

2006

## Congress, Article IV, and Interstate Relations

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### Recommended Citation

Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, HARVARD LAW REVIEW, VOL. 120, P. 1468, 2007; COLUMBIA PUBLIC LAW RESEARCH PAPER No. 06-123 (2006).

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# Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number 06-123

## CONGRESS, ARTICLE IV, AND INTERSTATE RELATIONS

*(version of 08/28/2006)*

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## CONGRESS, ARTICLE IV, AND INTERSTATE RELATIONS

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\* Assoc. Prof., Columbia Law School. Special thanks to Mike Dorf, Ariela Dubler, Liz Emens, Barry Friedman, Caitlin Halligan, Tom Lee, Henry Monaghan, Gerry Neuman, Sasha Samberg-Champion, Cathy Sharkey, and John Witt for their insightful comments and questions. This paper also benefitted greatly from comments I received from participants in faculty workshops at Columbia Law School and the University of Virginia Law School. Ella Campi, Rachel Rubenson, and Adam Schleiffer provided helpful research assistance.

## INTRODUCTION

Consider three potential federal statutes:

- Congress authorizes states to refuse to recognize laws and judgments of other states that relate to same-sex marriage.
- Congress authorizes states to impose residency requirements as a condition of engaging in certain economic activities within a state, such as the provision of legal services.
- Congress imposes civil and criminal penalties on anyone who knowingly assists a minor to obtain an out-of-state abortion without complying with the parental notification requirements of the state in which she resides.

Each of these statutes authorizes interstate discrimination in some form. Moreover, absent such authorization, each of these forms of interstate discrimination is of dubious constitutionality. Indeed, under current caselaw state legislation refusing to recognize other states' judgments or requiring residency as a condition of occupational licensure plainly contravene Article IV of the U.S. Constitution.<sup>1</sup> Collectively, therefore, these measures raise the question of the scope of congressional power with respect to interstate relations in general, and Article IV in particular.

That question is of increasing practical importance. Conjuring up these statutes requires no great feat of legal imagination. The first, of course, is already enacted law, in the form of Section 2 of the 1996 Defense of Marriage Act (DOMA).<sup>2</sup> The third may soon become law; it mirrors Section 2 of the Child Interstate Abortion Notification Act (CIANA), which the House passed last year and which the Senate recently adopted in the form of the Child Custody Protection Act.<sup>3</sup>

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<sup>1</sup> See, e.g., *Baker v. General Motors Corp.*, 522 U.S. 222, 232–33 (1998); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985).

<sup>2</sup> 28 U.S.C. § 1738C, § 2.

<sup>3</sup> See CIANA, H.R. 748, 109th Cong., 1st Sess. § 2 (adopted by the House on April 27, 2005); Child Custody Protection Act (CCPA), S. 403, 109th Cong., 2nd Sess. § 2 (adopted by the Senate on July 25, 2006). CIANA is a broader measure than CCPA, in that separately mandates parental notice and a minimum 24 hour delay for minor abortions regardless of whether the minor's home state or the state in which the abortion is sought impose such requirements. See *infra* notes 257–258. To avoid confusion and because it raises some additional constitutional concerns, the discussion here references CIANA only, but the substance of CIANA's

Only the second is (for now) purely hypothetical. However, similar measures authorizing interstate economic discrimination—such as proposals to allow states to grant discriminatory tax incentives to foster in-state economic activity or to ban importation of other states’ waste—are currently pending in Congress.<sup>4</sup>

The scope of congressional authority over interstate relations is also important on a more conceptual level, both in clarifying the role of Article IV in our constitutional structure and in delineating the respective responsibilities of Congress and the courts in horizontal federalism disputes. Federalism is most commonly envisioned as addressing federal-state relationships, what is sometimes called the “vertical” dimension of federalism. But any system of government based on a union of otherwise “sovereign” entities must also address the relationship among those entities. The resultant rules and doctrines governing interstate relationships are the “horizontal” dimension of federalism.

Article IV is one of the least familiar components of the original Constitution, but it is central to our horizontal federalism framework. Indeed, the article is in many ways the backbone of national union. Known as the states’ relations article,<sup>5</sup> its principal provisions limit the states’ ability to discriminate against one another—whether by not respecting sister state judgments, laws, and criminal proceedings, or by denying out-of-state residents the right to engage in economic and other activity within the state. In the words of the Supreme Court, without such prohibitions “the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”<sup>6</sup> These prohibitions are phrased absolutely and, given their importance to securing union, would seem to allow no exceptions.

Yet Article IV’s antidiscrimination prescriptions are only one side of the constitutional equation when it comes to union; the other consists of Congress’ powers to regulate interstate relations. Article I’s Commerce Clause grants Congress affirmative power to “regulate Commerce . . . among the several States,”<sup>7</sup> from which the courts have inferred a prohibition on state discrimination against interstate commerce. This prohibition, known as the dormant Commerce Clause, represents

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Section 2 and the CCPA are identical.

<sup>4</sup> Solid Waste Empowerment and Enforcement Act of 2005, H.R. 70, 109th Cong., 1st Sess. (authorizing states to impose limits on importation of solid waste from other states); Economic Development Act of 2005, S. 1066, 109th Cong., 1st Sess. (authorizing states to provide tax incentives for the purposes of economic development provided, among other requirements, that the availability of the tax incentive does not depend on state of incorporation, commercial domicile, or residence).

<sup>5</sup> *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 378–79 (1978).

<sup>6</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180–81 (1869) (addressing Article IV’s Privileges and Immunities Clause); see also *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (“The animating purpose of the full faith and credit command . . . “was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.”) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

<sup>7</sup> U.S. Const., art. I, 8, cl. 3. I do not discuss here the use of the spending power.

another core horizontal federalism postulate, and indeed where economic activity of nonresident individuals is involved, the demands of the dormant Commerce Clause and Article IV largely overlap. Notably, nearly a century and a half of precedent holds that Congress can authorize states to engage in interstate economic discrimination that, absent such congressional approval, would violate the dormant Commerce Clause.<sup>8</sup> In like vein, Article I's Section 10 expressly grants Congress power to sanction certain otherwise prohibited forms of state action. Even Article IV itself speaks in two voices. At the same time as it prohibits state discrimination in absolute terms, Article IV also grants Congress broad control over aspects of interstate relations without expressly subjecting Congress itself to equivalent antidiscrimination requirements.<sup>9</sup>

Squaring these two constitutional features—Article IV's prohibitions and Congress' power to structure interstate relations—requires developing a comprehensive account of the scope of congressional authority in the interstate arena. Such an account, however, is currently lacking; indeed, the challenges and dilemmas of horizontal federalism have been generally underappreciated in American constitutional scholarship. Not surprisingly, therefore, enactment of DOMA has triggered a flurry of writing on Article IV's Effects Clause, which grants Congress authority to determine the effect that one state's laws and judgments will have in another.<sup>10</sup> But overwhelmingly, this commentary treats that topic in isolation, without seeking to develop an integrated understanding of Congress' power with regard to Article IV as a whole. Substantial commentary also exists

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<sup>8</sup> See *infra* notes 31–39 and accompanying text. The most prominent examples of such congressionally-sanctioned discrimination are: the McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015; the Bank Holding Company Act, originally codified at 12 U.S.C. § 1842(d) but since repealed; Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e; Webb-Kenyon Act, codified at 27 U.S.C. § 122; Wilson Act, codified at 27 U.S.C. § 121. But see *Granholm v. Heald*, 125 S. Ct. 1885 (2005) (holding that the Wilson Act, now embodied in the 21st Amendment, did not extend to authorizing state liquor regulation that discriminated against interstate commerce).

<sup>9</sup> For example, after setting out the requirement that states must provide full faith and credit to the acts, records, and judicial proceedings of other states, Article IV proceeds to grant Congress power to declare the effect that such out-of-state measures will have, without expressly subjecting Congress to the full faith demand. See U.S. Const. art. IV, § 1. Similarly, Article IV's New State Clause authorizes Congress to admit new states to the union but says nothing express about the powers new states must enjoy or their relationships to existing states, other than protecting existing states from being divided or combined against their will. *Id.*, § 3.

<sup>10</sup> The scholarly commentary on DOMA's constitutionality is too extensive to be cited in full. Some of the thoughtful contributions are: Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 *Neb. L. Rev.* 604 (1997); Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 *New Eng. L. Rev.* 361, 400–08 (2006); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 *Iowa L. Rev.* 1, 21 (1997) [hereinafter Koppelman, *DOMA*]; Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *Yale L. J.* 1965 (1997); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional*, 90 *Minn. L. Rev.* 915 (2006) [hereinafter Rosen, *DOMA*]; Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 *Nw. U. L. Rev.* 827 (2004); Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 *Brook. L. Rev.* 307 (1998); Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 *Creighton L. Rev.* 365 (2005); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 *Creighton L. Rev.* 255 (1998).

assessing the dormant Commerce Clause's limits on interstate economic discrimination. Only occasionally, however, does this scholarship engage the question of Congress' power to authorize violations of the dormant Commerce Clause,<sup>11</sup> or how that power relates to congressional authority under Article IV.<sup>12</sup> Serious analysis of Congress' power to authorize relaxation of Article IV's Privileges and Immunities Clause is particularly rare, although the dominant presumption, expressed best by Laurence Tribe, is that the Clause "confers a personal right against state action discriminating against out-of-staters, whether or not such discrimination has purportedly been endorsed by Congress."<sup>13</sup>

Nor has the Court provided much guidance on these issues. Despite the mountain of federalism precedent accumulated in the over two hundred years since the Constitution's adoption, the Court has scarcely addressed the question of Congress' powers in the interstate context. It has never ruled, for example, on whether Congress can contract the antidiscrimination obligations that courts have read Article IV as imposing on the states.<sup>14</sup> Moreover, when the Court has addressed such questions—as, for example, in decisions sustaining Congress' power to authorize state burdens on interstate commerce—it has provided little clarification of the proper bounds of Congress' role, and none at all with respect to the seeming conflict between the upheld congressional authority and Article IV's protections against discrimination. The Court's relative silence on Congress' role in horizontal

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<sup>11</sup> For nearly sixty years, the leading article on Congress' power to authorize dormant Commerce Clause violations has been Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 *Colum. L. Rev.* 547 (1947); see also Henry P. Monaghan, *The Supreme Court, 1974 Term: Foreword—Constitutional Common Law*, 89 *Harv. L. Rev.* 1 (1975) (discussing this congressional power as a form of constitutional common law). Norman Williams recently authored a sustained critique of Congress' ability to authorize dormant Commerce Clause violations, but he does not analyze whether Congress can sanction state violations of the Article IV Privileges and Immunities Clause and instead presumes that it cannot. See Norman Williams, *Why Congress May Not "Overrule" The Dormant Commerce Clause*, 53 *U.C.L.A. L. Rev.* 153 (2005).

<sup>12</sup> Two efforts to take a more comprehensive view of Congress' powers over interstate relations and Article IV are Laurence H. Tribe, 1 *American Constitutional Law* § 6-35 (3rd ed. 2000) [hereinafter Tribe, *Treatise*], and William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 *Stan. L. Rev.* 413, 395–96, 399–400 (1982) (hereinafter Cohen, *Enigma*). In addition, Douglas Laycock offers an integrated analysis of Article IV's Full Faith and Credit and Privileges and Immunities Clauses, although not addressing Congress' powers under these provisions. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *Colum. L. Rev.* 249, 270–73 (1992); see also Jonathan Varat, *State "Citizenship" and Interstate Equality*, 48 *U. Chi. L. Rev.* 487, 570–71 (1981) (discussing Congress' power over the Privileges and Immunities Clause, and its relationship to Congress' power to authorize interstate economic discrimination in the course of a broader exposition of the Clause's import).

<sup>13</sup> Tribe, *Treatise*, supra note 12, at 1243; see *infra* sources cited note 130.

<sup>14</sup> See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality opinion) ("While Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court."); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 n. 1 (Blackmun, J., concurring and dissenting in part) (noting that the Court had "no occasion to determine whether Congress may authorize . . . what otherwise would be a violation of th[e] Privileges and Immunities] Clause" and stating that the "question may present considerations different from . . . the dormant Commerce Clause").

federalism may, however, soon change. With Massachusetts' recent recognition of same-sex marriage,<sup>15</sup> the issue of whether DOMA's Section 2 exceeded Congress' powers may well come before the Supreme Court in the near future.<sup>16</sup>

The time is thus ripe for a sustained examination of Congress' power over interstate relations, and this article aims to undertake that task. I conclude, first, that the Constitution grants Congress expansive authority to structure interstate relationships. This authority derives from both Article I and Article IV, although the latter source has independent determinative significance only regarding the relatively narrow category of interstate activity that falls outside Congress' Article I powers. Second, contrary to Professor Tribe and others, in wielding this interstate authority Congress is not limited by judicial interpretations of Article IV. In my view, subjecting Congress to Article IV's antidiscrimination restrictions unjustifiably limits Congress' interstate authority and ignores Congress' unique institutional position and capacities as the national representative body. In general, Congress should be able to authorize interstate discrimination when it plausibly concludes that such discrimination serves the national interest, and its enactments in this regard should not be subject to greater scrutiny than the lenient rationality review that ordinarily applies to congressional commerce power legislation.

Thus, rather than constituting the unalterable demands of union, the antidiscrimination provisions of Article IV are, like the dormant Commerce Clause, best understood as constitutional default rules. These provisions are judicially enforceable against the states, but their enforceability is contingent on the absence of congressionally-authorized discrimination. This does not mean that Congress is wholly free to reset the bounds of acceptable state behavior in interstate contexts. On the contrary, Congress is constitutionally constrained; however, the relevant limits do not derive from Article IV or principles of federalism. They derive instead from the Fourteenth Amendment: Congress cannot authorize states to violate interstate prohibitions that are independently protected by that provision.<sup>17</sup>

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<sup>15</sup> See *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding Massachusetts' prohibition on same-sex marriage violates the state's constitution). In Vermont, a similar state supreme court determination has led to a state law authorizing same-sex civil unions. See *Baker v. State*, 744 A.2d 864 (Vt. 1999). For a list of challenges currently pending in numerous state courts alleging that statutory prohibitions on same-sex marriage violate state constitutions, see <http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9> (last visited March 9, 2006).

<sup>16</sup> Challenges to the constitutionality of DOMA's section 2 have been rejected by lower federal courts, although no such litigation is currently pending. See, e.g., *Wilson v. Ake*, 354 F. Supp.2d 1298, 1303–04 (M.D. Fla. 2005); see also *Smelt v. County of Orange*, 2006 WL 1194825 at \*6 (9th Cir. May 5, 2006) (No. 05-56040) (affirming district court's ruling that plaintiffs lacked standing to challenge constitutionality of DOMA's Section 2). In addition, however, legislation is currently pending in Congress to deny federal court jurisdiction over questions arising under the DOMA. See Marriage Protection Act of 2005, H.R. 1100, 109th Cong. § 2 (2005).

<sup>17</sup> The same principle would apply to other individual rights amendments that bind the states. The discussion here references only the Fourteenth Amendment because that amendment is most salient to the interstate context; in addition, by their terms other amendments apply to Congress as well as the states, and thus Congress' inability to authorize state violations of their requirements is more evident.

My analysis here focuses primarily upon extrapolating the constitutional “structures and relationships”<sup>18</sup> that govern the division of power between the different levels and branches of government in horizontal federalism contexts. Such a structural focus is a staple of federalism jurisprudence and scholarship, in part because the proper boundaries of federal and state power are often difficult to discern from constitutional text alone.<sup>19</sup> The need to look beyond text is equally true here, despite Article IV’s seeming facial clarity, because limning the proper reach of congressional power over interstate relationships necessitates integrating Article IV with Article I. Nonetheless, my argument pays close attention to constitutional text, both to discern what limitations are imposed on Congress in the interstate arena and for more general insights regarding Congress’ structural role. It also places great weight on precedent in analyzing the scope of congressional authority, as well as considers historical evidence on how the framers and subsequent generations understood Congress’ interstate role.<sup>20</sup>

Less emphasis is put on justifying the scope of Congress’ power from a more strictly normative or policy perspective. To some, this might seem a significant omission, since strong normative and policy arguments could be leveled against granting Congress broad power essentially to revise the Constitution’s interstate antidiscrimination requirements. Congressionally-authorized state discrimination may undermine national economic growth, by encouraging state barriers to free trade; it also seems likely to lead to multiple and potentially conflicting systems of state regulation, with inefficiencies an inevitable result. In addition, the examples of DOMA and CIANA raise concerns that Congress will exploit its interstate powers to advance a restrictive social agenda in areas otherwise thought outside its purview, at the cost of individual liberty.

I share many of these concerns. But I believe that these policy and normative arguments are largely for Congress, not the courts. Fears that Congress will misuse its powers cannot legitimately trump the structural, textual, and precedential evidence for recognizing Congress broad authority over interstate relations. Thus, to my mind such policy and normative arguments are relevant only to the extent they

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<sup>18</sup> Charles Black, *Structure and Relationship in Constitutional Law* 7 (1969).

<sup>19</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (inferring prohibition on Congress commandeering states to implement federal regulatory programs from, inter alia, the Constitution’s diverse grants of protection to state governments and the principle of limited national powers combined with the Tenth Amendment); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (declaring, in the Eleventh Amendment context, that “[b]ehind the words of the constitutional provisions are postulates which limit and control”).

<sup>20</sup> This article is not the occasion for, and it does not require, a full-dress justification of my views on constitutional interpretation. But some precatory comments orienting this article against the background of constitutional scholarship seem in order. As the methodological description above suggests, I am fairly “conventionalist” in my approach to constitutional interpretation, in that I believe it is necessary to take seriously insights offered by the variety of standard sources of constitutional interpretation. See Thomas W. Merrill, *Toward A Principled Interpretation of the Commerce Clause* 22 *Harv. J. L. & Pub. Pol’y* 31, 32–33 (1998); see also Philip Bobbitt, *Constitutional Interpretation* 11–12 (1991) (identifying standard sources of constitutional interpretation). In any event, given its relative obscurity in constitutional scholarship, consideration of Article IV’s full background is merited, whatever one’s view of the proper metes and bounds of constitutional analysis.

provide evidence on whether granting Congress a revisory power over interstate relations accords with the system of government that the Constitution created. In this regard, caution is needed before condemning congressional authority to sanction interstate discrimination as inherently at odds with the Constitution's commitment to national union. Viewed functionally, the demands of national union have no preset, acontextual content. What is needed to ensure union at the outset of a fragile federation or in situations when norms and rules of national attachment are weak may not be what is needed when national identity and ties are strong. Most importantly, Congress institutionally is best positioned to determine whether instances of interstate discrimination ultimately accrue to the national interest.

The article begins in Part I with the structural arguments for broad congressional power over Article IV and interstate relations. Several central features of the interstate relations context—the need for a federal umpire; the Constitution's emphasis on congressional supervision in a variety of interstate relations contexts; differences between vertical and horizontal federalism regarding the danger of congressional self-dealing; and institutional competency concerns—support recognizing such expansive congressional authority. Part I then turns to an examination of counterarguments, which focus on constitutional text and Article IV's history. It contends that none of these counterarguments supports denying Congress the preeminent regulatory role when it comes to ordering interstate relations, including the power to authorize state conduct that otherwise would violate Article IV.

One core theme that emerges from Part I is the importance of examining Article IV's provisions against both the background of Article I and of Article IV as a whole. Article IV is not often considered as a single entity; understandably so, given that its four sections were cobbled together during the last minutes of the constitutional convention. Moreover, the article's core interstate prohibitions—the Full Faith and Credit, Privileges and Immunities, and Extradition Clauses—are located in its first two sections, whereas the latter half of the article (comprising the New State, Territory and Property, and Guarantee Clauses) is facially more focused on state-federal relations. Yet these last sections also contain an interstate dimension, and they are notable in the extent to which they address potential sources of interstate conflict by granting power to Congress. Viewing Article IV as a whole, and particularly in conjunction with the Commerce Clause, significantly clarifies Congress' central role in interstate relations. Doing so, however, also dissolves Article IV's seeming textual clarity and complicates any historical case for viewing its requirements as absolute.

Part II takes up the question of what limits, if any, the Constitution imposes on Congress' power to structure interstate relations. It begins by examining the constraints imposed by state sovereignty. Viewing Article IV as a whole is also helpful here, as its latter sections suggest core federalism postulates—such as state autonomy, state equality, and state territoriality—to which any account of Congress' powers over the initial, more overtly interstate provisions of the article must adhere. But careful investigation demonstrates that these federalism postulates have little cabining effect on Congress in its structuring of interstate relations; they preclude only extreme measures that Congress is exceedingly unlikely to enact. Instead, the

real limit on Congress comes not from Article IV or federalism at all, but from the Fourteenth Amendment. In regulating interstate relations, Congress cannot authorize states to violate the Fourteenth Amendment's prohibitions.

This Fourteenth Amendment restriction on Congress' interstate relations authority necessitates a nuanced assessment of Article IV's interstate requirements, to discern which requirements receive independent protection under the Fourteenth Amendment and which instead are fundamentally interstate relations measures subject to congressional control. Part III undertakes this inquiry, using an analysis of the interstate provisions of DOMA and CIANA as a prism through which to assess the scope of Congress' power over Article IV. It concludes that both measures fall within Congress' powers over interstate relations. Nonrecognition of judgments potentially could violate the Fourteenth Amendment's protections of property. But given the difficulty in proving justified reliance, DOMA's authorization for nonrecognition of judgments involving same-sex marriages seems unlikely to fall on this ground. Insofar as CIANA relates to states' regulation of their own residents, they arguably present no Article IV issue at all, and Congress should have power to authorize states to impose residency requirements as a condition for engaging in ordinary economic activity, notwithstanding the restriction of the Article IV right to travel that would result. The forms of the right to travel at issue in these measures—freedom to take advantage of lawful activities in other states and to exercise constitutionally-protected freedoms without regard to state of residence—are aspects of individual liberty and national citizenship in a federated union that generally qualify for stronger Fourteenth Amendment. Nonetheless, recognition of a state's special relationship to its minors may well suffice to render Section 2 of CIANA itself constitutional.

#### I. THE STRUCTURAL DEMANDS OF UNION: THE CASE FOR BROAD CONGRESSIONAL POWER OVER INTERSTATE RELATIONSHIPS

A structural account of the demands of union establishes both the need for a federal umpire and the Constitution's allocation of this role primarily to Congress. This part begins by setting out the affirmative case for an expansive congressional power over interstate relations, including the power to expand or contract Article IV's prohibitions on state discrimination. It argues that the constitutional model for interstate relations—evident in the dormant Commerce Clause context and also in regard to Article IV—consists of judicially-enforced antidiscrimination norms that are subject to congressional override. This model reflects structural differences between horizontal and vertical federalism. While not absent, fears of congressional self-dealing at the expense of the states and constitutional federalism principles are substantially mitigated in the horizontal federalism context. Congressional primacy also accords with institutional competency. Congress has a comparative advantage over the courts in both discerning state discrimination and determining when such discrimination is justified. This part then turns to assessing, and ultimately rejecting, arguments for a more limited congressional role based on Article IV's text and history.

