FAR FROM HOME: INTERSTATE CORRECTIONS COMPACTS

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> "Mass incarceration is our American reality. It is a system whose logic evolved from the same lineage as Jim Crow, American apartheid, & slavery. To end it, we have to change."[1]
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> "A cage is a cage is a cage. And humans don't belong in them."[2]
>
> — Congresswoman Alexandria Ocasio-Cortez

When a person is convicted and sentenced to incarceration, we imagine that that person will be incarcerated within the boundary lines of the state that convicted them. That tenet is foundational to the United States' federalist scheme, wherein states retain the sovereign authority to adjudicate crime and punishment within their borders. Naturally, then, the convicting state will serve as the recipient and determinant of all legal and administrative complaints arising from their incarcerated citizens. But for a select population of incarcerated persons—the story is not so simple.

Every year, several thousand people incarcerated in correctional facilities are transferred out of the state that convicted them into the custody of another state. These out-of-state transfers are

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1. Alexandria Ocasio-Cortez (@AOC), TWITTER (Oct. 7, 2019, 9:15 AM), https://twitter.com/AOC/status/1181196457145225216 [https://perma.cc/NJ8L-XKUF].

2. Alexandria Ocasio-Cortez (@AOC), TWITTER (Oct. 7, 2019, 9:22 AM), https://twitter.com/AOC/status/1181198160045195269 [https://perma.cc/K86H-H2Z4].

governed by interstate corrections compacts, the largest of which includes thirty-nine states and the federal government. Corrections compacts govern every facet of a person's incarceration out-of-state and, on paper, provide clear remedies for out-of-state prisoners to vindicate grievances with their conditions of confinement. In reality, the act of transferring an incarcerated person completely alters the legal infrastructure surrounding them, making it almost impossible to determine who is responsible for providing administrative and post-conviction relief.

This Note unfurls the intricate legal, administrative, and constitutional issues raised by interstate corrections compacts. Its primary concern is in exploring whether the Compact Clause of the Constitution has transformed the various interstate corrections compacts currently in operation into federal law. The question is not purely academic: if the Compact Clause has transformed corrections compacts into federal law, violations of the rights conferred under these agreements can serve as the basis for claims under 42 U.S.C. § 1983, the primary mechanism through which incarcerated litigants challenge the conditions of confinement. Under current law, however, federal courts have shut the courthouse door on those incarcerated out-of-state based on an incomplete history of the legal and political history of these agreements. This Note aims to reset the historical narrative through compelling legal and historical evidence that weigh decisively in favor of reading corrections compacts as elements of federal law.

Part I traces the political history of interstate compacts generally and criminal compacts specifically. This engagement with the historical record contextualizes corrections compacts as only one facet of a broad, national movement that encouraged regional cooperation between states with the legal and political blessing of the federal government. Part II introduces the complex web that comprises Compact Clause jurisprudence with a keen eye towards its application to corrections compacts. The Part concludes by engaging with the legislative and jurisprudential history of these agreements, and demonstrates that Congress has provided ample evidence that correction compacts received the requisite consent to be transformed into federal law. Part III then canvasses the history of state, and later federal, prison administration from the Founding Era to date. This engagement buttresses the legislative record, and once again strongly suggests that corrections compacts have been transformed into federal law.

This Note does not suggest that the ability to access federal court is a panacea for incarcerated persons; instead, it asserts that access to federal court is one of several pathways to which incarcerated

citizens are constitutionally entitled, and one that may provide desperately needed relief.

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INTRODUCTION

Robert Burke was convicted and sentenced to prison in New Hampshire in 2009. In 2012, he was transferred into the custody of the Connecticut Department of Corrections pursuant to the New England Interstate Corrections Compact (NEICC).[3] According to medical reports discussed extensively in his court filings, Mr. Burke suffered from a range of medical conditions. In addition to cystic acne and boils, Mr. Burke was also diagnosed with colitis and sleep apnea, and his dietary needs continued to change during his incarceration in Connecticut.[4] To obtain the treatment prescribed by both the Connecticut and New Hampshire correctional departments' medical personnel, Mr. Burke filed one habeas action in New Hampshire state court and five habeas actions in Connecticut State Court, all of which focused on vindicating his medical claims.[5] By the time Mr. Burke filed a complaint with the U.S. District Court of Connecticut in 2021, he had spent nearly ten years pleading with courts, corrections officers, and prison administrative personnel across two states to recognize his claims.[6] Over the course of these ten years, Mr. Burke's health deteriorated. His skin cracked, causing him to bleed precipitously. One morning, he woke up without hearing, a condition which continued for weeks without treatment, and he was routinely denied the diet doctors had prescribed him to manage his conditions.[7] Adrift in a sea of state court proceedings, Mr. Burke attempted to challenge the conditions of his incarceration in the United State District Court of Connecticut. He handwrote twenty-nine different claims for relief against various administrators throughout the Connecticut Department of

3. Burke v. Lamont, No. 3:22-CV-475 (OAW), 2022 WL 3997549 at *2 (D. Conn. Sept. 1, 2022); N.H. REV. STAT. ANN. § 622-A:1 et. seq. (1961) (adopting the New England Interstate Corrections Compact on behalf of New Hampshire); CONN. GEN. STAT. § 18-102 et seq. (1961) (adopting the New England Interstate Corrections Compact on behalf of Connecticut).

4. *Burke*, 2022 WL 3997549, at *3–5.

5. *Burke*, 2022 WL 3997549, at *3–5; Burke v. Warden, Docket No. TSR-CV-15-4007445-S (Conn. Super. Ct. Aug. 17, 2015); Burke v. Comm'r Corr., Docket No. TSR-CV-17-4009173-S (Conn. Super. Ct. Oct. 20, 2017); Burke v. Comm'r Corr., Docket No. TSR-CV-19-5000268-S (Conn. Super. Ct. Jul. 15, 2019); Burke v. Comm'r Corr., Docket No. TSR-CV-19-5000326-S (Conn. Super. Ct. Aug. 29, 2019); Burke v. Comm'r Corr., Docket No. TSR-CV-21-5000872-S (Conn. Super. Ct. Jan. 11, 2021).

6. *Burke*, 2022 WL 3997549, at *3–5.

7. *Id.*

Corrections, ranging from the doctors that treated him, all the way to the Governor of Connecticut.

Among those claims, Mr. Burke filed a 42 U.S.C. § 1983 claim alleging violations of the Eighth Amendment, the Fourteenth Amendment, and the NEICC.[8] The NEICC is one of several similar multistate agreements that, on a basic level, allow one state to delegate custodial responsibility for its prisoners in exchange for agreed-upon compensation.[9] Among other matters, the NEICC establishes that incarcerated persons retain all the legal rights they would hold if incarcerated in the convicting state.[10] One can imagine that, in Mr. Burke's estimation, if Connecticut was failing to provide adequate medical care under the NEICC, and the Connecticut courts were unresponsive to his claims, perhaps the federal district court in Connecticut could help him get the care he needed. Instead, the District of Connecticut summarily dismissed Mr. Burke's pleadings associated with the interstate compact on the grounds that Mr. Burke had not alleged any facts "establishing that the Compact constitutes federal law as approved by Congress pursuant to the Compact Clause with subject matter appropriate for federal legislation." Consequently, Mr. Burke could not sustain a section 1983 claim based on violations of the agreement.[11] Federal courts frequently recite this rationale in response to similar pleadings for relief from prisoners incarcerated far from home.[12]

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8. *Id.*

9. Mitchell Wendell, *Multijurisdictional Aspects of Corrections*, 45 NEB. L. REV. 520, 524–28 (1966). The New England Interstate Corrections Compact remains operative today and includes Connecticut, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Vermont. *New England Interstate Corrections Compact*, NATIONAL CENTER FOR INTERSTATE COMPACTS, https://compacts.csg.org/compact/new-england-interstate-corrections-compact/ [https://perma.cc/9ZNR-K8TG].

10. Article IV provides that all inmates confined under the NEICC are to be treated in a "reasonable and humane manner" and "equally" to similar inmates of the receiving state confined within the same institution. The following provision states that the fact of confinement "shall not deprive any inmate" "of any legal rights" the inmate would have had if confined in an appropriate institution of the sending state. CONN. GEN. STAT. § 18-102, art. IV(e).

11. *Id.* at *9.

12. *Id.* at *9 ("[O]ther courts have declined to recognize a federal action under section 1983 based on the violation of provisions of the relevant interstate compact."). *Burke* cites, for example, Halpin v. Simmons, 33 F. App'x 961, 963–64 (10th Cir. 2002), Ghana v. Pearce, 159 F.3d 1206, 1208 (9th Cir. 1998), Stewart v. McManus, 924 F.2d 138, 142 (8th Cir. 1991), Denham v. Schwarzenegger, No. CVF05-0995AWIDLB, 2005 WL 3080857, at *5 (E.D. Cal. Nov. 16, 2005).

In 2019, Professor Emma Kaufman published ground-breaking research documenting the United States' interstate prison transfer network, which she describes as "The Prisoner Trade."[13] The interstate prison transfer network is a product of mid-twentieth century "bureaucratic and doctrinal innovation" that allows, for example, New Hampshire prison officers to send Robert Burke across state lines to be housed—indefinitely—in Connecticut.[14] Corrections compacts are the "legal machinery" that facilitate this network, and the three currently operative corrections compacts are wired nearly identically.[15] Once a state legislature has chosen to adopt a corrections compact, administrative personnel within each state may then negotiate bilateral or multilateral contractual agreements to govern the transfer of incarcerated persons between those states.[16] These agreements establish that the convicting state is delegating to the receiving state the responsibility to house and care for the prisoner in exchange for agreed-upon compensation.[17] On paper, the act of transferring an incarcerated person should not affect their legal rights. The statutory texts of the three corrections compacts active today specify that transferred persons retain all legal rights they would possess if housed in the state that convicted them.[18] But, the reality is not so.

This Note demonstrates that, in practice, when prison administrators transfer a person in their custody, they completely alter

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13. Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1818 (2020).

14. *Id.* at 1822.

15. Wendell, *supra* note 9, at 525–26. Mitchell Wendell was one of the original architects of corrections compacts. In addition to the New England Compact, which was ratified in 1958, two other corrections compacts are currently in effect. The Western Corrections Compact was drafted in 1958. The national Interstate Corrections Compact, drafted in 1966, has been enacted by thirty-seven states and the District of Columbia. *Id.* at 524–28.

16. Such agreements may go above and beyond the plain text of the statute if desired. *See id.* 526–27 (explaining that the statutory text provides only a baseline, and states must contract with one another for the specific terms of their arrangements).

17. Wendell, *supra* note 9, at 524–28.

18. For example, the NEICC states in Article IV(c) that individuals confined under the NEICC are at all times subject to the jurisdiction of the sending state, and may be removed therefrom at any time. CONN. GEN. STAT. § 18-102, art. IV(c) (1961). Article IV(f) provides that any hearings that the incarcerated individual may be entitled to by the laws of the sending state may be held in the receiving state, provided that the sending state agrees and that any such hearing is conducted according to the laws of the sending state. CONN. GEN. STAT. § 18-102, art. IV(f). Article IV(f)'s hearing requirements are often "honored in the breach." Kaufman, *supra* note 13, at 1830.

the legal infrastructure governing that individual's incarceration. As illustrated by Burke's and other incarcerated persons' stories, that altered legal infrastructure comes into sharp relief when incarcerated citizens attempt to challenge the conditions of their confinement. The filing of habeas corpus, section 1983, or other types of remedial claims illuminates labyrinthine legal and administrative complications: incarcerated persons transferred under the authority of a corrections compact are governed by at least two separate sets of prison administrative regulations;[19] they are held under the *legal* custody of the state that convicted them but the *physical* custody of the state that houses them;[20] and their ability to access the judiciary is discernible only through a vast body of state and federal court precedent that directs them to the jurisdictions of either their legal or physical custodians depending on the pleading.[21] For *pro se* litigants, many of

19. Prisoners have struggled to discern which administrative regulations apply to particular circumstances of their detention. Article IV(e) has been a particularly contentious provision. It provides that all inmates confined under the NEICC are to be treated in a "reasonable and humane manner" and "equally" to similar inmates of the receiving state confined within the same institution. The following provision states that the fact of confinement "shall not deprive any inmate" "of any legal rights" the inmate would have had if confined in an appropriate institution of the sending state. CONN. GEN. STAT. § 18-102, art. IV(e). Prisoners have attempted to argue that, where the disciplinary sanctions imposed by the receiving state differ markedly from those of the sending state, Article IV(e)'s deprivation of legal rights clause is triggered—thus banning such treatment. These arguments have not yet persuaded courts. *See, e.g.*, Stewart v. McManus, 924 F.2d 138, 141 (9th Cir. 1991) (rejecting plaintiff's arguments that the ICC conferred a liberty interest in the application of Kansas' disciplinary rules during his detention in Iowa, despite the loss of liberty that would result).

