Fall 2003

The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems

Michael L. Buenger
Richard L. Masters

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Most questions of interstate concern are beyond the jurisdiction of the Supreme Court; they are beyond all court relief. Legislation is the answer, and legislation must be coterminous with the region requiring control... With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures, and regional interdependencies.\(^1\)

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They are arcane, sometimes complicated, little understood, and frequently overlooked. Many lawyers and most citizens have little knowledge of them and virtually no understanding of how they affect our daily lives. They are seldom the subjects of celebrated litigation except, perhaps, in that unusual circumstance of states suing other states under the original jurisdiction of the United States Supreme Court. Ask lawyers or law students how much time they have spent studying them and the likely answer is scant to none. They operate in that gray area of the Constitution involving issues of regional or national importance that do not fall within the immediate purview of the federal government, yet clearly rest beyond the realm of the states acting individually. Additionally, in recent years they have quietly emerged as an increasingly effective vehicle by which the states retain policy control over regional and national issues, preserve their sovereignty to act on such issues, and preempt federal interference.

Throughout the history of the United States, interstate compacts have been used to define and redefine the relationships of states and the federal government on a broad range of issues. Compacts, instruments recognized by the Constitution, address

2. The Supreme Court has exercised its original jurisdiction in suits between states very sparingly. The general standard for invocation of the Court's original jurisdiction is that the "dispute between States [is] of such seriousness that it would amount to casus belli if the States were fully sovereign." Texas v. New Mexico, 462 U.S. 554, 571 n.18 (1983); see also New York v. New Jersey, 256 U.S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."); Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) ("It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" (quoting Utah v. United States, 394 U.S. 89, 95 (1969))); California v. Texas, 437 U.S. 601, 615 n.15 (1978) ("The status of unsatisfied creditor does not necessarily create the kind of controversy between States that can or should be resolved by means of adjudication under this Court's original jurisdiction. This may, rather, be the kind of dispute that is best resolved by the contending States through negotiation or arbitration."); cf. Colorado v. Kansas, 320 U.S. 383, 392 (1943), cited infra note 10.

3. Article I, Section 10, Clause 3 of the U.S. Constitution provides, in part:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign
matters that are "supra-state," "sub-federal" in scope. There are some 196 compacts in effect today with still others being drafted or under consideration. Most recently, forty-eight states and the District of Columbia adopted the Interstate Compact on Adult Offender Supervision (ICAOS). The ICAOS seeks to define the rela-

Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Id. (emphasis added). Interstate compacts have also been used to define the relationship between the states and the federal government. See, e.g., Interstate Agreement on Detainers, ARIZ. REV. STAT. § 31-481 (2003) (designating the federal government as a signatory); N.Y. CRIM. PROC. LAW § 580.20 (McKinney 1997) (same); National Crime Prevention and Privacy Compact, 42 U.S.C.A. §§ 14611–14665 (West 2003) (creating a governance structure to oversee the interstate use of criminal justice information for non-criminal justice purposes, and designating the federal government as a signatory).

4. One scholar has described the realm of compacts as addressing those issues that are "supra-state" but "sub-national" in nature. See generally VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT (Public Affairs Press 1953). The authors submit that the characterization of "sub-national" is no longer valid. In the latter half of the twentieth century, states used compacts to resolve problems that were unequivocally national in scope but did not fall within the immediate realm of the federal government. See, e.g., Interstate Compact for Adult Offender Supervision [hereinafter ICAOS], http://www.adultcompact.org/Adult%20Compact%20Language.pdf; Interstate Agreement on Detainers, ARIZ. REV. STAT. § 31–481 (2003); N.Y. CRIM. PROC. LAW § 580.20 (McKinney 1997); Interstate Compact on the Placement of Children, CAL. FAM. CODE § 7900 (West 2001); N.D. CENT. CODE § 14–13–01 (2002); Driver License Compact, THE MVR BOOK 331 (BRB Publications, Inc. 2003), available at http://www.dui.com/DLC/driver_license_compact.html; see also Hess v. Port Auth. Trans–Hudson Corp., 513 U.S. 30, 40 (1994) (“A compact accorded congressional consent 'is more than a supple device for dealing with interests confined within a region . . . . [I]t is also a means of safeguarding the national interest . . . .” (quoting West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 27 (1951) (first alteration in original)). The more appropriate characterization of the issues addressed by interstate compacts is "supra-state, sub-federal" because many issues have national implications and yet do not fall within the immediate purview of the federal government.


tionship of the states regarding the interstate movement and supervision of adult criminal offenders (adult offenders). The Wyoming Interstate Commission for Adult Offender Status, Member States & Status (Aug. 13, 2003), http://www.adultcompact.org/Member%20States.htm. The compact is under consideration in Massachusetts. Id. Only Virginia and Mississippi are not currently considering the compact, though they will likely reintroduce it in 2004. Id.

The term "adult offender," as used in the ICAOS, embraces all classes of offenders including those on probation, parole, or in pre-trial or alternative sentencing status. See infra note 130. The ICAOS is a replacement for the 1937 Interstate Compact for the Supervision of Parolees and Probationers. See ICAOS pmbl., supra note 4. Congress created the original interstate compact on adult parolees and probationers pursuant to a specific grant of consent under the 1934 Crime Control Act. Pub. L. No. 293, 68 Stat. 909 (1934). The Interstate Compact for the Supervision of Parolees and Probationers provided:

Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An act granting the consent of Congress to any two or more states to enter agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (hereto called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (hereto called "receiving state"), while on probation or parole if:

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such a person being sent there. Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person. A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six consecutive months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person
ICAOS is more than just another interstate compact, however. By creating a particularized intermediate governing authority that is truly supra-state, sub-federal in its purpose, the ICAOS advances the administrative control and enforcement powers of compacts to

on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the persons to be retaken. All legal requirements to extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons.

The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state, provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue to force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other state party hereto.

Section 2. If any section, sentence, subdivision or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

Section 3. Whereas an emergency exists for the immediate taking effect of this act, the same shall become effective immediately upon its passage.

a new level.8 While the creation of such an intermediate governing authority may raise important federalism questions, the use of such administrative authorities is becoming a practical necessity today if traditional notions of state autonomy are to be preserved. With the fundamental principle of state sovereignty increasingly brought into question by the economic, social, governmental and political integration of the United States, interstate compacts modeled after the ICAOS may well provide an effective vehicle through which states can act jointly on a broad range of regional and national issues while preserving their autonomy within the federal framework of the government.9

I. COMPACTS AND FEDERALISM

Over the years, usually on their own initiative, but sometimes at the urging of the federal government, state legislatures have adopted compacts to address a wide range of issues.10 In the early

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8. See discussion infra Part II.B.
9. As early as 1925 compacts were recognized as an important instrument in addressing many of the regional and national problems that had begun to emerge in the United States. See generally Frankfurter & Landis, supra note 1.

The Secretary of Health and Human Services shall take all possible steps to encourage and assist the various States to enter into interstate compacts (which are hereby approved by the Congress) under which the interests of any adopted child with respect to whom an adoption assistance agreement has been entered into by a State under section 673 of this title will be adequately protected, on a reasonable and equitable basis which is approved by the Secretary, if and when the child and his or her adoptive parent (or parents) move to another State.

Id.; see 42 U.S.C.A. § 2021d(2) (West 1994) (encouraging low-level radiation waste disposal compacts). The Supreme Court has also encouraged the use of compacts as a means for resolving interstate problems for which a judicially enforceable solution is not readily available. See, e.g., Colorado v. Kansas, 320 U.S. 383, 392 (1943).

The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present compli-
years of the Republic, compacts were used primarily to resolve boundary, jurisdictional, and trade disputes. The resolution of such disputes was the exclusive purpose of all but one of the approximately thirty-six compacts enacted before 1921. In modern times, however, compacts are emerging as an effective tool for addressing a broad range of interstate issues that rest outside the traditional confines of the federal government. Almost any matter between two or more states that is supra-state, sub-federal in scope can become the subject of an interstate compact. For example, compacts are being used to tackle problems regarding wa-


14. One author has suggested that compacts are intended to address “supra-state, sub-national” issues. See THURSBY, supra note 4. However, the notion of compacts being restricted to “supra-state, sub-national” issues is being challenged by such compacts as the ICAOS. Compacts can be an effective tool for addressing multi-state issues that have national consequence. States can also use compacts as a means to preempt federal usurpation of matters that are traditionally within the purview of the states. The authors suggest that the more appropriate characterization of interstate compacts is that they address issues that are “supra-state,” but “sub-federal” in nature.
ter management, nuclear waste disposal, the building of interstate transportation links, regional economic development and regional planning, the placement of children and juveniles, education, mental health treatment, crime control, insurance regulation, and pollution control. Of the approximately 200 compacts in effect today, some 150 have been adopted in the last


22. E.g., Interstate Agreement on Detainers, ARIZ. REV. STAT. § 31-481 (2003); N.Y. CRIM. PROC. LAw § 580.20 (McKinney 1997); ICAOS, http://www.adultcompact.org/Adult%20Compact%20Language.pdf. The Interstate Agreement on Detainers is notable because it is one of the few interstate agreements to which the federal government is also a signatory. For a brief history on the Interstate Agreement on Detainers, see United States v. Mauro, 436 U.S. 340, 349–50 (1978).


seventy-five years, mainly on matters unrelated to state boundaries and usually involving some interstate regulatory matter. Like the ICAOS, several of these compacts create ongoing administrative agencies to manage compact matters and address a wide variety of state concerns.25

A. The Origin of Compacts

The ICAOS is part of a long heritage of managing interstate relations using the compact device. Compacts are one of the oldest mechanisms available to promote formal interstate cooperation, predating the founding of the United States.26 Well before the adoption of the Articles of Confederation and the U.S. Constitution, colonial authorities used a variety of mechanisms similar to compacts to resolve various disputes.27 Many inter-colonial disputes resulted from boundary controversies arising from the various royal land charters under which the colonies were founded.28 These charters were, by definition and operation, vague and expansive, applying to lands that lacked adequate surveys and the possession of which was questionable.29 Moreover, as their popula-


26. See Frankfurter & Landis, supra note 1, at 692-95. For a more general discussion on the use of other formal and informal administrative agreements between states, see JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS (2002).

27. Frankfurter and Landis observed that, “[t]he story of these disputes, their final outcome and the resulting territorial changes, concern the historian; the methods evolved for settlement are of prime importance to the lawyer.” Frankfurter & Landis, supra note 1, at 692.

28. Of particular interest is the dispute that arose between Virginia and Tennessee contesting the borders of those two states relative to the original colonial charters establishing Virginia and North Carolina under the Virginia–North Carolina Boundary Compact of 1803. See Virginia v. Tennessee, 148 U.S. 503, 528 (1893) (affirming the boundary line established by the 1803 compact); see also infra note 29 (regarding the border dispute between Massachusetts and Rhode Island as illustrated in Rhode Island v. Massachusetts, 37 U.S. 657 (1838)).

29. For example, the Plymouth Charter of 1628 to Sir Henry Rosewell gave a tract of land described as:

[A]ll that part of New England, in America, aforesaid, which lies and extends between a great river there, commonly called Monomack, alias Merrimac, and a certain other river, there called Charles river, being in the bottom of a certain bay, there commonly called Massa-
tions migrated further west; Atlantic coast colonies made extravagant—and at times conflicting—claims to portions of the interior continent based, in part, on broad royal land charters and, in part, on the notion that possession was nine-tenths of the law. As a consequence of the vagueness of these claims, boundary disputes between the colonies were inevitable. Resolution of these disputes generally occurred by negotiations through a joint commission, which then submitted a proposed written resolution to the king for approval. The origin of the compact device is grounded in this approach to inter-colonial dispute resolution, which incorporated negotiation followed by written documentation of the resolution, and approval from the crown.

Rhode Island v. Massachusetts, 37 U.S. 657, 659-60 (1838). This charter and its subsequent amendments formed part of the basis for Rhode Island's lawsuit against Massachusetts concerning the boundary between the two states. See generally id.

