

2006

# Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires

Mark D. Rosen

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## Recommended Citation

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## Article

# Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: *Lawrence*, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires

Mark D. Rosen<sup>†</sup>

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When Hawaii seemed poised to be the first state of the Union to permit same-sex marriage in the 1990s, Congress passed the so-called Defense of Marriage Act (DOMA).<sup>1</sup> The Act had

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1. The Hawaii Supreme Court ruled in 1993 that denying marriage licenses to gays violated the Hawaii Constitution. *See Baehr v. Lewin*, 852 P.2d 44, 59–67 (Haw. 1993). Congress enacted the Defense of Marriage Act in 1996, but in 1998, voters in Hawaii adopted a constitutional amendment that effec-

two parts. One provided a definition of marriage for purposes of federal law that excluded same-sex unions.<sup>2</sup> The second part was a choice-of-law provision that provided that states were not required to recognize same-sex marriages performed in sister states or judgments in connection with such marriages.<sup>3</sup> Though many scholars have argued that DOMA exceeded Congress's powers,<sup>4</sup> controversies concerning DOMA's provisions have not yet appeared in the courts because Hawaii did not ultimately legalize same-sex marriage.

Claims of DOMA's unconstitutionality recently have intensified following the Supreme Court's opinion in *Lawrence v. Texas*, which struck down as unconstitutional state laws that criminalized sodomy.<sup>5</sup> Moreover, now that Massachusetts has become the first jurisdiction within the United States to solemnize same-sex marriages,<sup>6</sup> the scenarios DOMA sought to address certainly will arise. Accordingly, this is an opportune time to revisit the question of DOMA's constitutionality.

This Article's thesis is that DOMA is not unconstitutional—at least not yet. There are two components to the analysis. The first is a demonstration that *Lawrence* has not invalidated DOMA. The second component is an explanation as to why DOMA was not otherwise beyond Congress's powers even before *Lawrence*.

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tively overturned the Hawaii Supreme Court's opinion. See Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2684–85 (2004).

2. See Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (2000)).

3. See *id.* § 2(a) (codified as amended at 28 U.S.C. § 1738C (2000)).

4. See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 14 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2000–07 (1997).

5. 539 U.S. 558, 578–79 (2003).

6. Gay marriage became legal in Massachusetts on May 17, 2004, in response to the decision by Massachusetts's highest court that the Massachusetts Constitution demanded that marriage be available to gays. See Opinions of the Justices to the Senate, 809 N.E.2d 565, 572 (Mass. 2004) (concluding that the state constitution requires that gays be permitted to marry, not simply have access to civil unions); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003). See generally Associated Press, *Gay Couples Exchange Vows in Massachusetts*, MSNBC NEWS, May 18, 2004, <http://www.msnbc.msn.com/id/4991967> (summarizing the events surrounding and reaction to the Massachusetts Supreme Judicial Court's decision to let same-sex couples marry).

Part I of the Article argues that *Lawrence* has not invalidated DOMA. Though Justice Scalia in dissent argued that *Lawrence's* logic invariably leads to the conclusion that the Constitution prohibits government from treating gay marriage differently from heterosexual marriage—a proposition that, if true, would render DOMA unconstitutional—the *Lawrence* opinion expressly reserved the question of what the Constitution has to say about same-sex marriage. The *Lawrence* opinion certainly contains analysis that advocates of same-sex marriage can muster on their behalf, but other aspects of the opinion offer grounding for those who take the opposite view.<sup>7</sup> Part I then explains the benefits of allowing a society-wide debate to continue on issues of gay rights and considers the dangers were the Court to prematurely offer a definitive constitutional ruling on an issue about which citizens are deeply divided and with respect to which societal norms are rapidly changing.

That *Lawrence* has not decided the constitutionality of same-sex marriage does not mean that DOMA necessarily is constitutional. Years before *Lawrence* was decided, many of our country's finest public law scholars argued that DOMA lies beyond Congress's powers. Parts II, III, and IV of the Article critically engage these arguments from Dean Larry Kramer, Professors Laurence Tribe, Joseph Singer, Andrew Koppelman, and others. Of the many critiques the Article dissects, four arguments recur. First, several scholars have proffered Tenth Amendment-type claims that DOMA violates state sovereignty by interfering with a family law subject that appropriately falls to the states. Part II shows that such arguments mischaracterize DOMA: the statute does not regulate family law as such, but serves the quintessentially federal function of determining the extraterritorial effect of state law.

Second, many DOMA critics aver that the statute undermines the Full Faith and Credit Clause's fundamental principle of unifying the country. Part II of the Article shows that such

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7. Several other noted commentators have come to similar conclusions as a matter of positive law. See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1186 (2004); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 30–31, 36 (2003). For a contrary view, see Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 8–9 (2005).

arguments rest on a problematic oversimplification of full faith and credit—the provision aims not only to unify but to preserve meaningfully empowered states. Because DOMA is fully consistent with at least one of the principles of full faith and credit, sweeping arguments that DOMA violates fundamental principles fail.

Third, virtually all scholarly critiques of DOMA have assumed that the statute purports to authorize states to deviate from Supreme Court precedent regarding the enforcement of judgments. This has been a predicate to their conclusion that Congress overstepped its authority in enacting DOMA. Part II shows, however, that DOMA's rules actually fill a gap in the Court's jurisprudence in a manner fully consistent with precedent.

Fourth, the Article shows that several apparently disparate arguments leveled against DOMA turn out to be unargued assertions that the Supreme Court has the final say in determining the scope of the Full Faith and Credit Clause. To be sure, this entire line of argumentation is irrelevant if, as I contend, DOMA fills a gap rather than alters the Supreme Court's baseline rules. But because the view that DOMA alters Supreme Court doctrine is so widespread, Part III forthrightly analyzes the nature of Congress's power under the so-called "Effects Clause" to determine what full faith and credit requires.<sup>8</sup>

Part IV defends DOMA against a novel argument that Professor Joseph Singer of Harvard Law School recently advanced.<sup>9</sup> Singer has argued that full faith and credit demands that all states recognize a marriage that any sister state sanctions. Part IV shows that Singer's position is contrary to more than two centuries of jurisprudence and calls for the extension of a single case that has proven to be deeply problematic. Further, the policy concerns that animate Singer's proposal can be addressed by means that do not interfere with state sovereignty in the drastic way Singer proposes. Unless and until the Court decides (probably and properly under *Lawrence*-type due

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8. The first sentence of the Full Faith and Credit Clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. The second sentence provides that "the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

9. See Singer, *supra* note 7, at 31–46.

process considerations) that states may not refuse to allow same-sex couples to marry, the Full Faith and Credit Clause should not prevent states from differing on matters about which there is no constitutionally required national standard.

In the end, the Article concludes that DOMA is best understood as an instance of congressional participation in the process of defining our country's constitutional culture. The Court has not yet decided the constitutionality of same-sex marriage, and DOMA reflects the political branches' contribution—by means of the institutional tools at their disposal—to the process of deciding how American constitutional culture should deal with the incidents of gay life.

### I. WHY *LAWRENCE* HAS NOT RENDERED DOMA UNCONSTITUTIONAL

The *Lawrence* opinion expressly stated that it was not deciding the constitutional status of same-sex marriage.<sup>10</sup> Justice Scalia disagreed, arguing in dissent that the logic of the majority's analysis invariably leads to the conclusion that the Constitution requires that marriage be available to gays if it is available to heterosexuals. The majority opinion, said Justice Scalia,

dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” . . . what justification could there possibly be for denying the benefits of marriage to [gays]? . . . This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.<sup>11</sup>

If Justice Scalia is correct, it would follow that DOMA—a statute providing a federal definition for marriage that excludes same-sex unions and that purports to authorize states not to recognize same-sex marriages from jurisdictions that accept such marriages—is unconstitutional.

Is Justice Scalia correct? Has the constitutionality of same-sex marriage already been decided by the Court? I think not, for three principle reasons.

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10. See *Lawrence*, 539 U.S. at 578 (“The present case does not . . . involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

11. *Id.* at 604–05 (Scalia, J., dissenting).

## A. REASONS INTERNAL TO THE OPINION ITSELF

The first reason involves considerations wholly internal to the opinion itself. In addition to explicitly saying that it did not decide the question of same-sex marriage, the majority opinion contains principles in tension with one another that would yield divergent same-sex marriage outcomes. As Professor Robert Post has shown, in declaring Texas's law unconstitutional, the Court reconfigured due process and equal protection concerns into constitutional principles of respect, dignity, and antistigma.<sup>12</sup> At the same time, however, the *Lawrence* Court preserved the public/private distinction,<sup>13</sup> under which regulations targeting private conduct are deemed more intrusive and hence more difficult to sustain, as it condemned Texas's ban on sodomy for penalizing sexual relations that occur in private.<sup>14</sup>

Although the principles of stigma, respect, and dignity certainly provide powerful arguments to those who wish to advocate that the Constitution forbids the denial of same-sex marriage,<sup>15</sup> marriage is readily characterized as a "public" act and accordingly could be argued to lie outside *Lawrence's* holding. Indeed, the *Lawrence* Court appears to expressly say as much when formulating its "general rule" that government should not "define the meaning of the relationship or . . . set its boundaries absent . . . *abuse of an institution the law protects*."<sup>16</sup> Insofar as the prohibition of same-sex marriage typi-

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12. See Post, *supra* note 7, at 97–101.

13. Although the public/private distinction has been subject to searing critiques over the years for being incoherent, see Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 199–201 (2004) (surveying such critiques), the Court has given no indication that it is ready to abandon it. The analysis above in text accordingly accepts the distinction's continuing validity on positive grounds. Elsewhere I have defended the public/private distinction on normative grounds. See *id.* at 201–06.

14. See, e.g., *Lawrence*, 539 U.S. at 578 ("The present case . . . does not involve public conduct . . . . The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."); *id.* at 567 ("[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives . . . ."); *id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). For other academic commentary that notes the Court's retention of the private/public distinction in the *Lawrence* opinion, see Franke, *supra* note 7, at 1401–04; and Post, *supra* note 7, at 101–03.

15. For some excellent examples, see Ball, *supra* note 7, at 1207–31; and Note, *supra* note 1, at 2688–2707.

16. *Lawrence*, 539 U.S. at 567 (emphasis added); see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v.*



cally is justified on the ground that doing so protects the institution of marriage,<sup>17</sup> this language of the *Lawrence* opinion invites claims that allowing same-sex marriage would destabilize the “institution” of marriage.<sup>18</sup> For this reason, *pace* Justice Scalia, the “logic” of the *Lawrence* opinion is not so unidirectional as to inexorably lead to any single result vis-à-vis same-sex marriage.

#### B. THE UNCERTAIN FUTURE OF *LAWRENCE*'S NOVEL PRINCIPLES

A second reason that *Lawrence* is best understood as not deciding the constitutionality of same-sex marriage is that the status of several of the opinion's animating principles is uncertain. This uncertainty arises because several of *Lawrence*'s core constitutional principles are novel, and many novel constitutional principles do not survive.

Much is new in *Lawrence*. Professor Post has shown that the “[t]hemes of respect and stigma [that] are at the moral center of the *Lawrence* opinion . . . are entirely new to substantive due process doctrine.”<sup>19</sup> Similarly novel is the doubt *Lawrence* casts on whether the majority's moral opprobrium is a constitutional basis for criminalizing an activity.<sup>20</sup>

The durability of these aspects of *Lawrence* is uncertain simply by virtue of their novelty. Though the Court sometimes overturns well-entrenched constitutional principles,<sup>21</sup> newly

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Texas, 88 MINN. L. REV. 1233 (2004).

17. This justification seems particularly unconvincing to me. For an interesting analysis of this claim that largely tracks my own, see Sam Fleischacker, *Civil Unions for Everyone*, S.F. CHRON., Feb. 18, 2004, at A17.

18. McGinnis and Lund suggest a similar interpretation of this line of the opinion. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1584 & n.102 (2004).

19. Post, *supra* note 7, at 97.

20. See *Lawrence*, 539 U.S. at 571. The Court stated:

[T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

*Id.* (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 850 (1992)); see also Ball, *supra* note 7, at 1221–22; Goldberg, *supra* note 16.

21. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (de-

minted constitutional principles are more vulnerable because the Court can narrow or ignore them without disturbing reams of precedent. There are many examples of newly born constitutional principles of apparently broad scope whose development has been dramatically limited by subsequent case law. For example, although several opinions in the 1960s and 1970s suggested that wealth was a suspect classification triggering strict scrutiny under equal protection and due process doctrines,<sup>22</sup> the Court decisively aborted this doctrinal revolution in *San Antonio Independent School District v. Rodriguez*.<sup>23</sup> The Court quashed this constitutional revolution not because it lacked “logic,”<sup>24</sup> but more likely because it would have radically reworked society,<sup>25</sup> potentially reshaping our polity into a near-socialist system; indeed, the *Rodriguez* Court seemed to say as much.<sup>26</sup>

Consider as well what has become of the state action principle the Court famously announced in *Shelley v. Kraemer*.<sup>27</sup>

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finitively rejecting *Lochner v. New York*, 198 U.S. 45 (1905)).

22. See, e.g., *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (“Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine.”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (“Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored.” (internal citation omitted)); *Griffin v. Illinois*, 351 U.S. 12, 16–17 (1956) (“Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. . . . [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.”).

23. 411 U.S. 1, 20 (1973) (holding that legislative classifications having a disparate impact on rich and poor trigger heightened scrutiny only where “because of their impecuniness [the poor were] completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit”).

24. The argument that disparities in monies spent on public education interfere with the “effective exercise of First Amendment freedoms and [the] intelligent utilization of the right to vote,” *id.* at 35, seems far from illogical.

25. Cf. Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 689 (2004) (“A court . . . cannot get too far ahead of public opinion.”).

26. See *Rodriguez*, 411 U.S. at 37. The Court noted:

The logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.

*Id.*

27. 334 U.S. 1 (1948).

The *Shelley* Court attributed the substantive provisions of a private contract to the state when the court was asked to enforce a racially restrictive covenant. *Shelley's* approach, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement."<sup>28</sup> Although *Shelley's* is not an illogical conception of state action,<sup>29</sup> *Shelley's* principle, virtually everyone believes, has been limited to the context of race.<sup>30</sup> I have suggested elsewhere that this limitation likely occurred because so broadly extending constitutional limitations to private action would have reworked our society in ways inconsistent with American cultural sensibilities.<sup>31</sup>

In short, wealth classifications and *Shelley's* state action doctrine are examples of (then) novel constitutional principles that became aborted constitutional revolutions. Similarly, today we cannot be certain what will become of the concepts of respect and stigma, nor of the limits that *Lawrence* purports to place on the role of moral considerations in criminal law. Each of these novel constitutional principles has the potential of significantly reworking our society.<sup>32</sup> Indeed, it is the recognition that *Lawrence's* principles could have profound implications on American society that has led Professor Post to begin the process of locating limitations for the Court's principle of respect.<sup>33</sup>

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28. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1697 (2d ed. 1988).

29. See Rosen, *supra* note 13, at 200–03.

30. See *id.* at 190–99. In fact, the Supreme Court even has been reluctant to apply *Shelley* in other cases of racial discrimination, but instead has nearly confined *Shelley* to its facts. See Mark D. Rosen, Was *Shelley v. Kraemer* Incorrectly Decided? Some New Answers 7–10 (Jan. 16, 2006) (unpublished manuscript, on file with author).

31. See Rosen, *supra* note 13, at 201–06.

32. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("The law, it is said, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." (internal quotation omitted)).

33. See Post, *supra* note 7, at 98. Post finds it

unlikely that *Lawrence* intends to authorize persons to demand from the state affirmative indicia of respect, both because this would impose an unusual positive obligation on the state, and because it is entirely unclear what such indicia might be. It is therefore more plausible to interpret *Lawrence* as prohibiting the state from stigmatizing or demeaning the private lives of persons.

*Id.*

Perhaps courts will take up Post's suggested limitations. Perhaps others will be created. Or perhaps the principles themselves will be left undeveloped.

To conclude, the uncertain future of the many new constitutional principles identified in *Lawrence*—an uncertainty generated by their very novelty—constitutes a second reason why the opinion should not be viewed as having answered the constitutionality of same-sex marriage.