20. *See supra* note 18 and accompanying text (explaining the custodial arrangement provided for in Article IV).

21. *Compare* Taylor v. Peters, 361 P.3d 54, 55–57 (Or. Ct. App. 2015), *aff'd*, 383 P.3d 279 (Or. 2016) (stating that an Oregon prisoner transferred to Florida under the ICC retained his right to file a state habeas action in Oregon), *with* Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004) (announcing the general rule that the proper custodian for a federal habeas petition is "the person with the ability to produce the prisoner's body before the habeas court" (internal quotations omitted)). Courts have struggled to reconcile *Padilla* as applied to prisoner transfers, especially in light of conflicting circuit precedent that interprets prior court rulings not fully overturned by *Padilla*. *See* Hickam v. Janecka, 2007 WL 2219417 (D.N.M. May 7, 2007) (denying a motion to transfer habeas petition to Colorado district court filed by a prisoner convicted and sentenced in Colorado but housed in New Mexico under an ICC—concluding that *Padilla* undercut prior Ninth Circuit precedent that would have designated state of conviction as the proper custodian). *But see* Watson v. Figueroa, 2008 WL 2329107, at *9 (W.D. Okla. June 3, 2008) (disagreeing with *Hickam* as to whether *Padilla* undercut the reach of prior Supreme Court precedent

whom struggle in a basic case to make sense of post-conviction proceedings, this maze is exceptionally daunting.[22] Mr. Burke, for example, tried and failed to plead with New Hampshire—his legal custodian—for his freedom and with Connecticut—his physical custodian—for medical relief. Yet, despite the intricate shared custody agreement governing his incarceration, Mr. Burke cannot be found on either Connecticut or New Hampshire's online inmate registries.[23] Both within and outside the prison walls, it's impossible to determine who is responsible for Robert Burke.

The Compact Clause of the U.S. Constitution offers one pathway through this morass. To determine whether an interstate agreement has been transformed into federal law under the clause, the agreement must have received congressional consent and its subject matter must be appropriate for congressional legislation.[24] If corrections compacts satisfy these two conditions, then a state's failure to abide by the compact agreements or their implementing contracts raises a question of federal law and can thus serve as the proper basis for a section 1983 claim.[25] While the federal courts have nearly uniformly found that corrections compacts only address purely local, not federal, concerns, a return to the legislative and historical records unsettles these analyses.

This Note proceeds in three Parts. Part I introduces the origins of corrections compacts and explores the purpose and impact of these agreements. Part II introduces the Compact Clause of the Constitution and situates corrections compacts within the relevant doctrinal framework. Part II then explores the dispute between state and federal courts as to whether corrections compacts raise questions of federal law under the Compact Clause. The Part concludes by recentering the

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in this context and instead transferring federal habeas petition by state prisoner to district in the state of conviction).

22. *See* Rashaan "New York" Thomas, *Barriers to Jailhouse Lawyering*, 68 UCLA L. REV. DISC. (JAILHOUSE LAWYERING) 4, 8–13 (2021) (explaining the byzantine procedural and practical hurdles incarcerated persons face in obtaining law library access and pursuing their claims).

23. Burke appeared in neither database at the time of writing. Offender Information Search, CONN. STATE DEP'T OF CORR., http://www.ctinmateinfo.state.ct.us/ [https://perma.cc/75FE-YLLU] (enter "Robert" in "First Name" search bar and "Burke" in "Last Name" search bar). Inmate Locator, N.H. DEP'T OF CORR., https://business.nh.gov/inmate_locator/ [https://perma.cc/T69J-QLQT] (enter "Robert" in "First Name" search bar and "Burke" in "Last Name" search bar).

24. Cuyler v. Adams, 449 U.S. 433, 439–40 (1981).

25. *Id.* at 433–34.

statutory text of the Crime Control Consent Act of 1934, wherein Congress both approved of states entering into corrections compacts and identified these agreements as appropriate for federal legislation—thus conclusively satisfying the Supreme Court's standard for interstate compacts. Part III buttresses the legislative history by canvassing the historical record from the Founding era through Congress's passage of the Crime Control Consent Act. This survey reveals that the federal government and the states have always exercised shared authority over the management of the country's prison populations, thus challenging the idea that corrections compacts are an inappropriate subject for federal legislation. Instead, the historical record demonstrates that Congress has always been intimately involved with the regulation of the nation's prisons. The Note concludes by inviting further scholarship to explore the legal questions that remain unanswered after this project's analysis of the Compact Clause issue.

I. INTERSTATE COOPERATION AND THE RISE OF TRANS-JURISDICTIONAL CRIME

At the turn of the twentieth century, state, local, and federal authorities were faced with a novel issue: interstate criminal activity. Empowered by the technological advances of the Industrial Revolution, particularly the automobile, innovative criminals were now able to commit a crime in one jurisdiction and quickly abscond to another.[26] The trans-jurisdictional scope of criminal activity was not lost on the American population. In 1926, the *Chicago Daily Tribune* wrote: "[t]oday, crime is a national affair, run on interstate lines, made so by the railroads and the automobile, principally the latter."[27] Because cars were one of the most valuable assets a middle-class American family could own, auto theft rings were a boogeyman within the American imagination.[28] Criminal authorities now had to grapple with the consequences of crime that could occur in one jurisdiction while

26. Daniel Richman & Sarah Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. OF C.R. & LIBERTIES 421, 422–37 (2022). The American automobile revolution was particularly impactful because, in addition to changing the jurisdictional consequences of "age-old crimes" like bank robberies, kidnapping, and murder, it also introduced the novel crime of auto theft.

27. *Id.* at 426 (quoting *The Interstate Commerce of Crime*, CHI. DAILY TRIBUNE, June 17, 1926, at 10).

28. *Id.*

scattering evidence all over the country, thus triggering multiple state and local criminal codes.[29]

This rise in trans-jurisdictional criminal activity catalyzed a historic expansion of federal criminal law.[30] With the passage of the Mann Act in 1910, the Harrison Anti-Narcotics Act in 1914, the National Motor Vehicle Theft Act in 1919, and the ratification of the Eighteenth Amendment and subsequent Volstead Act in 1920, the federal government became significantly involved in criminal law.[31] Over time, this fledgling federal criminal statutory regime would evolve into the sprawling and disjointed body of federal criminal statutes that exists today, empowered by the Supreme Court's unleashing of the Commerce Clause as the engine of federal criminal authority. But, for a brief moment in the 1930s, Congress, grappling with what it perceived to be the troubling consequences of federal criminal power, sought other avenues for targeting interstate criminal activity that exceeded the authority of any one state. It turned to "[t]he oldest device for regional governance—and the only one expressly provided for by the Constitution . . . the interstate compact."[32]

The remainder of this Part provides a brief history of corrections compacts and explores the differing rationales for these administrative programs as a matter of law and practice. Thereafter, the unique questions raised by corrections compacts under the Compact Clause of the Constitution will be refined, and these questions will orient the legal disputes explained in Part II as well as the solutions provided in Part III.

A. The Development of Corrections Compacts

Interstate compacts' history reflects both the promises and perils of our federalist mode of governance.[33] The bureaucrats that championed these agreements expounded "the promise of regionalism," or regional governance regimes, for dealing with problems that exceeded the capacity of any individual state.[34] Corrections compacts

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29. *Id.*

30. *See generally* DANIEL RICHMAN, KATE STITH, AND WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES (2d ed. 2018) (detailing the development of the federal criminal law).

31. Richman & Seo, *supra* note 26, at 432.

32. *Id.* at 384.

33. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 395 (2018).

34. *Id.* at 397.

thus emerged within a broader movement towards greater interstate cooperation and uniformity in the criminal legal system.[35] At the time, criminal authorities at all levels of government sought solutions to the problems raised by multijurisdictional criminal activity, including the sheer multiplicity of criminal legal regimes and their varying penalties. In 1916, the National Conference of Commissioners on Uniform State Laws (NCCUSL)—most famous for publishing the Uniform Commercial Code—proposed a uniform act providing for arrest and extradition of "Persons of Unsound Mind."[36] Several years later, the NCCUSL approved the first Uniform Criminal Extradition Act, which clarified legal questions prompted by the apprehension and transportation of interstate fugitives.[37] Finally, throughout the 1920s, law enforcement officials began to collect and trade information about each stage of the conviction process.[38] In 1933, state officials came together to form the Council of State Governments (CSG), which would eventually draft and champion the interstate corrections compacts.[39]

CSG was one of several regional governance organizations that had emerged at the zenith of New Deal bureaucratic optimism. One of the organization's primary areas of focus was to improve cooperation among the states. Indeed, the organization receives funding from all fifty states and describes itself as "a joint agency of all the state governments."[40] CSG has sponsored many legislative solutions to solve problems that face state administrators in general—particularly those that exceed the resources available to any singular state.[41] In the mid-1950s, CSG championed corrections compacts to help state administrators deal with severe funding and overcrowding crises that had resulted in inadequate facilities for the general population and non-existent facilities for special categories of incarcerated people,

35. Kaufman, *supra* note 13, at 1827.

36. *Id.*

37. *Id.*

38. *See* Richman & Seo, *supra* note 26, at 424–25 (explaining that this period in law enforcement history was a part of a wider shift in the regulation of criminal activity from local management to national schemes).

39. David Hudak & Richard Engler, Nat'l Sheriff's Ass'n, Research Study Number 2.1: Mandates for Interstate Prisoner Transports 30–31 (1977).

40. *Id.*

41. *Id.* at 31. Corrections compacts like the ICC are but one of many compacts proposed by the CSG that focus on interstate crime control; the organization also drafted or championed the aforementioned Uniform Criminal Extradition Act, the Uniform Act for Extradition of Persons of Unsound Mind, the Interstate Compact for the Supervision of Parolees and Probationers, and the Interstate Agreement on Detainers. *Id.* at 47–48.

including female prisoners.[42] The regional administrators designed these agreements as the "legal machinery" that would enable corrections administrators to transfer convicted offenders to institutions in other states.[43] The nuts and bolts of this machine were not new—Part III analyzes how, since the Founding, prison administrators at all levels have used statutory and contractual prisoner transfers to create administrative efficiencies in the management of prison populations.[44] But CSG created a statutory super-structure that could be adopted by all states, thus reducing the friction inherent in such a complex legal regime.

The first of these agreements, the Western Corrections Compact, was catalyzed by the mutual problem of how to deal with female prisoners.[45] At the time, a coalition of western states bordering California was considering how to accommodate each of the states' respective female prison populations, which were too small in any single state to justify the massive capital expenditures needed to build a women's prison.[46] But the California Women's Prison at Tehachapi was about to become vacant because its residents were being moved to a new facility.[47] California and its neighbors brokered an agreement: in the prison at Tehachapi, California would incarcerate out-of-state individuals sentenced to time in women's prisons in exchange for an equitable share of the costs of transferring and caring for the new wards.[48] Although the agreement was brought to an abrupt halt because of an earthquake that destroyed the prison at Tehachapi, the stage for future agreements was set. In 1958, a regional forum called the Western Governors' Conference drafted the statutory text that would eventually form the Western Corrections Compact.[49] A few years

42. Wendell, *supra* note 9, at 524–26.

43. Hudak & Engler, *supra* note 39, at 53.

44. For example, prior to the establishment of the New England Interstate Corrections Compact, Vermont contracted directly with New Hampshire to provide for the housing of female prisoners. Michael A. Lilly & James H. Wright, *Interstate Inmate Transfer After* Olim v. Wakinekona, 12 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 71, 93 (1986). As used here, "female" is used to refer to biological sex; further research is needed to understand the unique circumstances of incarceration for transgender prisoners and other similarly situated gender minorities.