30. See Frankfurter & Landis, supra note 1, at 692.

31. Each colony was directly related to the king through various royal land charters. See, e.g., VA. CODE ANN. § 7.1-1 (Michie 2002) (reciting the early history of Virginia and the king's various grants and charters). As such, inter-colonial disputes and the agreements resolving them had to be submitted to the King's Privy Council for approval. Colonies could not resolve such matters between themselves without the approval of the Council. See generally THURSBY, supra note 4. On several occasions the Privy Council was required to settle a number of colonial border disputes. In 1727, the Council resolved a dispute between Rhode Island and Connecticut; this was followed by cases between New Hampshire and Massachusetts in 1740 and between Rhode Island and Massachusetts in 1746. See Frankfurter & Landis, supra note 1, at 692 n.29.
Arguably, based on their colonial experience, the Founders acknowledged two important principles early in the evolution of the nation's governing structure: (1) that the federal structure of the nation—a large multistate system comprised of independent and autonomous political entities joined in a national union—required a "state-based" methodology for joint action to resolve interstate disputes; and (2) that some form of national control over joint action was essential to maintaining the integrity of the newly established union. Thus, while recognizing the need for formal interstate agreements, the Founders, like the British before them, foresaw the need to control joint state actions—actions that could prove highly detrimental to the prerogatives of the newly formed national government.

In drafting the Articles of Confederation, therefore, the Founders restricted the ability of the states to join in formal, common enterprises or allegiances. The Articles of Confederation recognized that each state retained "its sovereignty, freedom and independence..."32 They also, however, restricted the states by providing that no state could enter "any treaty, confederation or alliance whatever between them, without the consent... of Congress...."33 This congressional "consent" requirement was a counterweight (not unlike the colonies obtaining consent from the crown) against joint state action at the expense of the national government's viability and sovereignty.34 Moreover, the concern over joint action was so compelling that the drafters of the Articles

32. Articles of Confederation, art. II (U.S. 1781) ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

33. Id. art. IV ("No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.").

34. It is important to note that under the Articles of Confederation the national government had very little power, and what power it did possess was concentrated primarily in the area of foreign relations. See Frankfurter & Landis, supra note 1, at 694. Even the power it possessed regarding foreign relations was sometimes subject to the vagaries of the independent states. The restrictions contained in the Articles of Confederation were meant to protect what little power the national government truly possessed from state encroachment. These restrictions did not, however, prove effective with the passage of time. See infra note 36.
provided that Congress alone (like the crown) was to be the "last resort on appeal in all disputes and differences . . . between two or more States concerning boundary, jurisdiction or any other cause whatever . . . ."

Notwithstanding the restrictions imposed on the states by the congressional consent requirement, history under the Articles of Confederation is replete with examples of the states acting with little respect for the prerogatives or authority of the national government. Consequently, in forging a new constitution, the Fram-

35. Articles of Confederation, art. IV (U.S. 1781). Article IV proceeded to create an elaborate procedural mechanism by which the "legislative or executive authority or lawful agent of any State in controversy with another" would petition Congress for a hearing. Notice would then be provided to the other state(s) involved in the controversy setting a day for the parties to appear. The parties would then, by joint consent, appoint commissioners or judges to determine the matter sitting as a court of last resort. If the parties could not agree, Congress would name three persons from each state and the parties would then alternatively strike names from the list until thirteen names were reached. Congress would then, by drawing lots, appoint a commission from the list of not less than seven persons or more than nine persons to determine the matter. That determination was final. It is interesting to note the remarkable similarities between the process of resolving colonial disputes and the resolution of state disputes under the Articles of Confederation. In large part, the process conceived in the Articles of Confederation closely mirrored the process used by the crown during the colonial era. Colonial disputes were either (1) negotiated then submitted to the crown for approval (a process similar to the compact method), or (2) appealed directly to the crown through the Privy Council (a process similar to submitting state disputes directly to Congress). See generally Frankfurter & Landis, supra note 1, at 692-93.

36. The difficulty with governing under the Articles of Confederation was as much attitudinal as practical. For example, in Federalist No. 44, James Madison, in addressing the people of New York on the new Constitution, observed:

In the first place, as these [state] Constitutions invest the State Legislatures with absolute sovereignty, in all cases not excepted by the existing articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former, would in such States have brought into question, every power contained in the proposed Constitution.
ers were very cognizant of the deficiencies of the Articles and the threat that unchecked state allegiances posed to the continued harmony of the union. The union could not be preserved absent some form of institutional control over joint state action because the federal structure of two concurrent sovereigns could encourage some states to act in concert for the benefit of some regions of the country and to the detriment of other regions or the national government. If the Constitution represents anything from a philosophical standpoint, it is the evolution away from a pure federation of sovereign states to a federal union of states, each maintaining some dignity as a sovereign entity while simultaneously ceding a

THE FEDERALIST NO. 44 (James Madison); see also Brutus IX, The Dangers of a Standing Army, N.Y. J., Jan. 17, 1788, at 45, reprinted in THE DEBATE ON THE CONSTITUTION 45 (The Library of America 1993) (“It is acknowledged by this writer, that the powers of Congress, under the present confederation, amount to little more than that of recommending.”); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (“[A] central concern of the Framers [was that]... the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among... the States under the Articles...”).

When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. “... each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.” This came “to threaten at once the peace and safety of the Union.” H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (quoting STORY, THE CONSTITUTION, §§ 259, 260).

37. See Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (Brennan, J., concurring) (arguing that the Compact Clause of the Constitution was intended to be more restrictive on joint state action than the restrictions contained in the Articles of Confederation). The rationale offered in Brennan’s concurring opinion provides further insight into his majority opinion in Cuyler v. Adams, 449 U.S. 433 (1981), discussed infra pp. 101-05. Brennan consistently adhered to the notion that the constitutional requirement of congressional consent was to be read broadly, particularly given the restrictive nature of Article I, Section 10 of the Constitution. However, once consent was obtained, the effect was to immediately convert an interstate compact into federal law fully enforceable through the federal courts. Feeney, 495 U.S. at 314-15, 318-19.

38. This is sometimes referred to as the “collective action problem,” where two or more states maximize their own interests through collective and cooperative efforts. See Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, 102 HARV. L. REV. 842, 844-47 (1989).
portion of their sovereignty to the national government. Consequently, the Framers of the Constitution not only reserved to the federal government certain exclusive powers, but also continued the congressional consent requirement as a key ingredient of, and restriction upon, interstate agreements. "The basic purpose of

39. This evolutionary thinking is evidenced by many of the early decisions of the Supreme Court. For example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a seminal case on state versus federal authority, Chief Justice Marshall observed:

In discussing this question, [whether the federal government usurped state power] the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." . . .

. . .

No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to measures of the people themselves, or become the measures of state governments.

*Id.* at 402-03; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 1 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816). Each of these cases contains a discussion on state versus federal authority. However, it is important to note that each of these cases involved an explicitly enumerated power of the federal government. The fact that the newly created Constitution vested the federal court with sovereignty does not necessarily mean that the states were completely dispossessed of their sovereignty with regard to certain matters. The Supreme Court has consistently affirmed that states continue to possess fundamental aspects of sovereignty. See *supra* text accompanying note 2; discussion *infra* p. 88; see also Steven G. Gey, *The Myth of State Sovereignty*, 63 *Ohio St. L.J.* 1601 (2002) (examining the Supreme Court's recent state sovereignty rulings).

40. In *Federalist No. 43*, James Madison observed:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought
the constitutional requirement of Congressional consent is to make certain that no such agreements [those affecting the balance of power in the federal structure] can stand against the will of Congress.\textsuperscript{41} The Compact Clause in Article I, Section 10 of the Constitution reflects the Framers' paradoxical views that at once acknowledged the need for interstate cooperation (and by extension the limited sovereignty of each state) while simultaneously restricting that very cooperation out of fear that internecine political alliances would evolve and destroy the union.

The Constitution permits states to enter into compacts, in most cases subject to congressional consent.\textsuperscript{42} Unlike the Articles of Confederation, the Constitution relieves Congress of the obligation to settle state disputes, giving that responsibility to the Su-

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clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest have the members in political institutions of each other; and the great right to insist that the forms of government under which the compact was entered into should be substantially maintained . . . . If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. \textit{But who can say what experiments may be produced by the caprice of particular States}, by ambition of enterprising leaders, or by the intrigues and influence of foreign powers?

\textsuperscript{41} \textit{THE FEDERALIST} No. 43, at 290-91 (James Madison) (Heritage Press, 1945) (second emphasis added). Although Madison made this observation in commenting on the requirement that the states guarantee their citizens a republican form of government, it provides insight into his view of the states and dangers posed by unrestrained state action.

\textsuperscript{42} Some argue that "the framers . . . astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment." Frankfurter & Landis, \textit{supra} note 1, at 695. However, the Compact Clause of the Constitution has a more dubious interpretation, as some have observed. Article I, Section 10 of the Constitution contains a long list of prohibitions on the states, including a prohibition against joint state action without the consent of Congress. The Compact Clause is actually worded in the negative, not the affirmative. Rather than creating a legal mechanism to promote joint state action subject to national control, the Framers created a legal mechanism to restrict state action only to those areas approved by Congress. The underlying supposition is that joint state action is not preferred except in the most extraordinary of circumstances. \textit{See} Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990), \textit{supra} note 37. As to the limitations on the congressional consent requirement, see \textit{infra} Part I.C.2.
The development of a strong national judiciary is believed to be a major factor restraining state power and, in some circumstances, compelling the use of interstate compacts as a means of resolving state disputes and promoting state cooperation. As one scholar has noted:

The mere fact of the existence of the [Supreme] Court, with its mighty jurisdiction, has not only encouraged a habit on the part of the States of resorting to it for a decision of their controversies, but it has also encouraged an equally important habit of settling such controversies out of the Court, by means of compacts entered into between States.

43. U.S. Const. art. III, § 2 ("In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.").


The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies "between two or more States, respecting jurisdiction or territory," and to the Supreme Court jurisdiction of "controversies between two or more States, except such as shall regard territory or jurisdiction." A claim for money due being a controversy of a justiciable nature, and one of the most common controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the States was stricken out as well as the limitation upon the jurisdiction of this court, leaving to it in the language now found in the Constitution jurisdiction without any limitation of "controversies between two or more States."

Id.

45. Charles Warren, The Supreme Court and Sovereign States 69 (Princeton University Press 1924). While a powerful national judiciary has certainly affected interstate compacts, federal courts have not always been willing to jump into conflicts between states concerning compacts. See, e.g., Virginia v. Tennessee, 148 U.S. 503, 518-20 (1893) (holding that the Compact Clause does not make the Supreme Court the final arbiter with respect to the interpretation of interstate compacts); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 101-06, 109-10 (1938) (holding that the meaning of an interstate compact does not present a federal question); see also Del. River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 427 (1940). But see Kentucky v. Indiana, 281 U.S. 163, 176 (1930).

The fact that the solution of these questions may involve the determination of the effect of the local legislation of either State, as well as of acts of Congress, which are said to authorize the contract, in no
B. Compacts, Federalism and State Sovereignty

In theory, the Constitution divides governing authority between two coexisting sovereign entities. As Felix Frankfurter once observed, "The Constitution is naturally acclaimed as the creative achievement of statesmen bent on maintaining the co-operation of the States and on forming 'a more perfect Union.'" This "union of states" philosophically underlies the federal charter of government in the United States; that is, the lawmaking, law enforcement and the law interpreting functions are vested not only in three separate and independent branches of government, but also between two sets of coterminous sovereign authorities—the states and the federal government. Viewed from this perspective, the Constitu-

way affects the duty of this Court to act as the final, constitutional arbiter in deciding the questions properly presented.

Id.; see also Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278 (1958).

The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. Moreover, the meaning of a compact is a question on which this Court has the final say. The rule is no different when the contention is that a State has, by compact, waived its immunity from suit.

Id. (citations omitted).

This Court, however, finds that Congress, in granting the necessary consent to the Compact, imposed suability in the federal courts upon the States as a condition to its consent. No doubt Congress could have insisted upon a provision waiving immunity from suit in the federal courts as the price of obtaining its consent to the Compact.

Id. at 285 (Frankfurter, J., dissenting).

46. Frankfurter & Landis, supra note 1, at 685. The authors went on to note that "[i]n the creation lurked the seeds of inevitable contest between the new Union and its constituent members." Id.


While some might complain that our system of dual sovereignty is not a model of administrative convenience, that is not its purpose.... By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to "reduce the risk of tyranny and abuse from either front."

tion is itself perhaps the ultimate example of the use and power of an interstate compact.48

Subject to limited constitutional constraints, states retain substantial (some would even argue exclusive) authority to regulate activities that take place within their borders.49 As the Supreme Court noted in *Alden v. Maine*:

The federal system established by our Constitution preserves the sovereign status of the States in two ways.

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The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.

*Id.* (Souter, J., dissenting in part, concurring in part) (citing *Cipollone v. Liggett Group*, 505 U.S. 504, 533 (1992)).