### C. THE BENEFITS OF MULTILATERAL PARTICIPATION

The third reason for not prematurely construing *Lawrence* as having answered the constitutionality of same-sex marriage is that doing so eliminates the benefits of multiple actors in society offering their views of what the Constitution requires. I cannot hope in this Article to demonstrate definitively these advantages. But I can suggest that those who agree with the many academics from across the political spectrum who advocate that societal institutions apart from the Court play an important role in shaping constitutional meaning<sup>34</sup> should be in-

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34. A broad array of scholars from across the political spectrum have championed the role of actors apart from the Supreme Court in interpreting the Constitution, including John Harrison, Michael Stokes Paulsen, Thomas Merrill, Neal Devins, Louis Fisher, Robert Post, Jeremy Waldron, Keith Whittington, Cass Sunstein, Sanford Levinson, and Mark Tushnet. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 24–45 (1999) (recognizing that elected government and citizens properly play a role in constitutional interpretation); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181–82 (1999) (advancing the theory that the people are proper constitutional interpreters); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 98–104 (1998) (advocating that neither of the other branches of the federal government nor the people should “subjugate their constitutional judgments to those of the Supreme Court” (quoting Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1382 (1997))); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372–73 (1988) (arguing that the legislative and executive branches have the power to offer independent interpretations); Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1188–1201 (1998) (discussing state courts as constitutional interpreters); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987) (discussing the legislative and executive branches' roles in interpreting the Constitution); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 76, 79 (1993) (suggesting that judicial opinions are merely “explanations for judgments” and accordingly “lack the power to bind the other branches”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing that the executive branch has the power to offer its own independent interpretation of the

clined to take seriously the Court's statement in *Lawrence* that the decision did not resolve the question of same-sex marriage. This is because, as a purely descriptive matter, actors in society apart from the Supreme Court are more apt to develop and advance their own views of what the Constitution requires if the Court has not already definitively offered its constitutional ruling on the question.<sup>35</sup>

Two benefits of multilateral participation in constitutional decision making that commentators have identified are particularly applicable to the context of same-sex marriage.<sup>36</sup>

### 1. Varying Institutional Competencies

First, courts, like all societal institutions, have their particular institutional strengths and weaknesses,<sup>37</sup> and resolving the constitutional dimensions of same-sex marriage may call on information that courts are not particularly well suited to gathering and assessing. One of the principal arguments against same-sex marriage is the claim that it will endanger the institution of heterosexual marriage. It is plausible that the answer to this question is constitutionally relevant; *Lawrence* seems to say this very thing.<sup>38</sup> Yet courts are not institutionally suited to

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Constitution); Jeremy Waldron, *Judicial Power and Popular Sovereignty*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 181 (Mark A. Graber & Michael Perhac eds., 2002); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002); see also LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 233–48 (2004) (critiquing “judicial supremacy” and advocating a return to a form of “popular constitutionalism,” under which the Court’s understanding of the Constitution does not necessarily trump society’s constitutional understandings).

35. There is evidence that many nonjudicial societal actors by and large have accepted the regime of judicial hegemony described in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.”). See Devins & Fisher, *supra* note 34, at 83–84.

36. I believe that deeper considerations regarding the nature of constitutional doctrine provide yet additional reasons to favor multilateral participation in constitutional decision making. A work-in-progress of mine examines these, but space limitations preclude my discussing them here.

37. See, e.g., NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 35–52 (2001) (discussing the strengths and limitations of the adjudicative process); Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1978–84, 1990 (1999) (reviewing SUNSTEIN, *supra* note 34).

38. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (stating that government should not “define the meaning of the relationship or . . . set its boundaries absent . . . abuse of an institution the law protects”).

fact gathering of this sort.<sup>39</sup> The empirical information simply might not be available at the time of litigation. This would seem to be the case with the effects of same-sex marriage on heterosexual marriage, as gay marriage has been legal in the United States for only a short period of time. Moreover, even where information is available, courts are not well suited to conducting social science research. For instance, the information they receive is filtered by the litigants, and the rules of discovery and evidence (including the burdens of proof that each party carries) may not be appropriate to the conduct of valid social scientific inquiry.

Finally, the advance of scientific and social scientific knowledge virtually always involves the correction of initial hypotheses, and there are problematic institutional costs to correcting social scientific errors in Supreme Court opinions. The Court's determinations have precedential value and are protected by the principle of *stare decisis*. Legislative determinations (and, all the more so, administrative guidelines) enjoy no such institutional conservatism. Accordingly, they may be easier to undo if contrary information later emerges throwing into question the facts on which a legislative determination was premised.

## 2. Democratic Legitimacy

A second advantage of multilateral participation in constitutional decision making some commentators identify is that it can enhance democratic legitimacy.<sup>40</sup> To be sure, the relationship between constitutionalism and democratic legitimacy derives from one's conception of constitutional law and for that reason is hotly contested. Those who conceptualize the Constitution as a historical record of the commitments our political community has made and who understand constitutional interpretation as the elaboration of those historical commitments<sup>41</sup> may not view multilateral participation as enhancing constitutional legitimacy. Rather, fidelity to past commitments may be

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39. See Devins, *supra* note 37, at 1978–79.

40. See, e.g., SUNSTEIN, *supra* note 34; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1, 19–20 (2003).

41. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–117 (2004).

both necessary and sufficient to secure democratic legitimacy for those of this view.

For theorists who understand constitutional law in more evolutionary terms, however, multilateral participation can play a crucial role vis-à-vis democratic legitimacy. If constitutional law is the domain where society's most fundamental commitments are progressively elaborated, then it is not clear why courts should be the only participants in this process.<sup>42</sup> The Court's practice of engaging in proactive constitutional hermeneutics reflecting values removed from the contemporary societal consensus and not readily located in constitutional text or in history threatens democratic legitimacy. Moreover, when the Court seeks to situate itself at the vanguard of cultural change, it can interrupt the process by which society arrives at a consensus on its own: ordinary democratic politics and the cultural redefinition that invariably occurs over time. Constitutionalizing a matter, and thereby removing it from democratic politics, also can serve to radicalize opponents.

Drawing on these considerations, several noted scholars have questioned the extent to which *Brown v. Board of Education*,<sup>43</sup> long conceptualized as the paragon of appropriate judicial proactiveness, is properly credited with advancing the cause of racial desegregation.<sup>44</sup> All support the cause of desegregation and racial equality, but these scholars' works cast doubt on the propriety and efficacy of the Supreme Court's assumption of a position at the vanguard of cultural change as they highlight the important roles that other societal institutions play in refiguring constitutional culture.

This sort of conceptual schema relating to democratic legitimacy led Professor Post to explain *Lawrence's* aforemen-

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42. See, e.g., SUNSTEIN, *supra* note 34, at xiv (promoting the position that broad-based deliberation about constitutional ideals is among "a democratic nation's highest aspirations").

43. 347 U.S. 483 (1954).

44. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* *passim* (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39-169 (1991). For an excellent review of these and other recent works that critically analyze the legacy of *Brown*, see Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER, May 3, 2004, at 102. For a sharp critique of Professor Klarman's book, see Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973 (2005) (book review).

tioned open-endedness, ambiguities, and internal contradictions as making the opinion “an opening bid in a conversation between the Court and the American public”<sup>45</sup> on the constitutional status of the incidents of gay life. As a matter of positive law, I agree with Post’s observation,<sup>46</sup> with the caveat that *Lawrence* is not the *opening* bid—other societal actors, such as Congress in DOMA, already had registered their views on this question. The recognition that *Lawrence* has not decided all issues on gay rights allows other societal actors to add their voices in the ongoing process of elaborating our constitutional culture.

The analysis up to this point has been positive rather than normative. Before closing, a few words should be said about the normative question of whether it is good that the Court has left undecided many constitutional questions relating to gay life; after all, the mere fact that multilateral participation can be beneficial does not mean that the Court should never take a lead role in seeking to resolve a controversial issue.<sup>47</sup> Unfortunately, there is no widely agreed upon, adequately theorized account as to when the Court appropriately takes up the vanguard or the rear guard on issues of cultural change. Although I do not purport to develop a fully elaborated framework here, relevant considerations likely include the following: (1) whether the constitutional judgment rests on empirical facts about which there does not exist sufficient consensus among experts, (2) the extent to which the issue is hotly contested in general culture, (3) the risks the Court’s imposing a single constitu-

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45. Post, *supra* note 7, at 11.

46. Professors Lund and McGinnis argue that “[t]his conversation is a fiction” because the people of the states cannot communicate disagreement with the Court by “reenacting their statutes.” Because “[t]his is a ‘conversation’ in which the Court issues commands, and those who disagree must obey, . . . the dialogue between the Court and the public [is] a pretty one sided conversation.” Lund & McGinnis, *supra* note 18, at 1587–88. Lund and McGinnis’s point is well taken with regard to statutes criminalizing sodomy (at least under conventional theories of judicial review), but Post makes the different point that the potential of meaningful exchange between nonjudicial society members and the Supreme Court still exists vis-à-vis the entire spectrum of issues concerning gays (such as gay marriage) that have not been decided by the opinion. Moreover, the possibility of meaningful conversation remains even with respect to issues (such as statutes that criminalize sodomy) that have been decided by the Court insofar as the Court from time to time over-  
turns earlier decided cases.

47. For an insightful elaboration of this point, see Devins, *supra* note 37, at 1973.



tional rule pose to societal stability,<sup>48</sup> and (4) the risks vis-à-vis our constitutional culture of the Court's *not* intervening.

Taking account of these considerations, there may be good reasons to applaud *Lawrence's* explicit decision to leave many things undecided. To begin, the first three factors enumerated above suggest that the Court should not take the lead on gay rights more than it already has. The fourth factor is less clear. Does the Court's willingness to tolerate a constitutional culture in which heterosexuals are permitted to marry but gays may not mean accepting a circumstance so at odds with constitutional principles that it risks undermining the legitimacy of the Constitution itself in the eyes of its citizenry? The fact that American constitutional culture for so long has tolerated far worse (the criminalizing of homosexual sex, for example) suggests not. Conversely, judicial activism with regard to hotly contested social issues risks undermining judicial authority and constitutional culture.<sup>49</sup>

Another relevant consideration is whether the Court's inaction is likely to stymie the process of cultural change. Where majorities have a stranglehold on the airways of cultural and political change, there would appear to be a particularly strong reason for a nonmajoritarian institution like the Court to play an active role.<sup>50</sup> Even without court intervention, however, there have been significant changes in societal attitudes towards gays over the last decade. In an environment of (relatively) rapidly changing social norms, there may be less need for the Court to intervene definitively at an early time and take a constitutional position on matters still deeply controversial.

Judicial imposition of gay marriage on an unwilling citizenry (polls show that strong majorities of Americans today oppose gay marriage<sup>51</sup>) perhaps would hinder the softening of American culture's opposition to gay marriage. The high court of Massachusetts's decision that its state constitution required gay marriage appears to have been the impetus behind the

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48. This includes such considerations as the "risks of elected government reprisals to unpopular decisionmaking." *Id.* at 1979.

49. Though judicial authority and constitutional culture are analytically distinct concepts, the two tend to be melded together in our world of judicial supremacy in which the Supreme Court's interpretation of the Constitution typically is thought to constitute the authoritative exposition of what the Constitution requires. See Devins & Fisher, *supra* note 34, at 83–84.

50. See Devins, *supra* note 37, at 1991.

51. See *Opposition to Gay Marriage Grows*, CBS NEWS, Dec. 21, 2003, <http://www.cbsnews.com/stories/2003/12/19/opinion/polls/main589551.shtml>.

Marriage Protection Amendment, later defeated in the Senate.<sup>52</sup> A CBS News/New York Times poll found that opposition to gay marriage *increased* following the Massachusetts decision.<sup>53</sup> Would the result in the Senate have been different had the Supreme Court announced a federal constitutional right to gay marriage in *Lawrence*?

#### D. CONCLUSIONS AS TO WHAT *LAWRENCE* DID AND DID NOT DO

What I have argued up to this point does not mean that the Supreme Court appropriately assumes a position of “absolute” neutrality<sup>54</sup> on gay marriage at a time like this. There are perspectives particular to the Court’s institutional strengths that ought to be put into the mix of viewpoints that help to shape the cultural perspectives that ultimately will inform the hard doctrine. The Court’s strengths include identifying the overarching principles that help constitute our political culture.<sup>55</sup> Fairly read, the *Lawrence* Court did not remain absolutely neutral, for the Court identified a set of constitutional principles that provide significant traction for gay rights advocates.<sup>56</sup> But nonneutrality is not the same thing as finally deciding a question. For the reasons discussed above, the ambiguities, internally contradictory principles, and novel principles in *Lawrence* mean we should take seriously its express statements that it did not resolve other gay rights issues, including gay marriage. The Court weighed in on these issues, but it did not decide them.

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52. See Helen Dewar & Alan Cooperman, *Senate Scuttles Amendment Banning Same-Sex Marriage*, WASH. POST, July 14, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A49537-2004Jul14.html>.

53. See *Opposition to Gay Marriage Grows*, *supra* note 51 (reporting that opposition to gay marriage increased nationally from fifty-five percent to sixty-one percent in the month following the Massachusetts decision).

54. Even assuming there is such a thing, that is.

55. These principles typically do not, on their own, as a matter of “principle and logic,” *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting), dictate outcomes in particular cases because cases typically are junctions where multiple principles collide, each principle pointing in a different direction as to how the matter ought to be resolved. The harmonization of incommensurable principles is not the result of pure logic but instead is a subjective process in which societal actors apart from the Supreme Court have crucial roles to play. See *infra* notes 195–98 and accompanying text (discussing incommensurability). A work-in-progress more fully explores incommensurability in the context of constitutional doctrine. See Mark D. Rosen, *A Cultural Approach to Constitutional Law* (unpublished manuscript, on file with author).

56. See Post, *supra* note 7, at 97–101.

As a consequence, I conclude that *Lawrence* did not render the Defense of Marriage Act unconstitutional. The opinion arms DOMA's opponents with an assortment of new weapons. Those who deploy them undoubtedly will use the usual advocate's rhetoric of speaking as if what (in their minds) should be already is. But the various societal actors should not be fooled by this into thinking that the constitutionality of the various incidents of gay life has been decided. It has not. Nonjudicial actors in society remain free to call on the principles floated by the *Lawrence* Court, as well as other resources,<sup>57</sup> to press their views as to what the Constitution does and does not require. This critical job is a task that I do not intend to pursue here in this Article. Rather than argue what should be, this Article only seeks to identify what is: the constitutionality of same-sex marriage has not yet been decided, and DOMA has not been rendered a nullity by the *Lawrence* decision. At least not yet.

## II. RECURRING PRE-LAWRENCE CRITIQUES OF DOMA'S CONSTITUTIONALITY

Even before *Lawrence*, many of the country's leading public law scholars argued that DOMA was unconstitutional. The Article's next three Parts seek to answer these scholars' critiques. In so doing, the Article identifies the constitutional bases for congressional power to enact DOMA (primarily the Effects Clause of Article IV, Section 1) and explains why DOMA does not violate any constitutional side-constraints.

More specifically, Part II dissects four claims regarding DOMA's unconstitutionality, each of which has been advanced by multiple scholars. Two of the arguments rest on demonstrably incorrect assumptions. The other two arguments tacitly assume that the Supreme Court has the final say in determining what the Full Faith and Credit Clause requires. Part III forthrightly analyzes this crucial question concerning Congress's and the President's powers under the Effects Clause. The critics' second set of constitutional challenges dissolves under the interpretation of the Effects Clause proffered in Part III. Part IV defends DOMA against an additional Full Faith and Credit

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57. See *supra* note 34. What other resources and methodologies (apart from precedent) are appropriately utilized by societal actors apart from the Supreme Court when they work out constitutional meaning? This is a very important, undertheorized question. For an excellent start at answering this, see Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001).

Clause-based challenge that a highly regarded scholar has advanced.

Before proceeding, it is useful to briefly situate DOMA in the context of full faith and credit jurisprudence. The Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”<sup>58</sup> without differentiating among acts, records, and judicial proceedings. The Court’s jurisprudence, however, has long treated each of these categories differently. Under today’s case law, states have a virtually ironclad obligation to give effect to judgments from sister states<sup>59</sup> but are virtually never required to apply another state’s acts or records.<sup>60</sup> Marriage is not a judgment but instead is either a “public act” or “record.”<sup>61</sup> For this reason, although states typically give effect to marriages that were valid where the marriage occurred, nearly everyone agrees that this so-called “place of celebration rule” is a state common-law rule rather than a constitutional mandate.<sup>62</sup> Unlike a constitutional mandate, state law can override a common-law rule—for example, under a public-policy exception, a sister state’s law need not be applied if doing so would violate a strong public policy of the forum.

Thus, even without DOMA, there is strong authority for concluding that states would not be subject to a constitutional obligation to give effect to a same-sex marriage performed in another state. By contrast, most commentators believe that a forum state *would* be required under full faith and credit precedent to recognize and enforce a sister-state judgment based on a law that recognized same-sex marriages.<sup>63</sup> The gen-

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58. U.S. CONST. art. IV, § 1.

59. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 231–36 (1998).

60. If application of the forum’s substantive law is consistent with due process, then application of its law also will not be deemed to violate the Full Faith and Credit Clause. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1980); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 824 (1985) (Stevens, J., concurring in part and dissenting in part) (noting that contemporary doctrine “treats the two relevant constitutional provisions [the Full Faith and Credit and Due Process Clauses] as though they imposed the same constraints on the forum court”).

61. David P. Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 2D 7, 10–11 (1997).

62. See Koppelman, *supra* note 4, at 10. For my critical analysis of a prominent scholar’s recent argument that full faith and credit makes the place of celebration rule a constitutional requirement, see *infra* Part IV.

