integrated resource plan. In testimony to the Senate Energy and Natural Resources Committee, a vice president for Entergy described a two alternative plans. In the first alternative, each state would adopt a plan and file it with the FERC. The combination of plans would be the regional resource plan unless there was an objection by a state or utility. If either objected, the FERC could reject the plan only if it determined that the combination of plans did not meet the definition of a regional integrated resource plan contained in the statute. The second alternative for approval would permit either a state or utility to file a plan with the FERC. A state could substitute its own plan for that portion of the utility plan affecting it. The FERC would approve the plan(s) if it determined that the plan(s) met the definition of an integrated resource plan. If the plan(s) failed to meet the definition, the FERC would provide an opportunity for the parties to cure the deficiencies and resubmit.<sup>196</sup>

The proposed amendment thus gave up the compact as an option. This retreat may suggest that even the bill's proponents concede some of the institutional barriers that will make adoption and execution difficult. Given the limitations to effective use of interstate compacts, the concession seems justified.

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196. *Senate Hearing, supra* note 46, at 64 (statement of Kent Foster, Vice President, State Regulatory and Government Affairs, Entergy Services, Inc.).