48. The Constitution arguably has many of the elements of an interstate compact and has sometimes been referred to as a compact. *See* Padelford, Fay & Co. v. Savannah, 14 Ga. 438, 520 (1854) ("The Constitution, it is true, is a compact. . . . The States are the parties to it."); overruled by *Rain v. State*, 136 S.E.2d 169 (Ga. Ct. App. 1964). It was a creature of then sovereign states negotiated by representatives of the original thirteen states and ratified by them. Its ratification provision stated that "nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same." U.S. CONST. art. VII. The counter argument to this interpretation is that the people of sovereign states—not the states in their sovereign capacity—adopted the new Constitution and the states merely ratified their act. Within this interpretation is the implication that the states were never truly sovereign entities, but always acted in a subservient role to the national government. *See supra* note 39. *But cf.* Alden v. Maine, 527 U.S. 706, 714-15 (1999) (discussing the ways that the Constitution preserves the sovereign status of the States).

49. Most recently, the United States Supreme Court has decided several noteworthy cases addressing the issue of where state authority ends and federal authority begins. *See*, e.g., *Printz v. United States*, 521 U.S. 898, 918-19 (1997). Several of these cases have resulted from actions by Congress to regulate state conduct through its commerce clause power. Although these cases directly questioned whether Congress had exceeded its constitutional authority, the underlying debate on states' rights is as old as the Constitution. *Id.* ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" (quoting *The Federalist No. 39*, at 245 (James Madison) (Clinton Rossiter ed., 1961))).
First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes ining in that status. The states "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people . . . ." 50

Thus, states continue to possess many of the characteristics of sovereign entities as to matters within their borders and, to some extent, as to matters between them under interstate compacts. 51

50. Alden, 527 U.S. at 714 (citation omitted).
51. See, e.g., id. at 713-14 (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996)).

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.

Id. (citation omitted); see also Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) ("We have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . ." (citations omitted)).

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In Tafflin v. Levitt, "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."

This fact seems lost to many in an age where states are frequently viewed as mere political subdivisions of the national government.52

American federalism rests on the shared exercise of government authority by two sovereign bodies and, as such, solutions to problems have generally "been conceived in terms of exclusive duality."53 Those matters of national concern, such as interstate commerce, foreign affairs and national defense, rest within the exclusive authority of the federal government, while the states continue to exercise a significant portion of the nation's general police power as entities whose sovereignty is coterminous with that of the federal government. Even today, some argue that the "Constitution requires a distinction between what is truly national and what is truly local."54

However, in recent years, complex regional or national problems have shown little respect for the dual lines of federalism and the geographical boundaries of states. The practicalities of governing a large, multifaceted, federally designed nation frequently blur distinctions between what is distinctly "national" in scope and what is distinctly "local" in scope.55 The emergence of broad public policy issues that ignore state boundaries and the principles of federalism have presented new governing challenges to both state and federal authorities.56 The fundamental question presented by

52. See generally Gey, supra note 39.
53. Frankfurter & Landis, supra note 1, at 688.
55. See, e.g., New York v. New Jersey, 256 U.S. 296, 313 (1921). There, the court held:

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.

Id.
56. For example, according to 2000 Census figures, over thirty of the largest metropolitan areas in the United States extend across state lines. These include the following Metropolitan Statistical Areas (MSAs) and Consolidated Metropolitan Statistical Areas (CMSAs) with their national ranking: New York - Northern New Jersey - Long Island (NY, NJ, CT, PA
these issues is: How does a nation, founded on federalism, which is experiencing increasing social, political and economic integration, continue to respect the principle of dual sovereignty while contemporaneously confronting supra-state, sub-federal problems?

This is precisely where interstate compacts, such as the ICAOS, provide an effective solution. Compacts fit comfortably into the federal scheme because they enable the states—in their sovereign capacity—to act jointly and generally outside the confines of the federal legislative or regulatory process while concomitantly respecting the view of Congress on the appropriateness of joint action.\(^{57}\) Equally important, compacts effectively preempt federal interference into matters that are traditionally within the purview of the states but have regional or national implications.\(^{58}\)

Unlike federal actions that generally impose unilateral, rigid

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CMSA), ranking 1; Chicago – Gary – Kenosha (IL, IN, WI CMSA), ranking 3; Washington – Baltimore (DC, MD, VA, WV CMSA), ranking 4; Philadelphia – Wilmington – Atlantic City (PA, NJ, DE, MD CMSA), ranking 6; Boston – Worcester – Lawrence (MA, NH, ME, CT CMSA), ranking 7; St. Louis (MO, IL MSA), ranking 18; Portland – Salem (OR, WA CMSA), ranking 23; Cincinnati – Hamilton (OH, KY, IN CMSA), ranking 24; Kansas City (MO, KS MSA), ranking 26; Norfolk – Virginia Beach – Newport News (VA, NC CMSA), ranking 31; Las Vegas (NV, AZ MSA), ranking 32. These eleven areas contain almost 62,000,000 people, or approximately 25% of the U.S. population. Census 2000 PHC-T-3. Ranking Tables for Metropolitan Areas: 1990 and 2000, tbl. 3: Metropolitan Areas Ranked by Population: 2000 (U.S. Census Bureau, 2000).

57. As Garland C. Routt observed, "The Constitution itself, while it apparently did not contemplate the development of administrative relationships between the state and the central government, departed from federal theory in giving recognition under certain conditions, to agreements and joint action by the states." Garland C. Routt, Interstate Compacts and Administrative Cooperation, 207 ANNALS AM. ACAD. POL. & SOC. SCI. 93 (1940).

58. One example of a federal attempt to preempt state control over the interstate movement of adult offenders is “Aimee’s Law.” 42 U.S.C. § 13713 (2002). Under this act, the U.S. Attorney General is required to transfer federal law enforcement assistance funds, due a state that convicted a person of certain offenses, to the state that convicted a person of a subsequent offense. Id. § 13713(c)(1). Congress, using its power of the purse and the power of federal grant programs, sought to compel states to be more conscientious about the interstate movement of individuals convicted of murder, rape or child molestation. Most recently, discussions have been initiated to revise the Driver License Compact. See, e.g., Driver License Compact, DEL. CODE ANN. tit. 2, § 8101 (2001). One reason for this renewed scrutiny is to prevent the federal government from assuming control over this matter as a means of creating a national identity card to promote national security in the aftermath of September 11, 2001.
mandates, compacts afford states the opportunity to develop dynamic, self-regulatory systems, over which the member states can maintain control through a coordinated legislative and administrative process. The very nature of an interstate compact makes it an "ideal tool to meet the demand for cooperative state action to develop and enforce stringent standards" upon the member states. Compacts also enable the states to develop adaptive structures that can evolve to meet new and increased challenges that naturally arise over time. In short, through the compact device, states acting jointly can not only control the solution to a problem but can also shape the future response as the problem changes.

C. The Dual Nature of Compacts

To understand the potential reach of compacts like the ICAOS and those that may be modeled after it, one must appreciate the legal status of interstate compacts within the constitutional framework. Interstate compacts, particularly those receiving congressional consent, have what may be described as a dual or binary nature. Compacts are state laws adopted by state legislatures that bind sister states to fully enforceable contracts. Thus, compacts are concurrently statutory (within a member state) and contractual (between the member states). However, compacts are also creatures of state governments that, under particular circumstances, function as the "law of the United States," enforceable not only as contracts between member states, but also against individual member states under the Supremacy Clause of the Constitution. It is this dual or binary nature of compacts—at once both statutory and contractual, state and federal—that gives them a unique legal standing.

59. COUNCIL OF STATE GOV'TS, STATE OFFICIALS GUIDE: INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION 22 (July 2002).
60. The Supreme Court has recognized the flexibility of compacts to meet both immediate and future concerns. See Colorado v. Kansas, 320 U.S. 383, 392 (1943).
1. State Laws that are Binding Contracts

Interstate compacts are initiated by the adoption of enabling statutes by the legislatures of the member states. It is the act of adoption of such statutes that creates contractual obligations between the states. There is an offer (a proposal to enact, virtually verbatim, statutes by each member state), an acceptance (enactment of the statutes by the member states), and consideration (the settlement of a dispute, creation of an association or some mechanism to address an issue of mutual interest). Many modern compacts also contain provisions for withdrawal or termination. While compacts are most often given force by state legislatures adopting virtually identical statutes, compacts can also be activated by legislative acts authorizing entry into force by administrative action.

62. As Zimmermann and Wendell observed, "The principle of consideration is probably applicable to compacts, but it has far less practical meaning than in the field of private contracts." ZIMMERMANN \& WENDELL, supra note 41, at 9.

63. See, e.g., ICAOS, art. XII, cl. 1, http://www.adultcompact.org/Adult%20Compact%20Language.pdf ("Once effective, the Compact shall continue in force and remain binding upon each and every Compacting State; provided, that a Compacting State may withdrawal from the Compact ("Withdrawal State") by enacting a statute specifically repealing the statute which enacted the Compact into law."). The provision goes on to describe the procedure by which a state actually withdraws including notice requirements, the effective date of withdrawal, and a state's post-withdrawal responsibilities regarding assessments, liabilities, and obligations. Id. cl. 2-6; see also Interstate Insurance Receivership Compact, Mich. Comp. Laws Ann. § 550.11, art. XII, § A (West 1948).

64. See, e.g., Nonresident Violator Compact of 1977, art. VII, Ark. Code Ann. § 27-54-101 (1994) (providing specifically that the compact may be entered into force "by a resolution of ratification, executed by authorized officials of the applying jurisdiction."). As to entry into force by administrative act, the language of the compact must specifically provide such a mechanism. If a state uses an administrative act without specific compact authorization, the compact may be null and void as to that state. See, e.g., Driver License Compact, art. VIII, Del. Code Ann. tit. 2, § 8101 (2001) (providing specifically that the compact "enter[s] into force and becomes effective as to any state when it has enacted the [Compact] into law."). The Pennsylvania Supreme Court held, in Sullivan v. DOT, 708 A.2d 481 (Pa. 1998), that the Compact was not in effect in that state because the legislature enacted a statute empowering the Secretary of the Department of Transportation to enter into the Compact rather than enact the specific language of the Compact as required. Id. at 485. In reaching this conclusion, the court held that since
It is important to appreciate that compacts are not mere intergovernmental agreements or informal administrative alliances. Although passed by state legislatures in essentially the same form, compacts are not "uniform laws" as that term is commonly understood. Compacts like the ICAOS are binding legal contracts with their terms and conditions controlling—even trumping—the actions and conduct of the member states as to the subject matter of the compacts. The fact that compacts are creations and crea-

the Compact was a contract, Pennsylvania law required the court to interpret the Compact within the four-corners of the instrument. Id. at 484.

65. See, e.g., Uniform Commercial Code (UCC), ALA. CODE § 7-2-101 (1998); Uniform Interstate Family Support Act, R.I. GEN. LAWS § 15-23.1-101 (2002); Uniform Act on Close Pursuit, WIS. STAT. ANN. § 976.04 (West 1998); Uniform Fraudulent Transfer Act, ALA. CODE § 8-9a-1 (2002); Uniform Money-Judgments Recognition Act, CONN. GEN. STAT. ANN. § 50a-30 (West 1994); Uniform Anatomical Gift Act, GA. CODE ANN. § 44-5-140 (2002). Uniform Acts are promulgated by the National Conference of Commissioners on Uniform State Laws in an effort to study and review the laws of the states to determine which areas should be uniform between the states. Legislatures are urged to adopt Uniform Acts exactly as written to promote such uniformity. Model Acts are designed to serve as guideline legislation, which states can borrow from, or adapt, to suit their individual needs and conditions. Although legislatures are urged to adopt uniform acts as written, they are not required to do so and may make changes to fit individual state needs. Uniform acts do not constitute a contract between the states, even if adopted by all states in the same form, and thus, unlike contracts, are not binding upon or enforceable against the states. While uniform acts unify state laws as to those states adopting them, compacts can provide enforcement tools not only as to the populous but also as to the states themselves. Compacts are, therefore, a more powerful, albeit complex, tool for promoting uniform state behavior as to the subject matter of the compact. A state's failure to adopt a uniform law exactly as proposed has no impact on the state's relation to other similarly situated states as sovereigns within a constituent union. A state's decision to unilaterally modify a uniform law after adoption does not constitute any type of violation for which the state is accountable at law.

66. See, e.g., Missouri v. Illinois, 200 U.S. 496, 519 (1906) ("The compact, by the sanction of Congress, had become a law of the Union. A state law which violated it was unconstitutional.").

By this surrender of the power, which before the adoption of the constitution was vested in every state, of settling these contested boundaries, as in the plenitude of their sovereignty they might; they could settle them neither by war, or in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If Congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, . . .
tures of individual state legislatures in no way alters their status as contracts with enforceable obligations between member states.