63. See Letter from Laurence H. Tribe, Professor, Harvard Law School, to Sen. Edward M. Kennedy (May 24, 1996), in 142 CONG. REC. S5931, S5932–33

eral view is that DOMA purports to authorize states to deviate from the ordinary requirements of full faith and credit doctrine regarding foreign judgments.<sup>64</sup> In the view of most scholars who believe DOMA to be constitutional, Congress had the power to authorize such deviations on the basis of its powers under the so-called “Effects Clause”—which provides that “the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof”<sup>65</sup>—when it enacted DOMA.<sup>66</sup> I take a different view: although I agree that Congress has the power to provide different rules than those laid down by the Court, I argue that DOMA properly understood is not inconsistent with the Court’s precedents.

#### A. FIRST PRINCIPLES OF FULL FAITH AND CREDIT

An oft-repeated critique is that DOMA is unconstitutional because it flatly subverts the Full Faith and Credit Clause’s foundational principle. According to Dean Larry Kramer, the Full Faith and Credit Clause “represents the very idea of what it means to be in a Union. States are required to recognize and respect each other’s laws because that is what members of a federation do.”<sup>67</sup> Professor Andrew Koppelman similarly argues that “[t]he preeminent purpose of the Full Faith and Credit Clause is to promote uniformity of result across the nation.”<sup>68</sup> Professor Laurence Tribe likewise has spoken of the Full Faith and Credit Clause’s “nationally unifying shield”<sup>69</sup> and quoted language from the hoary case of *Hughes v. Fetter*<sup>70</sup> that spoke of “the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by . . . sister states.”<sup>71</sup> All of these scholars have argued that

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(daily ed. June 6, 1996) [hereinafter Tribe Letter]; Koppelman, *supra* note 4, at 22; Kramer, *supra* note 4, at 2006.

64. See Tribe Letter, *supra* note 63; Koppelman, *supra* note 4, at 22; Kramer, *supra* note 4, at 2006.

65. U.S. CONST. art. IV, § 1.

66. See H.R. REP. NO. 104-664, at 26 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2930.

67. Kramer, *supra* note 4, at 2006.

68. Koppelman, *supra* note 4, at 22.

69. Tribe Letter, *supra* note 63, at S5932.

70. 341 U.S. 609 (1951).

71. Tribe Letter, *supra* note 63, at S5933 (omission in original) (quoting *Hughes v. Fetter*, 341 U.S. 609, 612 (1951)).

DOMA is unconstitutional because it runs counter to this foundational principle of unification insofar as it provides that states need not give effect to other states' acts or judgments "respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."<sup>72</sup>

These arguments rest on an incomplete conception of the Full Faith and Credit Clause's purposes. It is true that the Court's rhetoric sometimes suggests that unification is all that full faith and credit is about.<sup>73</sup> Case law makes clear, however, that the Clause aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct polities.<sup>74</sup> In *Pacific Employers Insurance Co. v. Industrial Accident Commission*, for example, the Court permitted California to apply its own workmen's compensation statute to a Massachusetts employee of a Massachusetts employer who had been injured while in California in the course of his employment.<sup>75</sup> The Supreme Court held that "[t]he full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, *even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.*"<sup>76</sup> As the italicized language indicates, the Court understood that the full faith and credit doc-

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72. 28 U.S.C. § 1738C (2000).

73. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) ("The animating purpose of the full faith and credit command, as this Court explained in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), '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 throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.' *Id.*, at 277.").

74. Stated differently, the principle of unification is not unalloyed, but is tempered by a concern for preserving state autonomy, as will be discussed above in text. To be sure, this second aspect of full faith and credit received far less attention by the Founders than the goal of unification. See generally 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) (setting forth the historical groundwork for the Full Faith and Credit Clause and discussing its varied historic and contemporary interpretations). This is not surprising, for the pressing problem at that time was unifying states that, if anything, were too sovereign. As the Union became stable, the second component of full faith and credit—guarding state sovereignty—emerged in the case law, as will be discussed in text.

75. 306 U.S. 493, 502 (1939).

76. *Id.* (emphasis added).

trine it was fashioning would have allowed a Massachusetts court to apply Massachusetts law on the identical facts had the lawsuit been filed in Massachusetts instead of California. This is still the state of the law.<sup>77</sup>

The outcome in *Pacific Employers* is inexplicable if the Full Faith and Credit Clause is conceptualized in the manner propounded by Dean Kramer and Professors Koppelman and Tribe. Notwithstanding Koppelman's description of full faith and credit, *Pacific Employers* does not "promote uniformity of result across the nation."<sup>78</sup> Just the opposite is true: the Court itself recognized that the law applied would turn entirely on whether the lawsuit was filed in California or Massachusetts. Contrary to Tribe's view, the case is not readily characterized as reflecting the principle of "maximum enforcement in each state of the obligations or rights created or recognized by . . . sister states."<sup>79</sup> Similarly, it cannot be said that the case required that California "recognize and respect [Massachusetts's] laws because that is what members of a federation do,"<sup>80</sup> *pace* the understanding of full faith and credit proffered by Dean Kramer.

By contrast, *Pacific Employers* is readily understandable on recognizing that the Full Faith and Credit Clause aims not just at unification but also at protecting each state's sovereignty. The Court stated explicitly:

To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its [own] policy . . . .

. . . While the purpose of [the Full Faith and Credit Clause] was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.<sup>81</sup>

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77. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) ("[S]ince the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.").

78. Koppelman, *supra* note 4, at 22.

79. Tribe Letter, *supra* note 63, at S5933 (omission in original) (quoting *Hughes v. Fetter*, 341 U.S. 609, 612 (1951)).

80. Kramer, *supra* note 4, at 2006.

81. *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501

The Full Faith and Credit Clause's coordinate concerns for both unification and meaningful state autonomy could not have been stated more clearly.

In short, the scholars discussed above oversimplify full faith and credit. It is not solely concerned with union, but with union of a certain kind: a union of meaningfully empowered subfederal polities.<sup>82</sup> Analysis considering only one pole in a dialectic is methodologically suspect. Unfortunately, myopic obsession with only one of the Clause's dual principles infects the arguments of the scholars discussed above.<sup>83</sup>

One may object that the notion that the Full Faith and Credit Clause incorporates twin goals in tension with one another applies to public acts but not to judgments. Such an objection is unavailing for three reasons. First, any such distinction is not analytically sensible because the tension between unification and maintaining meaningful state autonomy is present not only when a state is asked to apply a sister state's law but also when it is asked to apply a sister state's judgment.<sup>84</sup> Second, the text of the Full Faith and Credit Clause suggests that acts and judgments implicate similar issues, for the Clause addresses both acts and judgments in a single sentence and by its terms applies the same rule to each. Finally, as a purely descriptive matter, it cannot be said that the full faith and credit doctrine resolves the tension by permitting the prin-

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(1939). This is not to say that I agree with the case's ultimate holding. My disagreement stems not from a view that the Clause advances only one purpose, but because I think the Court gave inadequate weight to Massachusetts's interest. I hope to pursue this line of inquiry in a future work.

82. *Cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring) (arguing that the Full Faith and Credit Clause protects the "federal interest in national unity" by ensuring that states do not "unjustifiably infring[e] upon the legitimate interests of another State").

83. There are two ways that this point may be conceptualized: first, that there are two competing principles, unification and state autonomy; or second, that there is a single principle of unifying states that retain certain autonomy. I do not perceive any meaningful difference between the two formulations for present purposes, and hereinafter my analysis utilizes only the former "dual principle" approach.

84. *See, e.g., Fauntleroy v. Lum*, 210 U.S. 230, 236–38 (1908). Requiring state *A* to enforce a judgment from state *B* that is based on state *B*'s misapplication of state *A*'s law facilitates unification (insofar as a judgment from the court of one state can be enforced everywhere else), but does so at the expense of state *A*'s sovereign interests. Recognizing these tensions has important implications for the appropriate roles that societal institutions apart from the Supreme Court play in elaborating what the Full Faith and Credit Clause requires. *See infra* Part III.C.3.



ciple of unification to prevail in one context (judgments) and state autonomy to prevail in the other (acts). Although it is true that full faith and credit doctrine with regard to judgments typically favors unification insofar as the judgments of sister states almost always must be recognized, there are several types of judgments that sister states need not recognize.<sup>85</sup> These exceptions have been justified on the ground that requiring recognition would unduly interfere with the forum state's autonomy.<sup>86</sup> Conversely, full faith and credit sometimes requires state courts to apply another state's law notwithstanding a forum policy to do otherwise.<sup>87</sup>

What does all this mean for DOMA? Whereas DOMA is incompatible on its face with the oversimplified conception of full faith and credit articulated by the scholars discussed above, it is consistent with the enriched conception of full faith and credit. This is so because DOMA is a statute that resolves the tension between unification and state autonomy in favor of the latter. Because the Full Faith and Credit Clause seeks to advance principles that are in tension with one another, and because DOMA is compatible with one of these principles, it cannot be said that DOMA is flatly incompatible with the Full Faith and Credit Clause on the basis of first principles.

## B. TENTH AMENDMENT CLAIMS

### 1. Interference with State Prerogatives

Professors Laurence Tribe and Stanley Cox both argue that DOMA violates the Tenth Amendment. Tribe suggests that

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85. For example, a forum state need not recognize a sister state's decree concerning land ownership that seeks to transfer title in the forum state, *see* *Fall v. Eastin*, 215 U.S. 1, 13 (1909), nor give effect to an antisuit injunction issued by a sister state, *see* *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 (1998). For further discussion of these exceptions, *see infra* Part II.C.

86. *See Baker*, 522 U.S. at 238 (holding that a Michigan judgment precluding a party from testifying cannot "control courts elsewhere by precluding them, in actions brought by strangers to the [issuing state's] litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth"); *id.* at 240 (declaring that the issuing state's "power does not reach into a Missouri courtroom to displace the forum's own determination whether to admit or exclude evidence"); *Fall*, 215 U.S. at 10, 12 (arguing that the Full Faith and Credit Clause "does not extend the jurisdiction of the courts of one state to property situated in another" and that holding otherwise would violate the policy of the forum state).

87. *See Hughes v. Fetter*, 341 U.S. 609, 612 (1951).

Congress does not have the power to “exempt” a narrow “category of judgments” from the requirements of full faith and credit.<sup>88</sup> He says that DOMA “create[s] a precedent dangerous to the very idea of a United States of America.”<sup>89</sup> If DOMA is permissible, then Congress can pick and choose any substantive field governed by state law—let’s say commercial judgments—and render “any State’s official acts, on any subject, to second-class status” that need not receive full faith and credit, undermining the “Tenth Amendment’s unambiguous language, that ours is a National Government whose powers are limited to those enumerated in the Constitution itself.”<sup>90</sup> Cox similarly argues that DOMA is unconstitutional because it is “solely substantive rather than jurisdictionally based” and hence is not “content neutral.”<sup>91</sup> “[B]ecause it invalidates state judgments based on their content alone,” says Cox, “DOMA thereby vitiates state sovereignty.”<sup>92</sup>

Under contemporary Tenth Amendment doctrines, these arguments are parasitic on the conclusion that the Effects Clause does not authorize Congress to enact DOMA. The Court has held that “whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment” is a “mirror image[]” of the question of “whether an act of Congress is authorized by one of the powers delegated to Congress . . . in . . . the Constitution.”<sup>93</sup> DOMA accordingly invades the province of sovereignty only if it is not authorized under the Effects Clause. The question at hand is whether DOMA falls within Congress’s Effects Clause powers. The arguments advanced by Tribe and Cox do not answer this question but instead assume the conclusion that subject-matter-specific legislation is not authorized by the scope of the Effects Clause.

Perhaps Tribe’s and Cox’s Tenth Amendment claims can be construed as policy arguments for not interpreting the Effects Clause in a manner that would subvert state sovereignty. If so, their arguments are premised on a distorted understanding of what DOMA does. Tribe’s and Cox’s stated beliefs that Con-

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88. Tribe Letter, *supra* note 63, at S5932.

89. *Id.*

90. *Id.*

91. Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1081–82 (1999).

92. *Id.* at 1064.

93. *New York v. United States*, 505 U.S. 144, 155–56 (1992).

gress should not be able to use the Effects Clause to “modify or displace substantive state policy” with regard to subject matters that fall outside of Congress’s appropriate regulatory powers drive their arguments.<sup>94</sup> Such assertions fail because DOMA does not “modify or displace substantive state policy” or “replace state substantive policy with Congressional value preferences.”<sup>95</sup> For example, Massachusetts’s decision to permit same-sex marriages is neither modified nor displaced.

What DOMA *does* regulate, however, is a quintessentially federal function, and for that reason the statute does not implicate Tenth Amendment considerations. DOMA regulates the extraterritorial effects of the Massachusetts law and of Massachusetts records and judgments that are based on that law. Setting the scope of subfederal polities’ extraterritorial powers naturally falls within the federal government’s purview because subfederal polities are apt to pursue only their state interests and systematically discount the externalities they impose on other subfederal polities. The federal polity is more likely to take account of the interests of all subfederal polities because Congress contains representatives from all the subfederal polities, whereas state governments obviously do not. Furthermore, the federal polity is institutionally charged with the responsibility of looking out for the interests of the Union. These considerations have led many commentators to argue that Congress should create a federal choice-of-law statute.<sup>96</sup> These considerations also have been invoked to explain why Congress can displace dormant Commerce Clause limitations on state protectionist legislation.<sup>97</sup>

In short, DOMA does not regulate substantive state policies that properly fall to the states. Rather, DOMA regulates the extraterritorial effects of state policies—an eminently federal function that accordingly does not improperly trench on state sovereignty.

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94. Cox, *supra* note 91, at 1075.

95. *Id.*

96. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 301 (1992) (arguing that Congress’s Effects Clause powers are considerable and citing several scholars who “agree[] that [this] includes power to specify choice-of-law rules”).

97. See Mark D. Rosen, *A Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1571–75 (2005).

## 2. Subject-Matter-Specific Congressional Enactments

Tribe's and Cox's Tenth Amendment arguments impliedly raise the question of whether Congress can appropriately determine the extraterritorial effects of one state's acts on a subject-matter basis.<sup>98</sup> There is a plausible textual basis to conclude not: the Effects Clause, after all, states that Congress "may by *general laws*" prescribe the effect of acts, records, and proceedings,<sup>99</sup> and one might argue that subject-matter-specific legislation is not a "general" law.<sup>100</sup> There is an alternative plausible interpretation of the language of "general laws,"<sup>101</sup> however, and there are strong reasons to reject a construction of the Effects Clause that would prevent Congress from enacting subject-matter-specific legislation.

First, to the extent that patterns of congressional behavior are instructive in interpreting constitutional provisions,<sup>102</sup> it is

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98. See Tribe Letter, *supra* note 63, at S5932 (arguing that Congress does not have the power to "exempt" a narrow "category of judgments" from the requirements of full faith and credit); Cox, *supra* note 91, at 1082 (arguing that DOMA is unconstitutional because its rules are "substantive rather than jurisdictionally based").

99. U.S. CONST. art. IV, § 1 (emphasis added).

100. A student comment makes this textual argument. See Julie L.B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress's Power under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1639–40, 1643 (1997). The comment argues that "Congress's power under the Clause [is] to be exercised only in broad strokes, and not narrowly to determine the effect of particular acts, records, and proceedings," and that DOMA accordingly is constitutionally suspect because it deals with only a "narrow group" of "proceedings within th[e] class" of marriages. *Id.* The author has provided neither legislative history nor case law to support it. In text, I provide precedent- and policy-based reasons for rejecting such an interpretation.

101. U.S. CONST. art. IV, § 1. The Effects Clause's reference to "general laws" might mean that Congress does not have the power to enact legislation that addresses only individual cases. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 967 (7th ed. 2004). Such a limitation would parallel the Constitution's ban on bills of attainder, which prevents states from enacting legislation that imposes punishments on specified individuals. See U.S. CONST. art. I, § 9, cl. 3.

102. Several constitutional doctrines treat the longstanding practices of the coordinate branches of government as evidence of constitutionality. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (indicating that Congress's acquiescence to or authorization of the President's seizure of private property during national emergencies supports the constitutionality of such acts); *Field v. Clark*, 143 U.S. 649, 683 (1892) (noting that the longstanding practice of Congress delegating authority to the President under the Taxing Clause "is entitled to great weight"); see also David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV.

notable that Congress has enacted legislation addressing the effects of laws and judgments limited to discrete subject matters: there are separate federal statutes on child custody orders, child support orders, and protective orders in relation to domestic violence.<sup>103</sup> Moreover, as Professor Emily Sack has shown, “Congress has in fact been selective in determining which judgments will be entitled to full faith and credit, based on policy choices” in the Parental Kidnapping Protection Act (PKPA).<sup>104</sup> For example, although the PKPA generally grants full faith and credit status only to custody judgments rendered in the state in which a child currently lives, it permits a nonabducting parent to bring custody proceedings in his or her own state.<sup>105</sup> Despite the fact that the child’s new state of residence might “have a connection that is equal, and arguably, more significant than the state permitted to have jurisdiction,” Congress likely “did not want to penalize a parent who remained in a state after the other parent had abducted the child to another state.”<sup>106</sup> By effectively discriminating against state laws based on policy choices, Congress has legislated in a manner inconsistent with Tribe’s and Cox’s theories. While the two professors are free to conclude that the PKPA and these other statutes are unconstitutional insofar as the statutes deviate from their theories, the above-noted pattern of congressional practice coupled with the absence of constitutional challenges suggest that it is the scholarly theories, rather than the several statutes, that require reworking.