A. *Structural Arguments for Congress' Role As Interstate Umpire*

Some national umpire over interstate relations is essential for ensuring union. The alternative is to have the states themselves, either through their political branches or their courts, determine when they have transgressed the Constitution's interstate demands. Granting the states alone such power creates obvious dangers of bias and retaliation, as the history of interstate discrimination under the Articles of Confederation made clear. The grant of alienage and diversity jurisdiction to the federal courts, as well as jurisdiction over disputes between two or more states,<sup>21</sup> confirms the framers' recognition of the need for a federal arbiter of interstate disputes.<sup>22</sup> In Federalist No. 80, Hamilton notably linked the grant of diversity jurisdiction to Article IV, arguing that diversity jurisdiction was needed to ensure "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled."<sup>23</sup>

Thus, the ultimate question is not whether the federal government should have power to mediate interstate relations; it does. Nor is it whether both Congress and the Court are authorized to play this umpiring role; both are. Instead, the real question is which of these two branches of federal government should exercise primary control over interstate relations. In general, I submit, the Constitution assigns the primary role of interstate umpire to Congress.

1. *Congressional Power to Authorize State Violations of the Dormant Commerce Clause.* The grant of the commerce power is particularly instructive on congressional primacy in ordering interstate relations. Discriminatory state commercial regulation and resultant state retaliation formed a key part of the impetus behind the constitutional convention.<sup>24</sup> Even so, the Constitution granted only Congress the power to regulate interstate commerce, with limited prohibitions on its ability to discriminate among states.<sup>25</sup> Of course, the Commerce Clause could have been read as granting Congress exclusive control of interstate commerce, and thus as excluding state regulation in this area altogether. Indeed, *Gibbons v. Ogden*, an early landmark, indicated sympathy for this view.<sup>26</sup> Ultimately, however, *Gibbons* itself rested on the Court's conclusion that the New York statute at issue was

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<sup>21</sup> U.S. Const., art. III, para. 1.

<sup>22</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346-47 (1816).

<sup>23</sup> Federalist 80 (Hamilton), *The Federalist Papers* 478 (Clinton Rossiter, ed. 1961).

<sup>24</sup> See, e.g., *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 91949); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827); Thomas R. Colby, *Revitalizing The Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 266-84 (2005); Richard B. Collins, *Economic Union As a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 52-57 (1988). For a discussion of scholarship questioning whether the extent of such discrimination was as great as the framers claimed, see Collins, *supra*, at 57-58.

<sup>25</sup> See Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 429-35 (1981).

<sup>26</sup> 22 U.S. (9 Wheat.) 1, 199-209 (1824); see also *id.* at 227 (Johnson, J. concurring in the judgment) (adopting the exclusive view of the commerce power).

preempted by federal law.<sup>27</sup> Subsequent decisions established, invoking one governing standard or another, that states possess a concurrent power to regulate activities deemed within interstate commerce.<sup>28</sup> By the middle of the twentieth century, the Court had arrived at a steady formula for its dormant Commerce Clause jurisprudence. That formula, still in force, posits a judicially-enforceable prohibition on discriminatory or unduly burdensome state regulation.<sup>29</sup>

Of particular importance here, however, is that the Court has long sanctioned congressional power to authorize state measures that otherwise would violate dormant Commerce Clause prohibitions.<sup>30</sup> Intimations of such a power in Congress came early. In 1851, for example, *Cooley v. Board of Wardens* emphasized that Congress had provided for continued state regulation of river and harbor pilots in finding that this was not an area requiring uniform national regulation.<sup>31</sup> On a slightly different note, a 1855 decision, *Pennsylvania v. Wheeling & Belmont Bridge Company*, upheld an act of Congress authorizing two bridges over the Ohio river, notwithstanding that the Court previously had found the bridges to obstruct navigation on the Ohio.<sup>32</sup> By 1891, the Court unanimously upheld a congressional statute authorizing state regulation of imported liquor—even though the year before it had found such state regulation, absent congressional sanction, to violate the dormant Commerce Clause.<sup>33</sup>

As others have argued, why Congress has power to authorize state action that violates the dormant Commerce Clause is not self-evident; nor are the Court's

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<sup>27</sup> See *id.* at 210–221.

<sup>28</sup> See *Cooley v. Board of Wardens*, 53 U.S. 299, 318 (1851) (arguing that Congress' commerce power is only exclusive regarding matters of a nature that require uniform regulations); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding New York statute requiring master of a vessel to report names and residences of passengers as a police regulation); see generally Felix Frankfurter, *The Commerce Power Under Marshall, Taney, and Waite* (1937).

<sup>29</sup> See, e.g., *American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2423 (2005). *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), embodies the modern statement of the doctrine.

<sup>30</sup> For recent reiterations of this rule, see, e.g., *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *New York v. United States*, 505 U.S. 144, 171 (1992); see also *Granholtz v. Heald*, 125 S. Ct. 1885, 1990–02 (2005) (discussing pre-Prohibition congressional acts authorizing state regulation of alcohol to determine if the acts authorized state discrimination against out-of-state alcohol).

<sup>31</sup> See 53 U.S. at 319–20. *Cooley* is one step short of the current formula because the Court did not give conclusive effect to the federal statute.

<sup>32</sup> 59 U.S. 421, 430–31 (1855) (emphasizing that its prior decision turned on its determination that obstructing navigation of the Ohio river conflicted with prior acts of Congress, which were superseded by the new legislation); see also *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 569, 578 (1851).

<sup>33</sup> *In re Rahrer*, 140 U.S. 545, 560–63 (1891); see also *Leisy v. Hardin*, 135 U.S. 100, 109–10 (1890) (holding Iowa lacked power to ban sale of imported liquor that remained in its original package, but signaling that congress could authorize such state action if it chose). The Court again upheld Congress' power to authorize state prohibitions on liquor importation in *James Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311, 325–31 (1917).

explanations for this rule very satisfying.<sup>34</sup> But the doctrine is nonetheless firmly entrenched. *Prudential Insurance Co. v. Benjamin*<sup>35</sup> is the leading modern decision. There, the Court sustained the constitutionality of a South Carolina statute taxing only out-of-state insurance companies, on the ground that the tax was authorized by the McCarran-Ferguson Act.<sup>36</sup> That the South Carolina statute would violate the dormant Commerce Clause absent the federal act was of no moment; Congress' power to regulate interstate or foreign commerce was limited only by a requirement that what is being regulated "affect [such commerce] sufficiently to make [c]ongressional regulation necessary or appropriate."<sup>37</sup> Were Congress itself bound by dormant Commerce Clause prohibitions, whether acting "alone or in coordination with state legislation," then its "power over commerce would be nullified to a very large extent."<sup>38</sup> Instead, the only additional limits on congressional action under the Commerce Clause were those constitutional restrictions "designed to forbid action altogether by any power or combination of powers in our governmental system."<sup>39</sup>

*Benjamin*'s emphasis on the presence of coordinated federal-state action is somewhat perplexing, for it is hard to see why such coordination, considered alone, could affect the South Carolina statute's constitutionality.<sup>40</sup> The Court has stated repeatedly how important restraints on interstate commercial discrimination are to our status as a nation, most recently identifying the dormant Commerce Clause's antidiscrimination requirements as "essential to the foundations of the Union."<sup>41</sup> Why, then, should congressional authorization make any difference to the validity of state legislation that otherwise contravenes the dormant Commerce Clause? Congressional power to conclusively determine the meaning of a constitutional prohibition, let alone *de facto* overrule prior judicial determinations that a particular form of state regulation is unconstitutional, seems fundamentally at odds with

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<sup>34</sup> See, e.g., Dowling, *supra* note 11, at 554; Monaghan, *supra* note 11, at 15; Williams, *supra* note 11, at 156; see also Benjamin, 328 U.S. at 425 (noting that the Court had given different rationalizations for its decisions upholding congressional power to authorize state discrimination).

<sup>35</sup> 328 U.S. 408 (1946); see also *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174–75 (1985).

<sup>36</sup> 328 U.S. at 429–33.

<sup>37</sup> 328 U.S. at 423.

<sup>38</sup> *Id.* at 422.

<sup>39</sup> *Id.* at 435–36.

<sup>40</sup> See Dowling, *supra* note 11, at 556; Williams, *supra* note 11, at 157–58.

<sup>41</sup> *Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005); see also *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935) ("The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.")

*Marbury*'s instruction that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>42</sup>

The better answer lies implicit in *Benjamin*'s concern that precluding Congress from authorizing state burdens on interstate commerce would infringe far too much on Congress' acknowledged power under the Commerce Clause. That power is plenary; Congress itself can enact legislation that imposes burdens on or discriminates against interstate commerce.<sup>43</sup> Put differently, there is no "uniformity" requirement under the Commerce Clause, and thus Congress could incorporate, by reference, discriminatory state law as federal law.<sup>44</sup> That being the case, Congress should also be able to conclude that the most appropriate approach is one that vests regulatory power in the states, even to the extent of authorizing states to adopt discriminatory legislation. This doctrine recognizes that Congress is the best judge of the national interest in the interstate commerce context, and its judgment that discriminatory state regulation is appropriate requires respect. Further, if Congress itself can enact a discriminatory measure, then precluding Congress from instead granting states discretion over whether to impose such a measure only undermines the cause of national union. Such a rule forces Congress to mandate discrimination by all states when it concludes discrimination is justified rather than pursue the more moderate tack of allowing states to discriminate if they choose.<sup>45</sup> While this result may make Congress more reluctant to authorize discrimination, it also may lead to greater burdens on interstate commerce than Congress—and also the states—consider necessary in particular contexts.

My argument treats congressional authorization of discriminatory state legislation as no different from any other form of congressional commerce legislation. That characterization might at first seem implausible. After all, the framers did not vest the power to regulate interstate commerce with the states, but with Congress. This considered decision appears overturned if Congress can simply turn around and "delegate" the power to regulate interstate commerce back to the

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<sup>42</sup> 5 U.S. (1 Cranch.) 137, 177 (1803); Williams, *supra* note 11, at 154–55. Henry Monaghan has argued that as a result the dormant Commerce Clause is best viewed as a form of constitutional common law; rooted in constitutional text, to be sure, but not intended to have the binding force on Congress enjoyed by other constitutional limits. See Monaghan, *supra* note 11, at 17.

<sup>43</sup> Generally, but not always. For example, Congress is prohibited from giving preference to "the Ports of one State over those of another," and is also prohibited from imposing "Duties, Imposts and Excises" that are not "uniform throughout the United States." U.S. Const. art. I, §§ 8,9. This Uniformity Clause of Article I may explain *Benjamin*'s emphasis on the presence of "coordinated" federal-state action, as it suggests Congress itself could not provide that out-of-state insurers be taxed at differing rates than in-state insurers. See, e.g., *Benjamin*, 328 U.S. at 434, 438; Cohen, *Enigma*, *supra* note 12, at 405.

<sup>44</sup> For the argument that current doctrine deviates from original expectations in not imposing any uniformity requirement, as well as a discussion of the different possible meanings of uniformity, see Colby, *supra* note 9.

<sup>45</sup> This is why the Court did not treat the federal statute as conclusive in *Cooley*. See 53 U.S. 299, 319–21 (1851).

states.<sup>46</sup> Moreover, the regulatory product of state legislatures will likely differ significantly from that which emerges from the national political process. It seems fair to expect that states will downplay harms to out-of-state interests for in-state gain, at least where out-of-state interests lack effective in-state surrogates. Congress, by contrast, will be more responsive to interest groups with national political presence and national economic clout.<sup>47</sup>

This objection ignores an important distinction: a determination by the national legislature that state regulation, even state discrimination, is the best regulatory response in a particular context is simply not equivalent to a state's decision to discriminate absent such authorization. "[W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one."<sup>48</sup> In short, Congress' institutional position as the national elected body, containing representatives from all the states, puts it in a unique position when it comes to authorizing interstate discrimination.

Moreover, a variety of legitimate national considerations might lead Congress to favor interstate discrimination in a particular setting. Congress might conclude that discrimination is warranted as a means of encouraging regulatory experimentation or forcing states to internalize the full costs of their actions.<sup>49</sup>

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<sup>46</sup> *McCulloch v. Maryland*'s argument for federal immunity from state taxation also seems pertinent here: "In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with power of controlling measures which concern all, in the confidence it will not be abused." 4 Wheat. (17 U.S.) 316, 431 (1819); see also Jesse H. Choper, *Judicial Review and the National Political Process* 205–06 (1980).

<sup>47</sup> See Roderick M. Hills Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, U. Mich. Law Sch., Public Law Working Paper No. 27 at 16–21 (May 28, 2003), available at <http://ssrn.com/abstract=412000> (last visited March 9, 2006); Williams, *supra* note 11, at 197–202; Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization: Grappling with the "Risk to the Rest of the Country,"* \_\_ U.C.L.A. L. Rev. 101, 119–22, 137–38 (forthcoming 2006). This argument features in dormant Commerce Clause doctrine, where lack of in-state interests that are similarly harmed by legislation can trigger more rigorous scrutiny. See *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187 (1938); Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *Yale L. J.* 219, 229–30 (1957); Eule, *supra* note 25, at 443–44.

<sup>48</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). Conceivably, a structural argument could be made against allowing Congress to authorize state regulation in those areas reserved by the Constitution for exclusive federal control. For discussion of such an argument, see Cohen, *Enigma*, *supra* note 12, at 401–10. Notably, though, the Court has not to date taken this view. See, e.g., *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). In any event, such a federal exclusivity argument would have little impact on the question of Congress' power to authorize state violations of Article IV. Implicit in Article IV's targeting the states with the Full Faith and Credit and Privileges and Immunities Clauses is recognition that the states have power to regulate in these areas—otherwise the imposition of prohibitions against discrimination would make little sense.

<sup>49</sup> Thus, for example, Congress might conclude that states should be able to experiment with interstate discrimination as one method by which to address the problems of waste disposal. See *Solid Waste Empowerment and Enforcement Act*, H.R. 70, 109th Cong., 1st Sess. § 2 (authorizing a variety of measures, including different fees for disposing of out-of-state and in-state municipal waste); see also *New York v. United States*, 505 U.S. 144, 151–55 (1992) (describing the *Low-Level Radioactive Waste Policy Amendments Act of 1985*, where Congress allowed states to bar access to their waste facilities to states who failed to adopt measures

Alternatively, it might conclude that, although economically inefficient when viewed from the perspective of the nation as a whole, state economic protectionism nonetheless was warranted in some circumstances to encourage development or continuation of certain industries.<sup>50</sup> Substantial interstate strife over an activity, or simply a tradition of local regulation that states do not want displaced, are still other reasons why in the past Congress has decided that interstate discrimination is justified.<sup>51</sup> Finally, Congress might conclude that freeing states from some dormant Commerce Clause constraints is necessary to allow effective state regulation. State taxation of electronic commerce is a prime example here. To effectively tax such transactions, states may need to impose tax collection responsibilities on out-of-state entities that lack physical presence within their borders, but under current doctrine states lack the power to legislate extraterritorially in this fashion without congressional authorization.<sup>52</sup>

This is not to suggest, of course, that Congress is “disinterested” in some platonic sense when it comes to state regulation of interstate commerce. To the contrary, members of Congress can be expected to advance their own policy preferences or those of particular interest groups—businesses and residents in their states perhaps, or powerful national enterprises and associations.<sup>53</sup> Congress is not an umpire of interstate economic relations in the sense of a neutral arbiter enforcing preset rules. Instead, it is an umpire in the sense of being the entity that weighs

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for disposing of low-level wastes generated within their borders). But see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. Rev. 903, 923–26 (1994) (arguing that state and local governments generally will not be willing to experiment).

<sup>50</sup> International trade scholars are suspicious about this “infant industries” justification for deviation from free trade principles, arguing that in those instances where investing in an industry is or ultimately will be economically efficient, firms will do so without subsidies. See, e.g., Robert E. Baldwin, *The Case Against Infant-Industry Tariff Protection*, 77 J. Pol. Econ. 295 (1969). But even if economically inefficient, long-term industry protection still may be normatively justified, for example as a way of preserving communities otherwise facing economic extinction or ensuring that states can protect themselves against interstate competition perceived as particularly threatening on non-economic grounds.

<sup>51</sup> See, e.g., *New York*, 505 U.S. at 150–51 (describing concerns of states with nuclear waste facilities that led to enactment of Low-Level Radioactive Waste Policy Amendments Act of 1985); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 413–17, 429–31 (1946) (detailing tradition of state regulation of insurance and congressional determination in the McCarran-Ferguson Act that such regulation should continue).

<sup>52</sup> See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312–17 (1992); Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 Tax L. Rev. 425, 480–90, 503–05 (1997); see also Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 Fordham L. Rev. 149, 171–82 (2002) (noting Court’s willingness to accept extraterritorial taxes when necessary for administrability). Congress has responded to concerns about state and local taxation of electronic commerce with a temporary moratorium on such taxes applied to internet access and multiple or discriminatory taxes. See *Internet Tax Freedom Act of 2004*, Pub. L. No. 108-435, 108th Cong., 2d Sess., codified at 47 U.S.C. § 151 (extending moratorium to November 2007).

<sup>53</sup> There is no need here to debate the merits of public choice theory or alternative accounts of elected officials’ behavior. See generally Jerry Mashaw, *Greed, Chaos, and Governance* (1999) (describing and critiquing public choice accounts of official action). Whether their preferences derive directly from base self-interest or more altruistic concerns, members of Congress will have particular views regarding what should be interstate policy in a given area and in that sense are not disinterested.

competing claims and determines how these claims should be balanced in the rules that ultimately govern state behavior. Just as the Court presumes that state legislatures are in the best position to set economic and social policy within their borders,<sup>54</sup> so too it presumes Congress is in the best position to do so for the nation as a whole—whether Congress legislating rules that will govern private behavior directly or rules that determine how the states can govern in this area.

2. *The Constitutional Model for Interstate Regulation: Default Prohibitions Subject to Congressional Override.* The model thus established by the Court's dormant Commerce Clause jurisprudence is one of judicially-enforceable constitutional default rules<sup>55</sup> prohibiting state discrimination that are subject to an ultimate congressional override. Notably, this model is expressly mirrored in Section 10 of Article I.<sup>56</sup> That section imposes numerous prohibitions on the states. Some of these, such as the prohibition on states impairing contracts, are unconditional. Many others, however—including several directly addressing interstate relations, such as the ban on interstate compacts and restrictions on states' ability to impose duties—are made waivable by Congress.<sup>57</sup>

In the coupling of the Full Faith and Credit and Effects Clauses of its first section, Article IV displays the same model of constitutional rules applicable to the states combined with congressional discretionary authority. Rather than simply stopping after providing that each state shall accord other states' acts, records, and judicial proceedings full faith and credit—as had its forerunner provision in the Articles of Confederation—Article IV proceeds to grant Congress power to “by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Not surprisingly, given the dearth of Effects Clause legislation, little precedent exists on the scope of Congress' power under that Clause, particularly regarding Congress' power to contract the credit otherwise due state laws and judgments.<sup>58</sup> The parallel of the Commerce Clause and Article I,

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<sup>54</sup> See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955).

<sup>55</sup> For an interesting discussion of default rules in the context of constitutional law more generally, see John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 Fla. St. U. L. Rev. \_\_\_, available at <http://ssrn.com/abstract=897958>.

<sup>56</sup> Laurence Tribe maintains that the dormant Commerce Clause and Section 10 are in fact two distinct constitutional models of federal-state relationships regarding matters affecting union. See Tribe, *Treatise*, supra note 12, § 6-35 at 1238. Tribe bases his claim of distinction on the fact that the limits of dormant Commerce Clause are inferred rather than express, a point he underscores because of his view that Congress “cannot authorize a state to disregard an explicit constitutional prohibition.” *Id.* But he does not explain why the express nature of a prohibition on the states should make such a difference, if that prohibition's application to Congress still has to be inferred.

<sup>57</sup> U.S. Const. art. I, sec. 10, cls. 2–3.

<sup>58</sup> In very occasional dicta, the Court has indicated that Congress has the power to expand judicially-prescribed full faith and credit requirements using its Effects Clause power. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728–29 (1988); *Pac. Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939). The Court has stated that Congress' ability to contract full faith requirements is an open question. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality opinion); *Williams v. North Carolina*, 317 US 287, 303 (1942) (citations omitted).

however, supports reading the Effects Clause as granting Congress power to redefine the scope of the full faith and credit demand on the states, resulting in recognition requirements that might be narrower or more expansive than those imposed by the courts.

This point applies to the remainder of Article IV as well. Like the Commerce and Effects Clauses, all of the grants of congressional power in Article IV are expansive in scope.<sup>59</sup> Moreover, the powers granted to Congress to regulate federal territory and property, admit new states, and guarantee republican government all have implications for interstate relations. Historically, rivalries among the states regarding western land claims provided a significant basis for the federal territory power. Subsequently, control over federal territories and admission of new states became a central area of contention in interstate battles over slavery.<sup>60</sup> Even outside the battle over slavery, the terms on which new states are admitted affects interstate relations as it establishes the basis for their relationship with existing states. The Guarantee Clause, in turn, sets certain minimal requirements regarding the form of government and protections against spread of violence that states are entitled to demand of other states as a condition of union.<sup>61</sup>

Again, however, despite the grant of broad power to Congress, these sections of Article IV impose few express conditions on Congress' ability to discriminate among the states. The New State Clause, for example, contains no textual requirement that new states be admitted on equal terms with existing states, and records from the constitutional convention demonstrate that this omission was intentional.<sup>62</sup> Instead, the restrictions that the New State Clause does contain echo

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<sup>59</sup> This is particularly true of the Territory and Property Clause, which requires that congressional regulations regarding federal territory and property be "needful"—seemingly a minimal constraint—but does not otherwise limit Congress in regard to the content, duration, or geographic range of the regulations it enacts. See U.S. Const., art. IV, § 3, cl. 2.

<sup>60</sup> On the relationship of interstate disputes over western land grants to the territory and property power, see Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 *Minn. L. Rev.* 16–26 (2001); see also *Federalist 7* (Hamilton), *supra* note 23, at 61–62 (arguing that absent union dispute over the western territories would lead the states to wage war with one another). On the way that the interstate divide over slavery manifested itself in regard to regulation of federal territories and admission of new states, see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 100–87 (1978); see also Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions imposed on States Entering the Union*, 46 *Am. J. Legal. Hist.* 119, 140–41 (2004) (discussing relationship of slavery and admission of Nebraska and Nevada after the Civil War).