By entering into a compact, the member states contractually agree on certain principles and rules. Depending on the terms of the compact, a state may effectively cede a portion of its individual sovereignty over the subject of the agreement, as is the case with the ICAOS.67 Once entered, the terms of the compact, as well as

whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers.

Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838); see also Nebraska v. Cent. Interstate Low-Level Radioactive Waste Comm'n, 207 F.3d 1021, 1026 (8th Cir. 2000) (holding that the state of Nebraska did not have a unilateral right to exercise a veto when such an act was not authorized by the compact).

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact without the concurrence of the other signatories.


67. ICAOS, art. XIV, §§ A, B, http://www.adultcompact.org/Adult%20Compact%20Language.pdf. These two sections of the new Compact provide, in part:

Section A. Other Laws.

All Compacting States' laws conflicting with this Compact are superseded to the extent of the conflict.

Section B. Binding Effect of the Compact.

All lawful actions of the Interstate Commission, including all Rules and By-laws promulgated by the Interstate Commission, are binding upon the Compacting States. All agreements between the Interstate Commission and the Compacting States are binding in accordance with their terms.

Id.; see, e.g., CAL. PENAL CODE § 11180 (West Supp. 2003). The drafters of the Compact did provide an escape clause in article XIV as to the binding effect of the Compact and its rules. To the extent that a provision of the Compact exceeds constitutional limitations imposed on the legislature of any compacting state, the "duties, powers or jurisdiction sought to be conferred by such provision upon the Interstate Commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the Compacting State." ICAOS, art. XIV, § B. However, it should be noted that only a state constitutional limitation can trigger the escape clause.
any rules and regulations authorized by the compact, supersede substantive state laws that may be in conflict, including state constitutional provisions, unless a specific exemption applies. Moreover, member states must not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with its terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment adopted by all member states in essentially the same form. The contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legis-

68. Under the Compact Clause of the United States Constitution, the federal questions are the execution, validity and meaning of federally approved state compacts. See U.S. Const. art I, § 10, cl. 1. A compact controls over a state's application of its own law through the Supremacy Clause. See id. art. VI, cl. 2; see also supra discussion at notes 66, 67; Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938); Kentucky v. Indiana, 281 U.S. 163, 176 (1930).

It has frequently been held that when a question is suitably raised whether the law of a State has impaired the obligation of a contract, in violation of the constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislation of the State. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 29 (1951) (citing Larson v. South Dakota, 278 U.S. 429, 433 (1929)).

69. See Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985) (holding that reciprocal statutes passed by two states did not constitute a compact when the states retained authority to unilaterally modify or repeal the statutes, and when the effect of the statutes was not conditioned upon the action of another state).

70. Article I, Section 10, Clause 1, provides, in part, "No state shall... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts..."
latures pursuant to the Compact Clause.\textsuperscript{71} This analysis is not meant to suggest that states are simply "parties" to an ordinary, run-of-the-mill contract. The mere fact that the Supreme Court may exercise its very limited original jurisdiction in compact disputes is one indication of the importance the Framers attached to the status of the states as sovereign members joined in a constituent union. This special status of the states can present unique "contractual" issues, particularly when enforcing the terms of a compact. For example, in \textit{South Dakota v. North Carolina}, the Supreme Court recognized the propriety of money judgments against states as part of an original action, but acknowledged that forcing a state legislature to actually pay another state can present a unique problem.\textsuperscript{72} However, the Supreme Court also noted in \textit{Texas v. New Mexico}:

\textsuperscript{71} See West Virginia \textit{ex rel.} Dyer v. Sims, 341 U.S. 22, 33 (1951) (Reed, J., concurring); see also Hinderlider v. La Plata River & Cherry Creek Ditch Co., 101 Colo. 73 (1937), rev'd 304 U.S. 92 (1938). Presumably the "trumping" nature of compacts would extend not only to unilateral action by the state legislatures but also actions by executive agencies and the courts. For example, court rules that might conflict with a provision in an interstate compact would most likely be void. Likewise, an executive order whose terms conflict with the terms and conditions of an interstate compact would also most likely be void. Neither could a county probation department act outside the parameters of the ICAOS in discharging its supervisory responsibilities over persons transferred into the state or in sending its probationers out of state. By entering into a compact, a state legislature binds "the state," including all of its governmental branches, departments, and political subdivisions.

\textsuperscript{72} South Dakota v. North Carolina, 192 U.S. 286, 320-21 (1904); see also Texas v. New Mexico, 482 U.S. 124, 130 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State.") (citations omitted); Maryland v. Louisiana, 451 U.S. 725, 735-36 (1981). As to the limitations on actions to recover damages from states, see Kansas v. Colorado, 533 U.S. 1, 7 (2001).

Colorado contends, however, that the Eleventh Amendment precludes any such recovery based on losses sustained by individual water users in Kansas. It is firmly established, and undisputed in this litigation, that the text of the Eleventh Amendment would bar a direct action against Colorado by citizens of Kansas. Moreover, we have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens.

\textit{Id.}; see also New Hampshire v. Louisiana, 108 U.S. 76, 88-89 (1883) (stating that the Court will not assume jurisdiction over an action to recover payment on defaulted bonds that had been formally assigned to the state but remained
That there may be difficulties in enforcing judgments against States counsels caution, but does not undermine our authority to enter judgments against defendant States in cases over which the Court has undoubted jurisdiction, authority that is attested to by the fact that almost invariably the "States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same."73

Thus, notwithstanding the special status of states and the challenges presented with enforcing compacts, compacts fundamentally constitute enforceable obligations between the states just as if the states were acting as private parties to a legally binding contract.

2. State Creations with National Effect

An unvarnished reading of the Compact Clause could lead one to conclude that any agreement between two or more states requires congressional consent.74 However, compacts can generally

beneficially owned by private individuals; the Eleventh Amendment bars jurisdiction where the state is only a nominal actor in the proceeding); North Dakota v. Minnesota, 263 U.S. 365, 374-75 (1923) (recognizing that a state could obtain an injunction against the improper operation of another state's drainage ditches, but the Eleventh Amendment barred damages based on injuries to individual farmers, where the damages claim was financed by contributions from the farmers and the state had committed to dividing any recovery among the farmers in proportion to the amount of their loss); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 396 (1938) (holding that to invoke original jurisdiction of the Supreme Court a "state must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest").

73. Texas v. New Mexico, 482 U.S. at 130, 131; see also id. at 128 ("By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them, . . . and this power includes the capacity to provide one State a remedy for the breach of another.") (citation omitted).

74. In giving consent, Congress may also impose certain limitations on compacts both in duration and substance. For example, 16 U.S.C.A. § 544(d), affecting the management of Columbia River Gorge, provides "[m]andatory language . . . of this title respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 544c of this title." 16 U.S.C.A. § 544o(d) (West 2002); see also 7 U.S.C.A. § 7256, § 7256(1)-(7) (West Supp. 2002) ("Congress hereby consents to the Northeast Interstate Dairy Compact . . . subject to" (a) the Secretary of Agriculture finding a com-
be divided into two simple camps: those that require congressional consent and those that do not. The Supreme Court has long held that not all interstate agreements constitute formal compacts requiring Article I, Section 10 consent. In *Virginia v. Tennessee*, the Court concluded that the Compact Clause requires congressional consent only with respect to those agreements that intrude on the power of the federal government or alter the political balance between the states and the national government. For example, in 1976, the Supreme Court held that congressional consent was not needed to legitimize an agreement between Maine and New Hampshire that ended a dispute over a lateral maritime boundary. The Court concluded that because the agreement did not affect the balance of power between the states and federal government or threaten the prerogatives of the national government as to the issue in dispute, congressional consent was not required. Thus, states may enter enforceable agreements between themselves without the consent of Congress so long as those agreements do not infringe on federal interests or shift the balance of power within the federal structure of the government. Even when states have customarily sought congres-

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76. 148 U.S. 503, 521-22 (1893). The Supreme Court in *Virginia v. Tennessee* not only affirmed the notion that only those compacts affecting the “political balance” of the federal system need consent, but the Court also stated that consent can be implied after the fact. Id. Thus, the Court concluded that Congress consented to the Virginia–Tennessee boundary compact by setting up judicial districts and taking a number of other actions acknowledging the boundary determined by the compact. Id.


78. *Id.; see also id.* at 369-70; *U.S. Steel Corp.*, 434 U.S. at 472-73 (noting that the multistate tax compact did not require congressional consent because the commission can do nothing more than the states are empowered to do themselves and thus the compact does not encroach on the power of the federal government).

79. See Cuyler v. Adams, 449 U.S. 433, 440 (1981), in which the Supreme Court held:

Where an agreement is not “directed to the formulation of any combination tending to increase the political power of the States, which may encroach upon or interfere with the just supremacy of the
sional consent for reasons of caution and convenience, the mere act of consent is not automatically dispositive of whether it was required. However, once congressional consent is deemed applicable and appropriately given, the nature of a compact changes radically. It no longer constitutes an agreement between states.

United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.

Id. at 433. Thus, for example, congressional consent was not needed with reference to the Southern Regional Education Compact because it dealt with an area—education—that is normally a function of the States. The Compact did not infringe on any federal interest but only affected established state interests. 94 Cong. Rec. 5531, 5622 (daily ed. May 11, 1948); see also McComb v. Wambaugh, 934 F.2d 474 (3d Cir. 1991).

The Interstate Compact on Placement of Children has not received Congressional consent. Rather than altering the balance of power between the states and the federal government, this Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states. Congressional consent, therefore, was not necessary for the Compact's legitimacy.... Because Congressional consent was neither given nor required, the Compact does not express federal law. Consequently, this Compact must be construed as state law.

Id. at 479.

80. See U.S. Steel Corp., 434 U.S. at 470-71 ("The mere form of the interstate agreement cannot be dispositive.... The relevant inquiry must be one of impact on our federal structure."). But see the discussion of Cuyler infra pp. 101-02. The Court majority in Cuyler appears to have taken a more liberal view of when congressional consent is required. Id. While the decision in U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. at 470-71, reaffirmed the long held principle that consent is required where a compact changes the balance of the federal structure, the Court in Cuyler determined that congressional consent nationalizes a compact where the subject of the compact is an "appropriate subject for congressional legislation." 449 U.S. at 440. Thus, after Cuyler, the controlling principle in the consent requirement appears to be not whether the agreement changes the balance of power in the federal structure, but whether the subject matter of the agreement would be appropriate to some form of national legislation. One could argue that, in effect, the Court liberalized the constitutional consent standard from one that focuses on whether the agreement alters the balance of power in the federal structure to one focusing on whether the agreement infringes on the prerogatives of Congress to address issues through national legislation. This is a more liberal standard with significant implications. In an era of national government, little, arguably, escapes the purview of Congress's national legislative authority. Whether this view will continue to prevail in the aftermath of several recent Court decisions affirming state sovereignty remains to be seen.
Rather, compacts that receive congressional consent become the "law of the United States" under the Law-of-the-Union doctrine.\textsuperscript{81}

Congress can give consent in one of two ways: it may explicitly authorize the states to create a compact, or it can take actions subsequent to the adoption of a compact that imply consent.\textsuperscript{82} Whether explicit or implied, congressional consent is important for its effect on the legal standing of a compact, not only as a contract between member states, but more importantly, as an instrument of national law.\textsuperscript{83} The Supreme Court recognized in \textit{Cuyler v. Adams} that consent "transforms the States' agreement into federal

\textsuperscript{81} Compacts are contracts within the meaning and limitations of the Contracts Clause of the Federal Constitution. See \textit{Petty v. Tennessee-Missouri Bridge Comm'n}, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting) ("A Compact is, after all, a contract. Ordinarily, in the interpretation of a contract, the meaning the parties attribute to the words governs the obligations assumed in the agreement."); Kansas v. Colorado, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part) ("A compact is a contract. It represents a bargained-for exchange between its signatories and 'remains a legal document that must be construed and applied in accordance with its terms.'") (citation omitted); cf. \textit{Texas v. New Mexico}, 482 U.S. 124, 128 (1987) ("[A compact] remains a legal document that must be construed and applied in accordance with its terms.").


\textsuperscript{83} Such was not always the Supreme Court's interpretation of the congressional consent requirement. For example, in \textit{People v. Central Railroad}, 79 U.S. 455, 456 (1870), the Supreme Court suggested that interstate compacts could not be considered federal law. However, this position was largely abandoned by the Court in \textit{Delaware River Commission v. Colburn}, 310 U.S. 419, 427 (1940), where the Supreme Court held:

\textit{In People v. Central Railroad}, jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted, and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" which when "specially set up and claimed" in a state court may be reviewed here on certiorari . . . .} \textit{Id.} (citations omitted). This holding reaffirmed the Law-of-the-Union doctrine and the underlying principle that congressional consent can transform interstate compacts into federal law. \textit{Id.}
law under the Compact Clause.” Although the Supreme Court has qualified its consent analysis, holding that it applies “where the subject matter of that agreement is an appropriate subject for congressional legislation,” cases subsequent to *Cuyler* suggest that the Court assigns great significance to the mere existence of congressional consent, perhaps more than is appropriate given the subject matter of the compact. Therefore, the general principle is that once Congress gives consent, the compact is presumptively transformed into the “law of the United States” absent some compelling evidence that consent was not required.