Second, it is desirable for Congress to have the power to enact laws that are subject-matter sensitive. There are strong reasons to believe that an intelligent full faith and credit doctrine is not amenable to broad, transsubstantive rules but invariably will be highly context sensitive. This is due to the two

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190, 201 (1988) (explaining that “it is a commonplace that a legislative judgment that a statute is constitutional is generally entitled to some deference from a court, especially when that judgment is made after detailed consideration of the constitutional question”); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 872–76 (1996) (book review) (discussing some scholars’ view that congressional practice is relevant to ascertaining the Constitution’s allocation powers with regard to declaring war).

103. See *infra* note 187 (enumerating these statutes).

104. See 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, 895 (2004).

105. *Id.* at 894.

106. *Id.* at 894–95.

oft-conflicting principles that animate full faith and credit: creating (1) a national union of (2) meaningfully empowered sub-federal polities. Full faith and credit doctrine must be context sensitive because, although enforcing another state's laws or judgments always advances the cause of national unity, the burden imposed on the forum state will be a function of the substance of the law or judgment itself.

Experience and theory confirm the inadequacy of abstract, transsubstantive rules for purposes of full faith and credit doctrine. Consider first the Supreme Court's full faith and credit jurisprudence itself. Notwithstanding broad pronouncements that judgments from sister states must be enforced,<sup>107</sup> the Court has recognized several exceptions.<sup>108</sup> Additional evidence of the inadequacy of transsubstantive laws in the full faith and credit context can be found in the related field of choice of law. Virtually everyone agrees that the Effects Clause "includes power to specify choice-of-law rules."<sup>109</sup> In this regard, it is empirically instructive that efforts to create transsubstantive solutions to conflicts-of-law quandaries have proven inadequate.<sup>110</sup> There are strong theoretical reasons to think that

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107. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("Regarding judgments . . . the full faith and credit obligation is exacting.").

108. See, e.g., *id.* at 236 (determining that a forum state need not give effect to an antisuit injunction issued by a sister state); *Fall v. Eastin*, 215 U.S. 1, 10–12 (1909) (determining that a forum state need not recognize a sister state's decree concerning land ownership that seeks to transfer title in the forum state).

109. See Laycock, *supra* note 96, at 301.

110. Though the *Second Restatement of Conflicts* may not receive appropriate criticism for its transsubstantive character insofar as it does distinguish between contracts, property, and torts, the *Restatement's* core legal test—Section 6's "most significant relationship" test and its accompanying list of considerations—provides the applicable legal rules for all these areas. See EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 60–63 (4th ed. 2004).

In the context of this Article, it is impossible to fully demonstrate that the inadequacy of the *Second Restatement of Conflicts* is attributable in no small part to its transsubstantive character. Although most scholars agree that the *Second Restatement of Conflicts* has not been a success, see generally Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 *IND. L.J.* 403 (2000) (presenting a symposium on whether the *Second Restatement* should be discarded and replaced by a new Restatement), there are many possible explanations for the *Restatement's* failures. The answer, in my view, is that three factors have contributed to the *Restatement's* deficiencies: (1) the *Restatement's* authors did not make decisions among the various approaches to choice of law but instead adopted virtually all of them, thereby creating an unprincipled grab bag; (2) the *Restatement* adopted the wrong choice-of-law rules; and (3) the effort to create transsubstantive conflicts rules is misbegotten.

transsubstantive choice-of-law rules are doomed to be inadequate, if not wholesale failures. Nearly all contemporary approaches to choice of law understand it not as a distinct body of “procedural” law but instead as an aspect of the substantive law. A bit of background is necessary to make this clear. Choice of law determines which polity’s law governs a transaction or occurrence that cuts across more than a single polity. Perhaps the most important insight of interest analysis, an insight that virtually all contemporary approaches to choice of law have adopted, is that many apparent conflicts, upon careful examination, really amount to “false conflicts” to which only one law sensibly applies.<sup>111</sup> Courts determine whether there is a false conflict by considering the purpose of each state’s substantive law and asking whether the legislature would have wished to regulate the party, transaction, or occurrence. The process of deciding whether there is a false conflict hence involves ascertaining the scope of the substantive law of each potentially interested jurisdiction—a determination that necessarily is subject sensitive rather than transsubstantive.

Thus, if the modern conflicts approach of first eliminating “false” conflicts is indeed a genuine contribution, it follows that efficacious choice-of-law doctrines invariably are an aspect of substantive law and that searching for transsubstantive choice-of-law principles is hopeless. If so, Congress must have the power under the Effects Clause to generate subject-matter-specific choice-of-law rules. Conversely, a limitation of the sort put forward by Tribe and Cox, under which Congress cannot make subject-matter-sensitive choice-of-law rules, would doom to failure any congressional enactments to create sensible choice-of-law rules under the Effects Clause.

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111. Interest analysis forthrightly inquires as to whether there is a true or false conflict: “many courts that claim to follow the Second Restatement’s ‘most significant relationship’ test . . . apply it in a way that is indistinguishable from straightforward interest analysis,” and “other modern approaches all build on” interest analysis. DAVID P. CURRIE, HERMAN HILL KAY, & LARRY KRAMER, *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* 132 (6th ed. 2001). It is with respect to how “true conflicts” are to be handled that the modern approaches diverge. *See generally id.* at 168–98 (discussing “true conflicts”). It is only the traditional choice-of-law approach, which a minority of scholars and fewer than twenty percent of the states champion, that rejects interest analysis’s “false conflicts” approach. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 *AM. J. COMP. L.* 9, 26–27 (2004).

### C. CLAIMS THAT DOMA IS INCONSISTENT WITH SUPREME COURT PRECEDENT

Virtually all DOMA critics share the assumption that DOMA purports to authorize states to give *less* faith and credit to sister-state judgments than Supreme Court precedent requires.<sup>112</sup> From this, the argument goes, DOMA is unconstitutional because the Supreme Court has the final say in determining what the Full Faith and Credit Clause requires.<sup>113</sup> Part III of the Article takes issue with the view that the Court's views of full faith and credit trump Congress's. This subsection undermines the critics' assumption that DOMA's rule is inconsistent with Supreme Court precedent.

It is true that the Supreme Court's full faith and credit jurisprudence almost always requires that states enforce sister-state judgments. It is also true that the Court recently stated that there is "no roving 'public policy exception' to the full faith and credit due *judgments*."<sup>114</sup> Against this background, the critics' assumption that DOMA is inconsistent with the Court's precedent may seem irrefutable. There are two reasons, however, to understand DOMA's rule with regarding judgments as consistent with Supreme Court precedent. First, DOMA shares important characteristics with the small class of judgments that the Supreme Court does not require states to enforce, namely, judgments that constitute improper extraterritorial regulation by the issuing state. Second, even if DOMA is a public policy rule rather than an antiextraterritoriality rule, it creates a public policy exception that operates differently in crucial ways from those the Court has rejected. The next two subsections address each of these reasons *seriatim*.

#### 1. An Antiextraterritoriality Rule

The judgments that DOMA addresses share important characteristics with the small class of sister-state judgments

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112. See, e.g., Koppelman, *supra* note 4, at 15–16; see also Kramer, *supra* note 4, at 2000 ("Existing law does not . . . allow one state to refuse recognition to the final judgment of another state's courts."); Sack, *supra* note 104, at 888.

113. See Sack, *supra* note 104, at 895–96.

114. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998); see also *id.* at 234 ("We are 'aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.'" (alterations in original) (quoting Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943))).



the Supreme Court does not require states to enforce. The Court repeatedly has held that judgments that constitute improper efforts by the issuing state to regulate extraterritorially exceed the issuing state's regulatory jurisdiction and need not be enforced.<sup>115</sup> Thus, when the Court held that a Michigan judgment preventing a Mr. Elwell from testifying against General Motors did not preclude a Missouri court from allowing Mr. Elwell to testify, the Court explained that "Michigan's power does not reach into a Missouri courtroom to displace the forum's own determination whether to admit or exclude evidence."<sup>116</sup> When the Supreme Court ruled that a court in one state cannot issue a decree that transfers title to property that is located in another state, it explained that the Full Faith and Credit Clause "does not extend the jurisdiction of the courts of one State to property situated in another."<sup>117</sup> Judgments based

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115. It is worth noting that extraterritorial regulation by states is not *per se* invalid. See Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 919–30 (2002).

116. *Baker*, 522 U.S. at 240; see also *id.* at 238 (stating that Michigan's judgment cannot "control courts elsewhere by precluding them, in actions brought by strangers to the [issuing state's] litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth").

117. *Fall v. Eastin*, 215 U.S. 1, 12 (1909). As my colleague Laura Cooper has reminded me, the language in *Fall* that appears to erect an impermeable barrier protecting the property situated in one state from judicial interference by other states has been undermined by the Court's "refus[al] to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 n.11 (1982). By refusing to permit the second court to challenge the first court's jurisdictional determination in such cases, the doctrine permits an outcome where a court in state *B* must enforce a judgment from a court in state *A* with respect to property *Z*, despite the fact that state *B* claims exclusive jurisdiction over property *Z*.

There are two reasons why *Underwriters* nonetheless does not undermine the proposition that the Court has conceptualized as an antiextraterritorial rule the doctrine that a judgment from state *A* purporting to transfer title to real property in state *B* need not be enforced by courts in state *B*. First, even after *Underwriters*, the Supreme Court has continued to explain *Fall* as an antiextraterritoriality decision: in 1998 the Court explained *Fall* as a decision in which an

[o]rder[ ] commanding action or inaction [was] denied enforcement in a sister State when [it] purported to accomplish an official act *within the exclusive province of that other State* or interfered with litigation over which the ordering State had no authority. Thus, a sister State's decree concerning land ownership in another State has been held ineffective to transfer title, see *Fall v. Eastin* . . .

*Baker*, 522 U.S. at 235 (first emphasis added, second emphasis omitted).

on penal or tax laws also do not have to be enforced. The Court has characterized such laws as exceptions to its ordinary full faith and credit jurisprudence and has explained these exceptions in similar antiextraterritorial terms.<sup>118</sup> Finally, the Su-

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Second, *Underwriters* at most means that the antiextraterritoriality rule is not categorical, and the proposition above in text that *Fall* has been understood as an antiextraterritorial rule does not depend on its being a categorical rule. Indeed, the fact that the antiextraterritorial rule is not categorical should not be surprising because virtually all constitutional principles are noncategorical; for instance, the fact that Congress is sometimes permitted to regulate speech (i.e., when there is a compelling interest and the regulation is narrowly tailored) does not mean that there does not exist a constitutional principle of free speech. See Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS L.J. 691, 706 (2005). Moreover, considerations of finality of the sort found in *Underwriters* have been held to override threshold jurisdictional flaws in other contexts. For example, notwithstanding the strong principle that a federal court must dismiss an action if it becomes apparent that it lacks subject-matter jurisdiction, see Fed. R. Civ. P. 12(h)(3), the Supreme Court refused to vacate a final judgment where the federal court had mistakenly granted a motion to remand (there was an absence of full diversity at the time the motion to remand was granted) and where the defendant would have been unable to subsequently remove the case on account of 28 U.S.C. § 1446(b)'s one-year rule had the federal court correctly ruled on the initial motion to remand. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 64 (1996). Rather, once the case had been tried in federal court, "considerations of finality, efficiency, and economy bec[a]me overwhelming." *Id.* at 75. The *Caterpillar* decision does not negate the strong principle that federal courts cannot hear matters over which they lack subject-matter jurisdiction, but it shows that considerations of finality sometimes can override very strong jurisdictional principles.

In short, although the precise limitations on state extraterritorial powers are more complex to identify after *Underwriters* insofar as the extraterritorial rule is noncategorical, it remains true that Supreme Court doctrine recognizes limits on state courts' powers in relation to orders that purport to transfer title in other states, and that the Court continues to conceptualize these limits as an antiextraterritoriality rule.

It may be the case that *Fall* is best understood as an application of the general rule that enforcement mechanisms do not travel with judgments to sister states under the hoary precedent of *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. 312, 325 (1839). The fact that *Fall* itself cited to *McElmoyle* supports this approach. See *Fall*, 215 U.S. at 12. Conceptualizing *Fall* as an application of *McElmoyle* would not undermine my argument in text, however, for *McElmoyle* understood its holding as an antiextraterritoriality rule. See *McElmoyle*, 38 U.S. at 326, 327 (holding that a sister state's judgment is "put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment *beyond the jurisdiction declaring it to be a judgment*, but a domestic judgment as to the merits of the claim, or subject-matter of the suit" and explaining that "the Constitution did not mean to confer a new power of jurisdiction" (emphasis added)).

118. See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States. . . . Crimes are in their nature local, and the jurisdiction of crimes is local, . . . and

preme Court has approvingly noted that state courts typically do not enforce antisuit injunctions from other state courts, for “hold[ing] otherwise ‘would mean in effect that the courts of one state can control what goes on in the courts of another.’”<sup>119</sup> In short, the Court has deemed wrongful extraterritorial regulation the common ground shared by judgments and miscellaneous state orders that need not be enforced by a sister state.

As the House Report on DOMA clarifies, the drafters designed DOMA’s judgments provision to combat the same issue of problematic extraterritorial regulation.<sup>120</sup> Congress enacted DOMA when it appeared that Hawaii was to become the first state to marry gay couples.<sup>121</sup> Some gay rights advocates argued that gay couples married in Hawaii should request that a Hawaii court authenticate the marriage with a declaratory judgment.<sup>122</sup> Many believed that the Full Faith and Credit Clause would have required other states to respect such declaratory judgments.<sup>123</sup> The House Committee report on DOMA

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the authorities, legislative, executive or judicial, of other States take no action with regard to [crimes and offenses]”(internal quotation omitted)) (describing the penal law exception); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No state can legislate except with reference to its own jurisdiction”) (describing the tax law exception). For a recent case discussing penal judgments, see *Nelson v. George*, 399 U.S. 224, 229 (1970) (observing that the Full Faith and Credit Clause “does not require that sister States enforce a foreign penal judgment”).

119. *Baker*, 522 U.S. at 236 n.9 (quoting Willis L. Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 198 (1957)). Though the Supreme Court stated that it “has not yet ruled” on the question of whether antisuit injunctions must be enforced, it has spoken approvingly of the practice in dictum. *See id.* In fact, it is plausible that the Court’s approval of the current state courts’ practice, which, “in the main, regard[s] antisuit injunctions as outside the Full Faith and Credit ambit,” was a component of the Court’s holding in the *Baker* case. *See id.*

120. *See* H.R. REP. NO. 104-664, at 2–10 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906–14.

121. *Id.*

122. *See* Koppelman, *supra* note 4, at 17.

123. *See* sources cited in *id.* at 17 & n.87. A reader of a draft of this Article suggested to me that DOMA was unnecessary because such declaratory judgments are not enforceable against nonparties. Even if this were true, DOMA’s rule still would be of use were the parties to divorce; a jurisdiction opposed to same-sex marriage need not enforce judgments in connection with the dissolution of such a union. *See infra* Part IV. Moreover, although judgments generally do not have res judicata effects against a party who did not participate in the prior adjudication, *see Baker*, 522 U.S. at 237 n.11; Koppelman, *supra* note 4, at 17 & n.90, court judgments concerning a person’s status (e.g., nationality, paternity) typically apply to nonparties.

cited these writers and stated that “it is possible that homosexual couples could obtain a judicial judgment memorializing their ‘marriage,’ and then proceed to base their claim of sister-state recognition on that judicial record.”<sup>124</sup>

The suggested strategy—that travelers to Hawaii obtain a declaratory judgment—was designed to circumvent the ordinary American rule that the state of residence has virtually exclusive regulatory power over family law matters.<sup>125</sup> Thus, this strategy constituted an effort to extend Hawaii’s legislative ju-

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Professor Koppelman similarly has argued that the concern about declaratory judgments was not legitimate because “the only kind of proceeding[] that can generate a judgment entitled to full faith and credit” is a “genuinely adversarial proceeding.” *Id.* This is not wholly correct, for the full faith and credit doctrine contains loopholes pursuant to which sister states may be required to enforce collusive judgments. In the context of divorce proceedings, for example, couples who wish to avail themselves of more liberal divorce laws than those provided by their home states can travel to the state whose laws they wish apply to their marriage, live there for the minimum time needed to statutorily qualify as domiciled residents, have one of the parties perfunctorily raise the issue of domicile in their divorce proceeding, and walk out of court with a divorce judgment that their home state is bound to recognize. *See Sherrer v. Sherrer*, 334 U.S. 343, 361–62 (1948) (Frankfurter, J., dissenting); Currie, *supra* note 61, at 10. In short, the Full Faith and Credit Clause jurisprudence does not prevent conniving parties from creating collusive judgments, and DOMA was an effort to close this type of loophole.