45. Wendell, *supra* note 9 at 525.

46. *Id.*

47. *Id.*

48. *Id.*

49. David M. Hudak & Richard D. Engler, U.S. Department of Justice Office of Justice Programs, Research Study Number 2.1: Mandates for Interstate Prisoner Transports 57 (1977). Female prisoners were similarly at the heart of a proposed corrections compact among the southern states. Although the compact was never

later, at the suggestion of a successor organization to the Governors' Conference, several New England states adopted the New England Interstate Corrections Compact, hoping to achieve the same administrative efficiencies.[50] In 1966, building on the success of these two regional agreements, the Council of State Governments proposed the national Interstate Corrections Compact. The ICC has since been adopted by thirty-nine states and the District of Columbia.[51]

It is difficult to determine how many individuals are held under the authority of corrections compacts today because no unified administrative edifice maintains information on transferred prisoners, and state records on these prisoners vary widely from state to state. Recent scholarship estimates that as a percentage of in-state population, states may transfer between 0.1% and 45.31% of those they convict—totaling several thousand transfers per year.[52] While some states have designated officials that serve as corrections compacts administrators, the duties performed and records maintained by such individuals are often not subject to external scrutiny.[53] Professor Emma Kaufman's research illustrates a "flight map," in which small states and larger states facing overcrowding crises make particular use of prisoner transfers to "resolve budget disputes, comply with court orders, and placate opponents of prison construction."[54] As Kaufman details, because of the notorious black box of post-conviction prison management, the information she obtained through open-record requests amounts to a "snapshot" of the prisoner transfer network at

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finalized, the "South Central Corrections Compact" was focused on diffusing the administrative burden associated with the southern female prison population. *Id.* at 31.

50. *Id*.

51. The Interstate Corrections Compact, NATIONAL CENTER FOR INTERSTATE COMPACTS, THE COUNCIL OF STATE GOVERNMENTS, (April 12, 2024) https://compacts.csg.org/compact/interstate-corrections-compact/ [https://perma.cc/6KZH-4TL2]. *New England Corrections Compact,* NATIONAL CENTER FOR INTERSTATE COMPACTS, THE COUNCIL OF STATE GOVERNMENTS, https://compacts.csg.org/compact/new-england-interstate-corrections-compact/ [https://perma.cc/9M6B-7NXD] (April 12, 2024).

52. Kaufman, *supra* note 13, at 1828.

53. *See e.g.,* Sunset Public Hearing Questions Response Document, Interstate Corrections Compact, TENNESSEE GENERAL ASSEMBLY, https://www.capitol.tn.gov/Archives/Joint/committees/gov-opps/jud/Interstate%20Corrections%20Compact_June%20%2015,%202016.pdf [https://perma.cc/8AQX-TWG7] (demonstrating a state's explanation of the purpose and function of these agreements).

54. Kaufman, *supra* note 13, at 1842.

the moment such information was assembled and disbursed—her analysis canvasses 2009 to 2019.[55]

B. A Carceral "Safety Valve": The Mechanisms and Purposes of Corrections Compacts

Each of the corrections compacts discussed herein is enacted by the legislatures of compacting states through substantially similar—and often identical—statutory text. After each state ratifies a particular compact, states may enter into bilateral or multilateral agreements with one another to implement the governing prisoner transfer regimes between those particular states. In exchange for an agreed upon sum, the receiving state agrees to house the prisoners of the sending state in their correctional facilities. According to the statutory text, the transferred prisoner is at all times subject to the jurisdiction of the sending state and may at any time be transferred from a given facility within the receiving state to either (i) a new facility within the sending state or (ii) another facility with which the sending state has a contractual agreement for the housing of its prisoners.[56] Sending state authorities may—"at any time"—have the right to inspect the facilities of the receiving state and visit any of the prisoners it has transferred to the receiving state's care.[57]

The receiving state is to act solely as the "agent" of the sending state, and the Interstate Corrections Compact's provisions regarding the rights of transferred prisoners appears structurally aligned with this rationale.[58] The Compact provides that all transferred prisoners should be treated in a "reasonable and humane manner . . . equally" with similarly classified inmates already housed in the receiving state.[59] In litigation, prisoners have seized onto Article IV(e)'s statement that confinement shall not deprive the inmate of any "legal rights the inmate . . . would have had if confined in an appropriate

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55. *Id.* Professor Kaufman explains that, because there is no academic scholarship on the subject and the last comprehensive analysis was undertaken by the National Institute of Corrections in 2006, her research and the NIC reports are perhaps the only comprehensive analyses of the prisoner transfer network.

56. The Interstate Corrections Compact, NATIONAL CENTER FOR INTERSTATE COMPACTS, THE COUNCIL OF STATE GOVERNMENTS, art. IV (c), https://compacts.csg.org/wp-content/uploads/2024/03/Interstate-Corrections-Compact.pdf [https://perma.cc/2ZH4-UGTX].

57. *Id.* at art. IV(b).

58. *Id.* at art. IV(a).

59. *Id.* at art. IV(e).

institution of the sending state."[60] Article IV(f) of the Compact then provides that the prisoner retains any hearing rights to which they would have been entitled in the sending state.[61] These hearings may be conducted before authorities of either the sending state or the receiving state, but if the hearing is conducted before the authorities of the sending state, then it must be conducted according to the law of the sending state.[62] Finally, the prisoner is to be released within the territory of the sending state unless both they and state authorities agree otherwise.[63] Many of these rules are "honored in the breach."[64]

Corrections compacts are attractive solutions for prison administrators, particularly those dealing with overcrowded institutions.[65] The administrative efficiencies created by corrections compacts are an important tool for prison administrators nationwide, but are most valuable for smaller, resource-hungry states. These arrangements allow states to concentrate their limited administrative resources on particular classes of prisoners. For example, Vermont did not have sufficient maximum-security prisoners to justify an entire maximum-security facility. The state transferred this class of prisoners to the federal prison system and concentrated its resources on the larger number of lower-security individuals. [66] Another indication of the premium placed on these agreements is the measure of support the state of Hawaii received when, in *Olim v. Wakinekona*, it petitioned the Supreme Court to recognize that people incarcerated in Hawaii do not have a liberty interest in receiving a hearing prior to an administrative transfer, even one effectuated for disciplinary reasons.[67] Twenty-six

60. *Id.* at art. IV(e).
61. *Id.* at art. IV(f).
62. *Id.*
63. *Id.* at art. IV(g).
64. *See* Kaufman, *supra* note 13, at 1830–31 (arguing that following this framework may lead to undesirable results).
65. *See generally* Lilly & Wright, *supra* note 44, at 75 (identifying resource constraints, location preferences, and the "safety valve" rationale as the primary drivers of corrections compacts).
66. *See* Lilly & Wright, *supra* note 44, at 72 (citing Howe v. Smith, 452 U.S. 473 (1981)).
67. 461 U.S. 238 (1983). *Olim* is an essential case in the prisoner transfer canon. The Supreme Court stated here that a prisoner does not have a liberty interest in being housed in a particular institution, and it was neither "unreasonable nor unusual for an inmate" to serve their entire sentence in a state other than the one that convicted and sentenced them. *Id.* at 248. "Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits." *Id.*

states, the District of Columbia, and American Samoa filed or joined amicus briefs supporting Hawaii's position.[68]

The act of transferring a prisoner is not inherently value-laden—transfers can punish an incarcerated person or protect them. But the gravity of the act should not be understated. As articulated by Justice Thurgood Marshall, transferred prisoners are "in effect [] banished from [their] home[s], a punishment historically considered to be 'among the severest.'"[69] On the one hand, interstate transfers that move a person closer to home can be a pathway to reintegration, reuniting incarcerated persons with family and friends and re-establishing community ties.[70] Transfers can also allow prisoners to access institutions that have drug rehabilitation, educational, and employment programs that might serve the prisoner well.[71] Transfers also may allow prisoners to obtain medical resources they could not obtain in the sending state. For example, Rosalyn Alyssa Rodriguez was transferred from Ohio to Maryland under the Interstate Corrections Compact. Ms. Rodriguez, a transgender woman, was in pursuit of medical resources in Maryland that Ohio had failed to provide.[72] However, it does not appear from her court filings that Ms. Rodriguez was ultimately able to obtain such care.[73]

On the other hand, prisoner transfers can alienate incarcerated persons by isolating them from family and friends outside

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68. Lilly & Wright, *supra* note 44, at 72 n. 21. Given that corrections compacts had been in effect at this point for close to thirty years, a ruling that recognized a pre-transfer procedural due process liberty interest for Delbert Wakinekona would mandate that states evaluate, in a hearing or other proceeding, whether transfers were being effectuated in a manner consistent with the state prison's regulations for states prior to transfers.

69. *Olim*, 461 U.S. at 252; *see also id.* at n.1 (citing J. Madison, 4 Elliott's Debates, 455 and quoting United States v. Ju Toy, 198 U.S. 253, 270 (1905)) (Whether it is called banishment, exile, deportation, relegation or transportation, compelling a person "to quit a city, place, or country, for a specified period of time, or for life," has long been considered a unique and severe deprivation, and was specifically outlawed by "[t]he twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty") (quotations and alterations in original).

70. *Id.* at 56.

71. Kaufman, *supra* note 13, at 1842.

72. Rodriguez v. Kopp, No. CV RDB-17-3827, 2019 WL 568877 (D. Md. Feb. 12, 2019).

73. *Id.* at *12–13 (finding no constitutional violation based on the failure to provide Rodriguez with gender affirming care).

the prison walls.[74] On the other hand, transfers can offer protection to particular groups who face conditions of confinement that call their safety into question, including LGBT people and former law enforcement or correctional officers.[75] For example, Louis Antonio Thompson, a prisoner housed in a medium-security prison in Maryland, was transferred to a maximum security prison also in Maryland after he was targeted by the Crips gang because of the gang's policy that all "gay prisoners, snitches, child molesters, and rapists don't belong in general population" and "should be beaten or killed."[76] Thompson is gay, and the Crips believed he was a snitch.[77] Thompson claimed it was unfairly risky for him to be placed in a maximum security prison where many prisoners face life sentences and have "nothing to lose."[78] Once he arrived at Maryland's North Branch Correctional Institution (NBCI), Mr. Thompson requested a transfer to either a medium-security prison in Maryland or to an out-of-state prison via the ICC.[79] Instead, Thompson was placed into solitary confinement, and then returned to the general population.[80]

Finally, transfers effectuated to punish prisoners are inextricable from questions of institutional control.[81] Mr. Wakinekona's and Mr. Thompson's cases are illustrative here. Mr. Wakinekona was transferred to California without a hearing under the Interstate Corrections Compact, in violation of Hawaii state law that mandated hearings in cases like his. Prison officials invoked the "safety

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74. Transfers can also have severe consequences related to the conditions of incarceration. A transferred person can discover that their new facility may have markedly fewer resources for caring for residents. Beyond changes to their conditions of confinement, transfers can also obstruct an incarcerated person's ability to lodge legal challenges to their conviction. A receiving state may not furnish its law library with legal resources for the sending state. *See generally* 56 A.L.R.6th 553 (Originally published in 2010) (discussing the uncertain availability of necessary legal materials in prison law libraries).

75. *Id*.

76. Thompson v. Shearin, No. CIV.A. PJM-11-428, 2011 WL 5118411, at *2 (D. Md. Oct. 26, 2011).

77. *Id*.

78. *Id*. at *4.

79. *Id*. at *2.

80. *Id*. at *4; *see also infra* note 84 and accompanying text. Although used here as a safety solution, solitary confinement is widely recognized as an inhumane and destructive practice. *See* Vera Institute for Justice, *Why Are People Sent to Solitary Confinement? The Reasons Might Surprise You.*, March 2021, https://www.vera.org/publications/why-are-people-sent-to-solitary-confinement [https://perma.cc/26BC-KENM].