<sup>61</sup> The states' adherence to similar republican principles was seen as necessary for their successful union, as was assurance that they would come to each others' defense. See *Federalist 43* (Madison), *supra* note 23, at 273. Arthur Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 *Minn. L. Rev.* 513, 522 (1961). Tom Lee has speculated that the Guarantee Clause may have been animated by the idea that republication states would be unlikely to go to war with one another. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 *Nw. U. L. Rev.* 1027, 1036, 1052–53 (2002).

<sup>62</sup> As initially included in the August 6th draft, the Clause required that "new States shall be admitted on the same terms with the original states." 2 Max Farrand, ed., *The Records of the Federal Convention of 1787* at 188 (1911) [hereinafter, FARRAND]. Despite some delegates' arguments "for fixing an equality of privileges by the Constitution," Gouverneur Morris' proposal that this language be deleted so as not "to bind down the Legislature to admit Western States on the terms here stated" was adopted. Morris' proposal was fueled by a

*Benjamin*'s emphasis on coordinated national and state action, requiring both congressional and state consent before a state can be divided in two or amalgamated into a new state.<sup>63</sup> Moreover, while the Court ultimately held in *Coyle v. Smith* that Congress must admit new states on equal terms, notwithstanding the absence of an express state equality requirement, it simultaneously emphasized that Congress can impose conditions on particular states using its other powers.<sup>64</sup>

3. *Congressional Power Under Section 2 of Article IV.* Section 2 of Article IV, which contains the Privileges and Immunities, Fugitive Slave, and Extradition Clauses, stands out from the remainder of the article in its lack of any reference to Congress. Section 2 also differs notably from the dormant Commerce Clause in that its prohibitions on the states are express.<sup>65</sup>

Nonetheless, the scope of Congress' power under the Commerce Clause holds important lessons for an assessment of its authority under this section of Article IV as well. This is particularly true with respect to Congress' power under the Privileges and Immunities Clause,<sup>66</sup> given the overlap between the activities to which this clause applies and those regulatable by Congress under the commerce power.<sup>67</sup> Although the Privileges and Immunities Clause only prohibits state discrimination against nonresidents affecting fundamental rights, much of nonresidents' economic activity falls into that category for Article IV purposes.<sup>68</sup> Thus, invoking the Clause the Court has struck down state laws that tax nonresidents

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concern that an equality requirement would entitle the new states to equal representation in the Senate and thereby "throw the power into the[] hands" of those settling the western lands. *Id.* at 454; see also *id.* (remarks by Williamson). Madison argued that western states should not be degraded in rank, but the view that Congress should be left flexibility on this question appears to have carried the day. See *id.*; see also David P. Currie, *The Constitution in Congress: The Jeffersonians 1801–1829* at 243–45 (2001) (concluding that the framers rejected state equality, although arguing this rejection is at odds with the principle of enumerated powers) [hereinafter Currie, *The Jeffersonians*]. The more interesting question is what the framers meant by state equality, and in particular whether Congress could attach ongoing and permanent conditions, such as prohibitions on slavery, as a condition of admission; this issue rose to the fore with the admission of Missouri. See *id.*, at 219–49; see also *infra* text accompanying notes 185–94.

<sup>63</sup> U.S. Const., art. IV, § 3.

<sup>64</sup> 211 U.S. 559, 574–75 (1911).

<sup>65</sup> Several commentators invoke this textual difference to argue that the Court should disavow its dormant Commerce Clause jurisprudence and rely on Article IV's Privileges and Immunities Clause instead. See Eule, *supra* note 25, at 446–48; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 *Duke L.J.* 569, 606–12.

<sup>66</sup> The Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., art. IV, § 2, cl. 1.

<sup>67</sup> See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 407 (1948) (Frankfurter, J., concurring) (noting overlap between Privileges and Immunities Clause and dormant Commerce Clause); Mark P. Gergen, *The Selfish State and the Market*, 66 *Tex. L. Rev.* 1097, 1222–28 (1988) (arguing that privileges and immunities were originally defined in terms of rights of trade and commerce).

<sup>68</sup> *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978). "Fundamental rights" is a term with different meaning in different contexts; as discussed below, for due process and equal protection purposes, economic rights are not deemed fundamental. See *infra* text accompanying note 270.

at rates higher than residents, charge nonresidents higher license fees for engaging in commercial activities, or impose residency requirements as a prerequisite for certain forms of employment.<sup>69</sup> These cases involve not only economic activities, but economic activities with a clear interstate link, and thus would appear plainly to come under the scope of the Commerce Clause as currently interpreted.<sup>70</sup> If so, however, Congress would seem to possess power to authorize the very discriminatory state regulations currently prohibited by the Privileges and Immunities Clause.

On the other hand, if Congress lacks power to contract Article IV privileges and immunities protections in this fashion, then in practice its power to authorize state discrimination under the Commerce Clause is considerably more limited than generally thought. Congress would still have some ability to do so, because these two clauses have a different scope of application. Of greatest practical importance, of course, is the doctrine that corporations can maintain dormant Commerce Clause challenges but are excluded from the scope of Privileges and Immunities protections—an anachronistic rule at odds with many modern decisions, but one that nonetheless remains the law today.<sup>71</sup> In addition, some Privileges and Immunities protections for fundamental rights may not fall within the scope of the commerce power, such as the right to hold property in another state or to sue in its courts, at least as applied to noncommercial property or claims.<sup>72</sup> Nonetheless, the clauses'

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<sup>69</sup> See *Austin v. New Hampshire*, 420 U.S. 656, 665–68 (1975) (holding state imposition of higher tax rate for nonresidents violates the Privileges and Immunities Clause); *Toomer*, 334 U.S. at 396–03 (holding higher commercial shrimp license fees for nonresidents violates the Clause); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (striking down in-state residency requirements for bar membership as violating the Privileges and Immunities Clause); *United Building & Constr. Trades Council v. Camden*, 465 U.S. 208, 218–22 (1984) (holding residency requirement for employment on state-funded projects is subject to privileges and immunities scrutiny).

<sup>70</sup> See *Gonzales v. Raich*, 125 S. Ct. 2195, 2105–09, 2211 (2005). Income taxes, after all, are imposed on income-generating activities within a state, and commercial licenses are clearly tied to commercial activity. See *Granholtz v. Heald*, 125 S. Ct. 1885 (2005) (treating requirement that out-of-states wineries must open branch offices in state as a condition for licensure as a residency requirement and invalidating it on dormant Commerce Clause grounds); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429–32 (1946) (upholding congressional authorization of state imposition of differential insurance tax rates as falling within the Commerce Clause power); see also *City of New York v. New York*, 94 N.Y.2d 577, 587 (Ct. App. 2000) (invalidating tax on out-of-state commuters on both Article IV Privileges and Immunities and dormant Commerce Clause grounds).

<sup>71</sup> See *Paul v. Virginia*, 8 Wall. 168, 180 (1869); see also *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657–67 (1981) (describing erosion of the legal underpinnings for *Paul*'s holding that grant of a corporate privilege is a special privilege that the state could grant on whatever terms it chose); *Eule*, supra note 25, at 449–54; *Redish & Nugent*, supra note 65, at 610–11. But see Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 *Minn. L. Rev.* 384, 394, 406–07 (2003) (defending the exclusion of corporations).

<sup>72</sup> See, e.g. *Jones v. United States*, 529 U.S. 848, (2000) (construing federal arson statute as not applying to an owner-occupied residence not used for commercial purposes to avoid constitutional question of whether Congress' commerce power extends to criminalizing such 'traditionally local criminal conduct'); *Ward v. Maryland*, 79 U.S. 418, 430 (1870) ("Beyond doubt . . . [Article IV's Privileges and Immunities Clause]. . . plainly and unmistakably secures and protects the right of a citizen of one State . . . to take and hold real estate" in another state and "to maintain actions in [its] courts.").

topical overlap is quite broad, and thus Congress' ability to authorize state discrimination with regard to individuals' economic activities would be substantially curtailed were Congress forced to adhere to privileges and immunities restrictions on the states.

More generally, little reason exists to distinguish between congressionally-sanctioned state violations of the dormant Commerce Clause and congressionally-sanctioned state violations of Article IV's Section 2.<sup>73</sup> The Court has noted the "mutually reinforcing relationship" and "common origin in the Fourth Article of the Articles of Confederation"<sup>74</sup> of the Privileges and Immunities and Commerce Clauses. Diametrically different accounts of congressional power under these clauses therefore seem unjustifiable. In particular, the pattern of combining prohibitions on the states with a grant of power to Congress, evident in the Article I's Commerce Clause and Section 10 and also in the first section of Article IV, makes divergence in Congress' powers under the two articles an odd result. Nor is a solid policy justification apparent for such a divergence. The underlying logic of the Commerce Clause model appears to be that Congress is a well-positioned judge of what the national interest requires. If, therefore, Congress determines that certain dormant Commerce Clause restrictions on the states are unnecessary to serve national economic and political union, then Congress should have power to lift them. The same logic would seem to apply to almost all limitations imposed on the states by the Constitution in the name of national union.

Equally important, no basis exists to distinguish between Congress' power to expand and its power to contract the limits imposed on the states by Article IV. Several scholars disagree, insisting, as Dean Kramer has put it, that "commitment to Union is itself a fundamental value . . . Congress should not be permitted to define its terms at will or legislate away the minimum requirements of mutual respect and recognition it entails."<sup>75</sup> But this presumes that the terms of union are constitutionally preset, as opposed to left to Congress, exactly the point at issue. It also takes an unduly simplistic view of constitutional structure. As the Court famously stated in *Texas v. White*, "[t]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."<sup>76</sup> Imposing excessive discrimination prohibitions on the states is as harmful to "Our Federalism" as imposing insufficient ones. Once the possibility of any congressional readjustment of states' relations is accepted—and acceptance of some readjustment underlies the view that Congress can expand interstate antidiscrimination requirements beyond those found by the courts to inhere in Article

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<sup>73</sup> See Cohen, *Enigma*, supra note 12, at 414; Varat, supra note 12, at 570–71.

<sup>74</sup> *Hicklin*, 437 U.S. at 531–32.

<sup>75</sup> Kramer, supra note 10, at 2006; Cox, supra note 10, at 400–08.

<sup>76</sup> 74 U.S. (7 Wall.) 700, 725 (1869); see also Rosen, *DOMA*, supra note 10, at 935–37 (emphasizing that the Full Faith and Clause "aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct entities").

IV—why should Congress be precluded from rectifying excessive restrictions on the states? True, Congress clearly lacks power to legislate away the essential attributes of federal union, but congressional easing of Article IV’s demands is hardly equivalent to a *pro tanto* dissolution of the nation.

These arguments suggest that, at a minimum, Congress should have broad authority to waive prohibitions in Article IV’s Section 2 that relate to activities Congress can independently regulate. The source of this authority is simply power elsewhere conferred upon Congress, in particular under the Commerce Clause. Support also exists, from precedent as well as the structural dictate of congressional primacy in interstate relations described above, for implying congressional power to enforce Section 2’s anti-discrimination demands directly from that section itself.<sup>77</sup> A more difficult question is whether Congress can authorize state violations of Section 2 invoking *only* this latter, inferred power. The logic of the structural argument for congressional primacy in interstate relations suggest that Congress’ power should so extend. That is, Congress should be able to authorize state deviation from Section 2’s requirements when it concludes that so doing eases interstate tension and promotes national unity. On the other hand, deriving such revisory congressional authority from a text that simply imposes prohibitions on the states seems a rather remarkable feat of textual exegesis, all the more so given that the need to make these prohibitions effective is the basis for inferring congressional power in the first place.<sup>78</sup> For now, however, it is sufficient to note that the scope of activity subject to Section 2 but not coming within the commerce power is relatively narrow.<sup>79</sup> Accordingly, denial of congressional authority to waive Section 2’s prohibitions in a non-commerce context would limit Congress’ revisory power over Article IV in only a few contexts.

#### 4. *The Difference Between Vertical and Horizontal Federalism.*

Congressional primacy in structuring interstate relations, with the courts assigned a subsidiary role, might at first blush seem implausible in light of recent decisions emphasizing the Court’s role as ultimate arbiter of constitutional federalism.<sup>80</sup> A crucial variable distinguishes these decisions, however: they involved the vertical dimension of federalism. Structural differences between vertical and horizontal federalism justify recognizing far broader congressional power in the latter context.

In vertical federalism cases, the underlying issue is one of federal versus state power: can Congress impose an obligation on the states, expose them to financial

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<sup>77</sup> See *Prigg v. Pennsylvania*, 41 U.S. 59, 615–16 (1842); *Kentucky v. Dennison*, 65 U.S. 66, 104–05 (1860).

<sup>78</sup> The textual challenge posed by Section 2 is discussed more below at Part I.B.2.

<sup>79</sup> As discussed above, much of the activity triggering Article IV’s Privileges and Immunities Clause is economic and thus potentially regulatable by Congress under the commerce power. See *supra* notes 67–70 and accompanying text.

<sup>80</sup> See *Nevada Dept. of Human Res. v. Hibbs*, 531 U.S. 721, 728 (2003). For discussion of this feature of the Court’s recent federalism jurisprudence, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L. J.* 1943, 1964–65, 1966–71, 1980–84 (2003).

liability, or preempt their field of operation.<sup>81</sup> Horizontal federalism, by contrast, concerns interstate relations: what burdens and restrictions can one state constitutionally impose on another state and its residents. Congressional intervention adds a new federal actor to these interstate contests, but ordinarily does not change their horizontal character. This is most obvious when Congress authorizes interstate discrimination that would otherwise be unconstitutional. Such authorizations may result in state regulation in lieu of direct federal regulation, but do not affect the constitutional balance of federal and state powers, because Congress can always enact a preemptive federal regime. For example, Congress retains full constitutional power to repeal its authorization of state regulation of insurance, although its longstanding reliance on state regulation may make any such move politically difficult.

Congressional expansion of prohibitions on interstate discrimination might more plausibly be characterized as falling within the vertical federalism mold: after all, Congress would be imposing a federal duty that limits the states' ability to engage in what otherwise would be constitutionally-sanctioned discrimination. Yet even here the horizontal federalism dimension surfaces, and in ways that support such congressional impositions. Notably, Article IV's prohibitions against interstate discrimination are generally quite strict. For example, where privileges and immunities protections apply, the Court upholds state measures discriminating based on residency only if it concludes that such discrimination is closely related to a substantial government objective; indeed, at times it has gone so far as to require a demonstration that nonresidents "constitute a peculiar source of the evil at which the statute is aimed."<sup>82</sup> Where Article IV's direct constitutional prohibitions are thought to be less strict, moreover, as in the case of application of full faith and credit requirements to other states' laws, the article expressly grants Congress power to increase the states' obligations. Both of these features make congressional expansion of Article IV's prohibitions on interstate discrimination easier to justify as simply enforcing the constitutional scheme.<sup>83</sup>

These different features mean that, among other things, congressional power in horizontal federalism contexts raises far fewer concerns of congressional aggrandizement. This is true whether the focus is on Congress seeking to expand federal power at the expense of the states as a whole, or on the danger that some

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<sup>81</sup> See, e.g., *Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>82</sup> *United Building & Constr. Trades Council v. Camden*, 465 U.S. 208, 222 (1984) (quoting *Toomer v. Witsell*, 334 U.S. 385 (1948)).

<sup>83</sup> See *Printz v. United States*, 521 U.S. 898, 909 & n. 3 (1997); see also *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality opinion) (stating Congress clearly has power to expand full faith and credit). In like vein, in its recent decisions addressing limits on Congress' powers to remedy constitutional violations, the Court has been most willing to grant Congress broad discretion to impose duties on the states when Congress is enforcing an independently strong constitutional prescription. See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735–36 (2003).

states may harness federal power to impose their preferences on other states.<sup>84</sup> And it is fears of such aggrandizement that in large measure underlie the Court's recent decisions emphasizing the courts' ultimate role in policing constitutional federalism. Thus, in justifying greater judicial scrutiny of Section 5 legislation in *City of Boerne v. Flores*, the Court invoked the fox-in-the-henhouse reasoning of *Marbury v. Madison*, arguing that otherwise Congress would be able to set the limits on its own power.<sup>85</sup> In like vein, in its anticommandeering decisions—*New York v. United States* and *Printz v. United States*—the Court reasserted some judicially-enforced limits on congressional impositions on the states, expressing concern that otherwise Congress could duck the political heat for its regulatory choices.<sup>86</sup>

Similar concerns are absent from the Court's horizontal federalism decisions. Although the Court reasserted limits on the scope of the commerce power in *United States v. Lopez*<sup>87</sup> and *United States v. Morrison*,<sup>88</sup> those were vertical federalism decisions: the issue was federal power to regulate private activity, not federal authority to regulate relations among the states. By contrast, in dormant Commerce Clause cases, when no question exists that the activity at issue falls within the scope of the commerce power and the issue instead concerns interstate relations, the Court emphasizes Congress' ability to revise judicial decisions. Concerns about the lack of textual basis for the Court's enforcement of dormant Commerce Clause limits, as well as the Court's dubious competency in identifying discriminatory regulation, are regularly pushed aside on the grounds that Congress can rectify any judicial mistakes.<sup>89</sup>

*New York* and *Printz* further demonstrate that the Court is much more comfortable with congressional regulation of interstate relations than with other instances of congressional regulation of the states. In *New York*, the Court upheld Congress' power to authorize state bans on interstate commerce in low-level nuclear waste at the same time that it prohibited Congress from demanding that states either

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<sup>84</sup> Lynn Baker and Ernie Young argue that this latter phenomenon, which they term “horizontal aggrandizement,” is distinct from the former and has not received adequate attention. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *Duke L. J.* 75, 109–28 (2001). Their emphasis on the potential divergences among different states' interests is valuable, and their claim that states representing a dominant view may seek to use federal power to prevent states who disagree from adopting divergent policies seems intuitively plausible. But provided the federal legislation at issue falls within the scope Congress' enumerated powers—the vertical federalism question, in my terminology here—the danger they identify is not “aggrandizement” in the constitutional sense. When Congress can mandate interstate discrimination, its decision instead to allow states to choose whether to adopt a discriminatory approach does not aggrandize those states favoring discrimination at the expense of states who oppose it. See also *infra* Part II.A.1.

<sup>85</sup> 521 U.S. at 516, 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803)).

<sup>86</sup> *New York*, 505 U.S. 144, 168–69 (1992); *Printz v. United States*, 521 U.S. 898, 926–30 (1997).

<sup>87</sup> 514 U.S. 549, 559–65 (1995).

<sup>88</sup> 529 U.S. 598, 613–19 (2000).

<sup>89</sup> See *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 586 (1997); *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992).

create in-state waste sites or take title to such wastes generated in their midst.<sup>90</sup> In *Printz*, the Court held unconstitutional congressional use of the commerce power to impose regulatory duties on state executive officials. Yet it distinguished congressional imposition of duties on state executive officials under the 1793 Extradition Act, arguing that this form of commandeering was justified because Congress was acting pursuant to the Constitution's Extradition and Effects Clauses.<sup>91</sup>

No doubt, occasions exist when congressional involvement in interstate disputes raises greater dangers of aggrandizement and Congress appears to be using its control over interstate relations to impose policies that it lacks power to legislate directly.<sup>92</sup> Whether this possibility should suffice to subject an otherwise valid interstate relations measure outside of Congress' powers, however, is much more debatable. It is well-established, for example, that Congress can employ its spending power to achieve results that it lacks power to legislate directly.<sup>93</sup> More to the point, the fact that Congress is seeking to advance its own substantive agenda in an area traditionally reserved for the states does generally not suffice to put a measure outside the commerce power, and it is unclear why a different rule would apply when Congress is legislating on interstate relations.<sup>94</sup>

5. *Considerations of Institutional Competency.* A final point that merits note addresses the comparative institutional competency of Congress and the Court when it comes to the interstate arena.<sup>95</sup> The Court has struggled to make sense of the interstate relations provisions of Article IV. Read literally, the Full Faith and Credit Clause suggests "the absurd result that, wherever the conflict [between different states' laws] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."<sup>96</sup> To avoid such an anomalous result, current doctrine recognizes that the Clause "does not compel 'a state to substitute the statutes of other states for its own statutes [when] dealing with a subject . . . [on] which it is

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<sup>90</sup> See 505 U.S. at 166-68, 173-74; see also *id.* at 180-81 (arguing not that Congress has no constitutional role in mediating interstate disputes but that Congress must do so by regulating directly under its commerce power, not by mandating state regulation).

<sup>91</sup> 521 U.S. 898, 909 & n. 3 (1997). For criticism of *Printz*'s effort to distinguish the 1793 Act from other instances of congressional commandeering of the states, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz, and Principle?*, 111 *Harv. L. Rev.* 2180, 2197-99 (1998).

<sup>92</sup> DOMA is an obvious example. See *infra* text accompanying notes 246-248.

<sup>93</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207, 209 (1987).

<sup>94</sup> See *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528, 548-55 (1985). For discussion of this aggrandizement concern with respect to Effects Clause legislation, see *infra* notes 192-194 and accompanying text.

<sup>95</sup> On the importance of institutional competency considerations to federalism, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensatory Adjustments*, 46 *William & Mary L. Rev.* 1733, 1815-44 (2005).

<sup>96</sup> *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

competent to legislate.”<sup>97</sup> This means that a state must apply another state’s law instead of its own only when it lacks significant contacts with the parties or the event underlying the litigation, hardly a demanding standard or one that intuitively reflects the clause’s demand that the states grant each others’ laws *full faith and credit*.<sup>98</sup> Yet the Court’s earlier efforts to enforce a more robust full faith and credit requirement resulted in inconsistencies, due to the difficulty of ascertaining which states’ interests were paramount in a particular case.<sup>99</sup>

In turn, enforcing Article IV’s Privileges and Immunities Clause requires an initial determination of what constitutes a privilege and immunity of state citizenship. Two contrasting possibilities are immediately apparent: the Clause could be understood to require that a state to accord citizens of other states a predetermined set of rights, or alternatively, that a state must grant only the same rights and privileges it grants its own citizens. Early on, the Court rejected the former, natural law-based account of the Clause for the latter, equal protection-based view. But it also has rejected the argument that the Clause prohibits all distinctions between in-state and out-of-state residents: “Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States.”<sup>100</sup> It is for this reason that the Court has held that the Clause protects only fundamental rights, which in this context means those rights that are “basic to the maintenance or well-being of the Union.”<sup>101</sup> The Court’s efforts to render this standard operational are again not the model of consistency; it has held, for example, that states can impose discriminatory recreational but not commercial license fees.<sup>102</sup> While this distinction reveals the commercial flavor of the Court’s view of the Privileges and Immunities Clause, it leaves unexplained why resentment and

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<sup>97</sup> Baker, 522 U.S. at 663 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939)).