124. H.R. REP. NO. 104-664, at 30.

125. When the family unit resides in the same state, then the state of residence has the legislative jurisdiction to regulate virtually all family matters; conversely, nonresident states lack such regulatory powers. Complications arise when the family unit is spread among two or more states, as is the case when a divorcee moves out of state. The state of residence’s exclusive regulatory jurisdiction is true across the spectrum of family law matters. For instance, a state in which neither spouse resides cannot issue a divorce decree that binds the state of residence. *See Williams v. North Carolina*, 325 U.S. 226, 239 (1945). Similarly, under federal law, a child’s home state presumptively has the power to make custody and visitation determinations, and the presumption is overridden only if the child has been abandoned or in an “emergency” situation where “the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse.” 28 U.S.C. § 1738A(c)(2)(A), (C) (2000). Finally, a state in which neither the parent nor child resides cannot alter a valid child support order issued by the state in which the child or at least one of the parents resides. *See* 28 U.S.C. § 1738B(e) (2000).

To anticipate a possible objection, it cannot be said that the “place of celebration rule” is contrary to the proposition that the state of residence has virtually exclusive regulatory power over family matters. *See Koppelman, supra* note 4, at 10 (discussing the “place of celebration rule”). While it is true that the “place of celebration rule” provides that marriages are deemed valid by a home state if the marriage was legal in the state of celebration, this rule is, after all, the law of the home state and is subject to override if the marriage is deemed to violate the home state’s public policy. *See id.*

risdiction over matters that the home states more appropriately have the power to regulate under well-established American law. DOMA's judgments provision sought to limit illicit extraterritorial regulation. As such, one could plausibly argue that DOMA's instruction that such judgments need not be enforced by sister states is consistent with Supreme Court case law finding judgments reflecting illicit extraterritorial regulations outside the ambit of the Full Faith and Credit Clause.<sup>126</sup>

## 2. DOMA as a Public Policy Exception

Even if DOMA is a public policy exception, there are two important distinctions between DOMA and the instances where the Court has rejected invocations of the public policy exception.

First, in all cases where the Court rejected the invocation of public policy to avoid the enforcement of judgments, it has been the efforts of state officials that were rebuffed.<sup>127</sup> DOMA is different in this regard because it is a decision by Congress, a distinction that may well matter. The Court has explained its rejection of state invocations of the public policy exception on the basis of the Full Faith and Credit Clause's goal of "transforming an aggregation of independent sovereign States into a nation."<sup>128</sup> Permitting each state to invoke the public policy exception as it wishes would have a greater centrifugal force on the Union than allowing Congress to identify discrete circumstances under which states may do so. After all, state officials are responsible for advancing the interests of their states and are not expected to think more broadly about national interests, whereas we expect Congress to act with the national interest in mind. Structurally, whereas states cannot be expected to account for the externalities they impose on other states (by refusing to apply nonforum law, for instance), Congress com-

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126. To be sure, DOMA's language does not apply only to declaratory judgments but instead is broad enough to encompass judgments that do not reflect problematic extraterritorial regulation. In my view, however, DOMA should be construed in a narrow manner that does not embrace such judgments. *See infra* Part III.D.1.

127. *See, e.g.,* *Estin v. Estin*, 334 U.S. 541, 546 (1948); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943), *overruled by* *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261 (1980); *cf. Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (holding that the judgment of a Missouri court was entitled to full faith and credit in Mississippi despite the fact that the Missouri judgment rested on an erroneous application of Mississippi law).

128. *Baker*, 522 U.S. at 234 (quoting *Sherrer*, 334 U.S. at 355).

prises all interested parties and therefore is more likely to take account of all costs that a given rule imposes on states. These very considerations can explain why the dormant Commerce Clause's prohibition against the enactment of protectionist legislation extends to the states but not to Congress.<sup>129</sup> Thus, while it is eminently sensible that we would not want to leave the job of "transforming an aggregation of independent, sovereign States into a nation"<sup>130</sup> to the states, the same cannot be said about relying on Congress to aid in creating the Union and determining the appropriate degree of autonomy to be retained by the states.

A second distinction between DOMA and the Court's public policy jurisprudence is that case law has rejected the existence of a "ubiquitous" or "roving" public policy exception.<sup>131</sup> To the extent DOMA is conceptualized in public policy terms, DOMA announces a tightly confined exception, restricted to judgments in connection with same-sex marriage. A limited public policy exception is less threatening to the Full Faith and Credit Clause's goal of creating a union than a "ubiquitous" exception. This is suggested by the fact that although case law long has explained why the enforcement of sister-state judgments is particularly crucial for the creation and maintenance of our country's union,<sup>132</sup> there nonetheless are several discrete types of judgments that need not be enforced.<sup>133</sup>

In short, because DOMA is a congressionally created discrete exception to the general obligation to enforce sister-state judgments, it is plausible to conclude that DOMA does not alter any preexisting judicially created full faith and credit rules.

#### D. ASSERTIONS OF SUPREME COURT SUPREMACY

Professor Tribe calls DOMA unconstitutional because the Effects Clause does not authorize Congress to determine that certain acts or judgments need have *no* effect. Dean Kramer and Professors Koppelman and Sack each assert that DOMA exceeds Congress's power because it seeks to "dilute" full faith

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129. See Rosen, *supra* note 97, at 1573.

130. *Baker*, 522 U.S. at 234.

131. *Id.* at 233–34.

132. See, e.g., *id.* at 233 (noting that the "Full Faith and Credit Clause 'ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution, designed, demanded it'" (quoting *Estin*, 334 U.S. at 546)).

133. See *supra* Part II.C.1.

and credit's requirements. This subsection shows that the "no effect" and "dilution" arguments amount to the same unargued claim that the Supreme Court has the primary and last word in respect of determining full faith and credit's requirements. Part III of the Article forthrightly considers each branch's role with regard to the Full Faith and Credit Clause, rejecting the unspoken assumption of Supreme Court supremacy that underwrites Kramer's, Koppleman's, and Sack's apparently disparate arguments.

#### 1. No Effect is Not an "Effect"

Professor Tribe argues that the Effects Clause cannot be read to authorize Congress to "licens[e] States to give *no* effect at all to a specific category of 'Acts, Records and Proceedings.'"<sup>134</sup> According to Tribe, construing "prescribe . . . the Effect"<sup>135</sup> to include the power to declare that no effect need be given is "a play on words, not a legal argument."<sup>136</sup> Rather,

it is as plain as words can make it [that] the congressional power to "prescribe . . . the effect" of sister-state acts, records, and proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit under the Full Faith and Credit Clause as judicially interpreted shall instead be entitled to no faith or credit at all!<sup>137</sup>

To begin, Tribe's construction of the word "effect" is not self evident. Precisely *why* can't the power to "prescribe . . . the Effect" include the power to say that something has no effect?<sup>138</sup> Tribe does not suggest that such a construction violates linguistic conventions (as indeed it does not), but justifies his conclusion on the basis of the "context of the Full Faith and Credit Clause."<sup>139</sup> He asserts that those who advocate that Congress has the power to determine that a public act or judgment is entitled to no faith or credit would confer on Congress a "sort of

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134. Tribe Letter, *supra* note 63, at S5932.

135. U.S. CONST. art. IV, § 1.

136. Tribe Letter, *supra* note 63, at S5932.

137. *Id.*

138. For similar arguments, see *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 58 (1996) [hereinafter Hearing Letter] (letter from Michael W. McConnell, Professor, University of Chicago Law School, to Sen. Orrin G. Hatch, Chairman, Comm. on the Judiciary (July 10, 1996)); Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 313 (1998).

139. Tribe Letter, *supra* note 63, at S5932.

nullification authority,” that is, a “congressional license to ignore the Full Faith and Credit Clause.”<sup>140</sup> The Effects Clause, concludes Tribe, “simply will not bear so tortured a reading.”<sup>141</sup>

Careful examination discloses, however, that Tribe’s argument is not really a textual argument about the meaning of “effect” nor an argument about the nature of full faith and credit. Instead, he makes an implicit claim that only one governmental institution—the courts—authoritatively determine what full faith and credit requires.<sup>142</sup> After all, while Tribe states that the Full Faith and Credit Clause’s first sentence is a “self-executing requirement,”<sup>143</sup> he does not criticize the many Supreme Court cases identifying public acts (and sometimes even judgments) that need not be given effect by sister states. Consider, for example, *Pacific Employers*, in which the Court held that California courts need not apply Massachusetts’s workmen’s compensation law. Under Tribe’s logic, *Pacific Employers*’s conclusion that California need not give effect to the Massachusetts law would be a “play on words, not a legal argument” insofar as the Full Faith and Credit Clause’s “self-executing”<sup>144</sup> first sentence provides that “Full Faith and Credit shall be given . . . to the . . . public Acts”<sup>145</sup> of other states. There are many other cases where the Court has ruled that the forum need not apply the law of the nonforum state.<sup>146</sup> Unless Tribe is willing to reject all cases where the Court held that acts and judgments of sister states need not be enforced, it must be the case that he understands that the Full Faith and Credit Clause’s “self-executing” requirement does not mean that *all* the public acts of sister states must be given effect in the forum state. Some need not be.

The important question then becomes which institution determines what acts and judgments fall under the Full Faith and Credit Clause’s requirement. Built into Tribe’s argument is the unargued conclusion that it is the Supreme Court alone that has this power. Reread his argument:

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. U.S. CONST. art. IV, § 1 (emphasis added).

146. *See, e.g.,* *Carroll v. Lanza*, 349 U.S. 408, 412 (1955); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547–48 (1935); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).



it is as plain as words can make it [that] the congressional power to ‘prescribe . . . the effect’ of sister-state acts, records, and proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit under the Full Faith and Credit Clause *as judicially interpreted* shall instead be entitled to no faith or credit at all!<sup>147</sup>

The crucial language in Tribe’s assertion is “*as judicially interpreted*,” which suggests that Congress lacks the power to decide that acts entitled to full faith and credit “as judicially interpreted” shall not be given effect. The phrase rescues Tribe’s argument from indicting as wrongly decided all of the Court’s holdings identifying acts and judgments that need not be given effect. At the same time, this language proves that Tribe’s argument is not really a text-based claim that the power to prescribe effects cannot include the power to decide that an act shall have no effect. Instead, Tribe’s argument boils down to the unargued assertion that only the Supreme Court has the power to say that a state can give no effect to an act or judgment. Unfortunately, Tribe does not justify what turns out to be his unspoken major premise concerning judicial supremacy in the determination of what the Full Faith and Credit Clause requires.

## 2. Dilution

Another critique several commentators level is that DOMA exceeded Congress’s powers under the Effects Clause because DOMA dilutes the quantum of credit that the Supreme Court determined is required. The no-dilution constraint can be traced to Justice Stevens’s 1980 plurality opinion in *Thomas v. Washington Gas Light Co.*, which indicated in dicta that “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.”<sup>148</sup> Dean Kramer provides a possible textual basis for

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147. Tribe Letter, *supra* note 63, at S5932.

148. 448 U.S. 261, 273 n.18 (1980) (plurality opinion). The plurality’s comments are dictum because the *Thomas* case did not analyze the scope of a congressional enactment under the Effects Clause but instead concerned the question of whether one state must give *res judicata* effect to a workmen’s compensation claim issued by another state’s administrative agency. *Id.* at 286.

The *Thomas* plurality opinion also opined that “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.” *Id.* at 273 n.18. Though beyond the scope of this Article, I believe there are strong reasons to question this conclu-

the view that Congress does not have the power to reduce the credit that the Supreme Court indicated must be given to a public act, judicial proceeding, or record. Kramer notes that the Clause's first sentence provides that "*full* faith and credit *shall* be given."<sup>149</sup> He argues that "[t]his unqualified 'full' and mandatory 'shall' lose some (though obviously not all) of their meaning if Congress can simply legislate the requirement away or relieve states of whatever obligations the Full Faith and Credit Clause imposes."<sup>150</sup> From this, Kramer concludes that

it is more credible to read the Full Faith and Credit Clause as imposing a mandatory requirement of faith and credit (defined by the Supreme Court), with the Effects Clause authorizing Congress to enact whatever national legislation is needed to refine and implement it. Refine and implement, not undermine or abolish—which means that even federal legislation must be tested against, and shown to be consistent with, the core requirements of full faith and credit.<sup>151</sup>

This interpretation of the Effects Clause is one of the predicates for Kramer's conclusion that DOMA is unconstitutional.<sup>152</sup>

To begin, the dilution argument fails if DOMA's rules are consistent with Supreme Court precedent, as I argued above.<sup>153</sup> Beyond this, careful analysis shows that the no-dilution-power theory collapses into the unargued conclusion that the Supreme Court appropriately determines what the Full Faith and Credit Clause requires. Kramer's dilution argument, like Tribe's "no effects" position, on closer examination turns out to be an unargued claim for judicial supremacy. To see this, let us reformulate Kramer's question by substituting "the Supreme Court" for "Congress" and ask whether the "unqualified 'full' and mandatory 'shall' lose some . . . of their meaning" if the *Supreme Court* can simply interpret "away or relieve states of whatever obligations the Full Faith and Credit Clause imposes." If Kramer is correct that the requirement that "full" faith and credit "shall be given" means that all acts and judgments from sister states must be given full effect, then all of the Court's decisions identifying some acts or judgments that need not be given effect in sister states cause the Full Faith and Credit Clause to "lose some" of its meaning in the same way that DOMA purportedly

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sion. For one argument, see Sack, *supra* note 104, at 893–95.

149. See Kramer, *supra* note 4, at 2003.

150. *Id.*

151. *Id.*

152. *Id.* at 2007–08.

153. See *supra* Part II.C.

does. Kramer, however, has not rejected as wrongly decided all cases in which the Supreme Court determined that particular acts or judgments need not be given effect in sister states. If the critique Kramer levels does not apply to the Supreme Court's decision in *Pacific Employers* (for instance), then that is only because Kramer assumes that the Court properly undertakes the role of authoritatively interpreting the obligations that the Full Faith and Credit Clause imposes.<sup>154</sup>

The assumption concerning judicial supremacy in determining the meaning of the Full Faith and Credit Clause's requirements underlies the dilution analysis other scholars also provide.<sup>155</sup> This is not surprising because the concept of dilution necessarily presumes the existence of a baseline. None of the advocates of the "dilution" constraint on Congress's powers suggests that *all* acts, judgments, and records must be given

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154. Dean Kramer does not provide a full-blown account of why the Supreme Court properly assumes this hegemonic function in the interpretation of the Full Faith and Credit Clause. In his more recent scholarship, however, Kramer advances the view that societal actors apart from the Supreme Court, including Congress, play important roles in authoritatively determining what the Constitution means. See KRAMER, *supra* note 34, at 233–48. Thus, it is possible that Kramer's views regarding Congress's role in interpreting what the Full Faith and Credit Clause requires have shifted.

155. For example, Professor Koppelman argues that the Full Faith and Credit Clause's first sentence is a "clear, self-executing command" and that the Effects Clause "should not be read in a way that contradicts the first. The grant of power is thus limited by its context: Congress may not exercise its Effects Clause powers in a way that contradicts the self-executing command." Koppelman, *supra* note 4, at 20–21. Unless Koppelman dismisses as wrongly decided all Supreme Court decisions holding that a forum need not apply the acts and judgments of sister states—and there is no evidence that this is what Koppelman thinks—his critique assumes that the Supreme Court has the power to define the minimum full faith and credit baselines. Similarly, Professor Sack argues that "[t]he strongest argument for opponents of DOMA" is that "Congress did not have the power to diminish the Constitution's Full Faith and Credit requirements with legislation such as DOMA." Sack, *supra* note 104, at 891–92; see also *id.* at 895 ("The history and purpose of the [Full Faith and Credit] Clause provide convincing evidence that Congress cannot dilute the Full Faith and Credit mandates of the Constitution."). Professor Sack's formulation implicitly equates the Court's full faith and credit doctrine with "the Constitutional Full Faith and Credit requirements." *Id.* at 891–92. Professor Singer's critique of DOMA likewise treats Supreme Court case law as being metonymic with the constitutional protection of full faith and credit. See Singer, *supra* note 7, at 44 (relying on a Supreme Court case for the proposition that "[b]efore the federal DOMA, it was fixed constitutional law that states must enforce the final judgments of other states even if those judgments violate the forum's strong public policy" and concluding that "[t]o allow Congress to reverse this principle is to allow a statute to repeal part of the Constitution").

effect by sister states or that the many Supreme Court cases that did not require forum states to give effect to the laws of sister states were wrongly decided.<sup>156</sup> The notion that the Effects Clause does not permit Congress to “dilute” the requirements of full faith and credit accordingly is inseparable from the assumption that the Supreme Court alone appropriately determines the baseline Full Faith and Credit Clause requirements that may not be congressionally diminished. Below, I identify the various governmental institutions that properly play a role in determining this baseline.<sup>157</sup>

### III. CONGRESS’S POWER TO ENACT DOMA: UNDERSTANDING THE ROLES OF CONGRESS, THE PRESIDENT, AND THE COURTS IN DETERMINING WHAT FULL FAITH AND CREDIT REQUIRES

Even if DOMA authorized states to refuse to enforce judgments that Supreme Court precedent indicated had to be enforced, it would not ineluctably follow that DOMA is unconstitutional. DOMA’s constitutionality would turn on Congress’s and the President’s roles in determining what full faith and credit requires. Moreover, as shown above, many of the arguments propounded by DOMA critics are premised on the unstated conclusion that the Supreme Court appropriately has the final word in determining full faith and credit’s requirements.<sup>158</sup> This Part of the Article accordingly considers the role that governmental actors apart from the Supreme Court should play in determining what the Full Faith and Credit Clause requires. Section A sketches the two approaches that scholars and congresspersons to date have taken to this question. Laying them side-by-side suggests that there is an intermediate path. Sections B and C identify and defend this middle path, an

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156. *See supra* note 155.