81. Kaufman, *supra* note 13, at 1824 n.36 (listing state constitutional banishment clauses).

valve" rationale: they alleged Wakinekona's transfer was necessary because he was influential among his incarcerated peers, and a prison riot had just broken out.[82] To avoid further agitation, Wakinekona needed to be removed from the facility expeditiously.[83] However, punishment can also be arbitrary. Mr. Thompson, despite being the victim of gang violence and homophobia in prison, was confined to 180 days of administrative segregation upon his arrival at the new facility without explanation.[84]

In sum, corrections compacts are not neatly categorizable. Prisoner transfers can restore order in an overcrowded facility, reintegrate incarcerated persons with their communities, or allow them to seek facilities with more resources. Simultaneously, transfers can isolate incarcerated persons, and leave prisoners more vulnerable to institutional or social violence.

Having canvassed the purpose and mechanics of these agreements, this Note will proceed in Part II to unfurl the doctrinal implications of prisoner transfers. Corrections compacts, like all interstate compacts, are governed by the Compact Clause of the Constitution. Although the various corrections agreements discussed thus far do not explicitly frame themselves as compacts underwritten by the Compact Clause, each of these agreements were formulated at a time of extensive enthusiasm for compact agreements and are intended to function as such.[85] But courts analyzing claims for relief by those incarcerated under these corrections compacts have diverged on the question of whether these agreements rely on the Compact Clause

82. *Olim*, 461 U.S. at 239.

83. *Id*.

84. *Thompson v. Shearin*, 2011 WL 5118411, at *2–6.

85. In drafting the Crime Control Consent Act of 1934, the Act which provided early authorization for corrections compacts, Congress stated that in the absence of interstate compacts, it would be forced to greatly enhance its own jurisdiction: "The rapidity with which persons may move from one State to another, those charged with crime and those who are necessary witnesses in criminal proceedings, and the fact that there are no barriers between the States obstructing this movement, makes it *necessary that one of two things shall be done, either that the criminal jurisdiction of the Federal Government shall be greatly extended or that the States by mutual agreement shall aid each other in the detection and punishment of offenders against their respective criminal laws*." H.R.Rep. No. 91–1018, 1 (1970); S.Rep. No. 91–1356, 1 (1970) (emphasis added). With the CCCA, Congress "remove[d] the obstruction imposed by the Federal Constitution and allow[ed] the States cooperatively and by mutual agreement to work out their problems of law enforcement." S.Rep. No. 1007, 73d Cong., 2d Sess., 1 (1934); H.R.Rep. No. 1137, 73d Cong., 2d Sess., 1–2 (1934).

for authority, and thus whether they can give rise to a section 1983 claim.

II. TRAPPED IN THE LABYRINTH: THE CONFLICT OVER CONGRESSIONAL CONSENT

The Supreme Court's controlling analytical method for Compact Clause questions, set forth in *Cuyler v. Adams*, provides that where an interstate compact infringes the "full and free exercise" of federal authority in a given policy area, Congress must "consent" to such an interstate agreement through legislation.[86] Not all interstate compacts trigger the consent requirements of the Compact Clause.[87] However, if Congress consents to an interstate agreement, the matter is settled, and the agreement is transformed into federal law—regardless of its actual impact on federal authority.[88] In the case of corrections compacts, the plain text and the legislative history of the Crime Control Consent Act of 1934 strongly suggest that corrections compacts have been transformed into federal law.[89]

Yet, at the close of the twentieth century, the Eighth and Ninth Circuits determined that corrections compacts do not raise questions of federal law because there was no evidence that Congress had consented to these agreements.[90] Furthermore, both courts placed

86. Cuyler v. Adams, 449 U.S. 433, 439–40 (1981).

87. *Id.* at 440. For example, the Interpleader Compact is a compact between Maine, New Hampshire, New Jersey, New York, and Pennsylvania that authorizes courts of the compacting states to acquire personal jurisdiction over adverse claimants to property located anywhere within the compacting states. As a question of state civil procedure, this compact would not raise a question of federal law. *See* National Center for Interstate Compacts, https://compacts.csg.org/compact/interpleader-compact/ [https://perma.cc/W8H8-PHTU].

88. *Id*.

89. *See id.* at 438–50 (holding that the Interstate Agreement on Detainers, another interstate criminal compact that received congressional approval from the Crime Control Consent Act of 1934, was transformed into federal law under the Compact Clause); *id.* at 438–40 (proceeding through the two-part Compact Clause analysis).

90. *See* Stewart v. McManus, 924 F.2d 138, 142 (8th Cir. 1991) (affirming the district court's findings that Congress did not consent to the ICC and that no federal interest exists in the state's transfer of incarcerated persons as long as the states comply with the Constitution's requirements for their treatment); Ghana v. Pearce, 159 F.3d 1206, 1209 (9th Cir. 1998) (affirming the district court's dismissal of a pro se plaintiff's complaint under the Interstate Corrections Compact: "…[T]he Compact does not create a liberty interest protected by the Fourteenth Amendment. As the Compact is not federal law and does not create a constitutionally protected

substantial weight on the argument that corrections compacts deal with "purely local concerns" and are accordingly not appropriate subjects for federal legislation.[91] Courts across the country have summarily cited these two opinions in cursory determinations that incarcerated citizens like Mr. Burke cannot raise section 1983 claims associated with violations of rights conferred by correction compacts and their implementing contracts.[92]

These repeated cursory dismissals occur despite the textual intent of corrections compacts and their implementing contracts to confer substantive and procedural rights. Persons incarcerated out-of-state through corrections compacts are often denied the right to file a section 1983 claim on the basis of facts that would have given rise to a section 1983 claim if they had *not* been transferred: the key determination is whether the ICC provides a sufficient basis for federal court relief.[93] Thus, by adopting an agreement to secure rights for incarcerated citizens transferred between states, a state counterintuitively precludes the use of section 1983 as a mechanism to vindicate such rights which would otherwise be the tool of last resort.[94]

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liberty interest, we hold that a violation the [sic] Compact cannot be the basis for a section 1983 action.").

91. *Stewart v. McManus*, 924 F.2d at 142; *Ghana v. Pearce*, 159 F.3d. at 1208.

92. *See, e.g.*, Terry v. New Jersey Dep't of Corr., No. CIV. A. 06-3030 (JBS), 2006 WL 3780761, at *3 (D.N.J. Dec. 21, 2006) ("The Interstate Corrections Compact is not a federal law; accordingly, Plaintiff cannot utilize § 1983 to assert a claim in this Court based upon an alleged violation of the Interstate Corrections Compact."); Fisher v. Carroll, 375 F. Supp. 2d 385, 394 (D. Del. 2005) ("The ICC has not been approved by Congress pursuant to the Compact Clause, nor is the ICC's subject matter appropriate for federal legislation."); Garcia v. Lemaster, 439 F.3d 1215, 1219 n.7 (10th Cir. 2006) ("To the extent that Garcia contends New Mexico officials failed to abide by the ICC, and to the extent he seeks a declaration that New Mexico officials must follow the requirements of the ICC, he also fails to state a claim upon which relief may be granted. The ICC's 'procedures are a purely local concern and there is no federal interest absent some constitutional violation in the treatment of these prisoners.'") (quoting *Pearce*, 159 F.3d at 1208).

93. *Compare* Clark v. Washington, No. 98-C-3668, 1999 WL 182340 (N.D. Ill. 1999) (dismissing the § 1983 claim of a person convicted by New Mexico and housed in Illinois who attempted to rely on the ICC for the minimum standards because the ICC did not raise a question of federal law) *with* Smith v. Erickson, 884 F.2d 1108 (8th Cir. 1989) (finding that the incarcerated person's argument that the ICC required that he have access to requisite law library materials sufficiently plead a denial of access to courts).

94. *See Ghana v. Pearce*, 159 F.3d at 1207 (analyzing the legal status of the ICC as a "threshold question" prior to the evaluation of Mr. Ghana's § 1983 claim). The federal court's determination that violations of the ICC did not provide him with a colorable basis for his § 1983 claim denied Ghana the ICC procedural protections he would be entitled to by New Jersey statute if he were incarcerated

A federal court's refusal to recognize corrections compacts' status under federal law is thus another roadblock to the incarcerated citizens' ability to exercise "the fundamental constitutional right of access to the courts."[95]

Jurists in the various compact party states often reach materially different interpretations of the compact provisions. These interpretive conflicts surround foundational questions about the person's incarceration, including: which state determines whether the incarcerated person can access law library materials;[96] which state retains authority over subsequent transfers of the person;[97] and which state determines the incarcerated person's eligibility for parole.[98] For citizens incarcerated out-of-state, answering these and other questions requires access to well-resourced law libraries with the capacity to research federal law as well as the laws of both the sending and receiving states. Access to these materials is far from guaranteed.[99]

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in New Jersey, his state of conviction. N.J. STAT. ANN. § 30:7C-5, art. IV(e) (West 1973) (describing procedural protections granted in New Jersey under the ICC). Additionally, the ICC explicitly provides that the prisoner would retain all legal rights he would have enjoyed in the sending state and that any deprivations of liberty Ghana would experience while in the custody of the receiving state should be evaluated under New Jersey law. N.J. STAT. ANN § 30:7C-5, art. IV(e)–(f) (West 1973).

95. Bounds v. Smith, 430 U.S. 817, 828 (1977), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996).

96. *See* George L. Blum, Annotation, *Right to Law Library, Legal Materials, and Access to the Courts*, 56 A.L.R.6th 553 § 20 (2010) (describing Brant v. Fielder, 883 P.2d 17 (Colo. 1994), which held that it was not a violation of Colorado constitution for a Wisconsin prisoner to be denied access to Wisconsin legal materials so long as that person had access to an attorney).

97. *See* George L. Blum, Annotation, *Right to Transfer, Generally*, 56 A.L.R.6th 553 § 18 (2010) (describing State v. Tarver, 137 N.M. 115, 2005-NMCA-030, 108 P.3d 1 (Ct. App. 2005), where an appellate court held that the trial court did not have jurisdiction to transfer someone held under New Mexico's legal, but not physical, custody under the Western Interstate Corrections Compact).

98. In Butler v. Pennsylvania Bd. of Probation and Parole, 989 A.2d 936 (Pa. Commw. Ct. 2010), a Delaware prisoner held in Pennsylvania started his 120-day limitation period for parole eligibility when his Delaware sentence was completed, as Pennsylvania was acting solely as an agent for Delaware (described by George L. Blum, Annotation, *Rights related to Parole Matters; Hearings—Right to Hearing*, 56 A.L.R.6th 553 § 37 (2010)). *Compare with* Phifer v. Tennessee Bd. of Parole, 2002 WL 31443204 (Tenn. Ct. App. 2002), which held that a rational basis could be found for conducting parole hearing according to Florida law for an incarcerated person subject to Tennessee's legal custody, but Florida's physical custody (described by George L. Blum, Annotation, *Rights related to Parole Matters; Hearings—No Right to Hearing*, 56 A.L.R.6th 553 § 38 (2010)).

99. *See* 56 A.L.R.6th 553 (originally published in 2010) (collecting cases).

Incarcerated persons already face an uphill battle in federal court when challenging the conditions of their confinement because of the Prison Litigation Reform Act and various Supreme Court cases winnowing the universe of litigable claims against state and federal prison officials.[100] But the federal courts' refusal to acknowledge Congress' consent to interstate corrections compacts ensures prisoners do not reach this rocky terrain; negligent treatment and administrative brutality can hide under the long shadow cast by the Compact Clause.

This Part investigates whether the Interstate Corrections Compact has received the requisite congressional consent to transform that agreement into federal law. To answer this question, we must turn to the Court's construction of the Compact Clause of the Constitution. The Compact Clause forbids any state from entering into an interstate "agreement or compact" without the consent of Congress.[101] In *Cuyler v. Adams*, the Court relied on text and legislative history to hold that the Crime Control Consent Act ("CCCA") of 1934 had provided explicit congressional consent for the Detainer Agreement, an interstate agreement that facilitates the exchange of persons charged with crimes in multiple jurisdictions.[102] The Detainer Agreement was one of a slate of crime-related compacts championed by the Council of State Governments (CSG), described *supra* Section I.A, to deal with the issue of multi-jurisdictional criminal activity. The Court's analysis of that individual corrections compact is highly informative as to the legal status of corrections compacts under the Compact Clause because all such compacts rely on the CCCA for their grants of congressional consent. This Part analyzes the Compact Clause, the *Cuyler* test, and the authoritative opinions from both state and federal jurists that have assessed whether corrections compacts have received the requisite congressional consent. The Part concludes by returning to the legislative history of the Crime Control Consent Act of 1934, which demonstrates—conclusively—that corrections compacts have received congressional consent and thus raise questions of federal law.