<sup>98</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–13 (1981).

<sup>99</sup> Compare *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932) with *Alaska Packers Assoc. v. Industrial Acc. Comm’n*, 294 U.S. 532 (1935) and *Pacific Employers Ins. Co. v. Industrial Acc. Comm’n*, 306 U.S. 493 (1939); see Kramer, *supra* note 10, at 1977–78; Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 Wash. & Lee L. Rev. 47, 51–57 (2001).

<sup>100</sup> *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868). For the argument that the Court erred in rejecting the natural law view, see Chester J. Antineau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967). But see David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. L. Rev. 794, 841–45 (1986) (arguing that the natural law interpretation is inconsistent with the structure and history of Article IV).

<sup>101</sup> *Baldwin*, 436 U.S. at 388.

<sup>102</sup> Compare *Baldwin*, 436 U.S. at 388 (upholding discriminatory fees in hunting licenses where used for sport) with *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) (invalidating discriminatory commercial fishing license fees).

retaliation outside the commercial context is less threatening to the nation's well-being.<sup>103</sup>

Inconsistencies and theoretical tensions are also evident in the Court's dormant Commerce Clause jurisprudence. Here, too, the Court has been concerned with matters commercial, trying—within the limits that inhere in judicial lawmaking—to implement a vision of a national common market. One question with which the Court has struggled nobly is in distinguishing between a state's legitimate use of its resources to favor its own from unconstitutional economic protectionism.<sup>104</sup> While the Court has developed mechanisms to increase decisional consistency, such as its rule that facial discriminatory measures are virtually *per se* invalid, these mechanisms are prone to criticisms of their own. Measures can be facially discriminatory but not protectionist, whereas facially neutral measures may on closer inspection appear pernicious.<sup>105</sup> Not surprisingly, the Court's handiwork is often held up for criticism as empirically flawed, or worse, constitutionally illegitimate.<sup>106</sup>

Part of the explanation for the Court's difficulties is that the practical import of these constitutional provisions is not clear, hardly a problem unique to the interstate relations context nor one that in general suffices to call the propriety of judicial involvement into question. But part of the explanation is also that applying these provisions requires the Court to make determinations that it is institutionally ill-equipped to make. Identifying violations often turns on assessing the relative benefits and burdens of discriminatory measures and the importance of interstate uniformity or equality in particular contexts. Intuitively, such determinations seem

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<sup>103</sup> For efforts to rectify the analytic gap that exists as a result of the Court's failure to explain why some state discriminations are constitutional under the Privileges and Immunities Clause and some not, see Laycock, *supra* note 12, at 270–73; Varat, *supra* note 12, at 516–40.

<sup>104</sup> Compare *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) with *White v. Massachusetts*, 460 U.S. 204 (1983). For a discussion of this issue, see Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 *Yale L.J.* 965 (1998).

<sup>105</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596–98, 602–03 (1997) (Scalia, J., dissenting) (arguing that denial of charitable tax benefit was not discriminatory even though it distinguished on its face based on state of residence of individuals institution served); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (sustaining even-handed ban on sale of milk in plastic but not pulpwood nonreturnable containers, notwithstanding that plastic containers originated out-of-state and pulpwood containers manufacturer in-state). Nor is it always clear when a measure is facially discriminatory. See *C & A Carbone Inc. v. Clarkstown*, 511 U.S. 383, 403 (1994) (O'Connor, J. concurring) (arguing that requirement all trash generated in locality be processed at a particular facility created a monopoly but was not discriminatory); *id.* at 413–23 (Souter, J., dissenting) (same).

<sup>106</sup> See Lisa Heinzerling, *The Commercial Constitution*, 1995 *Sup. Ct. Rev.* 217, 234–51 (arguing that the Court fails to accurately identify discriminatory state legislation); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 *Cardozo L. Rev.* 1745, 1754–61 (1991) (arguing that Court is unable to identify instances where discrimination may be beneficial). For broader attacks on the whole concept of the dormant Commerce Clause, see, e.g., *Tyler Pipe Indus. v. Washington*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and concurring in the judgment) (arguing that dormant Commerce Clause jurisprudence is unjustified if it goes beyond invalidating discriminatory state regulation); Eule, *supra* note 25, at 435–36 (arguing that judicial intervention in defense of Congress's regulatory prerogatives is no longer justified given the breath of federal regulation and the availability of administrative agencies); Redish & Nugent, *supra* note 65, at (arguing that textual, structural, and policy arguments fail to justify continued application of the dormant Commerce Clause).

to fall more within Congress' competency than the Court's. Congress' factfinding capacity—and its ability to choose and compromise among conflicting values—allows it to investigate particular areas and legislate on discrete problems as they emerge, such as interstate child custody disputes or interstate disputes over garbage, without the necessity of devising rules capable of more general and principled application. Moreover, past experience supports the view that Congress (particularly Congress in combination with federal administrative agencies) is more competent in this area, as the Court has demonstrated little capacity to ferret out truly discriminatory state legislation.<sup>107</sup>

Most importantly, Congress' political accountability makes it a better barometer of when interstate restrictions threaten national union and when they do not, as well as provides it with greater legitimacy in legislating substantive limits on the states.<sup>108</sup> “Congress comprises all interested parties and therefore is more likely to take into account of all costs that a given rule imposes on the states.”<sup>109</sup> The claim that the political safeguards of Our Federalism are adequate to guard against congressional encroachment on the states has garnered substantial criticism.<sup>110</sup> But the case for political safeguards has more merit in the interstate relations context, given the mitigated fears of congressional self-dealing.<sup>111</sup> This is particularly true when Congress acts to authorize state discrimination. As William Cohen cogently put it over twenty years ago, whatever debate exists about the adequacy of political safeguards as a check on Congress imposing excessive restrictions on the states, “it is harder to argue that there is a need to monitor decisions by the national legislature that exalt state power at the expense of national power.”<sup>112</sup> It also merits noting that Congress has authorized very little state discrimination against interstate commerce, despite its long-established power to do so.<sup>113</sup> DOMA and recently proposed

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<sup>107</sup> See, e.g., Heinzerling, *supra* note 106, at 234–51; Friedman, *supra* note 106, at 1756–60.

<sup>108</sup> See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 *Geo. L. J.* 1, 21–22 (1991); see also Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Decisions*, 153 *U. Pa. L. Rev.* 1513, 1573–74 (2005) (arguing that this institutional difference justifies exempting Congress from dormant Commerce Clause constraints) [hereinafter, Rosen, *Tailoring*].

<sup>109</sup> Rosen, *DOMA*, *supra* note 3, at 950–51; see also *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

<sup>110</sup> For the classic account of the political safeguards argument, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

<sup>111</sup> See *supra* Part I.A.4. *Contra Baker & Young*, *supra* note 84, at 126–28.

<sup>112</sup> Cohen, *Enigma*, *supra* note 12, at 406; see also David Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 *Sup. Ct. Rev.* 158, 191 (critiquing rule that Congress cannot adopt existing nonuniform state admiralty laws).

<sup>113</sup> For the few examples when Congress has done so, see *supra* note 8. Norman Williams disagrees with this assessment that congressional authorization of laws burdening interstate commerce are relatively rare. See Williams, *supra* note 11, at 155 (“[G]iven this open-ended invitation [to authorize state regulations that burden or discriminate against interstate commerce, Congress has done precisely that.]”) One complication in assessing how willing Congress is to sanction state discrimination is that the Court is reluctant to read Congress

measures may suggest that Congress is becoming more willing to sanction such state discrimination; nonetheless, it is still a leap to conclude that these measures demonstrate the failure—as opposed to the proper functioning—of political safeguards.

*B. Constitutional Text and History Do Not Preclude Congressional Power to Authorize State Conduct that Otherwise Violates Article IV.*

These arguments for according Congress broad control over interstate relations, including the power to authorize state conduct that contravenes judicial understandings of Article IV’s interstate prohibitions, are largely structural. Ultimately, they rest upon claims about the relationship between Article I and Article IV, as well as inferences drawn from the powers granted Congress under these articles. Significantly, nothing in the Constitution’s text and history, or for that matter in the Court’s precedent, precludes such a spacious conception of congressional authority. Regarding the commerce power, this should come as no surprise, given the absence of textual references to the states as well as the scant attention the Commerce Clause received at the federal constitutional convention and state ratifying conventions<sup>114</sup>—not to mention the Court’s longstanding and frequently reaffirmed view that Congress can authorize state violations of the dormant Commerce Clause.

But Article IV seems at first blush to be a different story. Two textual points—the linkage of the Full Faith and Credit and Effects Clauses, and the absence of any express grant of power to Congress in Section 2—appear to counsel against implying broad congressional authority over Article IV’s scope. The historical role of Article IV in fostering national union also seems to weigh against an expansive view of Congress’ powers. In fact, however, none of these preclude granting Congress broad control over the scope of the article’s interstate prohibitions.

*1. The Text and History of the Effects Clause.* The Effects Clause itself is broad and unconditional in tone. The only express condition imposed by the Clause is that in specifying the effect of out-of-state laws and judgments or their manner of proof, Congress must proceed by means of “general laws.” The import of this requirement is somewhat ambiguous; “general laws” could be read as preventing measures targeting a specific state’s laws or a specific judgment (akin to the

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as doing so, and therefore requires a clear and fairly specific statement from Congress before such authorization is found. See *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

<sup>114</sup> See Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress* 102 (1993); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 *Minn. L. Rev.* 432, 443–46, 468–75 (1941); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 *Iowa L. Rev.* 1, 35–36 (1999).

Constitution's prohibitions on bills of attainder<sup>115</sup>), or alternatively as limiting Congress' ability to target a narrow category of laws and judgments for special treatment.<sup>116</sup> The former seems the better reading. The alternative view requires some constitutional benchmark against which the breadth or narrowness of congressional legislation could be adjudged. How such a baseline should be established is far from clear; could Congress, for example, establish choice of law rules governing product liability actions alone, or must it legislate regarding all tort actions? In other contexts, the Court has essentially refused to review congressional determinations that a measure is sufficiently general in its benefits or scope to meet analogous constitutional requirements, and a similar approach is warranted here.<sup>117</sup>

Either way, however, the "general laws" provision by itself would not prevent Congress from providing that classes of acts, records, and proceedings deemed sufficiently general should receive more or less credit than they would under the Full Faith and Credit Clause as judicially enforced. Similarly, nothing in the phrase "the effect thereof" textually precludes reading the Clause as granting Congress broad power over the scope of the Constitution's full faith and credit demand. On its face, this language is perfectly compatible with Congress determining that certain state laws and judgments should receive greater credit than they would absent congressional action, as well as with concluding that their effect should be more limited. No effect, after all, is a form of effect.<sup>118</sup> A useful contrast is to Section 5 of the Fourteenth Amendment, where the grant of power to Congress to "enforce" the amendment's substantive protections does imply that congressional enactments

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<sup>115</sup> U.S. Const. art I, §§ 9, 10.

<sup>116</sup> For contrasting discussions of the meaning of the general laws requirement, compare Mark Strasser, *Legally Wed: Same Sex Marriage and the Constitution* 134–36 (1997) and Julie L. B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress' Power Under the Full Faith and Credit Clause and The Constitutionality of the Defense of Marriage Act*, 145 U. Pa. L. Rev. 1611, 1639–43 (1997) with *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Judiciary Comm.*, 104th Cong. 42, 57 (1996) (Letter from Michael W. McConnell to Senator Orrin G. Hatch) and Rosen, *DOMA*, supra note 10, at 941–44.

<sup>117</sup> See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (stating, in rejecting a challenge to spending measure as not for the general welfare, "[t]he line must still be drawn between . . . particular and general. Where this shall be placed cannot be known through a formula in advance. . . . The discretion belongs to Congress, unless the choice is clearly wrong."); see also *South Dakota v. Dole*, 483 U.S. 203, 207 & n.2 (1987) (suggesting "general welfare" restriction on spending in fact may not be judicially enforceable); *Regional Rail Reorg'n Act Cases*, 419 U.S. 102, 158–59 (1974) (holding that bankruptcy statute applying only to eight railroads in a particular geographic region did not violate the "uniform laws" requirement of the Bankruptcy Clause). Bankruptcy is a particularly pertinent comparison. The general laws requirement is textually similar to the requirement of "uniform laws" in bankruptcy; indeed, the congressional power over bankruptcy was first proposed during discussion on the Full Faith and Credit Clause. Underlying adoption of the Article I Bankruptcy Clause and its uniformity requirement was concern about state enactment of private bankruptcy laws. For this reason, the Court has read "uniform laws" as precluding laws applying to particular debtors, not as prohibiting bankruptcy laws specific to particular types of contexts. *Railway Labor Execs' Ass'n v. Gibbons*, 455 U.S. 457, 471–72 (1981). By analogy, the general laws requirement of the Effects Clause suggests concern with full faith and credit demands that single out specific states' laws and judgments for lack of recognition.

<sup>118</sup> See McConnell, supra note 116, at 57; Rosen, *DOMA*, supra note 10, at 952–54; Whitten, supra note 10, at 377–86; see also Edward S. Corwin, *The Constitution and What It Means Today* 246–55 (14th ed. 1978) (stating Congress has power to specify certain decrees will have no effect to achieve uniformity).

dramatically restricting these protections would be invalid.<sup>119</sup> Moreover, even if “the effect” is read as requiring some positive effect, as Laurence Tribe has argued,<sup>120</sup> Congress could still prohibit states from recognizing certain classes of laws and judgments. By so doing, Congress would not be mandating no effect, but rather providing that such laws and judgments would have effect only in the state that issued them.<sup>121</sup>

The strongest textual basis for viewing Congress’ power under the Effects Clause as limited comes not from the language of the Effects Clause itself, but rather from the Full Faith and Credit Clause, which provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>122</sup> The two clauses are closely linked, with the Effects Clause even textually referring to the Full Faith and Credit Clause.<sup>123</sup> Several commentators have argued that the mandatory and uncompromising nature of the Full Faith and Credit Clause militates against reading the Effects Clause to allow Congress to limit the credit that otherwise due state judgments and laws. As Larry Kramer has put it, the “unqualified ‘full’ and mandatory ‘shall’ [of the former clause] lose some (though obviously not all) of their meaning if Congress can simply legislate the requirement away.”<sup>124</sup>

To be sure, the presence of express prohibitions on the states in the Full Faith and Credit Clause—as well as in the provisions of Article IV’s Section 2—marks an important difference between Article IV and the Commerce Clause. In the end, however, reading Congress as unable to reduce states’ obligations under judicial

<sup>119</sup> U.S. Const. amend XIV, § 5; see *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Mark Strasser argues to the contrary that *City of Boerne* and the Section 5 power support viewing Congress’ power to deny effect to laws and judgments as limited, but does not address whether “enforce” and “effect” carry the same limiting connotations. See Strasser, *supra* note 10, at 326; see also Letter from Laurence H. Tribe to Senator Edward M. Kennedy, 142 Cong. Rec. S5931, S5933 (daily ed. June 6, 1996) [hereinafter Tribe, Letter] (maintaining that Congress’ enforcement power under section 5 represents “perhaps the closest analogy” to its Effects Clause power but not discussing textual differences between the two); compare McConnell, *supra* note 116, at 57–58 (contrasting meaning of “enforce” and “prescribe. . . effect”). For discussion of whether Section 5’s “enforce” language is appropriately read as giving Congress very limited power to deviate from judicial constructions of the Fourteenth Amendment, see *infra* note 219 and accompanying text.

<sup>120</sup> See Tribe, Letter, *supra* note 119, at S5932 (stating that “it is as plain as words can make it” that “the congressional power to ‘prescribe . . . the effect’ of sister-state acts, records, and proceedings” does not extend to “prescrib[ing] that some acts, records, and proceedings that would otherwise be entitled to full faith and credit under the . . . Clause as judicially interpreted shall instead be entitled to no faith or credit at all.”).

<sup>121</sup> Moreover, Tribe’s argument appears to mean that Congress is precluded from prescribing that a state’s acts, records, or proceedings have no effect in certain circumstances even if that result is what would obtain directly under the Full Faith and Credit Clause, which seems an implausible result.

<sup>122</sup> U.S. Const., art. IV, § 1, cl. 1.

<sup>123</sup> Indeed, often both clauses are singly referred to as the Full Faith and Credit Clause. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D.Fla. 2005). The Effects Clause is separately identified here for the sake of clarity.

<sup>124</sup> Kramer, *supra* note 10, at 2004; see also Koppelman, *DOMA*, *supra* note 10, at 21 (“The second sentence [of the Full Faith and Credit Clause] should not be read in a way that contradicts the first.”); Strasser, *supra* note 10, at 308–13 (same).

interpretations of the Full Faith and Credit Clause is not a convincing account. Congress, after all, is nowhere expressly subjected to the full faith and credit requirement; instead, that requirement by its terms references only the states. This textual absence is particularly striking, given that the presence of the Effects Clause demonstrates a clear expectation that Congress would legislate in this area of interstate relations. At a minimum, as Mark Rosen has argued, the phrasing of the two clauses suggests that Congress has an important role to play in determining what “full effect” entails.<sup>125</sup> In addition, reading Congress as limited by judicial interpretations of full faith and credit has perverse consequences, for it renders the Effects Clause largely nugatory as a means of mediating conflicting choice of law rules among the states. Under this reading, Congress would lack power to specify which acts, records, or laws should receive credit in any context when those of more than one state have a legitimate claim to recognition. Such a measure necessarily serves to deny credit to the competing acts, records, or judgments that do not satisfy the congressional criteria.<sup>126</sup> The result would be to disable Congress from acting under the Effects Clause in precisely those contexts where congressional action seems most needed to ensure uniformity.<sup>127</sup>

The drafting history of the two clauses further undermines any claim that Congress is precluded from restricting the scope of the full faith and credit demand. As the clauses emerged from the Committee on Detail, Congress was limited to determining the effects of judgments; more importantly, Congress’ responsibility to legislate in the area was mandatory, whereas the initial full faith and credit instruction to the states was hortatory.<sup>128</sup> In the ensuing debate, the convention expanded the scope of the Effects Clause to grant Congress authority to specify the effect of acts and records as well as judicial proceedings, and at the same time adopted a proposal by Madison to reverse the mandatory and discretionary character of the two clauses.<sup>129</sup> This simultaneous move to make the Full Faith and Credit Clause mandatory and the Effects Clause discretionary weighs against reading the former’s mandatory language as directed at Congress. A more logical explanation is that the framers sought to make full faith and credit self-executing, thereby ensuring that congressional inaction did not prevent enforcement of the full faith and

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<sup>125</sup> See Rosen, *DOMA*, supra note 10, at 959–76.

<sup>126</sup> See McConnell, supra note 116, at 58; Sack, supra note 10, at 893.

<sup>127</sup> See Rosen, *DOMA*, supra note 3, at 944.

<sup>128</sup> The Effects Clause originated in a suggestion by James Madison that Congress “might be authorized to provide for the execution of judgments,” with Madison stating that he thought such a role for Congress “was justified by the nature of the Union.” 2 FARRAND, supra note 62, at 448. Only Randolph objected, arguing “there was no instance of one nation executing the judgments of another nation.” Gouverneur Morris then proposed adding language that would give Congress even broader responsibilities, specifically that “the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings.” *Id.* This proposal was submitted to the Committee on Detail, but as noted, however, the version that subsequently emerged from the Committee was more limited. See *id.* at 485.

<sup>129</sup> See *id.* at 488–89.

credit demand; but they also intended to leave Congress with power to legislate regarding the effects of laws and judgments if it so chose.

In sum, Article IV's text imposes few limits on Congress' ability to determine the extent to which states must recognize other states' laws and judgments. It may be that giving fair weight to the Full Faith and Credit Clause precludes Congress from largely legislating away comity. But such a measure might well fail on rationality grounds in any event, as it is hard to see how a broad retraction of comity is plausibly related to any legitimate interest Congress might have in exercising its Effects Clause powers.

2. *Section 2's Textual Silence Regarding Congress.* Perhaps the most striking feature of Article IV's text for assessing congressional authority is the absence of any reference to Congress in Section 2 of the article. This absence is especially salient because all the adjacent sections of Article IV expressly invest Congress with power to act. Given the enumerated powers conception of the federal government's authority, this omission appears to compel the conclusion that Congress lacks any power to implement Section 2 or alter the scope of its requirements. Unsurprisingly, many commentators believe this to be the case.<sup>130</sup>

The Court, however, has never directly considered Congress' powers under the Privileges and Immunities Clause, either to implement that Clause's protections or to authorize states to disregard its requirements.<sup>131</sup> On the other hand, the Court has long held that Congress could enact legislation to enforce the remainder of Section 2's demands, despite the lack of an explicit power to act. The Court's well-known decision in *Prigg v. Pennsylvania*<sup>132</sup> involved a challenge to the constitutionality of Pennsylvania's personal liberty law, enacted to prevent slaveowners and their agents from kidnapping individuals claimed to be fugitive slaves in Pennsylvania and then removing them from the state. In his opinion for the Court holding that Pennsylvania's law was unconstitutional, Justice Story concluded

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<sup>130</sup> See supra note 13 and accompanying text; see also *Piper v. New Hampshire*, 723 F.2d 110, 113 (1st Cir.) (opinion of Bownes & Coffin, JJ.) (positing that Congress lacks power to abrogate the guarantees of the Privileges and Immunities Clause but offering no analysis); Black, supra note 18, at 65 (arguing the "impersonally peremptory language" of the Privileges and Immunities Clause suggests it might bind Congress); Kathleen Sullivan & Gerald Gunther, *Constitutional Law* 306 (14th ed. 2001) ("[T]he Privileges and Immunities Clause is a rights provision, not a grant of authority to Congress, and so is arguably nonwaivable by Congress"); Denning, supra note 71, at 394, 412 (arguing that the text of the Privileges and Immunities Clause appears to preclude Congress from authorizing interstate discrimination); Redish & Nugent, supra note 65, at 591 (describing the Clause as a constitutional absolute that Congress lacks power to waive).

<sup>131</sup> The closest the Court has come is its 1999 decision in *Saenz v. Roe*, where the Court held that Congress lacks power to authorize state violations of the right to move to a new state and be treated like existing citizens, an element of the right to travel protected by the Fourteenth Amendment. 526 U.S. 489, 508 (1999) (holding that provision of federal statute authorizing one-year state durational residency requirements for welfare benefits could not render California statute imposing such a residency requirement constitutional). As another aspect of the right to travel is also protected under Article IV's Privileges and Immunities Clause, see, e.g., *Doe v. Bolton*, 410 U.S. 179, 200-01 (1973), *Saenz* could be read as establishing that Congress is similarly limited regarding Article IV. This view of *Saenz* accords with the Court's passing comment in *Bray v. Alexandria's Women's Health Clinic* that the right to travel "does not derive from the negative Commerce Clause, or else it could be eliminated by Congress." 506 U.S.263, 276 n.7 (1993). For greater discussion of *Saenz* and the distinctions between the Fourteenth Amendment and Article IV, see Part II.B, *infra*.