157. *See infra* Part III.B.

158. This assumption underwrites the criticism of DOMA propounded by Professor Tribe that the constitutional grant of the power to declare the “Effect thereof” cannot include the power to determine that some acts or judicial proceedings need not be given effect. *See* Tribe letter, *supra* note 63, at S5932; *supra* Part II.D.1. Similarly, arguments that Congress does not have the power to dilute the requirements of full faith and credit (including those by Dean Kramer, *see* Kramer, *supra* note 4, at 2003, Professor Koppelman, *see* Koppelman, *supra* note 4, at 20–21, and Professor Sack, *see* Sack, *supra* note 104, at 895) implicitly assume that the Supreme Court is responsible for determining the baseline requirements of the Full Faith and Credit Clause. *See supra* Part II.D.2.

approach under which Congress and the President have broad powers under the Effects Clause, including the power to prescribe choice-of-law rules that differ from those identified by the Supreme Court. Sections B and C also explain the important role courts continue to have in developing full faith and credit doctrine. Section D applies the principles developed in Sections B and C to DOMA.

#### A. APPROACHES ALREADY TAKEN

Scholars' and politicians' approaches to determining the scope of Congress's Effects Clause powers can usefully be divided into two general groups.<sup>159</sup> The first reflects the view that Congress is the ultimate arbiter of what effect need be given to the acts, records, and judicial proceedings of sister states. Call this the "Congressional Supremacy" approach. During floor debate of DOMA, for example, Senator Gramm argued that one "need only read the second sentence of article IV, section 1 of the Constitution to see that Congress has the *only* role in prescribing the circumstance under which one State must recognize a marriage that occurs in another State."<sup>160</sup> In a letter to Senator Hatch during DOMA's debate, Professor (now Judge) Michael McConnell similarly argued that the Effects Clause "does not give Congress power to make laws necessary and proper for the 'enforcement' of state laws in other states, or for carrying those laws into 'execution.' Instead, Congress is given full power to 'prescribe' their 'effect.'"<sup>161</sup>

To "prescribe the effect" of something is to determine what effect it will have. In the absence of powerful evidence to the contrary, the natural meaning of these words is that Congress can prescribe that a particular class of acts will have no effect at all, or that their effect will be confined to their state of origin.<sup>162</sup>

Proponents of this approach view Congress's plenary power as "encompassing both expansion and contraction" of effect that a forum must give to another state's acts or judgments under

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159. Professor Douglas Laycock has offered an approach to the Effects Clause that does not fit into either of these categories and with which I largely concur. See Laycock, *supra* note 96, at 301–33, *discussed infra* Part III.C.4.a.

160. 142 CONG. REC. S10106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm) (emphasis added); see also *id.* at S10116 (statement of Sen. Burns) (referring to the Effects Clause and stating that "the Framers of the Constitution had the foresight to give Congress the discretion to create exceptions to the mandate contained in the Full Faith and Credit Clause").

161. Hearing Letter, *supra* note 138, at 58.

162. *Id.* at 57.

the case law.<sup>163</sup> Though not completely clear, proponents of the plenary power position appear to take the position that Congress's determinations under the Effects Clause cannot be reviewed by the Supreme Court.<sup>164</sup> Then-Professor McConnell, for instance, wrote that Congress is "the ultimate umpire" in determining what effect one state's laws, records, and judgments have in another state.<sup>165</sup> Similarly, as noted above, Senator Gramm stated on the Senate floor that Congress has the "sole" role in determining the extraterritorial effects of one state's acts, records, and judicial proceedings.<sup>166</sup>

The second approach conceptualizes a far more circumscribed congressional role in determining what the Full Faith and Credit Clause requires. Under this view, Congress has power to legislate only with respect to matters about which the Supreme Court has not provided a full faith and credit rule. Call this the "Interstitial Power" approach.

There are three variants of the "Interstitial Power" approach. One group of scholars thinks that the Effects Clause "authorizes Congress to enforce the clause's self-executing requirements [only] insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient."<sup>167</sup> A second position is that the Court's holdings determine the minimal amount of respect owed to sister-state acts and judgments but that Congress can require more. Exemplary of this approach is Professor Cass Sunstein's statement before Congress during hearings for DOMA that Congress can "expand[] the reach of state rules and judgments" as defined by

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163. 142 CONG. REC. S10110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd); *see also* Crane, *supra* note 138, at 315 ("[T]he Full Faith and Credit Clause serves as a constitutional default provision in the absence of congressional legislation.").

164. *See* Kramer, *supra* note 4, at 2002 (describing the plenary power position as the understanding that the full faith and credit rules identified by the Court "have the status of federal common law and can thus be displaced by Congress, which has nearly unlimited power under the Effects Clause to prescribe alternative rules").

165. Hearing Letter, *supra* note 138, at 58. McConnell comes to this conclusion by arguing that there is no principled distinction between increasing and diminishing the effect of a state's law.

166. *See* 142 CONG. REC. S10106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm).

167. Tribe Letter, *supra* note 63, at S5932; *see also* Kramer, *supra* note 4, at 2003 (arguing that the Full Faith and Credit Clause "impose[es] a mandatory requirement of faith and credit (defined by the Supreme Court), with the Effects Clause authorizing Congress to enact whatever national legislation is needed to refine and implement it").

the Court, but not diminish it.<sup>168</sup> A third position denies Congress the power to expand the scope of what the Court has required. For instance, Senator Kennedy argued on the Senate floor that “[t]he Constitution gives Congress no power to add or subtract from the full faith and credit clause.”<sup>169</sup> Similarly, Professor Sack argues that “Congress does not have plenary power either to dilute or expand full faith and credit beyond what the Court has delineated as the Constitution’s mandate” and that Congress only has power to act in the areas “in which the Court has not provided clear guidance or has explicitly refused to rule on the requirements of the Constitution’s Full Faith and Credit Clause.”<sup>170</sup> In short, what unites these three approaches is the conception that Congress’s power under the Effects Clause is limited by Supreme Court full faith and credit case law.

#### B. THE PATH NOT TAKEN: THE TEAMWORK MODEL

As different as they are, both the Congressional Supremacy and Interstitial Powers approaches share something crucial in common: both vest full responsibility for articulating full faith and credit’s requirements in only one governmental institution. Though closer in many respects to the Congressional Supremacy approach, the alternative I provide is more collaborative than either Congressional Supremacy or Interstitial Powers. I shall call it the “Teamwork” model. I hope to show here that the Teamwork approach answers most objections that proponents of the two contending groups identified above have hurled against one another and accordingly is largely immune to the criticisms that apply to Congressional Supremacy and Interstitial Powers. Finally, I will argue that the Teamwork model is functionally sound and thus normatively attractive.

Here is a brief sketch of the Teamwork model, which I shall elaborate and fully defend below. Under the Teamwork approach, the Effects Clause’s charge that Congress may “pre-  
scribe . . . the effect”<sup>171</sup> grants plenary power to the political branches—meaning both Congress and the President<sup>172</sup>—to

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168. See *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 45 (1996) (prepared statement of Cass R. Sunstein, Professor, University of Chicago Law School) (emphasis omitted).

169. 142 CONG. REC. S10102 (daily ed. Sept. 10, 1996) (statement of Sen. Kennedy).

170. Sack, *supra* note 104, at 832.

171. U.S. CONST. art. IV, § 1.

172. The President participates, of course, by means of the constitutional

legislate and thereby determine what full faith and credit requires.<sup>173</sup> This includes the power to decide that a particular class of acts, judgments, or judicial proceedings need not be given effect. Additionally, case law decided under the Full Faith and Credit Clause does not diminish this power, but instead is usefully conceptualized as a form of federal common law.<sup>174</sup> Congress may accordingly disregard the full faith and credit rules developed by courts, including the Supreme Court, when exercising its powers under the Effects Clause. The Supreme Court nonetheless plays a significant role in reviewing legislation enacted under the Effects Clause. This legislation should be interpreted using a clear statement rule. Where legislation clearly addresses a particular subject matter, judicial review should be deferential, asking only whether the legislation is a reasonable choice-of-law provision.

In short, as the term suggests, the Teamwork model posits that determining what the Full Faith and Credit Clause requires is an undertaking that involves multiple institutions. This is not to imply that all institutions have equivalent, or even equally important, roles. The Teamwork model anticipates that Congress appropriately plays the largest role in fleshing out the requirements of full faith and credit. The other players' participation (i.e., the President's and the courts') nevertheless is essential for the enterprise to function properly.

### C. TEXTUAL, PRECEDENTIAL, AND FUNCTIONAL JUSTIFICATIONS

This Section identifies textual, precedential, and functional support for the Teamwork model. In the process, this Section also anticipates and refutes challenges likely posed by Congressional Supremacists and Interstitialists to the Teamwork model.

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requirements of presentment and return. *See generally* INS v. Chadha, 462 U.S. 919, 946–48 (1983) (describing the constitutional requirement of presentment).

173. This constitutes a rejection of the possibility that the Effects Clause's power to "prescribe" refers to nonlegislative powers that accordingly do not require presidential participation through presentment and are not subject to veto.

174. As discussed below, one could make a plausible argument that Congress enjoys such powers even if the Court's full faith and credit rulings are considered constitutional law rather than federal common law. *See infra* Part III.C.4.b.



## 1. Text

Let us start with the text of the Full Faith and Credit Clause. Read on its own, the Effects Clause seems to vest considerable powers in the national legislature when it states that Congress has the power to “prescribe . . . the Effect” of acts, records, and judicial proceedings by means of “general” laws.<sup>175</sup> Most scholarly works penned before passage of DOMA agreed that the Effects Clause vested Congress with considerable regulatory authority.<sup>176</sup>

The Teamwork approach comfortably fits the Effects Clause. The Clause makes it constitutionally mandatory that one state give full faith and credit to other states’ acts, judicial proceedings, and records, but authorizes Congress to “prescribe” the effects and thereby specify what full faith and credit requires in various contexts. Such a construction is not internally contradictory as a textual matter because, as case law long has recognized, it is implausible to suggest that full faith and credit means that state *A*’s court inexorably must apply state *B*’s law.<sup>177</sup> If full faith and credit cannot plausibly mean “apply the other state’s law all the time,” then some institution must determine what full faith and credit *does* mean, and the Clause’s second sentence explicitly identifies a congressional role in that task. This is not to suggest that courts properly play no role in fleshing out full faith and credit’s requirements. Federal courts have the power to create rules in the absence of congressional action, and, as will be discussed in greater detail below, the power to review congressional acts under a deferential standard that ensures such statutes are reasonable. But, as is the case with federal common law generally, any rules laid

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175. U.S. CONST. art. IV, § 1.

176. See, e.g., Laycock, *supra* note 96, at 301 (arguing that Congress’s Effects Clause powers are considerable, noting that “almost everyone agrees that [this] includes power to specify choice-of-law rules,” and citing as examples of those who agree, Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 425–26 (1919); Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 266–67 (1958); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 23–28 (1991); and Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 80 (1957)).

177. See *Alaska Packer Ass’n v. Indus. Accident Comm’n of Cal.*, 294 U.S. 532, 547 (1935) (“A rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”).

down by federal courts before Congress acts do not displace congressional power.

Importantly, the textual argument provided here insulates the Teamwork approach from a text-based critique to which the Congressional Supremacy approach is vulnerable. Many Congressional Supremacists argue that the Effects Clause grants Congress the power to make “exceptions” to what the Full Faith and Credit Clause requires.<sup>178</sup> Interstitialists understandably ask how this position squares with the Effects Clause’s requirement that “*full*” faith and credit “*shall*” be given.<sup>179</sup> The Teamwork approach’s perspective on this debate is that the Congressional Supremacists implicitly, and mistakenly, concede that courts alone are responsible for determining what full faith and credit means. The better approach is to understand the Effects Clause as authorizing Congress to play a role in determining what full faith and credit itself requires, not as granting congressional power to make exceptions to what Court-defined full faith and credit requires.

Interstitialists undoubtedly would argue that the Teamwork model, like the Congressional Supremacy model, undermines the Full Faith and Credit Clause’s requirement that “Full Faith and Credit . . . *shall be given*.”<sup>180</sup> Such Interstitialist criticism is subject to three responses. First, the mere fact that the Full Faith and Credit Clause utilizes unqualified, categorical language (“full,” “shall”) does not mean that it must give rise to a categorical constitutional requirement. After all, other categorical constitutional language has begotten noncategorical constitutional requirements. For instance, notwithstanding the First Amendment’s categorical declaration that “Congress *shall make no law* . . . abridging the freedom of speech,”<sup>181</sup> Congress

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178. See, e.g., H.R. REP. NO. 104-664, at 26 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2930 (“While full faith and credit is the rule—that is, while States are generally obligated to treat laws of other States as they would their own—Congress retains a discretionary power to carve out such exceptions as it deems appropriate.” (emphasis added)); 142 CONG. REC. S10116 (daily ed. Sept. 10, 1996) (statement of Sen. Burns) (“[T]he Framers of the Constitution had the foresight to give Congress the discretion to create exceptions to the mandate contained in the ‘Full Faith and Credit Clause.’”); *id.* at S10110 (statement of Sen. Byrd) (“[I]t is not at all clear why a general empowering of Congress to ‘prescribe . . . the effect’ of public acts does not give it discretion to define the ‘effect’ so that a particular public act is not due full faith and credit.” (emphasis added)).

179. See, e.g., Kramer, *supra* note 4, at 2002–03.

180. U.S. CONST. art. IV, § 1 (emphasis added).

181. U.S. CONST. amend. I (emphasis added).

can prohibit political speech that occurs outside of polling places,<sup>182</sup> and states may ban certain hate speech.<sup>183</sup> Similarly, notwithstanding the First Amendment's guaranty that government "shall make no law . . . prohibiting the free exercise" of religion,<sup>184</sup> Congress may enact laws that criminalize activities that are part of a religious community's worship and accordingly hinder the religious community's ability to freely practice its religion.<sup>185</sup> The fact that other constitutional provisions with the categorical language of "shall" have not been construed to generate categorical constitutional protections blunts Interstitialist criticisms that the Congressional Supremacist and Teamwork models do not give categorically "full" credit to sister states' acts, records, and judicial proceedings.

Second, the Interstitialist position itself does violence to the constitutional text. The Interstitialist claim that Congress's legislative power is what remains after the Supreme Court has acted conflicts with the Clause's apparently unconditional grant to Congress of the power to "prescribe . . . the effect" of acts, records, and judgments.<sup>186</sup>

Third, the Interstitialist approach condemns a long line of Supreme Court precedent. Interstitialists who accept currently decided Supreme Court case law that permits a forum to not apply a sister-state act or judgment are vulnerable to the same criticism they presumably would hurl at Teamwork model advocates (and that they already throw at Congressional Supremacists). This case law literally allows one state not to give "full" faith and credit to another state's public acts and judgments. To hold true to their strict textual approach, Interstitialists must denounce this entire line of precedent. All things being equal, a construction of constitutional language that does not suggest that more than a century of Supreme Court jurisprudence is wrongly decided is preferable to an interpretation that does.

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182. See *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

183. See *Virginia v. Black*, 538 U.S. 343, 362 (2003) (noting that "the First Amendment permits content discrimination based on the very reasons why the particular class of speech at issue . . . is proscribable" (citation omitted)).

184. U.S. CONST. amend. I.

185. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 876 (1990) (upholding Oregon's ban on peyote use against claims that its use was part of the plaintiffs' religious practices); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (upholding a congressional ban on polygamy against claims that it was a religious practice).

186. See U.S. CONST. art. IV, § 1.

For these three reasons, the Interstitialist position is less compelling on textual grounds than the Teamwork model.

## 2. Precedent

DOMA is only the fifth congressional enactment pursuant to the Effects Clause,<sup>187</sup> and none of the previous four has been constitutionally challenged on Effects Clause grounds. We consequently are without Supreme Court precedent as to the extent of Congress's powers under that Clause.