100. *See generally* Lewis v. Casey, 518 U.S. 343 (1996) (holding that an incarcerated person's constitutional right of access to courts is not violated when a prison lacks legal research facilities or legal assistance unless prisoners can demonstrate substantial harm arising from these deficiencies).

101. U.S. CONST. art. I, § 10 cl. 3.

102. Cuyler v. Adams, 449 U.S. 433, 449–50 (1981).

A. Congressional Consent: Tracing the Compact Clause's North Star

The Compact Clause provides, "No State shall, without the Consent of Congress . . .enter into any Agreement or Compact with another State, or with a foreign Power."[103] The Constitution's text is sparse: it does not clarify what form Congress's "consent" should take,[104] nor does it state what constitutes an "agreement" or a "compact."[105] Nevertheless, the Supreme Court has clarified that congressional consent can be either implied or explicit. Congressional inaction regarding a particular compact can be interpreted as "tacit acquiescence,;" alternatively, Congress can affirm its assent to a given compact by statute, an "express declaration of the legislative mind."[106]

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103. U.S. CONST. art. I, § 10 cl. 3.

104. *See* Green v. Biddle, 21 U.S. 1, 85–86 (1823) ("Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason.").

105. While there is some evidence that the Framers may have understood the terms "agreement" and "compact" to have differing meanings, the terms are functionally interchangeable today. For example, the congressional consent exception of the Compact Clause may appear to conflict with the categorical ban on "Any Treaty, Alliance or Confederation" imposed by the nearby Treaty Clause. U.S. CONST. art. I, § 10, cl. 1. But early drafts of the Compact Clause do not shed light on the definitions of "compact" or "agreement." *See* U. S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460 n.10–11 (1978) (discussing the blurry distinction between compact and agreement evident in the Articles of Confederation and Constitutional Convention records). And the Framers clearly understood compacts and agreements to be different from treaties. *Id*. at 460 n.10. Justice Powell described the terms "compacts," "agreements," and "treaties" as "terms of art" for which no explanation was required for the Framers and their contemporaries. *Id*. at 461–62. Treaties ". . . relate ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time; the power of making these is altogether prohibited to the individual states; but agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties, may still be entered into by the respective states, with the consent of congress." *Id*. at 461–62, n.13 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES, app. 310 (S. Tucker ed. 1803)). Despite the unique meanings the Framers may have imposed on these terms, those meanings were soon lost. *U.S. Steel Corp.*, 434 U.S. at 463.

106. *See Green*, 21 U.S. at 87. *See also U.S. Steel Corp.*, 434 U.S. at 463 n.14 (inferring the possibility of tacit acquiescence from *Green v. Biddle*) ("In *Green v. Biddle* . . . Henry Clay argued to the Court that the Compact Clause extended 'to all agreements or compacts, no matter what is the subject of them.' . . . The Court did not address that issue, however, for it held that Congress' consent could be implied." (internal citations omitted)); *accord Cuyler v. Adams*, 449 U.S. at 442

Such consent can occur *ex ante*, via "advance consent" statutes that authorize or encourage states to undertake joint action, or *ex post*, via the aforementioned express or implied approval to agreements the states have already joined.[107] Moreover, the terms "agreement" and "compact" have sufficient room "to embrace all forms of stipulation . . . relating to all kinds of subjects," ranging from those minute enough to be of little interest to the United States to those broad enough to "encroach upon or impair the supremacy of the United States" in areas where the federal government should exercise total control.[108] Consequently, not all compacts require congressional consent.[109] Where a court finds that an agreement increases the political power of the States, or impairs the "full and free exercise of federal authority" in a given area, such agreements activate the congressional consent requirement of the compact clause and can be invalidated where congressional consent is not found.[110]

In *Cuyler v. Adams*, the Supreme Court evaluated whether the Interstate Agreement on Detainers, a criminal compact providing for the transfer of sentenced prisoners for unrelated trials between two jurisdictions, had received congressional consent and was consequently transformed into federal law.[111] The *Cuyler* Court stated that the

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(citing *Green*, 21 U.S. at 84: "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.").

107. *See* Virginia v. Tennessee, 148 U.S. 503, 521 (1893) (stating that "in many cases the consent will usually precede the compact or agreement," but consent may need to be given after the fact).

108. *Id.* at 517–18.

109. *Id.*

110. New Hampshire v. Maine, 426 U.S. 363, 369–70 (1976).

111. Cuyler v. Adams, 449 U.S. 433 (1981). The *Cuyler* case arose as the result of a *pro se* class action complaint raised by John Adams. In April 1976, John Adams was convicted in Pennsylvania state court of robbery and was sentenced to thirty years. Pursuant to Article IV of the Interstate Agreement on Detainers, a New Jersey prosecutor lodged a detainer against Mr. Adams to bring him to Camden for trial on charges of armed robbery and other offenses. To prevent his transfer, Mr. Adams filed a *pro se* class-action complaint in the Eastern District of Pennsylvania seeking declaratory, injunctive, and monetary relief under 42 U.S.C. §§ 1981 and 1983 alleging first that state correctional officers had violated the Due Process and Equal Protection Clauses by failing to grant him the pre-transfer hearing and procedural protections he would have been entitled to under, alternatively, the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers. The Court granted certiorari to resolve a "recurring question" regarding the relationship between the Detainer Agreement and the Extradition Act that was activated when a Pennsylvania state court ruled that state prisoners transferred under Art. IV of the Detainer Agreement have no constitutional right to a pretransfer hearing.

"heart" of the Compact Clause inquiry lies in the question of congressional consent.[112] As demonstrated by its finding that the Constitution vests in Congress the power to consent, the majority believed the Framers had embedded a key supervisory mechanism for Congress to guard its authority over the states.[113] The *Cuyler* Court further explained that Congress's decision to provide its consent to a given agreement may reveal Congress's view of whether the agreement "[is] likely to interfere with federal activity in the area," or whether the agreement will "disadvantage other States to an important extent" or insert governmental authorities into matters "better left untouched by state and federal regulation."[114] Thus, the Court's *Cuyler* test, which applies only to agreements that "increase the political power in the States," or agreements that "encroach upon or interfere with the just supremacy of the United States," provides:

> "…where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."[115, 116]

Modern jurists continue to look for evidence of congressional consent as their North Star when assessing the legal status of an interstate agreement. In 2018, Justice Gorsuch wrote for a majority of the court that ". . . once Congress gives its consent, a compact between

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Cuyler, 449 U.S. at 438. The Third Circuit declined to follow the state court's result because the Detainer Agreement is an interstate compact approved by Congress and is thus a federal law subject to federal rather than state construction. This conflict between the state and federal courts catalyzed the Supreme Court to take up the question, and a six-justice majority affirmed the Third Circuit's ruling. *Id.*

112. *Cuyler*, 449 U.S. at 439.

113. *Id.* at 440.

114. *Cuyler*, 449 U.S. at 440 n.8 (quoting *U.S. Steel Corp.*, 434 U.S. at 485 (White, J., dissenting)).

115. *Id.*

116. Justice Rehnquist, writing for the dissent, took umbrage with several parts of the majority's decision, which he characterized as an "act of judicial alchemy" that transformed state law into federal law. Whereas the majority emphasizes congressional consent, Justice Rehnquist emphasizes the nature of the "agreement or compact." Justice Rehnquist—demanding a return to the Court's *Virginia v. Tennessee* test—would center any Compact Clause inquiry on the "impact" of a given arrangement "on our federal structure." Justice Rehnquist ultimately concludes that the Detainer Agreement does not encroach upon federal authority. Critically, however, even Justice Rehnquist concedes that the construction of a congressionally sanctioned interstate compact would create a federal question. *Cuyler v. Adams*, 449 U.S. at 451–55 (Rehnquist, J., dissenting).

States—like any other federal statute—becomes the law of the land."[117] A few years prior, Justice Kagan, writing for a majority that included Justice Roberts and Justice Sotomayor, expressed that congressional consent not only transforms an agreement into federal law, it signals a "limit" on the Court's enforcement power: "[w]e may not 'order relief inconsistent with [a compact's] express terms.'"[118] But, within the remedial authority granted by an interstate compact, "the Court may exercise its full authority to remedy violations of and promote compliance with the agreement so as to give complete effect to public law."[119] In sum, the centrality of congressional consent to the Compact Clause inquiry is foundational, and unquestionable—once granted, Congress's consent to an interstate compact transforms that agreement into federal statutory law.[120] Congress's blessing of a given agreement is also a clear statement to the other branches of government that the agreement does not threaten the federalist mode of governance mandated by the Constitution and that the agreement similarly does not threaten the interests of non-party states.[121]

B. *Cuyler v. Adams*: Lessons from the Detainer Agreement

With congressional consent as its guide, the *Cuyler* Court proceeded through a two-fold analysis to determine whether the Detainer Agreement was transformed into federal law. The *Cuyler* Court began by mining the legislative history of the CCCA to discover Congress's intent for the statute.[122] In relevant part, the CCCA states:

> "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

117. Texas v. New Mexico, 138 S.Ct. 954, 958 (2018) (citing Texas v. New Mexico, 462 U.S. 554, 564 (1983)).

118. Kansas v. Nebraska, 574 U.S. 445, 455–56 (2015) (quoting *Texas v. New Mexico*, 462 U.S. at 564).

119. *Id.* at 456. Note that Justice Thomas, concurring in part and dissenting in part, took issue with the "vast" equitable authority claimed by the majority. *Id.* at 493 (Thomas, J., dissenting). This may become a flashpoint in future cases—while Justice Alito joined Justice Thomas' opinion in full, Justice Roberts notably declined to adopt Justice Thomas' analysis of the Court's authority in Compact Clause cases. *Id.* at 475. Nevertheless, Justice Thomas does not disagree that congressional consent transforms an interstate compact into federal law. *Id.* at 478–79 (treating interstate compacts as federal law).

120. *Texas v. New Mexico*, 138 S.Ct. at 958.

121. *Id.*

122. *See Cuyler*, 449 U.S. at 441–42 (holding that Congress gave consent for the Detainer Agreement by enacting the CCCA in 1934).

> prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."[123]

The House and Senate reports preceding the Act revealed that Congress drafted the statute to "remove the obstruction imposed by the Federal Constitution" that prevented the states from establishing mutual agreements to "work out their problems of law enforcement."[124] Having discerned Congress's intended grant of authority to the states, the Court then asked whether the compact at issue—the Detainer Agreement—fell within the scope of the authority granted by the CCCA.[125] Here, the Court relied upon statements by the Council of State Government, the architects of both the Detainer Agreement and the ICC, that affirmatively cited the 1934 Act as providing the necessary grant of authority.[126] Additionally, the Court relied upon statements, found within the House and Senate reports of subsequent congressional legislation that adopted the Detainer Agreement on behalf of the District of Columbia and the federal government, that pointed to the 1934 Act as the basis of authority for the Detainer Agreement.[127]

The Court then turned to the question of whether the Constitution provided Congress with the power to legislate in the field of pre-trial custodial transfers, and additionally, whether the legislative history of the 1934 Act reflects Congress's awareness that it could legislate in this manner.[128] The Court found that the Constitution's Commerce Clause and Extradition Clause provided Congress with authority to legislate here, particularly the Extradition Clause, which Congress had relied upon to legislate in the extradition

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123. 4 U.S.C.A. § 112 (West 1949).

124. *Cuyler*, 449 U.S. at 441 n. 9 (quoting S. REP. No. 73-1007 at 1 (1934)); H.R. REP. No. 73-1137 at 1–2 (1934), "Legislation is necessary to accomplish the purpose sought by the bill because of the language of [the Compact Clause] of the Constitution . . . ").

125. *Id.*

126. The Court stated: ". . . the drafters of the Agreement state in their interpretive handbook that it "falls within the purview" of the 1934 Act and therefore has the consent of Congress . . . " *Id.* at 441 n.9 (citing COUNCIL OF STATE GOVERNMENTS, THE HANDBOOK OF INTERSTATE CRIME CONTROL 117 (1978)).