<sup>132</sup> 41 U.S. (16 Pet.) 59 (1842).

that Congress had not only power but an obligation to enact legislation enforcing the Fugitive Slave Clause of Section 2.<sup>133</sup> Congressional power and duty followed from the inclusion of the right to enforce delivery of fugitive slaves in the national constitution. The absence of any express grant of congressional authority was irrelevant: “The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also.”<sup>134</sup> Indeed, Story went so far as to hold that Congress’ power to enforce the Fugitive Slave Clause was exclusive and precluded states from legislating on the subject, at least in ways that added burdens for claimants seeking to recapture slaves.<sup>135</sup>

*Prigg* was a highly contentious decision, criticized by slavery opponents and supporters alike.<sup>136</sup> Although its ruling of federal exclusivity provoked more criticism, a few members of Congress and several state courts denied that Congress possessed any power to enforce the Fugitive Slave Clause at all.<sup>137</sup> Moreover, *Prigg*’s expansive view of congressional power under the Fugitive Slave Clause contrasts notably with the crabbed account offered by the Court fifteen years later in *Dred Scott* when interpreting the same article’s Territory and Property Clause—notwithstanding that this latter provision seems, on its face, a far more hospitable location for recognition of broad congressional authority.<sup>138</sup> *Dred Scott*’s narrow

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<sup>133</sup> See *id.* at 615–16.

<sup>134</sup> *Id.* at 618–19.

<sup>135</sup> For discussion of what scope of state action *Prigg* allowed, see Paul Finkelman, *Sorting out Prigg v. Pennsylvania*, 24 Rutgers L. J. 605, 641–57 (1993). This aspect of the decision provoked the strongest dissents. See, e.g., *Prigg*, 41 U.S. at 627–28 (Taney, C.J., dissenting).

<sup>136</sup> Antislavery forces condemned the Court’s sanction of federal involvement in returning fugitive slaves and its invalidation of state efforts to prevent free blacks from being kidnaped; slavery supporters attacked the Court’s conclusion that Congress could not force the states to enforce the Fugitive Slave Clause, claiming that it made “the [C]lause . . . a ‘dead letter,’ as there were not enough federal judges to do the job.” David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861* at 184 (2005) (quoting Senator Mason of Virginia) [hereinafter *Currie, Descent*]; see Carl B. Swisher, V *The History of the Supreme Court of the United States: The Taney Period 1836–64* at 535–47 (1974). Interestingly, however, response to the decision was muted at first. See Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North 1780–1861*, at 104–07 (1974). For more recent criticism, see Robert M. Cover, *Justice Accused 186–87*, 232–41 (1975); Fehrenbacher, *supra* note 60, at 43–47; Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 *Sup. Ct. Rev.* 247 [hereinafter, Finkelman, *Story Telling*]; Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 *Cornell L. Rev.* 1086, 1128–38 (1993).

<sup>137</sup> See Currie, *Descent*, *supra* note 136, at 185–94 (discussing congressional debates over the constitutionality of the 1850 fugitive slave law and to prohibit slavery in the territories); Paul Finkelman, *Story Telling*, *supra* note 136, at 269–73 (discussing prior case law on Congress’ power to enforce the Fugitive Slave Clause).

<sup>138</sup> See *Scott v. Sandford*, 60 U.S. 393, 432–42, 446–47 (1856) (holding that the Territory and Property Clause only applied to territory that was ceded to the United States under the Articles of Confederation and only authorized Congress to dispose of public lands, not to govern).

conception of the territory and property power has been rejected,<sup>139</sup> but the Court has never disowned *Prigg's* conclusion that, Section 2's silence notwithstanding, Congress has implied power to enforce its requirements. On the contrary, shortly thereafter in *Ex Parte Kentucky v. Dennison* the Court reached a similar conclusion, this time regarding Section 2's Extradition Clause. *Dennison* held that duty to "provid[e] by law the regulations necessary to carry [it] into execution . . . manifestly devolved upon Congress."<sup>140</sup> Moreover, recent decisions have reaffirmed *Dennison's* holding that Congress has power to legislate under the Clause.<sup>141</sup>

More to the point, focusing on the presence or absence of express grants of congressional power in Article IV ignores a key part of the textual equation: grants of congressional power elsewhere. In fact, the Constitution *does* contain an express textual grant of power to regulate much of the subject matter that arises under Article IV's Section 2, or at least under the Privileges and Immunities Clause,<sup>142</sup> that grant being the Commerce Clause of Article I. Once Article I is added to the picture, the textual question radically changes: Instead of being whether Section 2's silence regarding Congress precludes that body from legislating regarding the states' privileges and immunities obligations, it becomes whether this silence also limits by implication Congress' otherwise broad power to act under the Commerce Clause. No textual reason exists to interpret Section 2's silence differently in the context of Article IV alone. Hence, if silence on the role of Congress precludes Section 2 itself from authorizing congressional action, then the same silence should also preclude Section 2 from limiting congressional exercise of powers elsewhere granted.

Indeed, when read against the background of Article I, Section 2's silence regarding Congress ends up supporting congressional power to authorize state contraventions of its provisions. The logical location for restrictions on congressional exercise of the commerce power is Article I itself. In fact, Section 9 of that article contains several limitations, such as the prohibition on Congress giving

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<sup>139</sup> Appel, *supra* note 16, at 54-78. For the current broad view of congressional power under the Territory and Property Clause, see *Kleppe v. New Mexico*, 426 U.S. 529, 539-41 (1976) (stating "the power over public lands thus entrusted to Congress is without limitation" and "determinations under the Property Clause are entrusted primarily to the judgment of Congress.").

<sup>140</sup> 65 U.S. 66, 104-05 (1861); see also *Roberts v. Reilly*, 116 U.S. 80, 94 (1885) ("There is no express grant to congress of legislative power to execute this provision, and it is not, in its nature, self-executing; but a contemporary construction contained in the act of 1793, ever since continued in force, has established the validity of its legislation on the subject."). *Dennison* also emphasized Congress' power under the Effects Clause as authorizing congressional legislation stipulating the method by which the judicial proceedings forming the basis for extradition demands are authenticated. See 65 U.S. at 105.

<sup>141</sup> See, e.g., *Printz v. United States*, 521 US 898, 908-09 & n.3 (1997) (characterizing Congress' imposition of duties on state officials under the Extradition Act as being "in direct implementation . . . of the Extradition Clause of the Constitution itself" and authorized by the Effects Clause); *California v. Superior Court*, 482 U.S. 400, 407 (1987) (reaffirming *Dennison's* holding regarding congressional power). *Dennison's* further determination that the federal government lacks the power to compel states to perform the mandatory duties imposed by the Extradition Clause and implementing legislation has not fared as well. In *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), the Court ruled that the duties imposed by the Extradition Clause and the Extradition Act were judicially enforceable. See *id.*

<sup>142</sup> See *supra* notes 67-71.

preference to the ports of one state over another, that demonstrate the framers' awareness of how congressional commercial regulation could affect interstate relations.<sup>143</sup> Yet Section 9 is barren of restrictions on Congress that in any way mirror the specific provisions of Article IV. At a minimum, given their obvious topical overlap, if the Privileges and Immunities Clause were intended to limit Congress in its exercises of its Commerce Clause power, one would expect that intent to have been stated clearly in Article IV's text.

3. *The Union-Forging Purpose of Article IV.* A final argument against congressional power to authorize state discrimination in violation of Article IV rests on the article's union-forging purpose. The provisions that ultimately became Article IV, particularly the prohibitions on interstate discrimination contained in the Article's first two sections, generated little discussion at either the constitutional convention or during ratification.<sup>144</sup> It is nonetheless clear that the framers intended the article, especially Sections 1 and 2, to help forge the states into closer union. This is, in part, evident from the article's immediate predecessor, Article IV of the Articles of Confederation, which opened with the words: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union."<sup>145</sup> The Court has frequently emphasized the state-uniting purpose of Article IV, describing it as animated by the purpose of making the states "integral parts of a single nation"<sup>146</sup> and constituting "an essential part of the Framers' conception of national identity and Union."<sup>147</sup>

Article IV's union-forging provisions were centrally implicated in escalating fights over slavery. Increasingly, they yielded to the profound strains of sectional

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<sup>143</sup> See U.S. Const., art. I, § 9, cl. 6; see also *id.* cl. 1 (preventing Congress from abolishing the slave trade before 1808); cl. 5 (prohibiting Congress from imposing taxes or duties on articles exported from any state); Anderson, *supra* note 114, at 102–06; Colby, *supra* note 24, at 273–84.

<sup>144</sup> No doubt a major explanation for this silence was the close similarity between these antidiscrimination requirements and those already contained in the Articles of Confederation. The most significant difference is that the Constitution's Privileges and Immunities Clause excluded language in the Articles' version that expressly guaranteed "free ingress and regress," "all the privileges of trade and commerce," and a nonresident's right to remove property from a state. Art. Confed. art. IV para. 1; see also Bogen, *supra* note 100, at 796–832. The deletion of this additional language, however, seems not to have been intended to alter the provision's substantive meaning, and no discussion of the differences between the proposed clause and its Articles forebear is reported in the convention record. See *Austin v. New Hampshire*, 420 U.S. 656, 660–61 & n.6 (1975); Bogen, *supra* note 100, at 834–40 (detailing instances in which the Privileges and Immunities Clause was discussed); see also *Federalist 42* (Madison), *supra* note 23, at 270 (remarking on the "confusion of language" and redundancies in the Articles' version and thereby suggesting that the additional language was omitted in part for clarity's sake).

<sup>145</sup> Art. Confed., art. IV. cl. 1. (1777).

<sup>146</sup> *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (addressing the Full Faith and Credit Clause); see also *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (same); *Estin v. Estin*, 334 US 541, 545-46 (1948) (describing the clause as having "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns.").

<sup>147</sup> *California v. Superior Court* 482 U.S. 400, 403 (1987) (addressing the Extradition Clause); see also *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 380–81 & n.19 (1978) (addressing the Privileges and Immunities Clause).

division. Northern state courts adopted the view that bringing slaves into a state where slavery was prohibited, even as part of travel to a slave state, served to free them; southern states prohibited entry by free blacks and refused to recognize other states' judgments granting rights to free blacks.<sup>148</sup> Northern states enacted personal liberty laws to protect free blacks claimed as fugitive slaves and refused to extradite individuals accused of encouraging slaves to run away; southern states supported aggressive fugitive recapture efforts and refused to extradite alleged free black kidnappers.<sup>149</sup> Both sides contended that the other's actions violated the comity demands contained in Article IV.<sup>150</sup> In fact, this period was Article IV's heyday; never before or since has it figured so dominantly in political and legal discussion. In particular, the issue of Congress' power to ban slavery in the territories consumed years of congressional attention and debate.<sup>151</sup>

The central importance placed by Article IV, especially its first two sections, on securing union counsels against recognizing congressional power to contract their antidiscrimination prohibitions. On this premise, that the framers granted power to Congress so as to allow it to augment Article IV's interstate demands seems more plausible. The Effects Clause, for example, seems motivated by the framers' belief that congressional power was needed to ensure that the Full Faith and Credit Clause had real practical bite.<sup>152</sup> This account, in turn, readily leads to a one-way ratchet view under which Congress could expand, but not contract, the Constitution's full faith and credit demand.<sup>153</sup> Subsequent history, moreover, offers some support for this view and perhaps a narrower account of congressional power. Even those who argued that Congress could ban slavery in the territories did not contend more generally that Congress could authorize violations of Article IV. Instead, if anything members of Congress debated whether Congress had power to enforce Article IV's

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<sup>148</sup> See Currie, *Descent*, supra note 136, at 41–48 (limits on travel by free blacks); Fehrenbacher, supra note 60, at 69–73 (same); Paul Finkelman, *An Imperfect Union* 101–235, 285–312 (1981) [hereinafter Finkelman, *Imperfect Union*] (tracing development of northern restrictions on travel with slaves and southern resistance to northern emancipation laws).

<sup>149</sup> See Finkelman, *Imperfect Union*, supra note 148, at 6–8; Currie, *Descent*, supra note 136, at 183–94 (detailing southern success in resisting procedural protections for claimed fugitives in the 1850 Fugitive Slave Act); see generally Morris, supra note 136 (describing evolution of personal liberty laws).

<sup>150</sup> See Currie, *The Jeffersonians*, supra note 17, at 246; Finkelman, *Imperfect Union*, supra note 148, at 5, 11–13; Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 *Sup. Ct. Rev.* 277, 285 [hereinafter Hills, *Poverty*].

<sup>151</sup> See, e.g., David M. Potter, *The Impending Crisis: 1849–1861*, at 49, 54–62 (describing different views of the federal territorial power). Thus, Article IV's various provisions surface repeatedly in David Currie's volume of the Constitution in Congress addressing this period. See Currie, *Descent*, supra note 136.

<sup>152</sup> See, e.g., Kramer, supra note 10, at 2006; Tribe, *Letter*, supra note 119, at S5932.

<sup>153</sup> For articulations of the one-way ratchet view of Congress' Effects Clause power, see Chabora, supra note 10, at 606–07, 621–29; Tribe, *Letter*, supra note 119, at S5932.

requirements on the states at all, a debate that carried over to Reconstruction and contributed to adoption of the Fourteenth Amendment.<sup>154</sup>

But the historical record is not univocal, and it also offers plausible support for a more expansive view of congressional power. Evidence on how the grants of congressional power in Article IV were originally understood is skimpy at best. None of these grants sparked much concern or debate, notwithstanding that all represented departures from Article IV's progenitor in the Articles of Confederation and, at least on their face, appeared to grant Congress quite broad authority. Indeed, the drafting history of the Effects and New State Clauses demonstrates efforts by the convention to expand Congress' powers.<sup>155</sup> Concerns about the potential breadth of federal power were really only raised in regard to the Guarantee Clause,<sup>156</sup> but the debates also show that even there general agreement existed on the importance of including such a federal guarantee.<sup>157</sup>

This lack of concern about broad grants of congressional power may simply reflect the framers' expectation that Congress would use its powers to provide further protections against interstate discrimination. On the other hand, the absence of debate might instead reflect widespread agreement that granting Congress discretion over interstate relations was a better means of achieving union than relying on absolute constitutional prohibitions. Support for this alternative view comes from the latter sections of Article IV. Although lacking the direct interstate focus of the first two sections of Article IV, as noted above the New State, Territory and

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<sup>154</sup> See Currie, *Descent*, supra note 136, at 133-72 (describing debates over Congress' power to ban slavery in the territories; Fehrenbacher, supra note 60, at 100-87 (same). Some members of the Reconstruction Congress and President Johnson claimed Congress lacked power to enforce Article IV and thus to enact the Civil Rights Act of 1866, leading to the adoption of the Fourteenth Amendment. See Currie, *Descent*, supra note 136, at 170 n.71; Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* at 39, 55, 63-66 (1990). Given *Prigg* and *Denison*, however, the most likely basis for this claim appears to be that the act addressed a state's treatment of its own citizens as well as nonresidents, a relationship Article IV had not been interpreted to reach, rather than that Congress lacked power to enforce Article IV at all.

<sup>155</sup> For discussions of the drafting history of the New State and Effects Clauses, see supra notes 62, 128, and accompanying text. Gouverneur Morris proposed language nearly identical to the current Territory and Property Clause during debate on what was then the new state article. See 2 FARRAND, supra note 62, at 466. Despite the facial breadth of the proposed language, Morris' amendment passed without much debate, and the Territory and Property Clause also largely escaped comment during ratification. See Appel, supra note 60, at 25-30. Morris was not the first to suggest such a power; earlier Madison had proposed giving Congress power to "dispose of unappropriated lands" and "institute temporary Governments for New States arising therein." 2 FARRAND, supra note 62, at 324. As David Currie has argued, the choice of Morris' more general and empowering phrasing "suggest[s] the propriety of a broad construction." David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-64*, 1983 *Duke L. J.* 695, 734 n. 251.

<sup>156</sup> For example, only Edmund Randolph opposed Morris' motion to expand Congress' Effects Clause power to cover laws and records on the grounds that that Congress' powers would be too broad. 2 FARRAND, supra note 62, at 489.

<sup>157</sup> 2 FARRAND, supra note 62, at 466-67, 628-29; see also William M. Wiecek, *The Guarantee Clause of the U.S. Constitution 60-73* (1972); Bonfield, supra note 61, at 519-22.

Property, and Guarantee Clauses were understood to have an interstate dimension.<sup>158</sup> Yet the framers chose to address these areas of potential interstate contention through granting authority to Congress. This point stands out even more clearly in the framers' decision to address interstate commercial discrimination primarily through vesting the commerce power in Congress. Providing Congress with this power was viewed by many delegates as one of the Constitution's most important achievements,<sup>159</sup> and it was understood as a means of securing union and regulating relations among the states.<sup>160</sup>

Similarly, the pre-civil war period offers grounds for inferring a more expansive view of congressional power over interstate relations. Most members of Congress appear to have agreed that Congress had authority to enforce the Fugitive Slave Clause, focusing their debate instead on whether Congress should do so and the limited protections for free blacks in the 1850 Fugitive Slave Act.<sup>161</sup> Given the political contentiousness of the 1850 Act, the fact that few of its opponents seriously contested Congress' power to enact the measure is noteworthy. This was also a time in which the Court began to suggest that Congress could authorize state impositions on interstate commerce.<sup>162</sup> The history of this period further makes clear the importance of congressional power to securing union. For many years, two congressional measures—the Missouri Compromise of 1820 and to a far lesser extent the 1850 Compromise—played a central role in preserving the nation in the face of increasing sectional divides.<sup>163</sup>

In the end, Article IV's historical record—both at drafting and ratification, and in subsequent decades—offers perhaps the best argument against recognition of congressional power to lift the article's constraints on the states. But evidence on this score is too limited and equivocal to trump the strong structural arguments for broad congressional power in the interstate arena, particularly given the compatibility of an expansive view of Congress' role with constitutional text and with longstanding dormant Commerce Clause precedent.

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<sup>158</sup> See supra notes 60–61 and accompanying text.

<sup>159</sup> See *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1871); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827); *Federalist* 42 (Madison), supra note 23, at 267–68; Abel, supra note 114, at 443–46 (detailing consensus on the value of the commerce power).

<sup>160</sup> For example, Madison laid weight on the commerce power in his list of congressional powers that “provide for harmony and proper intercourse among the States” and also justified the commerce power in part on the grounds that other states' experience proved the “necessity of a superintending authority over reciprocal trade of confederated states.” *Federalist* 42 (Madison), supra note 23, at 267–68. But see Abel, supra note 114, at 450–51, 470–76 (arguing that the commerce power was understood narrowly as a means of preventing interstate discrimination).

<sup>161</sup> See, e.g., Currie, *Descent*, supra note 136, at 184–94.

<sup>162</sup> See supra notes 31–33 and accompanying text.

<sup>163</sup> See, e.g., Currie, *Descent*, supra note 136, at 157–94, 196–200; Potter, supra note 151, at 53–57, 118–20.

## II. LIMITS ON CONGRESS' POWERS OVER INTERSTATE RELATIONS

Fully accepting the structural argument for congressional primacy in interstate relations expounded in Part I still leaves the question of the exact magnitude of Congress' power in this context. What limits, if any, exist on Congress' ability to structure interstate relationships and to contract or expand Article IV's interstate antidiscrimination demands? As discussed below, state sovereignty might seem a likely repository for some such constraints; in fact, however, it supports little curtailment on Congress' control of interstate relations. Individual rights guarantees represent a more potent restriction on Congress, but this is true only those guarantees that receive strong protection independent of the interstate context.

### A. *The Constitutional Core of Horizontal Federalism: State Autonomy, State Equality, and State Territoriality*

Determining the extent to which state sovereignty limits Congress' ability to regulate interstate relations poses a formidable antecedent difficulty, that of establishing the meaning of state sovereignty. Existing federalism precedent suggests three overlapping yet distinct principles of state sovereignty in the interstate context: state autonomy, state equality, and state territoriality or the requirement of territorial limits on state authority. All three represent basic ingredients of federalism, and all three are clearly immanent in the New State and Guarantee Clauses of Article IV, thereby reinforcing the point that benefits result from considering the article as a whole. None, however, ultimately supports robust limits on Congress's powers to order interstate relations.

1. *State Autonomy.* State autonomy is generally invoked to defend the states from federal impositions, and in that context it is used to cover two very different ideas: the states' own immunity from federal regulation, and their freedom to regulate private conduct as they see fit.<sup>164</sup> Yet state autonomy also has a less prominent horizontal dimension, embodying the idea that each state is free to pursue the policies it believes best, subject to constitutional requirements and federal preemption but free from unwanted interference by its sister states. Although largely implicit in the Constitution, this horizontal dimension is nonetheless fundamental to our federal order.

Fundamental though it may be, however, the principle of state autonomy does not easily translate into constraints on congressional control over interstate relations. To begin with, congressional relaxation of Article IV duties seems likely to foster state autonomy by allowing states to pursue regulatory options that are otherwise constitutionally forbidden. Of course, congressionally-authorized state

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<sup>164</sup> Decisions such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), uphold the first type of autonomy; *United States v. Lopez*, 514 U.S. 549 (1995), and *New York v. United States*, 505 U.S. 144 (1992), the latter. See Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex L Rev.* 1, 13–15, 23–32 (2004) (defining state autonomy and contrasting autonomy and immunity models of federalism).

discrimination may result in significant burdens on other states. As a case in point, congressional authorization of state bans on waste importation will have a substantial economic, political, and environmental impact on states that are major waste generators, an impact they could avoid were dormant Commerce Clause protections in force. But these states suffer no diminution in the scope of their constitutional powers as a result of such congressional authorization, as their ability to export solid wastes was always subject to direct congressional prohibition under the commerce power. In other words, provided Congress is acting within the scope of its enumerated powers, state autonomy offers little defense against congressional authorization of state discrimination.<sup>165</sup> Indeed, it seems particularly odd to raise state autonomy as a barrier if the alternative is for Congress itself to impose the discrimination in question, thereby denying states the option of choosing an antidiscriminatory approach.