84. *Cuyler*, 449 U.S. at 440; see also *Waterfront Comm'n v. Elizabeth-Newark Shipping*, 164 F.3d 177, 180 (3d Cir. 1998) (“Although the Compact is a creature of state legislatures, it is federalized by virtue of congressional approval pursuant to the Compact Clause . . . .”). *But see Cuyler*, 449 U.S. at 450 (Rehnquist, J., dissenting) (“In a remarkable feat of judicial alchemy the Court today transforms a state law into federal law.”).


In reaching its conclusion, the Court attaches undue significance to the requirement that Congress consent to interstate compacts. Admittedly, the consent requirement performs an important function in our federal scheme . . . . But the consent clause neither transforms the nature of state power nor makes Congress a full-fledged participant in the underlying agreement; it requires only that Congress “check any infringement of the rights of the national government.” *Id.* at 56-57 (O'Connor, J., dissenting) (citations omitted). *But cf* *Malone v. Wash. Metro. Area Transit Auth.*, 622 F. Supp. 1422, 1424 (E.D. Va. 1985) (“In *Cuyler v. Adams*, the Supreme Court held that the test for whether an interstate compact becomes federal law is whether it 'is a congressionally sanctioned interstate compact within Art. I, § 10 of the Constitution.'” (citation omitted)).

One consequence of the "transformational" rationale articulated by the Court in *Cuyler* is that congressional consent places the interpretation and enforcement of interstate compacts squarely within the purview of the federal judiciary.88 "[A] congressionally sanctioned interstate compact within the Compact Clause is a federal law subject to federal construction."89 This is

88 See *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 507 F.2d 517 (9th Cir. 1974).

89 See *Carchman v. Nash*, 473 U.S. 716, 719 (1985); see also *Cuyler*, 449 U.S. at 439 ("[T]his compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?"

In arriving at our decision we do not overlook that the law of the Union doctrine may be said, under some circumstances, to present certain theoretical problems, e.g., impermissible delegation of congressional legislative power to the states in cases where Congressional consent precedes the compact. The possibility, however, that there may be problems in potential cases does not alter our duty to follow the mandate of *Colburn*. . . . While the Court in *Colburn* felt it unnecessary to clearly articulate the basic premise of its decision, we conclude after careful investigation that the result there was based upon the implicit finding that the interstate compact involved was a "statute of the United States" within the meaning of 28 U.S.C. § 1257(3). Neither logic nor policy justifies a different interpretation of the substantially similar language in 28 U.S.C. § 1331(a). Therefore, a case involving the construction of an interstate compact which requires a judicial determination of the nature and scope of obligations set forth therein "arises" under the "laws" of the United States within the meaning of § 1331(a).

*Id.* at 521-22 (citations omitted).
not to suggest that every dispute arising under an interstate compact must be litigated in the federal courts. Under the Supremacy (quoting Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1852)); Texas v. New Mexico, 462 U.S. 554, 564 (1983) ("[T]wo States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, 'congressional consent transforms an interstate compact within this Clause into a law of the United States.'" (citation omitted)).

But a compact is after all a legal document. . . . Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. . . . A State cannot be its own ultimate judge in a controversy with a sister State. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); New York v. Hill, 528 U.S. 110, 111 (2000). In addition to precedent of the Supreme Court, Congress has also provided through legislation that certain interstate compacts fall within the jurisdiction of the federal courts. See 33 U.S.C. § 466g-1(a) (2002), which provides, in part:

The United States district courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that of any other court of the United States or of any State of the United States in matters in which the Supreme Court, or any other court, has original jurisdiction) of any case or controversy—

(1) which involves the construction or application of an interstate compact which (A) in whole or in part relates to the pollution of waters of an interstate river system or any portion thereof, and (B) expresses the consent of the States signatory to said compact to be sued in a district court in any case or controversy involving the application or construction thereof . . . .

It is important to note that provisions such as this—and that are contained in article XII, section C of the ICAOS, discussed infra note 146—are choice of forum requirements, not mandates that all litigation involving an interstate compact must be conducted in federal court. Such choice of forum restrictions are not uncommon in interstate compacts; however, they act only to bind the states and any compact-created administrative body as to the forum for bringing actions regarding the enforcement and interpretation of a compact as to the member states. These restrictions would not automatically preclude a private citizen from suing in state court, nor would they prevent state courts from enforcing the terms of a compact as a collateral matter to other litigation. State courts, subject to the Supremacy Clause, would be required to defer to a compact's terms and conditions just as any federal court is required to do when confronted with compact issues. State court jurisdiction over compact disputes would presumably extend to enforcing the terms of the compact on state officials, and even declaring a state statute, rule or constitutional provision void as conflicting with the terms of a compact to which that state is a member. A state court's jurisdiction would not, of course, extend to enforcing a compact's terms and conditions on other states, that matter resting clearly with the federal courts.
Clause, state courts have the same obligation to give force and effect to the provisions of a compact as do the federal courts. It is, however, ultimately the United States Supreme Court that retains the final word on the interpretation and application of congressionally approved compacts given their now federalized nature. The interpretation that courts give to interstate compacts effectively controls a state’s application of its own law as to the subject matter of the compact.

90. The Supreme Court has considered the status of interstate compacts in connection with its certiorari jurisdiction. See Del. River Comm’n v. Colburn, 310 U.S. 419, 427 (1940); Dyer, 341 U.S. at 28. In these cases, the Court addressed the question of whether a claim based on an interstate compact is cognizable under the Supreme Court’s certiorari provisions as applied to reviewing the judgments of the highest state court where a title, right, privilege or immunity is claimed under the Constitution, treaties or statutes of the United States. Colburn, 310 U.S. at 427; Dyer, 341 U.S. at 28. In Colburn, the Court unequivocally answered this question affirmatively, holding:

[T]he construction of such a [bi-state] compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal ‘title, right, privilege or immunity,’ which when ‘specially set up and claimed’ in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code.

310 U.S. at 427. In reaching this interpretation of the certiorari statute, the Supreme Court in Colburn and its progeny has firmly established that the construction of a compact, by virtue of congressional consent, presents a federal question. Id.


Because the compact creating the MWAA was congressionally sanctioned in accordance with the Compact Clause, it is a federal law subject to federal construction, notwithstanding its genesis in the enabling acts of Virginia and the District of Columbia... [T]he MWAA compact cannot be modified unilaterally by state legislation and takes precedence over conflicting state law.

Id.; McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991) (“Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states.”); Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1319 (4th Cir. 1983) (explaining the WMATA’s “quick take” condemnation powers under the compact are superior to the Maryland Constitution which expressly prohibited “quick take” condemnations); Malone v. Wash. Metro. Area Transit Auth., 622 F. Supp. 1422, 1426 (E.D. Va. 1985) (“Because congressionally sanctioned interstate compacts within the meaning of Art. 1 § 10 of the Constitution are federal law, state laws inconsistent with the terms of these compacts are unenforceable as to agencies formed by these compacts.”); Kansas City Area Transp. Auth. v. Missouri, 640 F.2d 173, 174
Although a congressionally approved compact is federalized, it remains a contract between the member states that must be interpreted and enforced within the four corners of the agreement. In interpreting and enforcing compacts, the courts are constrained to effectuate the terms of the compacts (as binding contracts) so long as those terms do not conflict with constitutional principles.92 For example, in *Texas v. New Mexico*, the Supreme Court sustained exceptions to a special master’s recommendation to enlarge the Pecos River Compact Commission, ruling that one consequence of a compact becoming “a law of the United States” is that “no court may order relief inconsistent with its express terms.”93 Although congressional consent may change the venue in which compact disputes are ultimately litigated, it does not change the controlling nature of the agreement on the member states.

II. THE INTERSTATE COMPACT ON ADULT OFFENDER SUPERVISION

The emerging understanding of the power of interstate compacts has, over the last fifty years, given rise to a new and potent form of compact. These new compacts do not directly address the subject matter of a problem between the states, but rather create ongoing administrative agencies to do so on behalf of the member states. These administrative agencies, creations of the member states, are vested with substantial authority to regulate not only substantive issues, but also individual state responses to those issues. In a very real sense, such administrative agencies act as a supra-state, sub-federal governmental body accountable to the collective member states but not subject to the control of any individual member state or the federal government. The Interstate

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92. 462 U.S. at 564.
Compact on Adult Offender Supervision (ICAOS) is perhaps the foremost example of the states using the compact device to create a supra-state administrative agency to regulate an issue of regional and national concern.94

A. Why a New Compact: Fundamental Flaws in the 1937 Compact

Prior to the adoption of the 1937 Compact, the United States had no national mechanism to govern the movement of adult offenders between states. Offenders, generally probationers or parolees, could not leave the convicting state, even if residents of another state.95 Two exceptions to this general prohibition evolved as a matter of either practical necessity or political convenience. First, the so-called “gentleman’s agreement” exception existed where officials in one or more states established informal procedures for the transfer of offenders.96 Second, so-called “sundown parole or probation” conditioned the offender’s release from custody or supervision upon the offender leaving the jurisdiction never to return; a “get out of town” approach to the movement of offenders.97 Particularly in the latter case, little consideration was given to the impact on the receiving state of offenders residing in that jurisdiction unbeknownst to local or state officials.

It was against this backdrop that, in 1934, Congress authorized the creation of interstate compacts on crime control.98 The

94. See MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 300 (1971). Ridgeway argues that once created, states lack individual authority over compact created entities because “[a]n interstate compact, by its very nature, shifts a part of a state’s authority to another state or states, or to the agency the several states jointly create to run the compact.” Id.

95. As a practical matter, probation and parole were the only “tools” available to the states at the time the 1937 Compact was negotiated. The development of alternative and pre-trial programs was a creation of the late twentieth century. Interview with Carl Wicklund, Executive Director, American Probation and Parole Association (Oct. 13, 2002).

96. Id.

97. Id.

98. Congressional consent for the ICAOS is based on the consent Congress first granted in 1934 to promote interstate crime control measures:

The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to es-
1937 Interstate Compact for the Supervision of Parolees and Probationers was one of the first interstate compacts created under this congressional authorization. By its terms, member states agreed to certain principles regarding the movement of adult probationers and parolees from one state (the sending state) to another state (the receiving state). Key among the principles were the following: (1) the member states agreed that under certain circumstances, parolees or probationers could be sent to another state; (2) the receiving states would assume supervision of parolees or probationers; (3) duly accredited officers of the sending state could enter the receiving state and apprehend a parolee or probationer without following formal extradition requirements; (4) the decision of a sending state to retake a parolee or probationer was conclusive on the authorities of the receiving state; (5) duly accredited officers could pass through the territory of any member state uninhibited in an effort to apprehend or return a parolee or probationer; and (6) the governor of a member state could designate an official who, acting in concert with officials from other states, could promulgate rules.