127. Adding, ". . . Congress itself, when adopting the Detainer Agreement on behalf of the District of Columbia and the United States, Pub. L. 91–538, 84 Stat. 1397, expressly stated that it had authorized the Detainer Agreement in the Crime Control Consent Act." *Id.* at 441 n.9 (citing H.R. REP. No. 91-1018 (1970)).

128. *Id.* at 441.

area since 1793.[129] Moreover, the legislative history demonstrated that Congress was not only aware of the authority it was exercising under the Compact Clause, but also that the drafting Congress purposely suggested interstate compacts as a way to avoid aggrandizing federal power in the face of a new challenge—trans-jurisdictional crime:

> "The rapidity with which persons may move from one State to another, those charged with crime and those who are necessary witnesses in criminal proceedings, and the fact that there are no barriers between the States obstructing this movement, makes it necessary that one of two things shall be done, either that the criminal jurisdiction of the Federal Government shall be greatly extended or that the States by mutual agreement shall aid each other in the detection and punishment of offenders against their respective criminal laws."[130]

Having established that Congress explicitly intended the CCCA to serve as a grant of authority for the Detainer Agreement, and that Congress had the authority to legislate in this field through the Commerce and Extradition Clauses of the Constitution, the Court concluded that the Interstate Agreement had been transformed into federal statutory law.[131]

Turning to the dispute surrounding the legal status of corrections compacts, *Cuyler's* guidance is clear. First, determine whether Congress has consented to corrections compacts, implicitly or explicitly. Then, assess whether the interstate agreement is an appropriate subject for congressional legislation. However, the courts' compliance with *Cuyler's* instruction has been uneven.

C. Early Applications: The Eighth and Ninth Circuits' Rulings

The first significant consideration of the Compact Clause's application to interstate prisoners arose from the trial of Steven Stewart. Mr. Stewart was convicted of murder in Kansas in 1976.[132] He was housed in general population until 1980, when he was placed in solitary confinement for three years after pleading guilty to a charge

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129. *Id.* at 442 n.10.

130. *Cuyler*, 449 U.S. at 442 n.19, (citing S. REP. No. 73-1007 at 1) (emphasis added); H.R. REP. No. 73-1137 at 1 (emphasis added).

131. *Cuyler*, 449 U.S. at 442–43.

132. Stewart v. McManus, No. 86–185–A, slip op. at 3 (S.D. Iowa Nov. 8, 1989).

of involuntary manslaughter arising from the death of a food service worker. On January 7, 1983, Stewart was transferred to the Iowa State Penitentiary at Fort Madison (ISP) under the Interstate Corrections Compact.[133] In December 1983, Stewart was found guilty of making a homemade knife from a floor sign and threatening to kill officers and fellow inmates with the knife. He was sanctioned to one year of solitary confinement following a disciplinary proceeding conducted according to ISP's and the state of Iowa's rules and regulations. Stewart was returned to solitary confinement in 1985 following another major disciplinary report.[134] Following an uprising among the inmates in January 1986—during which Stewart was placed in flex-cuffs and cuffed to his cell while prison administrators secured the premises—Stewart, proceeding *pro se*, brought a section 1983 claim against ISP, alleging violations of the Fourteenth Amendment and the substantive provisions of the Interstate Corrections Compact.[135] After the rapid dismissal of that case, Stewart returned to the Southern District of Iowa in 1989 pursuing similar claims.[136]

Stewart argued that the Supreme Court's interpretation of the Detainer Agreement in *Cuyler* established that the Interstate Corrections Compact had been transformed into federal statutory law under the Compact Clause.[137] Judge Charles Wolle replied that "[a]pplication of the Compact Clause in the Constitution is limited to" interstate compacts that may "encroach upon or interfere with the just supremacy in the United States."[138] Citing *Cuyler's* "two-part" test, Judge Wolle argued that the Crime Control Consent Act of 1934 could not have provided the requisite consent for the ICC, as that statute was concerned with "interdicting interstate criminal activities."[139] Meanwhile, the ICC, "concerned not with reducing crime but with the care and control of persons convicted of crime," was, in his view, distinctly different in purpose and effect.[140] Judge Wolle also found that Congress' 1962 amendment authorizing Guam to enter into the Western Corrections Compact was just that—a grant of authority for Guam to enter into corrections compacts.[141] Finally, the court held that

133. *Id.* at 3–4.
134. *Id.* at 4.
135. *Id.* at 5–6.
136. *Id.*
137. *Stewart v. McManus*, 924 F.2d 138, 142 (8th Cir. 1991).
138. *McManus*, slip op. at 8 (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)) (internal quotations omitted).
139. *Id.*
140. *Id.*
141. *Id.* at 9.

the ICC does not address a subject appropriate for congressional legislation, as there is "no federal political interest in interstate compacts that concern only the transfer of inmates within" state prisons. "So long as states satisfy constitutional requirements in the treatment of prisoners, the federal interest is satisfied. [The ICC] is not a matter of federal law, and poses no threat to federal supremacy."[142] The Eighth Circuit's paragraph-long analysis of *Cuyler* adopted Judge Wolle's reasoning without critique: "We agree . . . that no evidence exists that Congress has approved the Interstate Corrections Compact."[143]

Seven years after the Eight Circuit issued its ruling in *Stewart v. McManus*, the Ninth Circuit ruled against Emory Ghana's section 1983 claims against Oregon corrections officials. Mr. Ghana proceeded *pro se* through his district and appellate court actions. Mr. Ghana had been convicted in New Jersey and was transferred to Oregon under the ICC. He argued that the ICC entitled him to "the protections of New Jersey procedural rules," thus rendering the misconduct hearings he was subjected to in Oregon defective because the hearings were conducted in accordance with the rules and regulations of the Oregon prison system.[144]

While Judge Wolle stated that *Cuyler* mandated a two-part test, the Ninth Circuit interpreted *Cuyler* to be tripartite, instead: "A state compact is transformed into federal law, and thus may be the basis for a 1983 action, when (1) it falls within the scope of the Constitution's Compact Clause, (2) it has received congressional consent, and (3) its subject matter is appropriate for congressional legislation."[145] The Ninth Circuit concluded that the ICC failed the legislative suitability prong of its interpretation of *Cuyler*: "In addition to our considerable doubt as to whether the Compact is within the scope of the Compact Clause and whether it was approved by Congress, it is clear that the Compact fails the third test—its subject matter is not appropriate for federal legislation."[146] Whereas the Detainer Agreement was appropriate for federal legislation under the Commerce Clause and the Extradition Clause of the Constitution because it was a "cooperative effort touching a federal concern—allowing extradition to enhance the prevention of crime and

142. *Id.*
143. *Stewart v. McManus*, 924 F.2d 138, 142 (8th Cir. 1991).
144. *Id.*
145. Ghana v. Pearce, 159 F.3d 1206, 1208 (9th Cir. 1998) (citing Cuyler v. Adams, 449 U.S. 433, 440 (1981)).
146. *Ghana v. Pearce*, 159 F.3d at 1208.

enforcement of criminal laws," the ICC had "nothing" to do with preventing crime or enhancing the enforcement of criminal laws.[147] The court understood the ICC to govern the interstate transfer of state prisoners, and, because these transfers were not effectuated pursuant to extradition or enforcement interests, the Compact's procedures were a "purely local concern." Absent a constitutional violation in the treatment of the prisoners, therefore, corrections compacts would not implicate a federal interest.[148]

As a reminder, *Cuyler* states that congressional consent to an interstate compact transforms that agreement into federal law.[149] The Court has reaffirmed that analysis as recently as 2018.[150] Consequently, it would be natural to expect the Eighth and Ninth Circuits to devote significant time and energy to the legislative history of the CCCA and the statements of the Council of State Governments to determine whether the 1934 Act was at all intertwined with corrections compacts. Notably, no such discussion has occurred.[151] Instead, many federal courts have applied the holdings of the Eighth and Ninth Circuits as an automatic rejoinder to arguments that the ICC is federal law, often providing little to no additional analysis of the constitutional and statutory claims raised by the compact.[152] This abdication of precedent and legislative history has tragic consequences: in the three cases we have explored thus far, prisoners have been denied access to court to challenge medical negligence and unduly punitive impositions of solitary confinement. The remainder of this Note challenges the "shallow and unpersuasive" reasoning that led to this tragedy.[153]

D. Recentering the Crime Control Consent Act: Text and History at the Forefront

Identifying Congress's consent to interstate corrections compacts is fairly straightforward. As stated previously, The Crime Control Consent Act of 1934 provides:

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147. *Id.* at 1208 (citing *Cuyler*).
148. *Id.* at 1208.
149. *Id.*
150. Texas v. New Mexico, 138 S. Ct. 954, 958 (2018) (citing Texas v. New Mexico, 462 U.S. 554, 564 (1983)).
151. *Id.*
152. *See infra* note 92 (detailing these cursory dismissals).
153. Seelye v. Stephens, No. 91-35847, slip op. at 2–3 (9th Cr. 1992).

> "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 establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."[154]

Section (b) of the Act clarifies that the term "States" means "the several States and Alaska, Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and the District of Columbia."[155] In 1962, Congress amended section (b) to add Guam to the list of jurisdictions included in the CCCA's grant of authority:

> "This bill extends to Guam the power to enter into **certain interstate criminal law compacts pursuant to [the CCCA],** relating to the enforcement of criminal laws and policies."[156]

In the General Purpose section of the statutory amendment, Congressman Willis from the Judiciary Committee added:

> "Congress, in enacting [the Crime Control Consent Act of 1934], **gave its consent** to the several States and the Federal territories…to enter into compacts for cooperative efforts and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies. **Pursuant thereto there have been several interstate corrections compacts to which various States have adhered.**"[157]

Under the direct terms of *Cuyler*, our inquiry may conclude here. Congress's explicit statements regarding the Crime Control Consent Act's grant of authority for corrections compacts are determinative, irrefutable evidence that these agreements have been transformed into federal law. The Guam Amendment was certainly compelling to the Massachusetts Supreme Court, which held in an advisory opinion requested by the Massachusetts State Senate that the CCCA was a "general consent" for states to enter into compacts for cooperation in "law enforcement" and allowed the states to establish

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154. 4 U.S.C. § 112(a).

155. 4 U.S.C. § 112(b).

156. H. REP. 434, 87th Cong., 1st Sess. (1961) (permitting Guam to enter Interstate Criminal Law Compacts, H.R. 6243, at 1) (emphasis added).

157. *Id.* (emphasis added).

"whatever joint agencies" were desirable to achieve "prevention and punishment of crime."[158]

Similarly, Judge Ferguson of the Ninth Circuit provided a comprehensive analysis of the legal status of the Interstate Corrections Compact in *Seelye v. Stephens*. Scott Seelye filed a section 1983 claim in the District of Montana against the Warden of the Montana State Prison and other state officials for opening certain items of his incoming mail outside of his presence.[159] Mr. Seelye had been transferred to Montana State Prison from Minnesota under the ICC. Under applicable Minnesota law, Mr. Seelye had a right to be present when prison officials opened his mail. Mr. Seelye argued that the ICC was transformed into federal law by the Supreme Court's holding in *Cuyler v. Adams*, thus Montana's failure to apply Minnesota law in handling Mr. Seelye's mail presented a violation of federal statutory law actionable under section 1983.[160] Confronted by contradictory interpretations of Article IV(e)—the ICC clause that provides that ICC prisoners should be treated equally with similar inmates of the receiving state and that ICC transfers do not deprive the prisoner of any legal rights they possessed in the sending state—the Ninth Circuit punted.[161] The court expressed "no view" as to whether Article IV(e) required Montana officials to abide by Minnesota law in handling Mr. Seelye's mail, nor did the court opine on whether violations of the ICC are sufficient to support a cause of action under section 1983.[162] Instead, the majority reversed on the grounds that Mr. Seelye's claim was improperly dismissed by the district court.

Justice Ferguson, concurring with the judgment, wrote specifically to address Mr. Seelye's ICC-related claims. He took umbrage with the majority's "unwarranted reliance" on *Stewart v. McManus*, distinguishing the case on substantive grounds and setting it aside as "largely irrelevant" in the analysis of Mr. Seelye's ICC and Fourteenth Amendment claims.[163] In Judge Ferguson's eyes, the court had failed the most basic step of proper Compact Clause analysis because the Eighth Circuit had not even applied *Cuyler* in its analysis

158. Opinion of the JJ., 344 Mass. 770, 774 (1962) (quoting the House Judiciary Committee report on the 1934 bill, H. Rep.1937, 73d Cong., 2d Sess.; see S. Rep. No.1007).