State autonomy similarly imposes few constraints on congressional expansion of prohibitions on interstate discrimination beyond what the courts have held Article IV to require. As noted above, these prohibitions are independently quite substantial, thereby suggesting that any power to discriminate against sister states and their residents is not an important aspect of state autonomy for constitutional purposes.<sup>166</sup> In addition, Article IV accords a breadth of congressional power over the states greater than that expressly granted elsewhere. Contrast to Section 5 of the Fourteenth Amendment is again instructive. The Court has denied that Section 5 grants Congress power to expand the content of Fourteenth Amendment guarantees.<sup>167</sup> But it has remarked (albeit in dicta) that under the Effects Clause “Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State.”<sup>168</sup>

Moreover, structural and normative grounds exist to support congressional power to enlarge antidiscrimination protections. Interstate discrimination presents a real danger of political process failure, given the lack of direct political representation for affected out-of-state interests. Congress’ greater representative status makes it better able to weigh fairly the harms particular forms of discrimination may pose to the nation as a whole. Allowing Congress to expand antidiscrimination protection thus fosters the democracy reinforcing principles that

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<sup>165</sup> Moreover, as many cases of congressionally-authorized state discrimination involve activities that fall within the core of Congress’ legitimate field of concern, see *supra* note 70 and accompanying text, reading Congress’ enumerated powers narrowly to protect state autonomy against horizontal encroachment will not be a plausible option. For arguments in favor of greater limits on federal regulatory power on horizontal federalism grounds, see Baker & Young, *supra* note 84, at 126–28.

<sup>166</sup> See *supra* Part I.A.4.

<sup>167</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). It has acknowledged, however, that Congress can enact prophylactic measures to preserve those guarantees if an appropriate showing of need is made.

<sup>168</sup> *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality *op.*).

John Hart Ely famously argued lie immanent in constitutional structure.<sup>169</sup> It also fosters the Constitution's commitment to national union. To say that a particular form of discrimination is not constitutionally prohibited does not guarantee it will not spark interstate resentment and retaliation.

In any event, congressional power to expand prohibitions on interstate discrimination accords with current precedent. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court held that, acting under its commerce power, Congress can impose generally-applicable duties on the states, and that such impositions are largely beyond judicial challenge.<sup>170</sup> Notwithstanding its recent federalism revival, the Court has not sought to reconsider *Garcia* directly,<sup>171</sup> and indeed the Court has fairly consistently sanctioned broad congressional power to regulate the states when they are engaging in commercial activities.<sup>172</sup> It did so again in *Reno v. Condon*, its most recent decision addressing this issue, when the Court upheld federal regulation of the commercial use of state-compiled driver license information.<sup>173</sup>

So long as the Court formally adheres to *Garcia*, congressional expansion of Article IV requirements is doctrinally unproblematic. The rationales sometimes given for upholding instances of state discrimination against Article IV challenges—that the activities in question involve state spending rather than state regulation, or the impact that one state's regulatory scheme has on sister states—do not distinguish congressional expansion of interstate discrimination protections from other congressional regulation of the states.<sup>174</sup> *Reno* left open whether Congress can target the states for regulation,<sup>175</sup> but congressional expansions of Article IV rights seem unlikely to target the states any more than the measure restricting disclosure of driver license information there at issue. For example, a congressional measure

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<sup>169</sup> See John Hart Ely, *Democracy and Distrust* 73–104 (1980).

<sup>170</sup> 469 U.S. 528, 548–55 (1985); see also Varat *supra* note 4, at 565–68 (arguing, prior to *Garcia*, that state autonomy concerns under *National League of Cities* may limit Congress' power to expand states' privileges and immunities obligations).

<sup>171</sup> See, e.g., *West v. Anne Arundel County*, 137 F.3d 752, 760–61 (4th Cir.), cert. denied, 119 S. Ct. 607 (1998).

<sup>172</sup> See, e.g., *New York v. United States*, 326 U.S. 572 (1946).

<sup>173</sup> 528 U.S. 141, 148, 151 (2000); see also *Board of Trustees v. Garrett*, 531 U.S. 356, 374 n. 9 (2000) (federal duties still apply and can be enforced through means other than money damages).

<sup>174</sup> Compare, e.g., *Martinez v. Bynum*, 461 U.S. 321 (1983) (upholding state's power to limit free public education to bona fide residents); *Sosna v. Iowa* 419 U.S. 393, 407 (1975) (emphasizing Iowa's interest in "avoiding officious intermeddling in matters in which another state has a paramount interest" in upholding that state's one-year durational residency requirement for filing for divorce) with *Garcia*, 469 U.S. at 554–56 (upholding application of FLSA notwithstanding financial costs on states), *Crosby v. National Foreign Trades Council*, 530 U.S. 363, 374 n. 8 (2000) (noting Congress can preempt state spending choices), and *United States v. Darby*, 312 U.S. 100, 121 (1941) (holding Congress has power to regulate intrastate commerce to insure interstate commerce is not used to foster unfair competition).

<sup>175</sup> 528 U.S. at 146.

prohibiting any institution of higher education from charging out-of-state students a larger tuition seems as much a generally applicable statute; no doubt it is overwhelmingly public universities that use such differential tuition rates, but it is also overwhelmingly state motor vehicle departments that generate and sell driver license information.<sup>176</sup>

To be sure, some enactments seem plainly beyond the constitutional pale, such as congressional prohibitions of all residency requirements for voting or election to state office. At this extreme, the Court's insistence on preserving state political autonomy and prohibiting federal commandeering of state legislative or executive branches would come into play; whether or not such measures violate the Guarantee Clause, they would severely compromise the necessary structure of a state as a political entity representing a distinct geographical community.<sup>177</sup> But move even a little away from such extremes, and the proper scope of congressional power quickly becomes murky.<sup>178</sup> In the end, state autonomy is unlikely to erect a much of a barrier to Congress' powers to contract or expand the requirements of Article IV and otherwise regulate interstate relations.

2. *State Equality.* The state equality principle, long a staple of nineteenth century political discourse, received its most articulate judicial exposition in *Coyle v. Smith*. There the Court held that Congress lacked power to compel Oklahoma to make the city of Guthrie its state capital for seven years as a condition of admission into the union.<sup>179</sup> *Coyle* contains the most prominent statement of the "equal footing" doctrine, which requires that "a new state is admitted into the Union . . . with all the powers of sovereignty and jurisdiction which pertain to the original states, and such powers may not be constitutionally diminished . . . by any conditions. . . which would not be valid and effectual if the subject of congressional legislation after admission."<sup>180</sup> In justifying this doctrine the Court stated:

'Equality of constitutional right and power is the condition of all states of the Union, old and new.'

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<sup>176</sup> State-specific enactments are more likely under the Effects and Extradition Clauses, but such enactment are also clearly sanctioned by the nature of those clauses' requirements.

<sup>177</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978); see also *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972); *Laycock*, supra note 12, at 270–72 (arguing that the right of each state to "reserve the exercise of government power, including the vote, to its own citizens. . . [is] required by the Founders' dual purpose of achieving national unity and preserving the states as separate polities.")

<sup>178</sup> For example, the constitutionality of a federal prohibition on residency requirements for public employees who do not have policy formation or execution responsibilities is already a much closer question. Cf. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

<sup>179</sup> 221 U.S. 559, 567, 579 (1911).

<sup>180</sup> *Id.* at 573; see also *Biber*, supra note 60, at 124 (arguing that Congress has continued to impose conditions that appear to violate the equal footing requirement). For earlier statements of the equal footing doctrine, see *Pollard v. Hagan*, 44 U.S. 212, 216 (1845).

[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may be a free people, but the Union will not be the Union of the Constitution.<sup>181</sup>

Although rhetorically powerful, *Coyle* offered little by way of constitutional analysis to support its conclusion that states must be admitted on equal terms, and the absence of any such equality demand in the text of the New State Clause—an intentional absence at that—might give pause. Nonetheless, *Coyle*'s intuition appears correct.<sup>182</sup> While the New State Clause does not expressly require that states enter on equal terms, the restrictions it imposes on Congress' ability to carve up or consolidate existing states embody state equality concerns. So, too, does the Effect Clause's requirement that Congress must act by means of "general laws."<sup>183</sup> The Constitution contains other manifestations of state equality concerns in regard to Congress, the strongest perhaps being the requirement of equal representation in the Senate, a structural feature critical to the Constitution's adoption and the only constitutional provision that is formally unalterable.<sup>184</sup>

But the principle of state equality, like state autonomy, fails to justify robust limits on Congress' powers to authorize state discrimination in violation of Article IV. Most significantly, interstate discrimination does not necessarily lead to state inequality.<sup>185</sup> Douglas Laycock and Larry Kramer disagree, arguing that in the conflict of laws context state equality means that "[s]tates must treat sister states as equal in authority to themselves."<sup>186</sup> In their view, a state must apply sister state law regardless of its view of the law's merits, and therefore the established doctrine that a state may reject sister state law that offends its strong public policy is

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<sup>181</sup> 221 U.S. at 575, 580 (quoting *Escanaba & L.M. Transp. v. Chicago*, 107 U.S. 678, 688 (1883)).

<sup>182</sup> See also Laycock, *supra* note 12, at 288 (describing state equality as a principle that "[t]he Constitution assumes, without ever quite saying so."); Kramer, *supra* note 10, at 2006 (arguing that state equality "represents the very idea of what it means to be in a Union.").

<sup>183</sup> See *supra* Part I.B.1.

<sup>184</sup> U.S. Const. art. I, art. V. Other equality provisions include the prohibition of port preferences and uniform taxation requirements of Article I. On the other hand, Section 9 of Article I distinguishes among the states in providing that Congress cannot prohibit "the Migration or Importation of such Persons as *any of the States now existing* shall think proper to admit" before 1808. *Id.* art. I, § 9, cl. 1 (emphasis added). This provision could signal either that the framers accepted that new states might have lesser powers, or (by operation of the *expressio unius maxim*) that in all other regards the states were to be equal.

<sup>185</sup> For an analogous argument, see John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 *Wm & Mary L. Rev.* 173, 185–91 (1981) (arguing that conflicts of law rules under which states grant nonresidents the benefits they would receive under their home state's law should satisfy Article IV's Privileges and Immunities Clause).

<sup>186</sup> Laycock, *supra* note 12, at 250.

unconstitutional.<sup>187</sup> This is unconvincing; if all states retain equal authority to reject sister state law on public policy grounds, in what sense are they systematically unequal?<sup>188</sup>

This leaves the possibility that measures singling out a particular states for distinct treatment might violate state equality requirements. Notably, however, the text of the Commerce Clause does not impose such a uniformity requirement on Congress, and the Court has stated that Congress can instead subject the states to distinct regulatory regimes.<sup>189</sup> It is even more clear that Congress can enact measures that, though facially uniform, have a disproportionate burden on some states, at least absent substantial evidence of “failings in the national political process.”<sup>190</sup> As the Court recently noted, to allow state regulatory choices to limit Congress in the exercise of its enumerated powers “would turn the Supremacy Clause on its head” and reflects a dual federalism model “long since . . . rejected.”<sup>191</sup> Moreover, it is hard to see why state equality would prevent Congress from choosing to allow other states to discriminate against a disfavored policy, rather than preempting it directly; after all, the former approach at least allows states adhering to the disfavored view to continue to do so within their own borders.

The situation is somewhat different when Congress is legislating under its Effects Clause power, given the latter’s “general laws” requirement. As discussed above, that requirement is best understood as imposing a uniformity requirement, and thus precludes Congress from facially distinguishing among the states, even if it can do so under the commerce power. But again, disproportionate impact on particular states should not prevent Congress from adopting measures that otherwise satisfy the Effects Clause’s requirements. Nor, finally, do grounds exist to conclude that state equality mandates that Congress use its Effects Clause power to legislate in a value-

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<sup>187</sup> See Laycock, *supra* note 12, at 313, Kramer, *supra* note 10, at 1986–91.

<sup>188</sup> For this reason, Tom Colby acknowledges that congressional authorization of state regulation does not violate the uniformity requirement he believes attaches to Congress under the commerce power. Although the net result is a nonuniform regulatory system across the nation as a whole, such congressional authorization of state regulation itself treats all the states uniformly. Colby, *supra* note 24, at 314–17.

<sup>189</sup> See *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 468 (1982); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616, (1950); see also *Coyle*, 221 U.S. at 568, 570 (indicating that Congress can impose ongoing conditions on new states when the conditions rest not on the New State Clause but on Congress’ regulatory powers). Tom Colby has attacked this precedent as actually at odds with original understanding, and argued that at least measures facially distinguishing among the states should be subject to more searching scrutiny. Colby, *supra* note 24, at 301–04, 311–12, 339.

<sup>190</sup> *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528, 554 (1985); see also *South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988) (rejecting political process failure claim, noting that “South Carolina has not even alleged . . . that it was singled out in a way that left it politically isolated and powerless.”); *Hodel v. Indiana*, 452 U.S. 314, 332–33 (1981) (rejecting equality claims against surface mining scheme that impacted more harshly on Midwest mining operations).

<sup>191</sup> *Gonzales v. Raich*, 125 S. Ct. 2195, 2213 n.38 (2005).

neutral fashion.<sup>192</sup> No such demand of value-neutrality applies to Congress' other powers or appears on the face of the Clause. In the end, the strongest argument for greater scrutiny of congressional value choices under the Effects Clause lies not in state equality but instead, as in the case of *Coyle*, in a vertical federalism fear that Congress might otherwise evade substantive limits on its enumerated powers under Article I. This presumes, however, that unlike Congress' other Article IV powers,<sup>193</sup> the Effect Clause grants no substantive authority on its own. But the Effects Clause's text supports a broader view; moreover, this reading renders the Clause redundant, for Congress could only alter the extent of full faith and credit states must provide in areas that already come under its Article I authority.<sup>194</sup>

3. *State Territoriality*. State territoriality is a third state sovereignty limit warranting consideration. The principle that states are territorially-bound polities permeates the Constitution and finds explicit textual manifestation in the New State Clause's protection of an existing state's territory.<sup>195</sup> The principle is most frequently encountered as a prohibition on extraterritorial state legislation. Perceived efforts by the states to regulate the legal consequences of actions occurring outside their borders often provoke strong judicial condemnation on federalism grounds.<sup>196</sup> Most recently, in the punitive damages context, the Court insisted that "[a] state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."<sup>197</sup> Similarly, in cases arising under the dormant Commerce Clause, the Court has stated that "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's

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<sup>192</sup> Contra Cox, *supra* note 10, at 400–08.

<sup>193</sup> Even *Coyle* allows Congress to impose substantive conditions under the New State Clause, provided these can be fulfilled upon or prior to admission. See 221 U.S., at 568; see also Currie, *The Jeffersonians*, *supra* note , at 243–45.

<sup>194</sup> This assumes, as do most scholars, see, e.g., Cox, *supra* note 3, at 391; Laycock, *supra* note 4, at 291–92, that the Full Faith and Credit Clause is self-executing, so that congressional legislation is not required to render operative the Full Faith and Credit Clause's demands.

<sup>195</sup> See Richard Briffault, What About the "Ism"?, 45 Vand. L. Rev. 1303, 1335–38 (1994) (emphasizing importance of Article IV's territorial guarantee).

<sup>196</sup> See Donald Regan, *Siamese Essays: (1) CTS Corp v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1884–96 (1987).

<sup>197</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); see also *BMW v. Gore*, 517 U.S. 559, 572 (1996) ("[I]t follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.") For a critique of the Court's reliance on extraterritoriality to limit punitive damages awards, see generally Michael P. Allen, *The Supreme Court, Punitive Damages, and State Sovereignty*, 13 Geo. Mason L. Rev. 1 (2004). But see Issacharoff & Sharkey, *supra* note 13, at 176–79.

power.”<sup>198</sup> To some extent, the extraterritoriality prohibition is more of a specific application of the principles of state autonomy and state equality than a distinct restriction in its own right; part of the problem with extraterritorial state legislation is that it gives the enacting state elevated authority over its sisters and denies these other states power to set policy within their borders.<sup>199</sup>

But inferring a limit on Congress from the extraterritorial prohibition is quite another matter. To begin with, the content of the prohibition on the states themselves should not be overstated. In practice states exert regulatory control over each other all the time. Perhaps the most prominent instance is Delaware’s corporate law, which has *de facto* nationwide application due to the number of major companies incorporated there.<sup>200</sup> So, too, do California’s automobile emission standards.<sup>201</sup> The prohibition on extraterritorial legislation is thus understood only to constrain a state from formally asserting legal authority outside its borders. Even in this form, however, the prohibition is hardly absolute. On occasion, the Court has accepted states’ formal assertions of authority over individuals and activities outside their borders, the most salient example being the Court’s switch from strong territorial limits on state assertions of personal jurisdiction to a minimum contacts and fundamental fairness approach.<sup>202</sup> Underlying these seeming inconsistencies is the Court’s realization that a state’s geographic territory does not mark the outer limit of its legitimate regulatory concern. In our federal system, which combines state regulatory control with a national market and interstate mobility, some extraterritoriality is not only inevitable, but appropriate.

Against this background, it would be odd indeed were Congress not to enjoy some additional leeway to authorize extraterritorial state regulation. Navigating the border between a state’s legitimate regulation and illegitimate intrusion on sister states is precisely the type of interstate relations question over which Congress

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<sup>198</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S.186,197 (1977)); see also *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989); *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975).

<sup>199</sup> See Arthur M. Weisbrod, *Territorial Authority and Personal Jurisdiction*, 13 Wash. U. L. Q. 377, 384, 402 (1985) (linking state territoriality to state equality).

<sup>200</sup> See Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1437, 1442–44 (1992) (describing the national impact of Delaware). A large literature exists on the merits of interstate competition regarding corporate law. For a description of the leading scholarship, see *id.*, at 1444–51.

<sup>201</sup> The Clean Air Act exempts California’s limits from federal preemption and allows states to adopt these limits instead of the otherwise applicable federal standards. See 42 U.S.C. §§ 7543(a)-(b), 7507; see also *Motor Vehicle Mfrs. Ass’n v. New York State Dep’t of Envtl. Conservation*, 17 F.3d 521, 524–28 (2d. Cir. 1994) (describing history of these provisions of the CAA).

<sup>202</sup> Compare *Pennoyer v. Neff*, 95 U.S. 714, 733 (1978) with *International Shoe Co. v. Washington*, 326 U.S. 310, 317–19 (1945). Other decisions taking a kindlier view of extraterritorial legislation also exist. See, e.g., *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 669–70 (1981) (holding retaliatory tax’s purpose of “apply[ing] pressure on other States to maintain low taxes on California insurers” to be legitimate); *Skiriotes v. Florida*, 313 U.S. 69, 76–77 (1941) (upholding application of Florida criminal statute to Florida citizen even if offense took place upon the high seas).

should have paramount authority. Indeed, extraterritoriality prohibitions imposed under the dormant Commerce Clause are presumably within the control of Congress, just like other dormant Commerce Clause restrictions. Moreover, the Effects Clause, in granting Congress the power to determine the effect that one state's laws will have in others, by its terms allows Congress to mandate extraterritoriality.<sup>203</sup>

Of course, some measures may be beyond Congress' powers because they represent too great a compromise of a state's independence from, and equality with, its sister states. Congress cannot grant Texas direct legislative authority over the territory of Massachusetts and individuals therein, even if so doing might resolve interstate tensions sparked by a blue state's liberal social policies. Indeed, any formal displacement of one state's regulatory control over its territory in favor of another state (as opposed to authorizing that the second state's regulation shall apply in some circumstances as well) arguably may transcend Congress' powers.<sup>204</sup> But such extreme measures are highly unlikely to win congressional approval in any event.

More significantly, the extraterritoriality prohibition is rooted in due process and individual rights protections as well as federalism. The prohibition's appearance in recent punitive damages decisions, for example, came in the course of the Court's elucidation of due process limits on such damages; restrictions on a state's ability to assert personal jurisdiction similarly have a due process basis.<sup>205</sup> In addition, a state's efforts to regulate its citizens' extraterritorial actions is often attacked as unconstitutionally burdening their right to travel.<sup>206</sup> Thus, the extent to which Congress can authorize extraterritorial legislation implicates the separate question discussed below: Whether—and if so, how—congressional power over interstate relations is limited when Article IV implicates individual rights.

## B. *Article IV and the Fourteenth Amendment*

1. *Congressional Power and Individual Rights.* Up to now, the discussion has treated Article IV primarily as a provision that regulates interstate relations. But, of course, Article IV is not just about interstate relations, it is also about individual

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<sup>203</sup> See Rosen, *DOMA*, supra note 10, at 940 (arguing that “regulat[ing] the extraterritorial effects of state policies” is “eminently federal function”).

<sup>204</sup> Aside from tripping on structural state equality concerns, such displacement of a state's regulatory control over its own territory would seem to run afoul of the spirit, if not the text, of the New State Clause's territorial guarantee. See U.S. Const. art. IV, § 3. Further support this conclusion comes from the Enclave Clause, which prohibits Congress from permanently ending a state's authority over federal property within its borders without the state's consent. See U.S. Const. art. I, § 8, cl. 17. If Congress must seek state approval before taking this step regarding federal property, then surely state consent is needed before Congress does so regarding areas not in its possession—assuming Congress can do so at all.

<sup>205</sup> See, e.g., *BMW*, 517 U.S. at 572–73; *Asahi Metal Industry, Inc. v. Superior Court of Cal.*, 480 U.S. 102, 113–14 (1987) (internal quotations omitted).

<sup>206</sup> See, e.g., Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451, 489 (1992) [hereinafter Kreimer, *Law of Choice*].

rights. This is clearest in regard to the Privileges and Immunities Clause, which by its terms prohibits states from discriminating against another state's "citizens."<sup>207</sup> To the extent that Article IV is seen as an individual rights guarantee, the case for a revisory congressional power seems intuitively more problematic.<sup>208</sup> Central to our contemporary idea of constitutional rights is a conviction that they represent restrictions on government that the political organs ordinarily lack ability to disregard.<sup>209</sup> If constitutional rights turned simply on the political branches' willingness to recognize them, they would differ little from the protections afforded by positive law.<sup>210</sup> Here, the distinction between Article IV expansion and contraction appears a significant one. Whatever Congress' powers to expand Article IV's requirements beyond judicial interpretations, allowing Congress to authorize interstate discrimination that otherwise would be held to violate Article IV appears fundamentally at odds with our understanding of constitutional rights.

One response is to argue that, because the individual rights secured by Article IV take the form of restrictions on state conduct, they are irrelevant to assessing Congress' powers. William Cohen, a forceful advocate of this view, argues that Congress is free to authorize state violations of constitutional rights whenever "Congress is not constitutionally prohibited from directly adopting the same policy itself."<sup>211</sup> Supporting Cohen is the Hohfeldian insight that rights describe relationships. They run against particular individuals or institutions; they are not freefloating entities that can be asserted against interference, regardless of its

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<sup>207</sup> U.S. Const. art. IV, § 2, cl. 1. Some scholars have emphasized the Privileges and Immunities Clause's protection of individuals as what distinguishes it from the dormant Commerce Clause, which protects interstate commerce. See Collins, *supra* note 24, at 115–16; Varat, *supra* note 12, at 499; Laycock, *supra* note 12, at 263–64. Though an interesting distinction, the significance of this difference should not be overstated. The protections of the dormant Commerce Clause, after all, are asserted by particular businesses and individuals. In like vein, the Full Faith and Credit Clause speaks to the states, but it is beyond dispute that an individual can assert her right under that Clause to recognition of a prior judgment.