Although the 1937 Compact was simple on its face, its operation became haphazard, difficult, and fragmented in recent years. As the population of the United States became more mobile, so too did parolees and probationers. The creation of a variety of "alternative sentencing" options, such as suspended sentencing, deferred sentencing and programs promoting treatment in lieu of conviction, complicated the interstate transfer and supervision of offenders. The 1937 Compact was silent on regulating those in al-
ternative sentencing programs and those in supervised pre-trial status who constitute a significant and growing population.\textsuperscript{101}

Compounding the ineffectiveness of the 1937 Compact was the dramatic rise in the number of parolees and probationers as a result of the push throughout the 1980s and 1990s to get tough on crime.\textsuperscript{102} Officials in member states increasingly ignored reporting requirements and the rules dealing with notice and transfer of supervision. Probationers and parolees were sent to other states without any forewarning—or warning at all. Probation and parole officers, overwhelmed by their own local caseloads and facing the widely disparate systems of other states, denied permission for out-of-state offenders notwithstanding the mandates of the 1937 Compact.\textsuperscript{103} This fragmented system made it almost impossible to

\textsuperscript{101.} See Brian A. Reaves & Jacob Perez, \textit{Pretrial Release of Felony Defendants, 1992}, U.S. Department of Justice, Bureau of Justice Statistics NCJ-148818 (November 1994), \textit{available at} http://www.ojp.gov/bjs/pub/pdf/nprp92.pdf. According to this bulletin, in 1992 (the last year for which figures are available) "\textit{an estimated 63% of the defendants who had State felony charges filed against them in the Nation's 75 most populous counties . . . were released}" from pre-trial detention. \textit{Id.} at 1. Approximately one-third of these defendants were "\textit{rearrested for a new offense, failed to appear in court as scheduled, or committed some other violation that resulted in the revocation of their pre-trial release.}" \textit{Id.} Some eight percent of released offenders for whom the court issued a bench warrant were still fugitives from justice after one year. \textit{Id.} "\textit{Twenty-seven percent of released defendants had at least one prior felony conviction . . . .}" \textit{Id.}

\textsuperscript{102.} See Lauren E. Glaze, \textit{Probation and Parole in the United States, 2001}, U.S. Department of Justice, Bureau of Statistics NCJ-195669 (Aug. 2002), \textit{available at} http://www.ojpusdoj.gov/bjs/pub/pdf/ppus01.pdf. According to this report, in calendar year 2001 there were 3,952,751 offenders on probation and 731,147 offenders on parole. \textit{Id.} at 1. This represents a 2.8% increase in probation caseloads and a 1.0% increase in parole caseloads over calendar year 2000. \textit{Id.} The Bureau of Statistics estimates that from 1995 to 2001 probation caseloads increased at an annualized rate of 3.4%, while parole caseloads increased at an annualized rate of 1.2% for the same period. \textit{Id.} For the period 1995-2001, prison populations increased at an annualized rate of 3.6%, while jail populations increased at an annualized rate of 3.7% for the same period. \textit{Id.} In 1998, the National Institute of Corrections estimated that some 250,000 of those currently on probation or parole will have their status transferred to another state under the two now existing interstate compacts. Interstate Compact for the Supervision of Parolees and Probationers, Advisory Group Report and Recommendations, Phase I 8 (Nat'l Institute of Corrections, June 29 & 30, 1998) \textit{available at} http://www.nicic.org/pubs/1998/013120.pdf.

\textsuperscript{103.} Approximately 3,285 different local authorities operating under some 861 different agencies oversaw probationers and parolees traveling inter-
account for offenders, much less provide any meaningful supervision of, or control over, their post-offense conduct.

Amplifying these practical problems was the lack of any formal governing structure provided in the 1937 Compact, or any structure formally recognized by the states. Although the 1937 Compact provided that each governor could “designate an officer who, acting jointly with like officers of other contracting states . . . shall promulgate such rules and regulations as may be deemed necessary,” there was no formal definition of the powers or duties of any joint body. Administration of the compact fell, essentially by default, to the Parole and Probation Compact Administrator’s Association (PPCAA). The Association—comprised of state officials from throughout the nation—promulgated rules and policies which sought to implement the spirit of the compact. However,


104. Member states to the 1937 Compact pay annual dues of $400 to the PPPCA. This is the only payment states make to a national body regulating that compact. THE PAROLE AND PROBATION COMPACT ADM’RS’ ASS’N MANUAL, ch.1, § 1.7 (2001), available at http://www.ppcaa.net.


106. It is arguable whether the PCCAA ever had authority to promulgate administrative and regulatory rules binding on the states in their sovereign capacity. The 1937 Compact authorized the governor of each state to “designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate . . . rules and regulations . . .” Id. § 5. As compacts are solemn contracts, they must be interpreted within the confines of the agreement and, thus, a specific delegation of a member state’s authority would seem warranted. Whether the PCCAA constitutes a group of “like officers” authorized to promulgate such rules is questionable given its membership. Membership in the PCCAA is not limited to the gubernatorially appointed state officials authorized by the 1937 compact to promulgate rules, but extends to a fairly broad range of individuals within each state, including: deputy administrators, coordinators, compact correspondents, and parole officers. THE PAROLE AND PROBATION COMPACT ADM’RS’ ASS’N MANUAL ch. 1, § 1.7 (2001), available at http://www.ppcaa.net. As the PCCAA acknowledges:

The object of the Association is to bring the officers of the respective States, Territories, and Administrative Sub-Divisions signatories to the Interstate Compact for Supervision of Parolees and Probationers, into an organization through which they may become personally acquainted with each other, to exchange information and to cooperate together for the effective carrying out of the provisions of the Uniform Act for Out-of-State Parolee Supervision, the Compacts entered
into by and among the contracting States, Territories and Administrative Sub-Divisions, and the rules and regulations promulgated thereunder and to secure uniformity in interpretation, practice, and procedure.

*Id.* Thus, the PPCAA is more akin to a professional association than an interstate commission authorized to bind the states to specific policies and procedures that can, in some cases, supersede substantive state law, including a state's constitution. There is no indication of any formal state recognition of, or delegation of authority to, the PPCAA outside of the bare fact that the states have acquiesced to its *assumed* role. Whether acquiescence constitutes state recognition of the PPCAA as the explicit governing authority of the 1937 Compact has never been litigated. One additional complication may be that the rules promulgated by the PPCAA were seldom done pursuant to a formal rulemaking procedure as outlined in the ICAOS and were frequently done by employees of the state compact administrator. *See, e.g.*, Interstate Compact for the Supervision of Parolees and Probationers, 1935-1936 R.I. Pub. Laws 2381. While individual members of the PPCAA may have been acting under color of state authority, the solemnity and formality of interstate compacts as contracts between sovereign states would appear to demand a higher standard. After all, compacts are not mere administrative agreements or arrangements. Given that the 1937 Compact was federalized by the consent of Congress, its rules are enforceable on the states under the Supremacy Clause. Therefore, it seems rudimentary that a specific delegation of the state's power to a state official is needed if that official is to, "acting jointly" with other state officials, negotiate rules that are binding on the individual states. *Id.* If a formal grant of the state’s sovereign authority is not needed in administering compacts, arguably any state employee can take actions detrimental to the sovereign status of a state, e.g., adopting rules ceding a portion of the state's sovereignty. This would seem contrary to the very purpose of compacts, which are to bind the states in formal contracts. The courts have long recognized the rules of the PPCAA because no one has specifically challenged its rulemaking authority relative to the states. Courts appear to recognize the PPCAA's authority by default; that is, they have assumed the validity of its actions because no one has challenged those actions or engaged in any formal analysis of the PPCAA's authority. *See* Doe v. Ward, 124 F. Supp. 2d 900, 913 (W.D. Pa. 2000) ("The regulations promulgated by the Parole and Probation Compact Administrators' Association . . . also support[] our reading of the statute."); *see, e.g.*, ALM Corp. v. United States Envtl. Prot. Agency, Region II, 974 F.2d 380, 383 (3d Cir. 1992) (judicial deference is given to agency's reasonable interpretation of a statute whether it is interpreting statute directly or through the promulgation of a rule or regulation . . . ."); *see also* Aveline v. Pa. Bd. of Prob. & Parole, 729 A.2d 1254, 1254 (Pa. 1999). Absent a specific grant of authority, the most one may argue is that the PPCAA acts in an "agency" capacity to the states or that the states and those affected by the rules have a right to "detrimentally rely" on the actions of the PPCAA. However, given that compacts are not contracts for the production of widgets but fundamentally can alter the sovereignty of a state, the authors suggest that more is needed. This issue is, however, largely rendered moot as to the member states of the ICAOS because the compact specifically designates who has the authority to make binding rules and under
as an association with questionable legal standing or political clout, it was nearly impossible to obtain state compliance with the rules. The PPCAA was in the untenable position of attempting to administer and enforce a contract between sovereign entities—the states—through an association of state officials whose enforcement authority was open to debate. The efficacy and en-


1. Interstate tensions, policy differences, and serious inefficiencies seem to characterize current Compact operations.

2. There is a philosophical split between those who believe that Compact rules should be strictly followed and—in addition—enforced, and those who believe the Compact has become too rule-bound, too inflexible to accommodate special circumstances.

3. Very few Compact offices have reliable data on violations of probation or parole committed by Compact transferees.

4. Agency staff are generally satisfied with operations within their own states, but sometimes extremely frustrated in their dealings with other states.

Id. The report concluded that rule "[v]iolations were described as rampant, suggesting a need for methodical review and modification of rules, as well as increased enforcement and accountability among states that are party to the Compact." Id. at 3.

108. For example, the PPCAA’s manual on dispute resolution called for states to informally resolve their differences. If that was not possible, the PPCAA provided for a formal complaint process that would result in an Executive Council ruling on the dispute. If the “offending state” failed to comply with the Council’s ruling, the rules called for the following actions:

a. Seek the assistance of the offending state’s legal counsel.

b. Seek the assistance of the offending state’s Attorney General.

c. Seek the assistance of the United States Attorney General.

d. Orchestrate a succession of letters from neutral states urging reconsideration by the offending state.

e. Write a letter of reprimand to the offending state’s Compact Administrator or Deputy Compact Administrator with copies to the Administrator’s immediate superior.

f. Write a letter of reprimand to the offending state’s Compact Administrator or Deputy Compact Administrator with copies to the Administrators’ immediate superior and the Governor.
forceability of the rules adopted under the auspices of the 1937 Compact was in serious doubt, as evidenced by how many state and local officials ignored the rules.  

Against this backdrop of compounding failures, several states began considering and adopting legislative regulations, effectively restricting the movement of interstate probationers and parolees. For example, several states adopted sex offender registration restrictions on out-of-state probationers and parolees. Colorado adopted legislation prohibiting “the travel of a supervised person who is a nonresident of this state . . . without written notification from the administrator of the interstate compact of acceptance of

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**THE PAROLE AND PROBATION COMPACT ADM'RS' ASS'N MANUAL,** ch. 3, § 1–102 (2001) available at http://www.ppcaa.net. As is clear from the list of possible “actions,” there was very little the PPCAA could actually do to effectuate a change in the behavior of the offending state.

109. For example, the 1998 field evaluation conducted by the National Institute of Corrections noted that, “[judges] often do not know enough about Compact guidelines, though their decisions affect Compact operations. Respondents noted that, for example, when judges fail to follow Compact regulations, it is almost impossible to have violators returned.” Clem, *supra* note 107, at 11.

110. See, e.g., **KY. REV. STAT. ANN. § 17.510(6) (Michie 2002)**, which provides in part:

> Any person who has been convicted in a court of another state or territory, a court of the United States, or a court martial of the United States Armed Forces of a sex crime or criminal offense against a victim who is a minor, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, shall be informed at the time of his or her relocation to Kentucky of the duty to register under this section, and to comply with the requirements of subsection (4)(b) of this section, by the interstate compact officer of the Department of Corrections or the Department of Juvenile Justice.

*Id.*
the supervised person into a private treatment program." The Colorado statute was the result of state officials having no notice that offenders from other states were residing in local communities or participating in in-state treatment programs. Several states enacted, or threatened to enact, laws prohibiting the transfer of individuals within high-risk groups, such as sex offenders, further eroding the enforceability of the 1937 Compact. By 1998, it was clear that an atmosphere had evolved in which the states could, with relative impunity, ignore the Compact and its rules with little fear of repercussions. In fact, this is precisely what happened. The 1937 Compact had outlived its usefulness.

111. COLO. REV. STAT. § 17-27.1-101(3)(b) (2002). The reason for adopting the restrictions was contained in the legislative finding to the statute, which provided, in part:

The general assembly further finds that although Colorado is a signatory to the interstate compact for parolee supervision, more information concerning out-of-state offenders is necessary for the protection of the citizens of Colorado, and it may be necessary to further regulate programs that provide treatment and services to such persons.

Id. § 17-27.1-101(1)(b).

112. See Clem, supra note 107. The report quoted a county administrator who observed, "[t]oo many bodies show up without advance approval,' and ‘[r]ejected bodies end up in the state anyway, and they have no on-site supervision.” Id. at 13.

113. In Doe v. Ward, the court held that Pennsylvania's attempt to impose higher restrictions on out-of-state sex offenders than it imposed on in-state sex offenders violated the terms of the 1937 Compact and rules adopted pursuant to the compact. 124 F. Supp. 2d 900, 900 (W.D. Pa. 2000). In 1997, Pennsylvania's parole board issued a policy mandating that all out-of-state offenders convicted of certain offenses register with the state police and submit to community notification. Id. at 905. This policy was eventually adopted by the state legislature and codified. 61 PA. STAT. ANN. § 331.1 (1999). In striking down the law, the court concluded that the 1937 Compact was, “as a congressionally sanctioned interstate compact, [both] a federal law as well as state law,” Ward, 124 F. Supp. 2d at 912. As such, it was subject to federal court jurisdiction and federal court construction. The court further concluded that “the Compact requires Pennsylvania to provide Doe with the same process as is provided to in-state offenders before subjecting him to community notification.” Id. at 911. The court reached this conclusion, in part, because the rules promulgated under the Compact required that the treatment of out-of-state offenders "be governed by the same standards that prevail for its own [receiving state] probationers and parolees.” Id. at 912 (quoting 61 PA. STAT. ANN. § 321 (1999)).