159. Seelye v. Stephens, 979 F.2d 855 (9th Cir. 1992).

160. *Id.*

161. *Id.* at 1–2.

162. *Id.* at 1.

163. *Id.* at 2.

of the ICC.[164] Setting aside the Eighth Circuit's arguments as "shallow and unpersuasive," Judge Ferguson argued that the Compact Clause analysis could be accomplished more successfully by closely following the guidelines set forth in *Cuyler*, including by analyzing the legislative history and plain text of the Crime Control Consent Act and the Interstate Corrections Compact.[165] Thereafter, the courts might also consider whether the states that are parties to the ICC accept federal aid for use in any correctional institutions or programs that are related to ICC-prisoners or the ICC, and whether there were any subsequent congressional actions which could indicate Congress's understanding of, and potential consent to the agreement.[166] For example, in *Cuyler*, the Court had placed weight on congressional statements of intent when it adopted the Detainer Agreement for the District of Columbia.[167] Future research should heed Judge Ferguson's guidance; many states' administrative codes explicitly identify the federal system as a party to the Compact.[168] Subsequent research could canvas the implementing administrative policies in each state and analyze contracts between the states and the federal government pursuant to corrections compacts.[169]

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164. *Id.* at 3.

165. *Id.* at 2–3.

166. *Id.* at 3.

167. *Id.* ("See *Cuyler v. Adams*, 449 U.S. at 441 n.9 (interpreting congressional statements of intent when adopting the Detainer Agreement for the District of Columbia as reaffirmation of Congress's consent to that agreement.")).

168. *See, e.g.*, N.J. ADMIN. CODE § 10A:71-3.52(a) ("Upon notification being provided to the Board by the Department that an inmate has been transferred under the interstate corrections compact, 30:7C-1 et seq., to another state or Federal institution to continue the service of his or her custodial term . . . "); Corrections Compact Transfers, OKLAHOMA DEPARTMENT OF CORRECTIONS, effective date 11/05/2021 (date accessed February 18, 2023) ("The corrections compact allows the Oklahoma Department of Corrections (ODOC) to exchange incarcerated inmates with other states and the Federal Bureau of Prisons when a corrections compact contract exists between Oklahoma and the respective jurisdiction . . . "); Sunset Public Hearing Questions, Interstate Corrections Compact, TENNESSEE DEPARTMENT OF CORRECTIONS, 7 (March 15, 2016) (date accessed February 18, 2023) ("Applications for transfers shall be considered for only those states which are parties to this compact. The states (including the Federal System) are as follows . . . ").

169. Additionally, such analysis could heed Judge Ferguson's instruction to analyze whether the states receive federal aid to support their administration of transferred prisoners. Seelye v. Stephens, 979 F.2d 855, 855 (9th Cir. 1992). Briefly, it is worth pausing for a moment on Judge Ferguson's characterization of the Eighth Circuit's opinion. As stated previously, the Eighth Circuit summarily adopted the district court's analysis of the legal status of corrections compacts under Cuyler. His characterization of that opinion as "shallow and unpersuasive,"

E. "We're All Textualists Now": Situating Corrections Compacts in the CCCA

Unlike in the case of the Interstate Agreement on Detainers, when Congress ratified the Crime Control Consent Act of 1934, Congress did not have administrative agreements like corrections compacts in mind. But corrections compacts fit comfortably within the broad consent provided by Congress in the Crime Control Consent Act of 1934 as a matter of both text and legislative history.

The House colloquy preceding the introduction of the Consent Act agreement reveals that the bill was drafted within the Judiciary committee with the hope that, by providing advance consent, Congress could "relieve the pressure upon the Federal Government to extend its criminal jurisdiction."[170] Congressman Sumners of Texas, the legislation's sponsor, stated that by relieving the states of the restraints placed by Article I, Section 10 of the Constitution, the states could contend with the difficulties created by the "general use of automobiles and airplanes and other means of rapid transportation" that had made the task of enforcing state criminal law "very great indeed."[171] Judiciary Committee Member Congressman LaGuardia of New York, who had been involved in drafting the legislation, echoed Sumner's characterization of the bill: the object was to allow "states to agree among themselves" to tackle criminal issues prompted by "new means of communication and transportation" "instead of calling upon the Federal Government to intervene."[172] Thus, the stated objective of the Crime Control Consent Act was to prevent a "tremendous increase in federal cases."[173]

Interstate corrections agreements accomplish the federalist principles that troubled Congressmen Sumners and LaGuardia. By delegating criminal enforcement authority to the states, Congress was freed of the responsibility of devising federal solutions to interstate crime. Congress empowered the states to adopt the criminal legal regimes they found most beneficial.[174]

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and the relative inaccessibility of Judge Wolle's slip opinion, raise troubling questions about the depth of analysis engaged in by federal courts citing *Cuyler*.

170. The Crime Control Consent Act, 63 Stat. 107 CONG. REC. OF DEBATE, 12095 (1932) (statement of Rep. Sumners) [hereinafter CCCA Debate].

171. *Id*. at 12095.

172. *Id*. at 12096 (statement of Rep. LaGuardia).

173. *Id*. at 12096 (statement of Rep. Sumners).

174. CCCA Debate, *supra* note 139, at 12,095.

Interstate compacts were not a novel vehicle for policymaking related to criminal law at the time of this debate; Congress had already passed legislation providing explicit advance consent for states to enter into compacts facilitating the testimony of witnesses in out-of-state proceedings.[175] The CCCA was intended to "go further"; the bill provides blanket consent for states to enter into compacts targeted at interstate criminal activity.[176] As a matter of "mutual importance and mutual interest, and subject to the control of the States . . . it seem[ed] absurd" to the legislators that the states would be barred by the Compact Clause from aiding one another to accomplish the "detection and punishment of offenders against their respective criminal laws."[177] Punishment is intrinsic to the rationale of the CCCA, as is to be expected—punishment is the inevitable result of criminal legal sanctions.[178] If the states received authority to "prevent" interstate crime and "enforce" their criminal laws, then the confinement of prisoners created by the criminal legal system must be included within the original grant of authority.

This pragmatic analysis is supported by the leniency of the statutory text. The CCCA authorizes the states to enter into whatever compacts may be "desirable" for the enforcement of their criminal laws—not required, sufficient, or necessary—each of which would retain significant supervisory authority for Congress.[179] In his letter to Congress sponsoring the Guam amendment to the CCCA, Assistant Secretary of the Interior George Abbott underscored the value of corrections compacts for policymakers, noting that these arrangements allow states to distribute the costs of prison administration:

> "Officials of correctional institutions in the United States have long recognized the desirability of providing specialized facilities and programs for

175. *Id.* (statement of Rep. Sumners).

176. *Id.*

177. *Id.* at 12096.

178. Cesare Beccaria, ON CRIMES AND PUNISHMENTS 113, 99 (Henry Paolucci, trans.) (1963) (expanding upon the justification for punishment discussed in Article VIII: "In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws.")

179. *See* Cuyler v. Adams, 449 U.S. 433, 439–440 ("By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.")

> particular categories of persons held in correctional institutions. In many Western states the number of persons in each special category is so small that separate facilities and programs prove too costly…"[180]

Notably, Assistant Secretary Abbott discusses a meeting of the Western Governors' Conference on November 25, 1958, wherein the meeting body—an arm of the CSG, the drafters of the Western Corrections Compact—deemed it necessary to obtain Congress's consent for Guam to enter into the WCC.[181] The *Cuyler* Court placed great value on CSG's determinations that the Detainer Agreement required congressional consent; the Western Governors' Conference's similar conclusions regarding the Guam amendment are thus highly compelling.[182]

The preceding analysis has demonstrated the sometimes vexing nature of Compact Clause analysis. When courts stray from the interpretive methods outlined in *Cuyler v. Adams*, determining whether a given interstate arrangement has been transformed into federal law under the Compact Clause becomes a murky enterprise, with courts' determinations about corrections compacts resting on vastly different methods. Nevertheless, the historical record is clear: Congress has provided clear consent to corrections compacts through the CCCA, thus transforming these agreements into federal statutory law and allowing violations of these agreements to ground section 1983 claims.

III. SHARED SOVEREIGNTY AND THE HISTORY OF PRISONER TRANSFERS

Finally, this Note advances a novel response to the question of whether corrections compacts are an appropriate subject for congressional legislation. Although that appropriateness is not determinative of whether these agreements raise questions of federal law, the interlocking theory of national prison administration discussed herein illustrates that Congress has always shared authority with the states in the administration of prisoner populations. This theory is premised first and foremost on history and tradition: from the first Congress, the federal government has relied upon the states to manage the federal prison system.[183] Congress's historic reliance on

180. S. REP. 87-1187 at 3 (1962).

181. *Id.* at 2.

182. *Cuyler*, 449 U.S. at 439.

183. *See* Chapter XXVII, 1 STAT. 96 (1789) (showing that at the first congressional debate, Congress was thinking about the relationship between states and the federal government relating to the prison system).

state and local prisons to confine federal prisoners created a foundational tradition of interlocking authority in the management of the national prison population. Thus, any action taken by the states to manages their own prison populations is necessarily intertwined with questions of Congress's own power to manage federal prisoners—and vice versa.

A. Prisoner Transfer: A Foundational Approach

From the country's founding, the incarcerated population of the United States of America has been intimately familiar with the practice of interstate transfers.[184] The First Congress called upon each state to house federal prisoners who were residents of that state at federal expense.[185] Having established their own prison systems and criminal codes, the states agreed, and the majority of federal prisoners were housed close to home—long-distance movements were uncommon.[186] Over time, this arrangement became burdensome and expensive, and the federal government shifted to a regional system with the enactment of an 1864 statute that empowered the Secretary of the Interior to contract for the housing of federal prisoners in "suitable prisons in convenient states or territories"[187] whenever the prisoner's state of origin could not house additional federal

184. *See* Lilly & Wright, *supra* note 44. Even prior to the formal establishment of the United States, the British government sent 50,000 convicted people to the American colonies under contracts of indentured servitude that typically lasted seven years. This practice was common in the British Empire, and generated resentment among the communities that had to receive the indentured servants. Indeed, the Founders "railed against 'monarchical' sanctions such as transportation and corporal punishment, which they saw as 'the native weapons of kings and despots.'" While a prohibition on interstate transfer of prisoners was not incorporated into the federal constitution, after the Founding, many early state legislatures adopted provisions in either their statutes or their legislatures banning the transportation of prisoners out-of-state. Kaufman, *supra* note 13, at 1822–1823 (quoting Rebecca McLennan, THE CRISIS OF IMPRISONMENT 19–31 (2008)).

185. Lilly & Wright, *supra* note 44, at 73; Chapter XXVII, 1 STAT. 96 (1789).

186. Lilly & Wright, *supra* note 44, at 73.

187. Prisoner transfers were essential to the administration of the prison population of newly constituted territories. Lilly & Wright, *supra* note 44, at 74. The close of the nineteenth century witnessed many of the newly formed territories adopting interstate prisoner transfers as a solution to limited funds and facilities. For example, the territory of Wyoming would contract with prisoners in Lincoln, Nebraska and Joliet, Illinois to house people convicted in Wyoming while they served their sentences. Although the territories initiated this practice without Congressional authorization, Congress soon lent its approval to these arrangements. *Id.* (citing 21 STAT. 259, June 16, 1880).

prisoners.[188] In response to overcrowding crises in Southern prisons arising from the Civil War, federal prison officials started to transfer prisoners progressively greater distances due to overcrowding and inadequate facilities.[189] By 1891, "federal officers were required to transport Florida and Georgia convicts to Albany, New York. Prisoners from Alaska and Washington Territory were confined in California. Three-fifths of the federal prison" population was incarcerated in "New York and Ohio penitentiaries and the Detroit House of Correction."[190]

Meanwhile, the material difficulties associated with sending prisoners to another state's penal facilities hampered the early development of the state prisoner transfer network.[191] Additionally, many states had adopted constitutional bans or limits on criminal sanctions involving forced mobility—at least sixteen state constitutions had a transportation clause by 1907.[192] Often grounded in provisions banning cruel and unusual punishment, the state transportation clauses banned "exile" or "banishment" from the state or being "transpor[ted] out of," or "being forced to leave" the state as punishment for violating state criminal laws.[193] Regardless, state-building efforts—local and national—and advances in technology empowered state officials to make prison governance more cooperative.[194]

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188. Lilly & Wright, *supra* note 44, at 73. *See also* Chapter LXXXV, 13 STAT. 74 (1864). State prisons had become severely overcrowded as the result of the Civil War when Southern state officials sought to imprison federal military officers and Freedmen. Even after the war, local officers sought to thwart the changes wrought by Reconstruction through imprisonment, often seeking to punish Freedmen and Northern officials to maintain control over their community through the federal military's occupation. With the sanction of the Thirteenth Amendment, southern prison officials started to sell prisoners' forced, unpaid labor to mining and railroad companies through convict leasing programs. Lilly & Wright, *supra* note 61, at 73.