<sup>208</sup> See Tribe, *Treatise*, *supra* note 12, at § 6-35 at 1246.

<sup>209</sup> See, e.g., Ronald Dworkin, *Taking Rights Seriously* 184–205 (1977). As noted below, this view of constitutional rights requires substantial qualification, given the deference courts give to the views of political institutions in determining whether an individual right violation has occurred, see *infra* text accompanying notes 216–217, as well as the way that most rights only protect individuals from government intrusion based on certain kinds of prohibited reasons. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 *J. Leg. Stud.* 725, 727–33 (1998) (describing rights in these terms). Nonetheless, even under this latter conception of rights, the fact that a majority supports action based on a prohibited reason is not sufficient to render such action constitutional.

<sup>210</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 162–63, 176 (1803); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Cal. L. Rev.* 1027, 1034–35 (2004) (discussing tension between some understandings of popular constitutionalism and the concept of constitutional rights).

<sup>211</sup> Cohen, *Enigma*, *supra* note 4, at 388, 406, 411–13.

source.<sup>212</sup> Cohen is also right that Article IV's failure to expressly impose its antidiscrimination provisions on Congress is instructive; as noted, this silence reinforces the structural implication that Congress has broad power over interstate relations.

In the end, however, this argument puts too much weight on Article IV's textual silence regarding Congress. Cohen himself acknowledges that the Court elsewhere has rejected the claim that textual silence is dispositive of the question whether constitutional rights apply against the federal government. One analogy concerns the Contracts Clause of Article I's Section 10; although the Contracts Clause expressly applies only to the states, the Court has read a similar, albeit perhaps more deferential, prohibition against Congress into the Fifth Amendment's Due Process Clause.<sup>213</sup> At bottom, the question is whether the Court should treat Article IV's protections in a parallel fashion. *Prigg*, *Dennison*, and *Coyle* further reject the proposition that Article IV's silence is determinative of the scope of Congress' power under Article IV.

In addition, an unqualified claim that Congress has power to authorize state violations of any rights to which it is not directly subject fails in structural terms. What distinguishes the federal and state governments is their different composition, powers, and responsibilities. As the political representative of the nation, Congress can claim a special responsibility for discerning and acting upon the national interest, and the powers granted to it often relate to subjects that intuitively require national treatment—interstate commerce, immigration and naturalization, foreign affairs, and so on. It is Congress' special expertise and stature as the representative of the national interest that explains the constitutional model described above, one in which constitutional default rules imposing obligations on the states in the name of union are ultimately subject to congressional control. Congress also regularly creates and limits individual statutory rights in the course of exercising its enumerated powers, and the Section 5 power indicates that Congress has some responsibility for ensuring that Fourteenth Amendment rights are realized. The structural basis for congressional authority to limit individual *constitutional* rights is, however, considerably less evident. In that context, Congress' own majoritarian and political status makes it an unreliable stand-in for the interests of individuals claiming rights against the similarly majoritarian and political branches of state government.<sup>214</sup>

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<sup>212</sup> See *DeShaney v. Winnebago Cty. Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (emphasizing that constitutional rights run only against government actors, not private individuals); see also Rosen, Tailoring, *supra* note 108, at 1546–53 (arguing that the substantive content of constitutional rights is context-dependent and that level of government is a particularly important contextual factor in determining their scope); see generally W. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, and Other Legal Essays* (1919).

<sup>213</sup> Cohen, *Enigma*, *supra* note 12, at 411; see, e.g., *United States v. Winstar*, 518 U.S. 839, 876 (1996). The Court's enforcement of equal protection requirements against Congress through the Fifth Amendment is often invoked as another example. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>214</sup> See Carlos M. Vazquez, *Eleventh Amendment Schizophrenia*, 75 *Notre Dame L. Rev.* 859, 872–73 (1999) (arguing that due to their majoritarian nature, neither Congress nor the executive branches is a reliable enforcer of constitutional limits on the states). For a similar arguments along this vein, see Choper, *supra* note 46, at 175–76, 195–205, 205–209; Wechsler, *supra* note 110, at 560 n.59. Interestingly, in an earlier essay assessing Congress' powers under the Fourteenth Amendment, Cohen similarly distinguished between federalism

For these reasons, the question of Congress' power to authorize state violations of Article IV rights is more difficult than Cohen acknowledges. But the contrary view, that Congress lacks power to contract Article IV's interstate requirements whenever they take the form of individual rights guarantees, ignores the fact that Article IV has a core interstate dimension and that Congress can legitimately claim broad authority regarding interstate matters. At a minimum, some account is needed to show why the arguments supporting broad congressional power over interstate relations become irrelevant once the article's individual rights dimension is acknowledged. Such an account is particularly important because, if adopted, this view would seem to force a reconsideration of Congress' well-established power to authorize state violations of the dormant Commerce Clause, at least with respect to individuals.<sup>215</sup>

More basically, the view that the individual rights character of Article IV's guarantees removes them from congressional control is based on a false premise. Congressional power to limit the scope of individual rights is not in fact an alien concept in our constitutional order. In some instances, constitutional rights are treated as fundamental and the views of the political branches given little weight.<sup>216</sup> In others, however—economic and social rights being the prime example—both federal and state governments have broad authority to determine what constitutional protections will mean in practice. True, the Supreme Court retains formal control over determining whether a particular regulatory measure is constitutional, but the standard of review it employs—“is there any reasonably conceivable set of facts that could provide a rational basis” for the legislation?<sup>217</sup>—is so deferential that as a practical matter it allows the political branches to control the operative significance of the rights at stake. If Congress has such power over the shape of some other constitutional rights, why should the Article IV guarantees, which at their core are also matters of interstate relations, be categorically free from congressional control?

2. *Congressional Power, Article IV, and the Fourteenth Amendment.* This suggests that the question of Congress' power to revise Article IV's interstate requirements cannot be answered simply by treating these requirements as a homogenous whole, and instead turns on the particular provision at stake. One particularly salient factor is the extent to which an Article IV requirement takes the

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limits, which Congress could waive, and liberty protections, over which Congress had no particular claim of authority. See William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 *Stan. L. Rev.* 603, 613–15 (1975)[hereinafter Cohen, *Due Process and Equal Protection*].

<sup>215</sup> See *supra* Part I.A.3 (discussing the overlap in application of the Privileges and Immunities Clause and dormant Commerce Clause).

<sup>216</sup> First Amendment protection of political speech is perhaps the classic example, see, e.g., *United States v. Eichman*, 496 U.S. 310 (1990), but even here the Court sometimes defers to the political branches' judgments, see *McConnell v. FEC*, 540 U.S. 93 (2003). In other contexts, actions by the political branches are taken as evidence in determining the content of fundamental constitutional rights. See Ferejohn & Friedman, *supra* note 55, at 35–43.

<sup>217</sup> *FCC v. Beach Communications*, 508 U.S. 307, 313–14 (1993); see also *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

form of an individual rights guarantee that applies independently of the interstate context. The structural argument above supports granting Congress broad power to contract or expand any Article IV requirement centered upon the interstate arena, even if the requirement takes the form of a claim of individual right. But when an individual right carries constitutional significance wholly independent of the interstate context, Congress' power is necessarily more limited. In these instances, the congressional role in interstate relations may support allowing Congress to expand the requirement beyond its fundamental core, but not contract it.

This distinction might appear unmanageable and too difficult to implement, as it requires close analysis of the meaning of each Article IV right. A little reflection, however, makes clear that the distinction is essentially equivalent to saying that Congress' power over Article IV's interstate demands is subject to the limitations of the Fourteenth Amendment. The reason is that Article IV requirements with such independent constitutional significance will be accorded substantial protection directly under the Fourteenth Amendment. Subjecting Congress to the Fourteenth Amendment seems odd at first blush, given the extent to which that provision speaks only to action by the states. Yet the Court has repeatedly held that Section 5's grant to Congress of power to "enforce" the Fourteenth Amendment means Congress cannot authorize violations of Fourteenth Amendment guarantees.<sup>218</sup> Some commentators contend that Congress should enjoy greater ability to deviate from judicial interpretations of Fourteenth Amendment rights in exercising its Section 5 power than the Court currently allows.<sup>219</sup> Even so, Section 5's "enforce" limitation would appear to preclude Congress from significantly contracting the scope of judicially-recognized Fourteenth Amendment rights. Moreover, most (though not necessarily all) Fourteenth Amendment rights receiving strong protection also apply directly to Congress through the Fifth Amendment, providing an additional independent barrier to congressional authorization of their violation.<sup>220</sup>

Arguably, the point can even be pushed further, to the broader claim that it is mistaken to view Article IV as a rights-creating provision in the first instance. Instead, notwithstanding that some of its clauses speak in individual rights terms, the article should be viewed solely as a structural provision, targeted at the interstate

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<sup>218</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (stating that Section 5's grant of power to Congress to "enforce the guarantees of the Amendment . . . grants Congress no power to restrict, abrogate, or dilute these guarantees"); see also *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (quoting *Katzenbach*) *Mississippi U. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (same).

<sup>219</sup> See, Cohen, *Due Process and Equal Protection*, supra note 214, at 606-08; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 199-201, 206-11, 228-29 (1971); Hills, *Poverty*, supra note 150, at 332-34; Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 161-63, 169-74 (1997).

<sup>220</sup> One distinction concerns the equal protection rights of immigrants; differences may also exist regarding the right to travel. Nonetheless, the overlap between the Fifth and Fourteenth Amendments is extensive, and thus the position I articulate here comes very close to that offered by William Cohen. As this discussion suggests, however, we differ in regard to how the limits on Congress are articulated and discerned. Where I would root these limits in the Fourteenth Amendment, Cohen argues that the relevant question is "whether Congress would have the power to make substantive policy choices analogous to those made in the state laws Congress approved." Cohen, *Enigma*, supra note 12, at 412-22.

relationship.<sup>221</sup> This is not meant to suggest any fundamental dichotomy between structural and individual rights provisions<sup>222</sup> or that individuals should not be able to assert Article IV rights in litigation. Structural provisions regularly accrue to the benefit of individuals, and were intended to do so by the framers.<sup>223</sup> But recognizing the primarily structural character of Article IV helps clarify that individual rights emanating from it are best viewed as contingent and congressionally displaceable. Article IV rights that intuitively resist such contingent status are better reformulated as resting on a constitutional basis independent of that article, specifically the Fourteenth Amendment.

It might seem anomalous to distinguish in this fashion between Congress' powers under Article IV and the Fourteenth Amendment.<sup>224</sup> In fact, however, such a disjunction is fully warranted. As discussed above, textual restrictions on Congress akin to Section 5's "enforce" language are much harder to infer from Article IV's terms.<sup>225</sup> But a distinction regarding congressional power in these two contexts would exist even if the Fourteenth Amendment did not contain Section 5. Critically, the Fourteenth Amendment lacks the interstate relations focus of Article IV. Its animating concern was the relationship between a state and its citizens, as well as with others within its boundaries. Yet Article IV's interstate dimension is of course precisely what justifies congressional power to contract its requirements. Existing doctrine supports the distinction between Article IV and the Fourteenth Amendment as well. Under recent decisions, Congress' commerce power is clearly of greater substantive scope than its Section 5 power. At the same time that the Court has emphasized limitations on Congress' power to expand the scope of Fourteenth Amendment rights when acting under Section 5, it has underscored Congress' ability to do so when acting under the Commerce Clause.<sup>226</sup> The greater substantive breadth of the commerce power is especially significant here, given that Congress overwhelmingly utilizes the commerce power when it regulates interstate relations.

Distinguishing between Congress' powers under Article IV and the Fourteenth Amendment also accords with the Court's recent decision in *Saenz v. Roe*. *Saenz* is a particularly important decision to consider in parsing the relationship between Article IV and Fourteenth Amendment rights, in part because it involved a

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<sup>221</sup> See Laurence H. Tribe, Comment: *Saenz* Sans Prophecy: Does the Privileges Or Immunities Revival Portend the Future—Or Reveal the Structure of the Present, 113 Harv. L. Rev. 110, 141 (1999) [hereinafter, Tribe, *Saenz*] (arguing that although Article IV may take an individual rights' form, "its animating *spirit* is located less in a norm of fair treatment than in a concern for interstate comity").

<sup>222</sup> See generally Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

<sup>223</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992). In Madison's famous words, a bill of rights alone, without institutions and structures to enforce its protections, is simply a "parchment barrier." Jack N. Rakove, *Declaring Rights: A Brief History With Documents* 22–23 (1998).

<sup>224</sup> See Tribe, *Treatise*, supra note 12, § 6-35 at 1243–44 & n.35.

<sup>225</sup> See supra text accompanying note 119.

<sup>226</sup> See *Board of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2000) (federal duties still apply and can be enforced even though Eleventh Amendment precludes use of claims for money damages to do so).

person's right to travel interstate, a right that is perhaps unique in being intrinsically linked to both interstate relations and individual liberty.<sup>227</sup> Moreover, in *Saenz* the Court linked the Privileges and Immunities Clause of Article IV with its companion clause in Fourteenth Amendment, describing both as sources of the right to travel and reiterating that Congress lacks power to authorize state violations of the Fourteenth Amendment. The Court thus underscored the individual rights aspect of Article IV guarantees and could be read to suggest that Congress lacks power to authorize violations of Article IV guarantees as well.<sup>228</sup> On the other hand, the Court also noted that the Article IV component of the right to travel, "the right to be treated like a welcome visitor," is subject to greater qualification than the component it identified as rooted in the Fourteenth Amendment, "the right to be treated like other citizens of that State" where one "elects to become [a] permanent resident."<sup>229</sup> In short, *Saenz* simultaneously both linked and differentiated between Article IV and the Fourteenth Amendment. Moreover, the reason *Saenz* noted for distinguishing between the right to travel protections under these provisions is that "[p]ermissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident."<sup>230</sup> By thus suggesting that these two constitutional provisions cannot simply be equated despite their shared concerns, and further that the interstate dimension of Article IV is what may justify different treatment, *Saenz* offers some support for the approach advocated here.

An effort to distinguish among different Article IV guarantees only works, however, if state classifications between residents and nonresidents do not receive searching scrutiny under the Fourteenth Amendment's Equal Protection Clause. Otherwise, the distinction drawn between rights tied to the interstate context and rights having significance independent of that context (and protected by the Fourteenth Amendment) collapses. With one arguable exception, the Court's caselaw is consistent with this rule. Although the Court has on occasion invalidated resident-nonresident classifications on equal protection grounds, it has held that for equal protection purposes such classifications are not inherently suspect and trigger only rationality review.<sup>231</sup> As all government action must survive that level of review, this means that a state residence classification in theory adds nothing special to this undemanding species of equal protection analysis.

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<sup>227</sup> See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite[] to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); see also Tribe, *Saenz*, supra note 221, at 112.

<sup>228</sup> See Tribe, *Treatise*, supra note 12, at § 6-35 at 1243-44 n.35 (adopting this view).

<sup>229</sup> 526 U.S. 489, 500-04 (1999).

<sup>230</sup> *Id.*, at 502.

<sup>231</sup> See *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 669-70 (1981).

The arguable exception is *Metropolitan Insurance Life Insurance Company v. Ward*.<sup>232</sup> There, over sharp dissent, the Court ruled invalid, on equal protection grounds, an Alabama statute that taxed out-of-state insurance companies at a rate higher than those incorporated and having their principal place of business within the state.<sup>233</sup> *Ward*, however, is a seriously flawed decision. Among other criticisms, its characterization of a state's desire to foster local business as nothing more than improper parochialism conflicts with numerous instances in which the Court has upheld this interest as plainly legitimate.<sup>234</sup> Nor did the Court provide a satisfying account of why congressional authorization of the discriminatory taxes at issue in the McCarran-Ferguson Act did not immunize them against equal protection challenges as well as dormant Commerce Clause challenges.<sup>235</sup> In any event, in reaching its result the *Ward* majority claimed to apply ordinary rationality review and also emphasized that Congress did "not purport to limit in any way the applicability of the Equal Protection Clause" to state regulation of insurance.<sup>236</sup> As a result, the legal standard invoked by *Ward* comports with the approach advocated here, under which "[a]ny federalism component of equal protection is fully vindicated where Congress has explicitly authorized a parochial focus."<sup>237</sup>

### III. APPLICATIONS

A brief restatement seems in order. The constitutional model for interstate relations is one of strong judicially-enforceable antidiscrimination requirements, but analysis shows that in fact these are default requirements, subject to congressional revision. Institutionally, Congress is best positioned to determine the national interest and the need for state restrictions; moreover, the aggrandizement concerns that dominate vertical federalism disputes are substantially reduced in the horizontal federalism context. Recognition of broad congressional power is at least consistent with (and in some aspects clearly supported by) Article IV's text and history. Core federalism postulates of state autonomy, state equality, and state territoriality yield few restrictions on Congress in this arena, barring only the most extreme forms of congressional regulation. Instead, the major limit on Congress, and potentially a

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<sup>232</sup> 470 U.S. 869 (1985).

<sup>233</sup> *Id.* at 878 (holding that the statute lacked any legitimate purpose because "Alabama's aim [was] purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations" and thus "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent").

<sup>234</sup> See *id.* at 885–86, 893–98 (O'Connor, J., dissenting).

<sup>235</sup> See *id.* at 899 (O'Connor, J., dissenting) ("Surely the Equal Protection Clause was not intended to supplant the Commerce Clause, foiling Congress' decision under its commerce powers" to authorize the discrimination in question); see also William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward*, 38 *Stan. L. Rev.* 1, 9–13 (1985).

<sup>236</sup> *Ward*, 470 U.S. at 880.

<sup>237</sup> *Id.* at 899 (O'Connor, J., dissenting).

quite significant one, is that Congress cannot authorize state violations of rights independently guaranteed by the Fourteenth Amendment.

What remains is to explore how the approach articulated here would operate in practice, an important exercise given the necessarily abstract quality of some of the preceding discussion. The goal of this part is to do so, by applying this approach to instances of congressional legislation affecting the states' obligations under Article IV's Full Faith and Credit and Privileges and Immunities Clauses. DOMA and CIANA are two obvious measures to consider under the proposed analysis, since each represents an actual congressional effort to alter otherwise existing state obligations under these clauses. Each measure can be challenged as bad policy. In addition, each may be found to violate the Fifth Amendment, even if each otherwise would fall within Congress' power over interstate relations. The question addressed here, however, is simply whether the acts indeed do fall within Congress' interstate relations authority. Examined under the proposed analysis, the answer is largely yes.

#### *A. DOMA and Congress' Power Under the Effects Clause*

Section 2 of DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>238</sup>

Section 2's purpose, evident from its terms, was to ensure that states would not be required to recognize same sex marriage by virtue of the Full Faith and Credit Clause. Under traditional choice of law principles, however, a state could refuse recognition to marriages performed elsewhere that violate its fundamental public policies. Accordingly, even absent DOMA, a state's refusal to recognize a same-sex marriage was unlikely to violate Article IV's full faith and credit demand, at least as applied to a same-sex marriage involving state residents.<sup>239</sup> But Section 2 does deviate from existing doctrine by authorizing states to refuse to recognize sister state judgments respecting a same-sex marriage, especially final money judgments.

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<sup>238</sup> 28 U.S.C. § 1738C.

<sup>239</sup> Kramer, *supra* note 10, at 1970–76; Linda Silberman, Same-Sex Marriage: Refining the Conflicts of Laws Analysis, 153 U. Pa. L. Rev. 2195, 1976 (2005). More complicated are instances when a state seeks to invoke the public policy exception to deny recognition where it has more minimal contacts with the couple involved, or where only particular incidents of marriage are at issue. See Silberman, *supra*, at 1974–75, 2108–12; Andrew Koppelman, Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges, 153 U. Pa. L. Rev. 2143, 2150, 2154–63 (2005) [hereinafter Koppelman, Interstate Recognition].

Ordinarily, the public policy exception is limited to sister state laws.<sup>240</sup> As the Court recently remarked, “the full faith and credit command is exacting with respect to a final judgment rendered by a court with full adjudicatory authority over the subject matter and persons governed by the judgment.”<sup>241</sup> Even if Section 2 does contract the requirements of full faith and credit, however, it would not for that reason be outside Congress’ powers under the approach outlined here.

The Court frequently identifies marriage and domestic relations as areas outside of federal commerce power control.<sup>242</sup> Whether nonetheless the commerce power could support some applications of DOMA’s Section 2 is a nice question but one unnecessary to address, because Congress has power to enact Section 2 under Article IV’s Effects Clause.<sup>243</sup> Although DOMA has a discriminatory aspect for Massachusetts alone, Section 2 on its face does not single out any particular state for disfavored treatment; its target is instead same-sex marriage.<sup>244</sup> And absent the unjustified assumption of all marriages as a constitutionally-mandated baseline, the category of all same-sex marriages appears sufficiently general for Effects Clause purposes.<sup>245</sup>

Plainly, DOMA reflects Congress’ substantive opposition to same-sex marriage. But that Congress is seeking to advance its own substantive agenda in an area traditionally reserved for the states does not render DOMA beyond its Effects Clause powers, provided that the Act can be seen as a reasonable effort to further the national interest in interstate harmony and union.<sup>246</sup> That Section 2 of DOMA meets this standard seems clear, given the extent of national debate and contention over same sex marriage and the fact that forty states recently have added statutory or

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<sup>240</sup> See *Baker v. General Motors*, 522 U.S. 222, 233–34 (1998); see also Cox, *supra* note 3, at 389–97 (discussing the DOMA’s application to judgments and conflict with existing law on recognition of judgments); Wardle, *supra* note 10, at 372–74, 380–86 (same). Wardle argues that DOMA only allows nonrecognition of a sister state judgment involving a same-sex marriage if the state has “a strong public policy against recognizing same-sex relationships. . . [and] some significant connecting interest in the matter of judgment enforcement that would implicate such policy.” Wardle *supra* note 10, at 390. These qualifications on DOMA’s application to judgments, however, are not evident on the statute’s face.

<sup>241</sup> *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003); see also Sterk, *supra* note 99, at 57–61, 77–96 (describing current doctrine on the full faith and credit due judgments).

<sup>242</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 615–16 (2000).