114. Recently, the failure of compact officials in Texas to comply fully with the 1937 Compact did not escape unnoticed by the North Dakota Supreme Court. In Hansen v. Scott, 645 N.W.2d 223, 232-33, 236 (N.D. 2002), that
court reinstated a wrongful death suit against Texas state officials finding that the plaintiffs established a prima facie tort claim and that Texas officials had sufficient minimum contacts with North Dakota under the state's long arm statute to establish jurisdiction. That court ruled, in part:

[T]he daughters' complaint alleges claims against the Texas defendants for wrongful death, survivorship, and constitutional violations under 42 U.S.C. § 1983. The daughters allege the Texas defendants unreasonably and recklessly failed to fully disclose Lawrence's background and extensive criminal history when providing transfer information to North Dakota officials, the Texas defendants unreasonably and recklessly failed to comply with the appropriate standard of care under the applicable policies and procedures governing supervision of parolees, and the Texas defendants acted in an unreasonable and reckless manner in developing and implementing policies and procedures for determining when a parole violator should be returned from a receiving state to Texas. The daughters allege the Texas defendants' conduct proximately caused the deaths of Gordon and Barbara Erickstad, which occurred in North Dakota. Under these allegations and in this posture, the daughters' wrongful death and survivorship claims against the Texas defendants are sufficient to allege prima facie torts within or without this state . . . .

Assuming the truth of the allegations in the complaint, the Texas defendants effectively sent a dangerous parolee to North Dakota without fully disclosing his dangerous propensities. The Texas defendants' affirmative action of asking North Dakota to supervise Lawrence, a Texas parolee, constitutes activity in which they purposely availed themselves of the privilege of sending Lawrence to North Dakota.

. . . Viewing the allegations in the complaint in the light most favorable to the daughters, we conclude the exercise of personal jurisdiction over the Texas defendants does not offend traditional notions of substantial justice, fair play, or due process of law.

Id. at 232, 236 (footnote and citations omitted). Texas filed a petition for writ of certiorari in the U.S. Supreme Court challenging the North Dakota Supreme Court's decision. One ground asserted by Texas was that the Hansen decision "now forces States to weigh this important objective [establishing a cooperative system for transfer of adult offenders] against a substantial burden they did not bargain for in joining the Compact [on Adult Offender Supervision]." Scott v. Hansen, Docket No. 02-657, petition for certiorari 10 (Nov. 1, 2002). The "substantial burden" referred to in the petition is subjecting officials in a sending state to the in personum jurisdiction of a receiving state should an offender commit subsequent offenses. However, the Supreme Court has denied certiorari of the North Dakota Supreme Court decision. Scott v. Hansen, 537 U.S. 1108, 1108 (2003).

B. A New Structure to Address Old Problems

Beginning in 1998, under the auspices of the National Institute of Corrections and the Council of State Governments, a concerted effort was made to substantially amend or completely replace the 1937 Compact. The end result of that process was the ICAOS. The importance of the ICAOS must be viewed within the context of both its policy implications and its legal standing. By adopting the new compact, each of the member states has ceded control (and a certain degree of sovereignty) over the interstate movement of adult offenders. In light of *Cuyler* and subsequent cases, the ICAOS, and the rules adopted by its newly formed Interstate Commission, function as “the law of the United States” applicable to the member states under both the terms of the compact and through the operation of the Supremacy Clause. Adoption of the ICAOS has, in a very tangible sense, “nationalized” and “federalized” the movement of adult offenders with state convictions, while simultaneously retaining policy direction and operational control in the member states.

The difference between the old compact and the new compact, however, does not rest so much in the “federalization” of a substantive area of law, but in the creation of a formal and powerful administrative and enforcement structure that can supersede in-

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116. Prior to convening a drafting team in 1998, the NIC conducted a two-year study of the 1937 Compact. See Interstate Compact for the Supervision of Parolees and Probationers advisory group report and recommendations phase I, available at http://www.nicic.org/resources/topics/InterstateCompact.aspx. Among the recommendations were:

- The compact administrator not a deputy or clerical person should represent the state on a nationwide governing commission. This would ensure policymaker level participation for the states and territories.
- A national governance commission to regulate the compact.
- Provisions that address governance, the role of an executive committee, mandatory funding of the national commission, permanent commission staffing, national data collection standards, and commission authority to make binding rules and regulations.

*Id.*

117. See *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (“The agreement is a congressionally sanctioned interstate compact within the Compact Clause and thus is a federal law subject to federal constructions.” (citation omitted)); see also *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001).
dividual state autonomy. The states have effectively created a sub-federal, supra-state governing body—an intermediate and particularized authority—to manage issues and resolve problems relative to the interstate movement of adult offenders. It is the creation of this new structure that may well pave the way for future compacts that can address other supra-state, sub-federal issues.

One need only compare the ICAOS with the 1937 Compact to immediately recognize the differences. Where the 1937 Compact addressed policy issues concerning the interstate movement of parolees and probationers, the ICAOS is silent as to the specifics of such policy matters. Where the 1937 Compact had scant detail regarding governance and management of compact affairs, the ICAOS is largely dedicated to creating an elaborate governance structure of state councils and an Interstate Commission to oversee the Compact. Where the 1937 Compact was a compact to regulate the movement of parolees and probationers, the ICAOS is a compact that governs the movement of adult offenders by regulating the conduct of member states.

Under the ICAOS, regulation of Compact operations is vested in two bodies: state councils that address intrastate affairs and an Interstate Commission that handles interstate affairs, administers the compact nationally, and establishes regulatory rules governing state officials in their management of adult offenders. The state councils provide Compact administrators and state policymakers with a forum for addressing intrastate issues, such as ensuring adequate funding for Compact operations and remedying intrastate activity that could pull the state out of compliance with the ICAOS. As the movement of adult offenders embraces all

118. The Cuyler reasoning applied equally to the 1937 Compact because it rested upon the congressional consent contained in the 1934 crime control act. Consequently, the 1937 Compact was also the "law of the United States." See Cuyler v. Adams, 449 U.S. 433, 440, 442 (1981). The substantive difference between the ICAOS and the 1937 Compact rests on breadth of authority given to the interstate commission.

119. According to ICAOS:

Each member state shall create a State Council for Interstate Adult Offender Supervision which shall be responsible for the appointment of the commissioner who shall serve on the Interstate Commission from that state. Each State Council shall appoint as its commissioner the Compact Administrator from that state to serve on
three branches of state government and many community interests, the state councils provide a much needed forum for the coordination and intrastate management of interstate adult offenders.

Notwithstanding the intrastate function of the state councils, the true power of the ICAOS rests in its interstate governing structure and particularly its new Commission. The vast majority of the ICAOS is dedicated to establishing the Commission and defining its powers. The ICAOS vests in the Commission significant rulemaking, management, operational, and enforcement authority. As noted in the preamble to the ICAOS:

It is the purpose of this compact and the Interstate Commission created hereunder, through means of joint and cooperative action among the compacting states: to provide the framework for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving state; and to equitably distribute the costs, benefits, and obligations of the compact among the compacting states.120

Pursuant to article I of the ICAOS, the Interstate Commission is charged with the following duties:

[E]stablish uniform procedures to manage the movement

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120. Id. art. I.
between states of the adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies which will promulgate rules to achieve the purposes of this compact; ensure an opportunity for input and timely notice to victims and to jurisdictions where defined offenders are authorized to travel or to relocate across state lines; establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials, and regular reporting of Compact activities to the heads of state councils, state executive, judicial and legislative branches and criminal justice administrators; monitor compliance with rules governing the movement of offenders and initiate interventions to address and correct non-compliance; and coordinate training and education regarding regulations of interstate movement of offenders for officials involved in such activity.121

Under the ICAOS, there is little regarding the interstate movement of adult offenders that does not fall within the purview of the Commission. The Commission can make rules regulating the terms and conditions under which the supervision of adult offenders can be transferred between states,122 collect and manage data,123 assist in dispute resolution,124 and bring enforcement actions against a member state that violates the terms and conditions of the Compact.125 In effect, the Compact governs the conduct of state officials in carrying out the provisions of the Compact and its rules. The scope of the Compact—as an instrument governing individual state conduct—is expansive.

The use of interstate commissions as a mechanism for implementing and regulating an interstate compact is not novel.126

121. Id.
122. Id. art. VIII.
123. Id.
124. Id. art. IX.
125. Id. art. XII.
126. E.g., Central Interstate Low-Level Radioactive Waste Compact, art. IV, ARK. CODE ANN. § 8–8–202 (Michie 2000); Connecticut River Flood Control Compact, art. II, CONN. GEN. STAT. § 25–99 (1999); Great Lakes Basin Compact, art. IV, 45 ILL. COMP. STAT. 145/1 (1993); Compact for Education,
Many regulatory compacts—such as the Interstate Compact on Insurance Receiverships and the Central Midwest Low-Level Radioactive Waste Compact—utilize the interstate commission governance model. Likewise, many development and water compacts use interstate commissions or boards of authority to manage the affairs of those compacts. However, the Interstate Commission created by the ICAOS is fundamentally different from most other compact-created commissions in three regards.

First, the ICAOS has a significant reach, potentially affecting the lives of millions of people classified as “adult offenders.” The ICAOS specifically provides that the Commission shall “oversee, supervise and coordinate the interstate movement of offenders subject to the terms of [the] compact and any by-laws adopted and

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127. See id.
129. Compare Interstate Insurance Receivership Compact Act, 45 ILL. COMP. STAT. ANN. 160/5 (Supp. 2003), with ICAOS, http://www.adultcompact.org/Adult%20Compact%20Language.pdf. The Interstate Insurance Receivership Compact is similar in model to the ICAOS. Both compacts create interstate commissions to manage their affairs. Moreover, both compacts vest their respective commissions with broad rulemaking authority. However, whereas the Interstate Insurance Receivership Compact provides for termination should a state default on its obligations, the ICAOS empowers its Interstate Commission to seek injunctive relief in federal court, suspend or terminate member states, or impose fines, fees and costs. This is a significant enforcement power conferred only on the ICAOS Commission and not contained in any other compact.
130. As used in the ICAOS, “adult offender” is derived from two definitions. See ICAOS, art. II, http://www.adultcompact.org/Adult%20Compact%20Language.pdf. The ICAOS defines an adult as “both individuals legally classified as adults and juveniles treated as adults by court order, statute, or operation of law.” Id. cl. 1. The ICAOS defines an offender as “an adult placed under, or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.” Id. cl. 9. By using the phrase “commission of a criminal offense,” the ICAOS sweeps into its regulatory scheme offenders who may be in pretrial or alternative sentencing status.
rules promulgated by the compact commission.”131 The Commission is not merely advisory, nor is its authority questionable; rather, it has clear management authority and responsibility. The rules adopted by the Commission apply not only to traditional parolees and probationers, but also to those in a pre-trial status and those subject to alternative sentencing programs.132 The decision to use the term “adult offenders” rather than “parolees and probationers” was very intentional. The ICAOS is intended to give the Interstate Commission authority to regulate the movement of the full breadth of the adult offender population, not just individual subsets of that population. Moreover, the language of the ICAOS is flexible, giving the Commission the ability to adapt to future developments in adult corrections without having to resort to the arduous task of amending the Compact.

In carrying out its regulatory activities, the ICAOS charges the Commission with specific responsibilities, the most important of which is rulemaking.133 The ICAOS Commission may promulgate rules addressing a wide variety of issues including notice requirements for victims, offender registration and compliance, violations and returns, transfer procedures, collection of restitution and fees from offenders, data collection and reporting, supervision levels in receiving states, dispute resolution, and transition from the 1937 Compact to the ICAOS.134 Through its rulemaking authority, the ICAOS Commission potentially can regulate all activities surrounding the movement of adult offenders and how states conduct themselves in managing that population.135

131. Id. art. V, cl. 3.
132. See supra note 130.
133. Article V of ICAOS discusses the full range of Commission authority including the authority to establish offices, hire staff, adopt by-laws, establish a budget, levy costs on the states, coordinate education of state officials, report annually to the three branches of each state's government, and establish uniform standards for reporting, collecting and exchanging data. ICAOS, art. V, http://www.adultcompact.org/Adult%20Compact%20Language.pdf.
134. Id. art. VIII.
135. The rulemaking authority of the Commission is extraordinarily broad. It is not, however, without some checks and balances. The Compact allows states to reject rules. “If a majority of the legislatures of the compacting states rejects a rule, by enactment of a statute or resolution in the same manner used to adopt the compact, then such rule shall have no further force and effect in any compacting state.” Id. If a majority of the compacting states
Second, under its broad rulemaking authority the ICAOS Commission has the power to regulate both the movement of individuals (adult offenders) and the conduct of the member states. The ICAOS Commission is empowered to "promulgate rules which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact." The ICAOS arguably extends the principles of the Cuyler decision beyond the specific language of the Compact to encompass all of the rules and actions undertaken by the Commission in the implementation and enforcement of the Compact. The rules and regulations will supersede any state laws in conflict, and a state will no longer be able to pass legislation that whittles away at compact regulations.