189. Lilly & Wright, *supra* note 44, at 73.

190. *Id.* (quoting Cumming & McFarland, Federal Justice 353 (1937)).

191. Kaufman, *supra* note 13, at 1825.

192. *Id.* at 1824–5.

193. *Id.* at 1824 (citing the relevant text of the West Virginia, Arkansas, and Georgia state constitutions). It is difficult to state with certainty exactly what sort of these punishment these measures prohibited. Formal banishment, or "punishing a person by requiring him to leave the state in lieu of some other criminal sanction" creates different political and legal questions than effective banishment—wherein a prisoner may be sent away from their original locality because of the unavailability of resources or facilities for prisoner housing in their convicting state. *Id.*

194. Kaufman, *supra* note 13, at 1825. Between 1870 to the turn of the century, Enoch Webb and his son Frederick's collective efforts yielded the first documented count of all prisoners in "state or local prison, penitentiary, reformatory, workhouse

Because of Congress's extensive and historic reliance on state and local prisons to house federal prisoners, any action taken by Congress or the states in the field of administration would inherently implicate traditional state interests. The overlap in authority arose when, at the turn of the twentieth century, both the states and the federal government had extensive impetus to take meaningful legislative action to alleviate the overcrowding crises that had originated during the Civil War and peaked in the 1920s.

B. Prisons at the Breaking Point: The Rise of Corrections Compacts

"CROWDING LED TO PRISON REVOLTS," read a *New York Times* interview with W.N. Thayer, a psychiatrist and state official, from September 20, 1929:

> "New York State's prisons are archaic, crowded, filthy; their inmates idle, disgruntled, inflamed–there is your reason for the prison revolts with which the papers have been filled."[195]

The prisons were indeed "archaic"—New York state prisons, like many prisons, had been established decades ago—and "filthy"—often little more than a series of inhospitable "stone cells." Prisoners were "idle," unable to work because of a then-existing constitutional ban on the sale of articles made by prisoners.[196] Moreover, state and federal criminal statutes had both only expanded the forms of criminalized conduct and enhanced the penalties associated with such conduct.[197] In sum, by the late 1920s there were more prisoners, convicted for longer sentences, in antiquated and insufficient facilities. It seemed clear to Thayer that the prisoners would revolt.[198]

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and jail." Congress established a permanent Census Bureau in 1902, and one of the newly appointed Director's first responsibilities was to collect prisoner statistics. The collection of this data accelerated information sharing amongst prison administrators, and with the invention of mass-produced automobiles in the early twentieth century, the feasibility of interstate prisoner transfers increased significantly. *Id.*

195. *Says Crowding Led to Prison Revolts*, N.Y. TIMES (Sep. 20, 1929), https://timesmachine.nytimes.com/timesmachine/1929/09/20/105203883.html?pageNumber=43 (on file with *Columbia Human Rights Law Review*).

196. *Id.*

197. *Id.*

198. *Id.* Thayer should not be understood as a model of empathy on behalf of the administrative state. When asked by reporters to respond to public outcry surrounding reports that prisoners had been shot to quell the revolts, Thayer

The regional mode of federal prison governance was ill-equipped to deal with the overcrowding crises that plagued local and state prisons. This regional model effectively delegated the supervision of the federal prison population to the wardens, who had failed to maintain adequate levels of prisoner welfare as the federal prison population continued to grow.[199] The enactment of the Federal Prison Bill of 1930 abolished the regional model of federal prison governance. In its place, Congress for the first time unified the administration of the federal prison system in a coherent administrative edifice.[200] But when Congress took action through the Federal Prison Bill to create a centralized system of federal prison management, Congress made repeated and explicit reference to the need for the state prison system to serve as a supplement to the federal system, to ensure the federal prison system would "never mirror the size" of the state prison system. These references are enshrined in both the statutory text and the legislative history preceding the bill.

On November 25, 1929, Attorney General William DeWitt Mitchell wrote to the Chairman of the House Judiciary Committee to prompt Congress to take decisive action to resolve many of the issues that had been highlighted in the Times' interview with Dr. Thayer. Mitchell wrote, "the Federal Government is now powerless to remedy the deplorable conditions of filth, contamination, and idleness which [are] present in most of the antiquated jails of the country, for it is wholly dependent upon the charity of the States."[201] Mitchell envisioned a centralized agency, under the authority of the Department of Justice, that would be responsible for the management of the entire federal prison system.[202] Mitchell was unequivocal as to the purpose of this centralization:

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replied "What are we going to do about it? . . . The men go mad. If you don't mow them down, they'll mow you down. Which is it going to be?" *Id.*

199. Regardless of the situs of their confinement, federal prisoners were subject to often minimal supervision—the Three Prisons Act of 1891, authorizing the establishment of the first three federal prisons, instituted a regional network of prison wardens under the authority of Department of Justice officer entitled the "General Agent." 9190 H.R.REP. NO. 106 at 2 (1930).

200. *Id.*

201. *Id.*

202. *Id.* The Bureau of Prisons would be led by a director, appointed by and responsive to the Attorney General, that would be empowered to contract with states for the custody of federal prisoners, or, when more economical, establish new prisons on a temporary or more permanent basis. Chapter 274, PUB. L. NO. 71-218, 46 STAT. 325 (1930).

> "The Federal Government has not provided an adequate organization to oversee the care and treatment of the nearly 20,000 men[203] who are in prisons and jails for violation of Federal statutes. Heretofore, there has not been a sufficient coordinating force at the seat of government to direct the … care and treatment of Federal prisoners in the 900 local jails distributed through the country. Because the penal authorities of some of the States are faced with the same overcrowded conditions which exist in the Federal prisons, it is becoming impossible for them to accept Federal prisoners as boarders. Moreover, conditions in some of the local jails are so insanitary and generally deplorable that the Federal Government does not feel it ought to use them."[204]

The Senate Report accompanying the bill incorporated and adopted Mitchell's explanation of the bill's purpose in full, and added that no bill "would contribute more to the present emergency" of overcrowding than the Federal Prison Bill. Additionally, the bill would provide "for the first time an adequate system for dealing with certain great masses of Federal prisoners held in local jails."[205] By enacting the bill, the Senate hoped to alleviate the "enormous handicaps in the administration of a broad program of social reconstruction and reformation of Federal offenders."[206] This objective was to be accomplished neither by building legions of federal prisons, nor by removing the federal prison population from state prisons. Instead, the bill's primary accomplishment was to streamline the administration of federal prisoners in state institutions. By allowing the Attorney General to contract with state prisons for the housing of the federal prison population, and vesting that office with the power to transfer federal prisoners as needed, the Federal Prison Bill could accomplish

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203. H.R. REP. NO. 106, at 1–2. The first federal prison for female prisoners was established in 1928 thanks to the initiative of Assistant Attorney General Mabel Walker Willebrandt. Willebrandt was ahead of her time; she advocated for special facilities for juvenile and female inmates long before it became standard policy. The Alderson facility was considered a model institution at the time. For more on AAG Willebrandt's life and career. *See Mabel Walker Willebrandt Dies*, N.Y. TIMES (Apr. 9, 1963), https://timesmachine.nytimes.com/timesmachine/1963/04/09/90553545.html?pageNumber=31 (on file with *Columbia Human Rights Law Review*).

204. H.R. REP NO.106, at 1–2.

205. 9186 S. REP. NO. 533 at 1 (1930).

206. *Id.*

its intended goal of ensuring the welfare of the federal prison population.[207]

If the policy requirements underpinning the Federal Prison Bill sound familiar, they should. Throughout the twentieth-century, the rise in trans-jurisdictional criminal activity—precipitated by the technological advances of the Industrial Revolution, particularly the automobile—catalyzed a vast and historic expansion of federal criminal authority. [208] The Federal Prison Bill explicitly contemplates reliance on state prison systems in order to house a rapidly growing federal prison population. Shared authority over the national prison population is embedded in the DNA of the Federal Prison Bill, and so, when Congress enacted the Crime Control Consent Act of 1934, any relief for the state prison system would inevitably serve the objectives of the federal prison system. With the history of the Federal Prison Bill in mind, the role of interstate corrections compacts as a bulwark of federalism comes into sharp relief.

CONCLUSION

Our popular mythology around incarceration is that, when a person commits a crime, they are apprehended, tried, and sentenced according to the laws and procedures of the state wherein their crime was committed.[209] The states lead in this arena, and the state's exercise of its "police power" is both legitimized and constrained primarily by the political will of those under its authority.[210] The state's authority to punish the offender is derived from the social contract agreed to by the state and its citizens.[211] Territoriality is integral to our justification

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207. 18 U.S.C. § 4002 (providing that "[f]or the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons").

208. *See generally* DANIEL C. RICHMAN, ET AL., DEFINING FEDERAL CRIMES (1st ed. 2014) (detailing this history).

209. This idea is enshrined in our federal constitution. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ").

210. Wendell, *supra* note 9, at 522 (discussing the legitimacy attached to the state's exercise of its criminal power within its own jurisdiction).

211. Kaufman, *supra* note 13, at 1863 (citing R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 36–39 (2001), who discusses classic liberal—in the Lockean sense—theories of punishment predicated on the social contract: "In the classic liberal account of punishment, a state's power to imprison flows from a

for the criminal legal system.[212] But for a prisoner housed under a corrections compact, territoriality is completely divorced from the justifications for the punishment received. Instead, the justification for the dual custody of the corrections compact prisoner is derived from the administrative efficiencies created for both states by transferring the prisoner to another jurisdiction in exchange for an established per diem rate of compensation.[213] Among other reasons, state and federal correctional authorities rely on prisoner transfers—effectuated through regimes like the New England Interstate Corrections Compact—to alleviate overcrowding, maintain control over the prison population, and to distribute the budgetary burdens associated with incarceration.[214] Administrators and citizens of the sending states never witness the consequences of their criminal enforcement; their local prison never becomes so overcrowded that it becomes a public health concern,[215] nor are their legislators forced to consider whether it is a political priority to deploy those citizens' tax revenue towards building new prisons to house an ever-growing prison population.[216] The burden, the consequence—the *person*—is transferred. This shifted cost collapses foundational legitimacy principles for the exercise of the state's power to punish.

This project does not argue that access to federal court is a panacea for the challenges incarcerated citizens face in seeking freedom; instead, this Note is principally concerned with proving that corrections compacts raise questions of federal law. Thus, while section 1983 may be one way "out of the labyrinth," this Note urges additional research to discover other pathways as well. At the end, what is likely to emerge are divergent paths, where an incarcerated person can evaluate which body of law—the sending state's, the receiving state's, or federal statutory law—can offer them the most expedient pathway towards the remedy they seek. The Author invites further scholarship to continue illuminating the comprehensive legal issues created by prisoner transfers, including in habeas corpus and due process claims.

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democratic decision to make certain conduct criminal and to authorize incarceration as the sanction for that crime . . . in the United States, much domestic criminal law operates on the idea that a state's penal power stems from and stops at state.").

212. Wendell, *supra* note 9, at 527.

213. Hudak & Engler, *supra* note 39, at 53–54. David M. Hudak & Richard D. Engler, U.S. Department of Justice Office of Justice Programs, Research Study Number 2.1: Mandates for Interstate Prisoner Transports 53–54 (1977).

214. *Id.* at 56.

215. Gower, *supra* note 10.

216. Kaufman, *supra* note 13, at 1828.