<sup>243</sup> Insofar as a same-sex marriage is invoked in connection with economic benefits, such as claims for health insurance, the Commerce Clause might well apply. Congress, however, identified the Effects Clause as the basis for enactment of DOMA’s Section 2. H.R. Rep. 664, 104th Cong., 2d Sess. at 24–26.

<sup>244</sup> Moreover, DOMA was enacted in 1996, prior to Massachusetts’ recognition of same-sex marriage and in response to the since-repealed protection of homosexuals’ right to marry under Hawaii’s Constitution.

<sup>245</sup> See *supra* notes 115–117 and accompanying text.

<sup>246</sup> See *supra* notes 92–94, 192–194 and accompanying text.

constitutional prohibitions against recognizing such marriages.<sup>247</sup> Whether or not state fears that they would be forced to recognize same-sex marriages absent DOMA were justified, these fears themselves could lead to interstate strife.<sup>248</sup>

DOMA's Section 2 thus represents a rational regulation of interstate relations that accords with the terms of the Effects Clause and principles of federalism. Under the approach advanced here, therefore, its constitutionality turns on the intersection of full faith and credit and the Fourteenth Amendment. The full faith and credit distinction between laws and judgments is mirrored in Fourteenth Amendment due process precedent. Under current full faith and credit doctrine, a forum state is required to apply another state's law only if it itself lacks sufficient contacts to legislate regarding the subject matter at issue. This is essentially the same standard that due process imposes, and the Court has made clear that the demands imposed by full faith and credit and due process on state choice of law rules are often equivalent.<sup>249</sup> The Fourteenth Amendment thus offers little impediment to DOMA's Section 2 as applied to choice of law, because it will be rare that a state cannot claim the minimal contacts demanded in regard to a case brought in its own courts.<sup>250</sup>

Applied to recognition of final judgments, however, the matter is different. Many judgments appear analogous to property, thereby receiving significant protection under Fourteenth Amendment due process: They grant a judicially-enforceable entitlement to benefits that, at least in the case of money damages, have an ascertainable monetary value and are not subject to discretionary termination.<sup>251</sup> Indeed, money judgments arguably qualify as property under the Takings Clause as well, given a government's limited ability to terminate or refuse to recognize a judgment, particularly one it has issued. Nor is it difficult to envision instances when an individual might sue to enforce a judgment that involves a same-sex marriage—for example, a judgment that an insurer is liable to cover the costs of medical procedures

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<sup>247</sup> See Koppelman, *Interstate Recognition*, *supra* note 239, at 2165 (Appendix A, listing state DOMAs).

<sup>248</sup> Implicit in this argument is the claim that Congress has power to determine whether states' opposition to enforcing laws and judgments relating to same-sex marriage is legitimate and that Congress can choose to make that determination on an across-the-board basis. See Raich, 125 S. Ct. at 2111-13 (upholding Congress' decision to include a narrower class of activities within a broader regulatory scheme as rational); *contra* Rosen, *DOMA*, *supra* note 3, at 977-84.

<sup>249</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-13 (1981). Although the Court phrases its requirement as being that a state "must have a significant contact or significant aggregation of contacts," *Allstate*, 449 U.S. at 312-13, the level of contacts deemed "significant" can be quite minimal.

<sup>250</sup> But see Cox, *supra* note 10, at 380-81 (noting some occasions where due process and full faith and credit requirements deviate, as when personal jurisdiction is based on temporary presence in the state and that presence is unrelated to the subject matter of the suit).

<sup>251</sup> See Thomas W. Merrill, *The Constitutional Face of Property*, 86 Va. L. Rev. 885, 960-67 (2000) (identifying these three features as core aspects of property for due process purposes); *Kirk v. Denver Publ. Co.*, 818 P.2d 262, 267 (Colo. 1991) (holding that a judgment for exemplary damages is a constitutionally-protected property interest). Judgments providing equitable relief raise more complicated issues, but some forms of injunctive or declaratory relief—those entitling the beneficiary to ongoing services or treatment with clear monetary value, for example—seem similarly akin to property.

under a health insurance policy covering spouses.<sup>252</sup> DOMA's Section 2 clearly allows states to refuse to recognize judgments of this sort, not simply in its retraction of full faith and credit for records and judicial proceedings, but further in stipulating that "[n]o state . . . shall be required to give effect to . . . a right or claim arising from [a same-sex] relationship."<sup>253</sup>

As a result, Section 2's application to judgments appears more problematic, although in the end even here the statute appears to fall within Congress' powers. Critically, DOMA was in place before any state recognized same-sex marriage, and thus before any judgments relating to same-sex marriages arose. That makes proving reliance on out-of-state recognition and enforcement difficult. Lack of such reliance, however, undermines the claim that a state's refusal to recognize and enforce such an out-of-state judgment constitutes a deprivation of property without due process or constitutes a taking for which compensation is due under the Fourteenth Amendment.<sup>254</sup> A takings claim would be difficult to assert in any event, unless the effect of DOMA's Section 2 was to make such judgments for all intents and purposes unenforceable,<sup>255</sup> but the continued availability of enforcement in the state of issuances makes that unlikely in most cases.

Of course, the fact that a same-sex marriage is involved may be an unconstitutional basis for denying a judgment's enforcement, because it constitutes invidious discrimination against homosexuals or violates the fundamental right to marry. Similar claims could be raised against DOMA as a whole. Thus, separate from whether it authorizes state violations of the Fourteenth Amendment, DOMA may be unconstitutional because it violates the due process and equal protection guarantees of the Fifth Amendment.<sup>256</sup> These issues bracketed, however, under the analysis proposed here DOMA's Section 2 appears to fall within Congress' powers.

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<sup>252</sup> See Wardle, *supra* note 10, at 378–80 (providing examples of possible judgments involving same-sex marriages).

<sup>253</sup> 28 U.S.C. § 1738C.

<sup>254</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that President did not effect a taking in nullifying petitioner's attachment against Iranian assets to enforce a judgment because the attachment was obtained clearly subject to the president's power of revocation and thus "petitioner did not acquire any sort of 'property' interest in its attachments of the sort that would support a constitutional claim for compensation."). A due process claim may perhaps remain in some instances, however, such as when the parties can demonstrate that they obtained a judgment initially with the expectation of purely domestic enforcement but circumstances changed. See Cox, *supra* note 3, at 397 (providing example of a lifelong Massachusetts same-sex couple who divorce and obtain a judgment dividing their financial assets, and then one former spouse moves out-of-state).

<sup>255</sup> See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326–27, 330–31, 342 (2002) (insisting that absent physical occupation or obliteration of all economically beneficial use, the appropriate analysis is to assess whether a taking has occurred by assessing the impact a regulation has on the property as a whole, not just that aspect directly affected).

<sup>256</sup> These issues go beyond the scope of this article. For arguments that DOMA is unconstitutional on these grounds, see, e.g., William N. Eskridge, Jr., *The Case for Same-Sex Marriage* (1996); Koppelman, *DOMA*, *supra* note 10, at 4–9, 25–32; see also *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that a right for same-sex couples to marry follows from the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

B. *CIANA and Congress' Power Over Article IV Privileges and Immunities.*

CIANA would enact substantial restrictions on a minor's access to out-of-state abortions. Section 2 of the act would make it a federal crime, and a basis for civil liability, to "knowingly transport[] a minor across a State line, with the intent that such minor obtain an abortion, and thereby in fact abridge[] the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the minor resides."<sup>257</sup> CIANA's Section 2 thus represents a congressional effort to authorize state regulation of activities undertaken by its residents outside its borders. What CIANA does not contain is also interesting. Specifically, CIANA does not include authorization for states to impose restrictions on abortion applicable only to out-of-state minors, such as a notification requirement only for such interstate abortions. Instead, in another section of the act, Congress itself prohibits physicians from performing abortions on minors from out-of-state without providing 24 hour constructive notice to one of the minor's parents. These notice and delay requirements apply regardless of whether the minor's home state, or the state where the abortion is performed, otherwise demand parental notification or impose a waiting period. The only way for a state to forestall application of these requirements is to enact a parental notification law that meets Congress' minimum standards.<sup>258</sup>

Like DOMA, CIANA falls within the scope of Congress' powers, unless it authorizes state violations of the Fourteenth Amendment or itself violates an independent constitutional prohibition. Although CIANA's Section 2 is facially focused on a state's relationship to its own residents, it is at its core an interstate relations measure; its underlying impetus is to protect states from having their regulatory schemes undermined by residents' ability to engage in interstate travel. Under the Commerce Clause, Congress has power to prohibit particular uses of the channels and instrumentalities of interstate commerce, and the purchase of abortion services—like many activities residents undertake in other states—come under the rubric of economic activity.<sup>259</sup> This is not to deny that, from a vertical federalism perspective, CIANA's imposition of mandatory federal notification and delay requirements on interstate abortions is extraordinary, particularly given that abortion regulation and familial relationships are areas traditionally left for state control. In addition, these federal requirements seem likely to prove quite burdensome and may

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<sup>257</sup> H.R. 758, 109th Cong., 1st Sess., §§2(a), 3(a). The Act exempts the minor herself and her parents from its scope of liability, but applies to other family members, as well as an adult with whom a minor may reside who is not legally recognized as a guardian or as standing *in loco parentis*. *Id.* §§ 2(b)(2), 3(c)(4).

<sup>258</sup> *Id.* §§ 2(b), 3(d).

<sup>259</sup> See *Gonzales v. Raich*, 125 S. Ct. 2195, 2205–09 (2005); Kreimer, *Law of Choice*, *supra* note 206, at 489.

independently violate the Fifth Amendment.<sup>260</sup> That possibility aside, the interstate commerce aspects of the activity regulated by CIANA would seem to put the measure squarely within Congress' commerce power.<sup>261</sup> Moreover, state regulation of residents' out-of-state activities also represents a choice of law issue—the question being which state's law should apply to govern residents' out-of-state activities, that of the residents' home state or that of the states where the activities occurred. Thus, Congress has power to enact Section 2 of CIANA under the Effects Clause as well.

Nor does the fact that Section 2 of CIANA authorizes extraterritorial state regulation suffice to put it outside congressional authority. As discussed above, to the extent the prohibition on state extraterritorial legislation rests on considerations of horizontal federalism and the needs of national union, it should be subject to congressional override. Indeed, it is by no means clear that all state efforts to regulate their residents' out-of-state activities are unconstitutional even absent congressional authorization. A state's ongoing relationship with its residents is in some contexts deemed sufficient to sustain its regulatory power over those residents wherever they are located; thus, for example, the law of the resident or domiciliary state is generally assumed to govern family law matters.<sup>262</sup> Perhaps most importantly, state regulation of residents' out-of-state activities does not technically fall within the scope of Article IV's Privileges and Immunities Clause, which the Court has held "has no application to a citizen of the State whose laws are complained of."<sup>263</sup>

That said, a state's regulation of its residents' extraterritorial activities is certainly a practical intrusion on their Article IV right to travel to other states and be treated the same as that states' residents. As Seth Kreimer has argued, "[a] system of personal law that empowered the home state to permit travel but to deny its object would undercut this liberty of movement just as surely as would a refusal on the part

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<sup>260</sup> For example, the Act contains no exception allowing physicians to perform abortions when necessary to preserve the health of the minor, which the Court recently reiterated is constitutionally mandated. Were aspects of CIANA found unconstitutional, however, they might well be deemed severable from Section 2. See *id.* § 4 (declaring provisions or applications of CIANA found unconstitutional to be severable); Ayotte, 126 S. Ct. at 967–69 (remanding for consideration of whether failure to include a health exception in a parental notification statute is severable).

<sup>261</sup> The extent to which the commerce power allows Congress to regulate aspects of abortion provision has arisen regarding the Freedom of Access to Clinic Entrances Act and the federal partial birth abortion ban. See, e.g., *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995); Allan Ides, *The Partial Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 Const. Comment. 44, 445–61 (2004). However, CIANA's facial limitation to abortions involving minors who have traveled interstate, and the impact travel has on state parental notification requirements, makes its commerce power basis much less open to question.

<sup>262</sup> Lea Brillmayer, *Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die*, 91 Mich. L. Rev. 873, 887 (1993).

<sup>263</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138 (1872); *Zobel v. Williams*, 457 U.S. 55, 59–60 n. 2 (1982); see also Mark Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 897–13 (2002). This result is not required by the Clause's text, however. See Seth Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. Pa. L. Rev. 973, 1003 (2002).

of the host state to allow newcomers to take advantage of local laws.”<sup>264</sup> Regulation of residents’ out-of-state activities is also in tension with aspects of the right to travel aside from the Article IV right to be a welcome visitor. Most significantly, while such regulation does not erect a physical barrier to residents’ ability to enter and leave the territory of their home states, it does prevent them from leaving their states viewed incorporeally as legal jurisdictions. Instead, residents must carry their states’ laws with them wherever they go.<sup>265</sup>

Of course, even if *CIANA* does implicate the right to travel, the question of Congress’ power remains. Framed in the terms of the approach advocated here, do all manifestations of the right to travel receive strong Fourteenth Amendment protection such as would preclude such congressional regulation? Certainly, some do, whether because they constitute part of the privileges and immunities of national citizenship or simply represent fundamental aspects of individual liberty.<sup>266</sup> According comprehensive Fourteenth Amendment protection to *all* exercises of the right to travel, however, would unduly limit Congress’ authority over interstate relations.<sup>267</sup>

To take an example: In *Supreme Court v. Piper* the Court held that state-imposed residency requirements for membership in a state bar violate Article IV’s Privileges and Immunities Clause.<sup>268</sup> Exercising the commerce power, however, Congress should be able to authorize states to impose such bar residency requirements. Although traditionally an area for state regulation and often involving intrastate conduct, lawyering is a form of economic activity that readily falls within the scope of the commerce power. In addition, the provision of legal services plainly has an impact on interstate commerce, as recent debates over product liability, medical malpractice, and securities fraud litigation demonstrate.<sup>269</sup> Of particular significance, while fundamental for Article IV purposes, the right to engage in

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<sup>264</sup> Seth Kreimer, “But Whoever Treasures Freedom. . .”: The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 920 (1993) [hereinafter Kreimer, “But Whoever”]; see also Gerald L. Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 U. Pa. L. Rev. 261, 323–24 (1987) (“Nonresidents who are known to carry their domicile’s law with them cannot participate as equals in the life of the state.”).

<sup>265</sup> See Kreimer, Law of Choice, *supra* note 206, at 504–08; Tribe, *Saenz*, *supra* note 221, at 152.

<sup>266</sup> See *Saenz v. Roe*, 526 U.S. 489, 500–04 (1999) (rooting aspects of the right to travel in Fourteenth Amendment privileges and immunities); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (identifying the right to travel as part of liberty protected by due process).

<sup>267</sup> Precedent is another obstacle. See *Saenz*, 526 U.S. at 500–04 (expressly rooting the right to be a welcome visitor in Article IV rather than the Fourteenth Amendment); *The Slaughterhouse Cases*, 83 U.S. 36, 74–79 (1872) (distinguishing between privileges and immunities protected under Article IV and the Fourteenth Amendment).

<sup>268</sup> 470 U.S. 274, 288 (1985).

<sup>269</sup> See, e.g., Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. § 102 (finding product liability system burdens interstate commerce); Medical Malpractice Reform Act of 2006, H.R. 4838, 109th Cong., 2d Sess., § 2 (finding that health care liability litigations restricts health care access and burdens interstate commerce).

economic activity has far more limited status outside of the interstate context. Instead, under the Fourteenth Amendment, economic regulations trigger the mildest forms of rationality review.<sup>270</sup> Nor does a residency requirement for employment have any effect on the right to travel separate from its impact on an individual's ability to engage in economic activity.

The point thus has general application: Congress should have broad power to narrow or enlarge application of privileges and immunities protections against state regulation of economic activity by nonresident individuals. This is an area where congressional and not judicial determinations should hold sway. Of course, some limits exist. Congressional authorization of a wholesale and permanent ban on nonresidents working in a state may, *inter alia*, come too close to dismantling the nation, given the strong historical and practical connections between economic and political union.<sup>271</sup>

In addition, Congress may lack power to authorize state discrimination when the economic activity at issue implicates fundamental rights that receive independent Fourteenth Amendment protection. An example here concerns state bans on nonresident women obtaining abortions within its borders, held unconstitutional in *Doe v. Bolton*. While Congress should be able to authorize state violations of residency requirements of the *Piper* variety, affecting only ordinary economic activity, its ability to authorize violations of *Doe*'s ban on residency requirements for abortion is far more dubious.<sup>272</sup> This is in part because the state discrimination at issue may itself violate the Fourteenth Amendment.<sup>273</sup> But it is also because the ability to enjoy constitutionally protected freedoms without formal limitation based on state of residence is arguably one of the privileges of national citizenship that Congress cannot authorize states to abridge. To be sure, that a right is constitutionally protected does not mean it is necessarily free from state-imposed burdens or restrictions. And in some circumstances, residency restrictions on access to fundamental rights are legitimate; states can, for instance, refuse to grant the right to vote to nonresidents.<sup>274</sup> Thus, perhaps a state could legitimately prohibit nonresidents from obtaining abortions at state facilities, in order to ensure such facilities were available to resident women.<sup>275</sup> As a general matter, however, restrictions on fundamental constitutional rights based on state of residency seem

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<sup>270</sup> See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955); Laycock, *supra* note 12, at 265.

<sup>271</sup> Cf. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523–24 (1935)

<sup>272</sup> See 410 U.S. 179, 200 (1973).

<sup>273</sup> Such bans on nonresident abortions seem likely to create a substantial obstacle on abortion access for a large fraction of the women for whom they are relevant—*i.e.*, women seeking out-of-state abortions—and thus would violate Fourteenth Amendment due process. See *Planned Parenthood v. Casey*, 505 U.S. 833, 874–79 (1992).

<sup>274</sup> See *supra* note 177 and accompanying text.

<sup>275</sup> See 410 U.S. at 200 (leaving this possibility open); see also *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263–68 (1975) (invalidating a durational residency requirement for accessing free medical services but suggesting a simple residency requirement would be constitutional).

incompatible with the character of such rights as guaranteed by the national charter to all.

As a result, assessing the constitutionality of congressional authorization of state residency restrictions requires determining whether the specific aspect of the right to travel at issue receives strong Fourteenth Amendment protection. In the case of CIANA's Section 2, that aspect is the right to travel and escape one's home state's jurisdiction, at least to the extent of undertaking activities that are lawful in the state where performed. Intuitively, freedom to travel to other states and take advantage of their legal regimes is part of individual liberty and national citizenship in a federated nation.<sup>276</sup> The Court has signaled a similar view when it has condemned, on due process grounds, legislation that seeks to penalize activities lawful in the states where committed.<sup>277</sup> True, individuals are free to leave a state and establish residency in states with more conducive laws, but that does not mean states have the ability to put their residents to such a choice. Moreover, denying individuals any protection short of relocating to another state seems insufficiently responsive to legitimate due process concerns raised by some forms of extraterritorial regulation. Nor does a robust account of what it means to be a state resident fit well with the Fourteenth Amendment's Citizenship Clause, which makes state citizenship automatic and preempts the states' power to choose their citizens. It seems somewhat incongruous to hold that a state has power to force its residents to carry its laws with them wherever they go, when it lacks power to prevent its residents from moving from state to state as they please.<sup>278</sup>

A key feature of CIANA's Section 2, however, is that it is limited to state regulation of minors, for whom the state in general bears special responsibilities. Further, at stake is minors' access to abortion, an area where the Court has particularly emphasized that states have "strong and legitimate interest in the welfare of [their] young citizens."<sup>279</sup> Even rights enjoying the greatest degree of constitutional protection ordinarily are not violated by measures that are closely

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<sup>276</sup> See Kreimer, *Law of Choice*, supra note 47, at 462, 479 (describing the right to travel and "take advantage of the legal entitlements of neighboring jurisdictions" as part of national citizenship); see also Tribe, *Saenz*, supra note 221, at 151–53 (characterizing the principle that "[n]o state may enclose its citizens in a legal cage" as a core structural precept of constitutional federalism).

<sup>277</sup> See, e.g., *BMW v. Gore*, 517 U.S. 559, 572–73 (1996); see also *Bigelow v. Virginia*, 421 U.S. 809, 822–25 (1975) ("A state does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State" and it "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State").

<sup>278</sup> See Kreimer, "But Whoever," supra note 264, at 936; see also Hills, supra note 47, at 310–16, 322–26 (arguing that Fourteenth Amendment's ascendancy of national citizenship precludes robust accounts of state citizenship in affective community terms).

<sup>279</sup> *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 966 (2006) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990)).

tailored to serve compelling government interests.<sup>280</sup> Hence, even if Congress' ability to sanction state regulation of residents' out-of-state activities is often constrained by the Fourteenth Amendment, CIANA's particular extraterritorial authorization may well fall within congressional power.<sup>281</sup>

## CONCLUSION

Federalism jurisprudence and scholarship focuses at great length on the scope of congressional powers. But the question addressed is overwhelmingly Congress' power over federal-state relations, whether in the form of direct imposition of duties on the states or regulation of private conduct that narrows the areas left for state control. Far less attention has been paid to congressional authority over interstate relations, the horizontal dimension of federalism. This article has attempted to remedy that gap, taking as its focus Congress' powers under Article IV, the constitutional article most devoted to interstate relations and horizontal federalism. Limning the contours of congressional authority in this context requires a structural analysis that focuses on the principles lying immanent in our federalist system. The conclusion that follows from such an analysis is that Congress enjoys broad power over interstate relations, including power to contract or expand the requirements of Article IV. The one limitation, that Congress lacks power to authorize states to violate the Fourteenth Amendment, on investigation seems not as substantial a constraint as might initially appear; few of the congressional measures considered here fall outside of Congress' powers on this ground.

That Congress has broad power to authorize interstate discrimination does not mean, of course, that Congress should exercise that power. Indeed, the relative infrequency with which Congress has expressly authorized state discrimination is instructive. Perhaps Congress has simply not awakened to the scope of its powers in this area. Alternatively, perhaps Congress takes seriously—whether due to political pressure or normative and policy commitments—the constitutional prohibitions on interstate discrimination, and requires convincing before it will legislate against them. While recent evidence suggests that such congressional opposition to interstate discrimination can dissipate in the heat of disputes over social values, that is not a reason for denying Congress its constitutional powers. It is, instead, a reason to insist that Congress use them wisely and fairly, and to condemn congressional efforts to sacrifice national union and federalism principles for political gain.

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<sup>280</sup> But see *Saenz v. Roe*, 526 U.S. 489, 504 (1999) (stating that the level of scrutiny appropriate for violations of one form of the right to travel, the right to move to another state and be treated like other citizens there, may be more “categorical” than strict scrutiny).

<sup>281</sup> Tribe, *Saenz*, supra note 221, at 151–52 & nn. 199–200.