Third, it is important to note that the ICAOS creates a regulatory scheme more than it regulates the actual movement of

do not reject the rule, the rule is in full force and effect in all states notwithstanding an individual state's action.

136. The Commission's rulemaking authority is outlined in article VIII of the Compact. All rules adopted by the Commission "shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C.S. section 551, et seq., and the Federal Advisory Committee Act, 5 U.S.C.S. app. 2, section 1 et seq., as many be amended . . . . All Rules and amendments shall become binding as of the date specified in each Rule or amendment." Id. By contrast, the interstate commission created under the Central Midwest Radioactive Waste Compact is empowered to enter agreements for the disposal of waste and may license certain facilities. E.g., art. V, § (d), 45 ILL. COMP. STAT. 140/1 (1997). However, that commission does not possess broad rulemaking power and under the explicit terms of the compact each state retains the right to enforce its laws, rules and regulations "pertaining [to] the packaging and transportation of waste generated within or passing through its borders." Id.; see also Ohio River Valley Water Sanitation Compact, art. VII, which provides, in part:

Nothing in this Compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

Id.


138. There is one exception to this statement. Acting in concert, a majority of the legislatures of the member states may reject a rule promulgated by the Interstate Commission. The rule would then have no force or effect on any member state. Id. art. VIII. Outside of this provision and various Compact requirements of the rule adoption process, there is no limitation on the Commission's rulemaking authority.
adult offenders. The ICAOS is directed at implementing a governance structure that can effectively regulate a particular activity. For example, unlike the 1937 Compact, nowhere in the ICAOS is there any explicit provision actually regulating the movement of adult offenders. Where the 1937 Compact required "judicial and administrative authorities of a state party to [the] compact (hereto called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (hereto called "receiving state")," the ICAOS leaves to the Commission the duty of adopting rules that meet the policy objectives of the Compact.\(^{139}\)

Inasmuch as the ICAOS is focused on the governance of state conduct more than the actual regulation of adult offenders,\(^\text{140}\) the Commission has been given a number of enforcement tools to ensure that member states comply with both the letter and spirit of the Compact.\(^\text{141}\) Historically, the single largest challenge with using interstate compacts has been providing flexible management of compact affairs while enforcing compact provisions on the member states. Although compacts are contracts within the meaning of the Compact Clause of the Constitution, the parties to the compacts have a unique status.\(^\text{142}\)

To address this issue, the ICAOS Commission has been given significant enforcement power. For example, the Commission pos-

\(^{139}\) Compare ICAOS, http://www.adultcompact.org/Adult%20Compact%20Language.pdf, with 1937 Compact, supra discussion pp. 107-14. The only language in ICAOS that can be construed as "regulatory" as opposed to governance in orientation is the following statement:

The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and bylaws and rules promulgated hereunder.


\(^{140}\) The Commission clearly has the authority to regulate the movement of adult offenders under article V. See generally id. art. V. However, as noted previously, that activity has been reserved for the Commission's rulemaking authority rather than contained in the text of the Compact itself.

\(^{141}\) Id. art. XII, § B.

\(^{142}\) See supra notes 74-93 and accompanying text.
sessed the power to impose on a defaulting state fines, fees and costs "in such amounts as are deemed to be reasonable as fixed by the Interstate Commission."\textsuperscript{143} The Commission can provide remedial training and technical assistance in an effort to bring a defaulting state into compliance.\textsuperscript{144} The ICAOS Commission can also suspend or terminate a defaulting state from the Compact.\textsuperscript{145} Additionally, the Commission can, by majority vote, initiate legal action in the federal courts to force compliance with the Compact and its by-laws and rules.\textsuperscript{146} The most likely form of legal action would be affirmative injunctive relief against a defaulting state to compel compliance with the terms of the Compact.

Of the enforcement tools provided to the Commission, the provisions allowing for fines, suspension or termination from the Compact, and federal litigation are the most unique. One must recall that compacts like the ICAOS are not only contracts between member states, but having received congressional consent are, under \textit{Cuyler} and its progeny, the "the law[s] of the United States."\textsuperscript{147} The use of these enforcement tools by the ICAOS Commission has practical, legal and policy implications, not the least of which is the fact that the Compact creates an intermediate gov-

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\textsuperscript{143} See ICAOS, art. XII, § B.
\textsuperscript{144} Id.
\textsuperscript{145} Id. In the event the Commission moves to suspend or terminate a member state, certain procedures must be followed. Specifically, the Commission can suspend or terminate a member state "only after all other reasonable means of securing compliance... have been exhausted." \textit{Id}. The Commission must then give a notice of suspension to "the Governor, Chief Justice, or Chief Judicial Officer of the state; the majority and minority leaders of the defaulting state's legislature, and the State Council." \textit{Id}. Termination from the compact requires a majority vote of the Commission. \textit{Id}.
\textsuperscript{146} Article XII, § C of the ICAOS provides:

The Interstate Commission may, by majority vote of the Members, initiate legal action in the United States District Court for the District of Columbia or, at the discretion of the Interstate Commission, in the Federal District where the Interstate Commission has its offices to enforce compliance with the provisions of the Compact, its duly promulgated Rules and By-laws, against any Compacting State in default. In the event judicial enforcement is necessary the prevailing party shall be awarded all costs of such litigation including reasonable attorneys fees.

\textit{Id}. art. XII, § C.
\textsuperscript{147} See supra Part I.C.2.
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ernment entity whose authority is clearly supra-state, sub-
federal.148

The ICAOS raises interesting challenges to traditional no-
tions of state sovereignty and federal control. By adopting the
ICAOS, member states have agreed to submit themselves to the
Commission in managing the movement of adult offenders.149 The
Commission, through its extensive rulemaking authority, stands
over the states in relation to the subject matter of the Compact.
No state legislature of any member state, for example, may pass a
statute that unilaterally attempts to regulate the movement of
adult offenders, or that establishes a state policy at odds with the
national policy established by the Commission. The act of any
state attempting to do so would be void under the Supremacy
Clause and subject the state to penalties under the explicit terms
of the Compact. While other compact-created commissions have
some modicum of enforcement power,150 no other compact vests in
a state-created interstate commission the enforcement authority
that the ICAOS affords its Commission. Moreover, no other com-
pact ties the commission's enforcement power so closely to the au-
thority of the federal judiciary.

C. Why the ICAOS Model is Important for the Future

Arguably, interstate compacts violate the pure ideal of federa-
lism to the extent that they allow for the creation of a third tier,
or intermediate, governing authority that is neither state in scope
nor federal in nature. However, with the United States becoming

148. Article V of the ICAOS provides, in part, that the Interstate Commis-
sion has the power "[t]o enforce compliance with compact provisions, Inter-
state Commission rules, and by-laws, using all necessary and proper means,
including but not limited to, the use of judicial process." ICAOS, art. V, cl. 4.
149. See, e.g., Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 41-42
(1994) ("As part of the federal plan prescribed by the Constitution, the States
agreed to the power sharing, coordination, and unified action that typify
Compact Clause creations."); see also Port Auth. Trans-Hudson Corp. v.
Feeney, 495 U.S. 299, 315 (1990) (Brennan, J., concurring in part and concur-
ing in judgment) ("Each State's sovereign will is circumscribed by that of the
other States in the compact and circumscribed further by the veto power re-
linquished to Congress in the Constitution.").
150. For example, the Interstate Insurance Receivership Compact, art.
XII, § B.1, empowers its interstate commission to terminate a state that is in
default of the performance of its obligations or responsibilities under the
increasingly integrated, rendering state boundaries largely irrelevant to many issues, compacts like the ICAOS may well prove to be an apt mechanism for developing state-based solutions to supra-state problems. Formal compacts modeled after the ICAOS provide two advantages to informal arrangements or federal pre-emption.

First, formal compacts creating intermediate governing authorities, such as interstate commissions, allow states to create enforcement mechanisms ensuring both sufficient regulation of a particular activity and sufficient enforcement of the compact’s terms and conditions on the member states. As noted, the true uniqueness of the ICAOS rests in the creation of an administrative governance structure that possesses a significant tool chest of rulemaking and enforcement powers, directed mainly at regulating individual state action. The ICAOS, by vesting an Interstate Commission of state officials with authority that is tied closely to the federal courts, ensures that the terms of the Compact can be enforced against the member states through judicial action if necessary. Absent this nexus, the ICAOS would not be significantly different than other compacts, and would be only marginally more effective than its 1937 counterpart. The ICAOS model effectively prevents individual state legislatures and state officials from unilaterally regulating supra-state issues.

Second, when properly constructed, compacts such as the ICAOS enable the member states to retain significant policy control over, and practical regulation of, the particular issue addressed by the compact. For example, in the case of the ICAOS, the Interstate Commission is comprised exclusively of state officials who may act on behalf of their respective states in creating and enforcing rules applicable to all member states. This is an effective means for preventing federal preemption in areas traditionally within the purview of the states' interests. History demonstrates that states are most at risk of federal preemption when

151. Article III of the ICAOS provides that the Interstate Commission shall consist of Commissioners selected and appointed by resident members of the State Council for Interstate Adult Offender Supervision for each state and that each compacting state represented at any meeting of the Interstate Commission is entitled to one vote. Id. art. III. The Compact further provides that each State Council shall appoint as its Commissioner the Compact Administrator from that state to serve on the Interstate Commission in such capacity under or pursuant to applicable law of the member state. Id. art. IV.
they fail to timely and effectively address supra-state, sub-federal problems. The ICAOS is a perfect example of short-circuiting a push by the federal government to regulate state conduct in an area traditionally reserved to the states, but which is of national consequence. The passage of "Aimee's Law" illustrates this point poignantly.152 Congress weighed in on the issue of the interstate movement of adult offenders by using its grant making and appropriation authority to regulate state conduct precisely because it viewed the states as unable to successfully address that issue. Thus, the compact instrument, when properly structured, can serve the dual purpose of regulating supra-state or national issues while simultaneously preempting the need for federal action. The ICAOS provides a firm, but flexible, management tool while allowing the member states collectively to retain authority over supra-state issues and regulate the conduct of individual member states.

Before the ICAOS, the enforcement of compacts was generally left to either the goodwill of the member states or the Supreme Court. Either of these approaches can prove to be inadequate, particularly where time is of the essence. Goodwill can only go so far, and the act of one state suing another state to enforce compact provisions is highly unusual in our jurisprudential history. Because traditional methods of enforcement appear less than successful, the ICAOS takes an approach that can be used in future compacts.153 At the center of this approach, lies the use of the compact instrument not to regulate specific activity, but to create a supra-state governance structure that can regulate the affected areas.

III. CONCLUSION

The use of compacts as instruments to address supra-state, sub-federal issues and promote uniformity of state policies can be controversial, particularly where those instruments create inter-

152. See supra text accompanying note 58.
153. A new juvenile justice compact has recently been drafted modeled largely on the ICAOS to replace a 1955 compact. See generally http://www.cfg.org (2003). Like the ICAOS, the juvenile compact creates the Interstate Commission for Juveniles and vests that Commission with many of the same duties and powers as the ICAOS Commission. Id. The juvenile compact is in draft form and, as of October 2003, has not been adopted by any state, although it has been introduced in several states. Id.
state commissions with broad enforcement and rulemaking authority. Yet, this is precisely the virtue of the ICAOS model. Today, states are facing issues that are not confined to geographical boundaries or jurisdictional lines. As the United States becomes more integrated socially, culturally and economically, the number of such issues will only increase. In an odd twist of fate, in an era of federal authority, states may only be able to preserve their sovereign authority over interstate problems to the extent that they share their sovereignty and work together through interstate compacts. Compacts are an attractive alternative, and in some cases are the only alternative, to federal intervention and regulation. The ICAOS model of a strong interstate commission, comprised of state representatives empowered to regulate both individual conduct and state behavior, can prove to be an effective and enforceable means of addressing other commonly shared supra-state, sub-federal issues.