On numerous occasions, however, the Court has indicated in dicta that Congress has the power under the Effects Clause to create full faith and credit rules that differ from those that the Court itself has identified. In the relatively recent case of *Sun Oil Co. v. Wortman*, for example, the Court decided that a forum state that was constitutionally obligated to apply nonforum law nonetheless could apply the forum state's statute of limitations.<sup>188</sup> The Court, per Justice Scalia, rejected the modern view that statutes of limitations are substantive, which would have led to the conclusion that the nonforum state's statute of limitations had to be applied, and instead held that the historical understanding that statutes of limitations are procedural governed for purposes of the Full Faith and Credit Clause.<sup>189</sup> The Court nonetheless went on to state that "[i]f current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes . . . it can be proposed that Congress legislate to that ef-

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187. The other statutes are the 1790 implementing statute directing that "[a]cts, records and judicial proceedings . . . so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken," see Act of June 25, 1948, ch. 646, 62 Stat. 947 (codified as amended at 28 U.S.C. §1738 (2000)); an 1804 Act that provided a method for authenticating nonjudicial records, see Act of March 27, 1804, ch. 56, 2 Stat. 298; the Parental Kidnapping Prevention Act of 1980, see Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3569 (codified as amended at 28 U.S.C. §1738A (2000)); the Full Faith and Credit for Child Support Orders Act, see Pub. L. No. 103-383, 104 Stat. 4064 (1994) (codified as amended at 28 U.S.C. §1738B (2000)); and the Violence Against Women Act's full faith and credit provision, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40221, 108 Stat. 1930 (codified as amended at 18 U.S.C.A. §2265 (2005)), which requires sister states to recognize and enforce a valid protection order issued by another state. See generally Sack, *supra* note 104, at 876–77 (describing these Acts).

188. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988).

189. See *id.* at 728–29.

fect under the second sentence of the Full Faith and Credit Clause.”<sup>190</sup>

*Sun Oil*'s dictum is inconsistent with those Interstitialists who posit that Congress can legislate only with regard to matters that have not been addressed by the Court. The dictum does not contradict Congressional Supremacists or the Teamwork approach, but nor does it fully support these approaches. This is so because the type of legislation that the dictum invited would have required the forum state to give more effect to sister-state law than the *Sun Oil* rule required: *Sun Oil* did not require the forum to apply a sister state's statute of limitations but invited Congress to so mandate.<sup>191</sup> The *Sun Oil* dictum accordingly does not provide any guidance with regard to the question of whether Congress can authorize states to give *less* effect to a sister state's act or judgment than Supreme Court precedent requires.

In fact, there are diverging views in Supreme Court opinions as to whether Congress can authorize the forum state to give less credit to a foreign judgment than case law otherwise provides. Justice Stone was of the view that Congress had such powers, writing in dissent in *Yarborough v. Yarborough*:

The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress . . . The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone.<sup>192</sup>

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190. *Id.* at 729. This opinion was handed down before the Court decided *City of Boerne v. Flores*, in which the Court determined that Congress's powers under Section 5 of the Fourteenth Amendment do not include the power to legislate in accordance with congressional understandings of the first four sections of the Fourteenth Amendment that differ from the Court's interpretations. 521 U.S. 507, 519, 536 (1997). *Boerne* does not undermine the argument here as to Congress's powers under the Effects Clause for two reasons. First, statutory nullification of the Supreme Court's full faith and credit determinations may be best conceptualized as congressional displacement of federal common law rather than congressional reinterpretation of what full faith and credit means as a matter of constitutional law. *See infra* text accompanying notes 204–11. Second, even if the Court's full faith and credit decisions are viewed as articulating constitutional rules, the *Boerne* line of cases may be distinguished: where the Constitution textually limits Congress's powers to enforce the Fourteenth Amendment, congressional powers under the Effects Clause can more plausibly be considered plenary. *See* Hearing Letter, *supra* note 138, at 58.

191. *See Sun Oil*, 486 U.S. at 728–29.

192. 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting).

On the other hand, a plurality opinion in the 1980 case of *Thomas v. Washington Gas Light Co.* indicated in dicta that “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.”<sup>193</sup> In short, the Supreme Court has not yet provided clear guidance, even in dicta, regarding the scope of congressional power under the Effects Clause.

### 3. Functionalist Considerations

The strongest justification for the Teamwork model’s rejection of judicial supremacy in the formulation of full faith and credit’s requirements rests on functionalist considerations. The Full Faith and Credit Clause does not aim to maximize one value, but instead mediates among a set of incommensurable considerations that sometimes conflict: nearly a century of case law has made clear that the Clause aims not just to unify the states, but to generate a federal system in which differences among the subfederal polities are accommodated so that they can remain meaningfully empowered, distinct political entities.<sup>194</sup>

How are the competing considerations of respecting states’ distinctiveness and unifying the country to be harmonized? Careful thought suggests that there is no single *a priori* correct way to do so; rather, determining how to harmonize these competing considerations is a highly subjective, identity-defining activity. This is so because the competing considerations of preserving state autonomy and unifying the country are not reducible to a common metric and hence are incommensurable. To fully understand this, it is necessary to refine the philosophical concept of incommensurability. When goods are commensurable, there are clear-cut choices among them with respect to which all rational actors would agree. For example, a single five-dollar bill readily can be evaluated in relation to

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193. 448 U.S. 261, 273 n.18 (1980) (plurality). These comments are dictum because *Thomas* did not analyze the scope of a congressional enactment under the Effects Clause but instead concerned the question of whether one state must give res judicata effect to a workmen’s compensation claim that had been issued by another state’s administrative agency. *See id.* at 286. The plurality opinion in *Thomas* also opined that “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.” *Id.* at 273 n.18. Though beyond the scope of this Article, I believe there are strong reasons to question this conclusion. For one argument, see Sack, *supra* note 104, at 893–95.

194. *See supra* discussion at Part II.A.

three one-dollar bills, and everyone would agree that, in the ordinary case,<sup>195</sup> the former is more valuable than the latter.<sup>196</sup> Incommensurability, by contrast, concerns the choice between (or among) options that cannot be reduced to a single, all-encompassing metric that permits comparisons with which all rational agents would agree.<sup>197</sup> Incommensurability accordingly describes the arena of choice in which subjective evaluations must be made. Choosing among incommensurables amounts to a process of prioritizing competing commitments. As such, the choice can well be understood as defining the very character of the person or polity making the decision.<sup>198</sup> In the context at hand, how the full faith and credit doctrine harmonizes the competing considerations of state autonomy and unifying the nation is an important determinant of the very character of our nation's federal system.

The question then becomes what governmental institutions are suited to making such determinations. Congress and the President are the strongest candidates. Ruling out the alternatives clarifies why this is so. To begin, the states are not well suited to making such determinations because they are not designed to take into account national interests; state governments, including state courts, are devised to look out for state

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195. This excludes, for instance, a dollar bill that has been signed by a celebrity.

196. Cf. Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1412–15 (2001) (speaking of the incontestable goal of “maximizing” when deciding among commensurable matters); see also *id.* at 1428–29 (“[I]f there is only one value that ultimately matters, then rationality will compel a practical decision maker to seek and choose the option that will realize the most of that value. From this view, practical reason is entirely a matter of calculation.”).

197. See, e.g., Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110, 110 (Ruth Chang ed., 1997) (“Incommensurability is the absence of a common measure.”); Scharffs, *supra* note 196, at 1390–91 (stating that incommensurability arises when “everything that matters about two competing options can[not] be expressed in terms of a common value”).

198. Other commentators have made similar accounts of incommensurability. See, e.g., Elijah Millgram, *Incommensurability and Practical Reasoning*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 197, at 151, 151–69 (focusing on individual decision making under circumstances of incommensurability); Raz, *supra* note 197, at 110–28 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 197, at 170, 170–83 (arguing that justified choice among incomparables can be made by analyzing how the competing goods fit within the “shape” of a persons life).

interests. These concerns give rise to the dormant Commerce Clause and Privileges and Immunities Clause doctrines that limit the extent to which states can regulate in ways that affect American citizens that are not citizens of the regulating state.<sup>199</sup> Because polities cannot be trusted to guard the interests of noncitizens—who have no political voice through voting—states cannot be trusted to make the extraterritoriality determinations that lie at the heart of full faith and credit doctrine.

When choosing among the possible federal entities, Congress and the President are particularly well suited for determining how to harmonize the competing commitments of unifying while still maintaining meaningful differences among subfederal polities. Most importantly, because harmonizing incommensurable commitments is an intrinsically subjective and identity-forming activity, decision making of this sort falls more to the political branches of government than to the judiciary. Moreover, the legislative process, which involves congressional and presidential participation, is structured such that both state and national interests are considered:<sup>200</sup> congresspersons are elected on statewide or substate-wide bases rather than a national basis yet are institutionally expected to consider the national interest. The President is elected by a constituency that is simultaneously nationwide and state-based. By contrast, the process by which federal judges are selected and the life tenure they enjoy does not suggest that they are apt to give due consideration to both state and federal interests. Instead, by virtue of their identities as federal officials and their predominantly federal case law, federal judges are likely to systematically favor federal over state considerations.

This is not to suggest that federal courts have no role to play in determining full faith and credit's requirements—they do. One of their most important roles was creating a century of jurisprudence that has teased out the underlying principles implicated by the Full Faith and Credit Clause. The intense analysis of highly fact-specific circumstances frequently facili-

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199. See generally Rosen, *supra* note 115, at 897–930 (reviewing constitutional provisions that limit state's extraterritorial regulatory powers).

200. See generally Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–54 (1985) (discussing the composition of the federal government and its effect on preserving states' interests). Of course, to accept that Congress is structured in a manner that takes account of states' interests is not necessarily to conclude that there is no role for judicial oversight via the Tenth Amendment. *But see id.* at 537–55.



tates excavation of underlying principles; this is a large part of the common-law system's wisdom.

However, while courts are well suited to identifying underlying principles, it does not follow that they are best candidates for determining how to fit the principles together. This is particularly true where the underlying principles both conflict and are incommensurable.<sup>201</sup> Foundational democratic principles suggest that such highly subjective, identity-determining decisions are best made by the more political branches of government. This is particularly true for matters determining the character of federalism insofar as the Congress and President (as explained above) are more apt than the federal judiciary to take account of both national and state interests. These considerations together suggest that there should be highly deferential judicial review of the political branches' harmonization of incommensurable commitments in the context of full faith and credit doctrine.

Another constructive and institutionally appropriate role federal courts can play in the context of determining full faith and credit's requirements is to adopt a standard of review that ensures the more political branches have considered how to harmonize the competing considerations. After all, it is sensible for courts to defer to the political branches' determinations with regard to harmonizing incommensurables only if the political branches have actually attempted to do so. A variation on a clear statement rule, discussed in greater detail below,<sup>202</sup> can accomplish this. Indeed, the Court has adopted clear statement requirements in several federalism contexts designed to make certain that Congress forthrightly indicates its intention to exercise its unquestionable constitutional powers.<sup>203</sup>

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201. Though judicial decision making not infrequently requires that courts seek to harmonize incommensurable considerations, *see generally* Scharffs, *supra* note 196, at 1374, that does not mean it is normatively desirable.

202. *See infra* Part III.D.1.

203. *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64–67 (1989) (requiring a clear statement to compel states to entertain damages suits against themselves in state courts); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (holding that abrogation of state sovereign immunity must be expressed “in unmistakable language”). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (noting that the Court has created “a series of new ‘super-strong clear statement rules’ protecting constitutional structures, especially structures associated with federalism”).

#### 4. Objections to the Teamwork Model

This subsection anticipates and responds to an obvious objection to the Teamwork model: that it subverts the ordinary system of judicial review under which the Supreme Court's constitutional interpretations are authoritative and final. There are two plausible bases for the Teamwork model's rejection of judicial supremacy in the context of determining full faith and credit's requirements. One basis relies on well-established doctrine. The second basis, wholly independent of the first, is premised on a normative claim that is at variance with some important contemporary doctrine.

##### *a. Doctrinal Justification*

The first response can be traced to Justice Stone's dissent in *Yarborough v. Yarborough*,<sup>204</sup> for any judicial supremacy objection would apply equally to Justice Stone's suggestion that Congress may have the power to "expand[]" or "contract[]" Court-determined requirements of full faith and credit<sup>205</sup> as it would to the Teamwork model. The justification he provided in support of his conception of congressional power under the Effects Clause applies to the Teamwork model: there is constitutional text—the Effects Clause—that grants Congress the power to determine the "effect" of acts, judgments, and judicial proceedings.<sup>206</sup>

But how, one might ask, could a constitutional provision authorize Congress to essentially overturn Supreme Court decisions? A deeper inquiry into the nature of any such congressional enactments and their relationship to preenactment judicial precedent answers this query, thereby confirming the plausibility of Justice Stone's text-based approach. That is to say, what follows is not the primary normative justification for the Teamwork approach. Rather, it is a demonstration that the Teamwork approach is not *sui generis* in constitutional law but instead can be assimilated to existing doctrine.

Let us begin by considering what status an enactment pursuant to the Effects Clause would have: would it be an ordinary statute or a constitutional interpretation by Congress of what full faith and credit requires? Careful thought suggests it would be at least a statute and perhaps even a constitutional

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204. 290 U.S. 202 (1933).

205. *Id.* at 215 n.2 (Stone, J., dissenting).

206. *See id.*

interpretation. Both possibilities are consistent with American constitutionalism.

Start by considering the possibility that a congressional enactment would be a mere statute. It is easy enough to understand that the Effects Clause empowers Congress to enact statutes that determine the effects of acts, proceedings, or judgments. Less obvious is how a statute could effectively overrule a Supreme Court decision. The solution is straight forward: statutes would have power to displace Supreme Court precedent if the court rulings constitute federal common law rather than constitutional rulings.<sup>207</sup> As Professor Douglas Laycock argues,<sup>208</sup> there is a well-established body of federal common law—namely, the federal common law the Supreme Court has fashioned to “resolve interstate disputes over boundaries”—that is conceptually similar to the full faith and credit doctrine.<sup>209</sup> The underlying commonality is that both interstate border disputes and full faith and credit concern the extent of one state’s authority vis-à-vis other states. Determining state borders is “in its nature a federal question” that Congress has the authority to decide,<sup>210</sup> but “in default of legislation, the Court must create federal common law to resolve such disputes.”<sup>211</sup>

The same reasoning applies to full faith and credit doctrine. Determining when one state must give effect to a sister state’s law or judgment by its nature is a federal question because it turns on deciding the scope of each state’s regulatory authority. Congress has the authority to make such determinations under the Effects Clause, and in the absence of congressional action, the Court must fashion rules. Any such court rules, however, are subject to congressional revision. The same give-and-take between Congress and the Court is found in the dormant Commerce Clause context. The Court creates dormant

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207. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–11 (1975).

208. Laycock, *supra* note 96, at 333.

209. *Id.* For an example of the Supreme Court’s application of this federal common law, see *Cissna v. Tennessee*, 246 U.S. 289, 295–97 (1918) (resolving a boundary dispute involving the shifting of the Mississippi River). The Court has continued to resolve such interstate disputes even after *Erie*. See, e.g., *Louisiana v. Mississippi*, 516 U.S. 22, 25–28 (1995) (resolving a border dispute between Louisiana and Mississippi).

210. See *Cissna*, 246 U.S. at 295–96; see also U.S. CONST. art. IV, § 3.

211. Laycock, *supra* note 96, at 333.

Commerce Clause doctrines in situations where Congress has not exercised Commerce Clause power it unquestionably enjoys, and Congress can reverse the Court's dormant Commerce Clause rulings (by, for example, authorizing states to enact protectionist legislation) when it elects to exercise its Commerce Clause powers.<sup>212</sup>

Next, consider the possibility that an enactment would constitute an instance of congressional constitutional interpretation. There is nothing revolutionary about this possibility.<sup>213</sup> Indeed, Congress's role in interpreting the Constitution under the Teamwork model is less expansive than Congress's role under well-established doctrine dating back nearly two hundred years, now known as the political question doctrine, under which Congress is the final and authoritative interpreter of several constitutional provisions.<sup>214</sup> For instance, it is the Senate's sole responsibility to determine what the constitutional requirement of "try" means in the context of impeachment proceedings; courts have no power to even deferentially review the Senate's interpretation.<sup>215</sup> One of the factors on which the Supreme Court has relied in deciding that the responsibility for constitutional interpretation rests with a nonjudicial branch is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>216</sup> The Effects Clause seems to be no less explicit an indicator of congressional interpretive responsibility than are other provisions held to be the interpretive responsibility of the nonjudicial branches.<sup>217</sup> Thus, conceptualizing congressional enactments under the Effects Clause as instances of congressional constitutional interpreta-

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212. See Monaghan, *supra* note 207, at 16–17.

213. For a similar argument to what follows, see Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 319–23 (2002) (noting the different roles Congress plays in proffering constitutional interpretations as well as the "spectrum of deference to the political branches' interpretation of the Constitution").

214. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210–37 (1962); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–43 (1849) (holding that "it rests with Congress" to determine the meaning of the Guaranty Clause).

215. *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the Senate alone determines what the Impeachment Trial Clause requires).

216. *Carr*, 369 U.S. at 217.

217. See, e.g., *Nixon*, 506 U.S. at 229–30 (holding that language in the U.S. Constitution stating that the "Senate shall have the sole Power to try all Impeachments" is a "textually demonstrable commitment to a coordinate branch").

tion would not require Congress to play an unprecedented role.<sup>218</sup>

Moreover, the nonjudicial branches' responsibilities for constitutional interpretation under the Teamwork model are less unusual than those found under the political question doctrine because courts still have important roles to play under the Teamwork model. The Court is responsible for ensuring by a clear statement rule that Congress and the President have forthrightly considered how to harmonize the full faith and credit doctrine's competing considerations and applies deferential review to ensure that any Effects Clause statutes are not unreasonable. In fact, congressional and presidential responsibilities under the Teamwork approach are not too different from those circumstances in which the Court adopts deferential judicial review of legislation.<sup>219</sup> After all, ordinary legislation proceeds after Congress has made a threshold determination that it has the constitutional power to legislate. Deferential judicial review reflects the Court's determination that it ought to give a benefit of the doubt to Congress's constitutional judgment as to its constitutional powers.<sup>220</sup> Insofar as all legislation proceeds from Congress's interpretation of its own constitutional powers, the nonjudicial branches' responsibilities in respect of constitutional interpretation under the Teamwork model are not that different from the interpretive duties asso-

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218. It is true that in these other political question contexts the Court not only decides that a constitutional provision is the interpretive responsibility of another branch of government but also determines that courts are without the power to decide the question. *See, e.g., Nixon*, 506 U.S. at 229–30. There is no particular reason to think, however, that justiciability is a prerequisite for judicial responsibility in constitutional interpretation. Nonjusticiability is wise if courts are institutionally incapable of crafting even an interim solution pending resolution by the branch ultimately responsible for providing the final and authoritative interpretation. If circumstances are such that a default judicial rule is better than no rule at all, why shouldn't courts be permitted to act first with the understanding that Congress thereafter may revise their judgments?

219. The extent to which the Court actually utilizes deferential review has varied over time, and it appears that the Court has been tending to show less deference to coordinate branches across wider expanses of constitutional doctrine. *See* Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 79–87 (2003).

220. *See id.* at 85–87; *see also* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–36 (1893) (discussing judicial power in relation to legislative power); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007–08 (1924) (quoting with approval the Thayerian view that Congress's constitutional interpretations should be given great deference).

ciated with run-of-the-mill legislation subject to only deferential review.<sup>221</sup>

To quickly conclude, Justice Stone's view that the Effects Clause may authorize Congress either to expand or contract the full faith and credit duties identified by the Court would not create an Effects Clause jurisprudence that is wholly *sui generis*. Instead, it generates an approach to the Full Faith and Credit Clause that is consistent with other constitutional doctrines. Effects Clause enactments plausibly could constitute either pure statutes or constitutional interpretations by Congress. Either type of enactment could displace the default rules of full faith and credit created by the judiciary that have the status of federal common law.

*b. Normative Justification*

Even if the Court's full faith and credit cases announce constitutional rules instead of federal common law, it would not ineluctably follow that Congress and the President are without the power to act on the basis of their own constitutional interpretation of the Full Faith and Credit Clause. Rather, Congress and the President lack the power act only if the Supreme Court's constitutional interpretations trump the nonjudicial federal branches' interpretations. Many scholars have rejected this "judicial supremacy" conception, adopting instead the "departmentalist" conception that the judiciary enjoys no special interpretive prerogative in constitutional interpretation.<sup>222</sup> Under this approach, the other branches of government—generally the federal government—may rely upon their own understandings of the Constitution when they act.<sup>223</sup>

The anti-judicial-supremacy argument, however, runs

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221. It might be objected that legislation under the Commerce Clause, for example, is different because any constitutional interpretation by Congress reflects only a judgment as to its own powers, whereas legislation under the Effects Clause represents a judgment about the Constitution's limitations on other polities (i.e., the states). Any such distinction is untenable because Congress's powers deprive other governmental entities of power by virtue of the Tenth Amendment. See *New York v. United States*, 505 U.S. 144, 155–56 (1992) (stating that "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment" is a "mirror image[]" of the question of "whether an Act of Congress is authorized by one of the powers delegated to Congress in . . . the Constitution").

222. See, e.g., KRAMER, *supra* note 34, at 106 (explaining the "departmental" theory).

223. *Id.*

afoul of important contemporary case law. Although the well-known 1966 opinion of *Katzenbach v. Morgan*<sup>224</sup> most plausibly is construed as a departmentalist approach within the context of Congress's Section 5 powers under the Fourteenth Amendment,<sup>225</sup> more recent case law rejects this approach,<sup>226</sup> asserting in its place strong judicial supremacy<sup>227</sup> in the interpretation of constitutional law.<sup>228</sup> To be sure, one could argue that the Court only asserts judicial supremacy in the limited context of Section 5, where Congress's powers are nonplenary.<sup>229</sup> As a purely positive matter, however, the Court's Section 5 jurisprudence seems to reflect the Court's current general conception of judicial review. Thus, any argument that Congress and the President may act on the basis of their own constitutional interpretations constitutes a plea for doctrinal change rather than an argument squarely based on contemporary precedent.

Even if Congress does not have the power to legislate on the basis of its own constitutional interpretations, one could still conclude that the Effects Clause explicitly gives Congress interpretive powers coextensive with the Supreme Court in the narrow context of full faith and credit. This argument does not directly run up against contemporary precedent, but no case law directly supports it, either. Instead, this argument is both novel and wholly *sui generis* to the full faith and credit context. For these reasons, the justification for Congress's plenary Effects Clause powers provided above<sup>230</sup> is a stronger argument for the Teamwork model in view of contemporary precedent.

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224. 384 U.S. 641 (1966).

225. See *id.* at 656 (upholding a statute banning literacy requirements for voting under Section 5 of the Fourteenth Amendment). The *Katzenbach* Court explained that even though the Court had upheld literacy requirements against an equal protection challenge in a recent case, Congress was free to legislate on the basis of the contrary view that such requirements were unconstitutional and the Court would uphold Congress's independent constitutional assessment as long as the Court could "perceive a basis upon which Congress might predicate [its] judgment." *Id.* For present purposes, there is no need to review the cottage industry of scholarly approaches to interpreting *Katzenbach*—which involved such distinctions as ratchet-up and ratchet-down interpretations—that arose following the decision's publication.

226. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997).

227. See Waldron, *supra* note 34, at 197–98.

228. See, *e.g.*, *Boerne*, 521 U.S. at 535–36.

229. See *Katzenbach*, 383 U.S. at 649–51 (explaining the standard for determining appropriate congressional legislation under Section 5 of the Fourteenth Amendment).

230. See *supra* Part III.C.3.

#### D. ELABORATING THE TEAMWORK MODEL AND APPLYING IT TO DOMA

Having generally described the Teamwork model and defended it against a powerful objection in the two preceding subsections, I will now elaborate the Teamwork model and apply it to DOMA.

##### 1. Elaboration

In the absence of federal legislation, both federal and state courts<sup>231</sup> can issue rulings on the Full Faith and Credit Clause's requirements. Any such rulings have the status of federal common law.<sup>232</sup> In the event that Congress enacts legislation under the Effects Clause, courts should undertake a two-part analysis. First, courts should apply a clear statement rule to check that Congress engaged in a decision-making process that considered how full faith and credit's competing considerations should be harmonized *in the context in which the statute is being applied*. The italicized language merits elaboration. The harmonization process that attends full faith and credit determinations invariably requires highly contextualized analysis because the extent to which state autonomy and national unity are implicated varies depending upon the substantive law or judgment at issue.<sup>233</sup> The type of judicial test I propose, designed to make certain that the political branches have forthrightly considered harmonizing the Full Faith and Credit Clause's competing considerations in the context at hand, is effectively a rule of statutory interpretation requiring context specificity.

Because Congress faces difficulty anticipating and considering the full range of substantive contexts, this standard of review likely means that courts would have the first opportunity to reconcile the Full Faith and Credit Clause's competing principles, subject to congressional override. Though a bit clunky, this institutional arrangement seems wise. Courts are well suited to highly context-specific analysis that identifies the underlying principles that particular fact patterns raise; this, indeed, is the core of common-law adjudication. Courts are less

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231. See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 839–51 (2005) (illustrating state courts' role in the formulation of federal common law).

232. See *id.*

233. See *supra* Part III.C.3.



institutionally suited than legislatures, however, to undertake the political, identity-defining reconciliation of the competing considerations. It is fine for courts to attempt an initial harmonizing of competing considerations, but only if the politically accountable branches responsible for making political decisions have the power to legislatively correct judicial efforts.<sup>234</sup>

If the statutory rule satisfies the first test, the court should then ask whether the rule is reasonable, taking into account the Full Faith and Credit Clause's twin goals of creating a union and meaningfully empowering states. While such a "reasonableness" inquiry is intrinsically open ended, some concrete guidelines do suggest themselves. To begin, a statutory provision that more-or-less embraces longstanding contemporary Supreme Court doctrine would seem to automatically qualify as reasonable. Similarly, a statutory provision adopting an approach that case law at one time reflected but later repudiated would be reasonable unless the later cases rejected the approach because of manifest error or gross injustice. This is true for two reasons. First, the mere fact that a majority of Supreme Court Justices championed the approach for some time is strong—though not dispositive—evidence that the approach is reasonable.<sup>235</sup> Second, judicial rejection of an approach sometimes reflects the conclusion that courts' institutional characteristics rendered the approach judicially inadministrable, not a determination that the approach was substantially wrong-headed.<sup>236</sup>

These guidelines are useful but nonexhaustive. After all, there is no *a priori* reason why previous judicial approaches

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234. Alternatively, Congress plausibly could delegate rule-making authority to an administrative agency to harmonize the Full Faith and Credit Clause's competing considerations across different contexts. This is a far inferior approach to the institutional arrangement sketched above in the text for two reasons. First, an administrative agency likely would face the same problem as Congress: a limited ability to anticipate the varied contexts and carefully think through the relevant considerations without the detailed context that adjudications provide. Second, administrative agencies lack Congress's authority and political accountability to make the political, identity-defining decisions reconciling the Full Faith and Credit Clause's competing considerations from context to context.

235. In my view, even a single Supreme Court Justice's embrace of a particular approach in dissent would constitute significant evidence of reasonableness.

236. An example might be the Supreme Court's approach to full faith and credit taken in *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 159–60 (1932), which *Carroll v. Lanza*, 349 U.S. 408, 413–14 (1955), effectively rejects. See SCOLES ET AL., *supra* note 110, at 163.

should limit the political branches' legislative determinations under the Effects Clause. Where there is no ready judicial analogue to the legislative determination, courts must directly query whether the balance struck between the principles of unification and meaningful empowerment is reasonable.

## 2. Application

This subsection considers DOMA's applicability to a variety of acts and judgments.

### *a. Public Acts and Declaratory Judgments*

Under the approach sketched above, DOMA's choice-of-law provisions would readily pass constitutional muster as applied to the circumstances Congress drafted DOMA to address. With regard to the first test, DOMA satisfies the clear statement rule vis-à-vis the types of public acts and judgments that Congress considered during the course of DOMA's debate: public acts defining marriage and declaratory judgments that declare two gays to be married. To apply the second test, one must distinguish between public acts and judgments. For public acts, the DOMA rule tracks the ordinary full faith and credit doctrine and for that reason readily qualifies as "reasonable." The analysis is only slightly more complex with respect to nonresidents who marry in a state that legalizes same-sex marriage and then obtain a declaratory judgment reflecting their marital status. Although full faith and credit law typically mandates the enforcement of sister-state judgments, DOMA's nonenforcement rule is similar to the exceptional cases that do not require enforcement of judgments on the theory that demanding enforcement would constitute illicit extraterritorial regulation by the state that issued the judgment.<sup>237</sup> It readily follows that DOMA's nonenforcement rule is reasonable as applied to declaratory judgments same-sex couples obtain for the purpose of circumventing home-state laws that do not authorize same-sex marriage.<sup>238</sup>

### *b. Insurance Judgments*

Next, consider DOMA's application to a difficult hypothetical that Professor Koppelman formulates.<sup>239</sup> Imagine a lawsuit

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237. See *supra* Part II.C.

238. See *supra* Part II.C.1.

239. Koppelman, *supra* note 4, at 12–13.

in Massachusetts by the same-sex spouse of a worker whose insurance policy covers “spouses.” If the insurance company declines coverage, a Massachusetts court might well decide that the couple indeed is married and that the company must pay. Armed with such a judgment, the prevailing plaintiff might seek to enforce it in another jurisdiction where the insurance company has assets. Because the judgment made an insurance company liable to pay “spousal” benefits due to the injury of a same-sex marriage partner, the insurance company might invoke DOMA to argue that state *B* need not enforce the judgment insofar as it is the product of a “claim arising from” a same-sex relationship under DOMA language if state *B* does not recognize same-sex marriages.<sup>240</sup>

Under my analysis, the insurance company cannot successfully invoke DOMA for two independent reasons. First, DOMA does not apply because Congress did not contemplate such an application during the course of DOMA’s debate and enactment.<sup>241</sup> Second, applying DOMA would not reflect a “reasonable” harmonization of the principles of unification and state sovereignty. The forum’s interest in not enforcing the judgment is negligible. The domestic costs of enforcement are slight because courts, by virtue of their institutional role, enforce judgments (and even apply laws) from other sovereigns all the time.<sup>242</sup> Citizens consequently appear not to construe judicial enforcement as governmental endorsement of the legal right in question.<sup>243</sup> Nor can one plausibly claim that nonenforcement would advance the forum’s interest in paternalistically regulating the same-sex couple, for the forum does not have a legitimate interest in regulating nonresidents who simply seek enforcement of a judgment.<sup>244</sup> Likewise, even if the insurance company resides in the forum state, the forum has no legiti-

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240. See 28 U.S.C. § 1738C (2000).

241. See Koppelman, *supra* note 4, at 17 (reviewing DOMA’s legislative history and concluding that “[i]n writing the provision to cover judgments as well as choice-of-law decisions, Congress does not seem to have contemplated any genuinely adversarial proceeding” and that “the drafters of DOMA appear to have been blind to the statute’s effects on the targeted class” in the type of issues discussed in my example).

242. See Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 848 & n.283 (2004).

243. *Id.*

244. Moreover, it is hard to imagine in what way nonenforcement could qualify as paternalistic regulation even if the forum did have some regulatory interest. Can one seriously think that nonenforcement will lead couples to revisit their preferences regarding their partner’s gender?

mate interest in ensuring that its corporate citizen avoid claims connected to same-sex marriages that are legal in states where the insurance company has voluntarily agreed to do business and entered into contracts providing spousal benefits. By contrast, the costs to unification of refusing to recognize such a judgment are substantial. There is strong national interest in not creating a regime under which persons can dodge their judgment obligations simply by refusing to pay and crossing a state border.<sup>245</sup> These various considerations justify interpreting DOMA more narrowly than its plain language admittedly suggests.

If courts were to adopt my conclusion that application of DOMA to the insurance company was not reasonable but reject the rule of statutory interpretation that constitutes the first step of my recommended analysis, it would not follow that DOMA is unconstitutional. This is so for two reasons. First, the Court could construe DOMA's judgments provision narrowly to apply only to declaratory judgments in accordance with the canon of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."<sup>246</sup> This narrowing interpretation of DOMA does not run afoul of Congress's intent for the reason mentioned above: Congress did not consider DOMA's application to garden-variety judgments but instead focused on ensuring that the nonadversarial declaratory judgments advised by gay rights advocates not be thought to bind other states.<sup>247</sup> Second, the Court could invoke the doctrine of severability and conclude that although DOMA's application to adversarial judgments of the sort discussed above is unconstitutional, "other applications of the statute may be separated from the invalid applications and left in force."<sup>248</sup>

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245. See Rosen, *supra* note 115, at 883–91; Singer, *supra* note 7, at 20–22.

246. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

247. See Koppelman, *supra* note 4, at 17.

248. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1951 (1997). Vermeule helpfully notes that "[t]here is a common misconception that severability analysis refers only to the severance of provisions or subsections enumerated or labeled independently in the official text of the statute" and shows that severability analysis applies as well "to applications of a particular statutory provision when some (but not all) of those applications are unconstitutional." *Id.* at 1950 n.26.

*c. Same-Sex Marriage Dissolutions*

Court orders in connection to the dissolution of a same-sex marriage, such as orders for spousal support, child support, or child visitation, present a far more difficult case. DOMA, under my analysis, does not address such court orders because Congress did not consider these orders when it debated and enacted DOMA. If courts did not adopt this step of my analysis, or if Congress were to enact a follow-up to DOMA that explicitly applied to such orders (let us call this hypothetical enactment “DOMA-2”), we would have to directly confront whether a rule permitting states to refuse recognition of judgments in connection with the dissolution of a same-sex marriage is “reasonable.”

This is a very difficult question. In favor of enforcement, such judgments can arise—and such judgments invariably *will* arise now that same-sex marriage is legal in one state—in non-collusive contexts. Moreover, the knowledge that state *B* will refuse to enforce postdivorce judgments in connection with same-sex marriages might seriously hamper a same-sex divorcee’s willingness to relocate to state *B*, and such obstacles to relocation in turn may undermine one of the core benefits of the national union.<sup>249</sup> Another trouble is that obligors from dissolved same-sex marriages may relocate to those states that do not enforce postdivorce judgments so as to effectively free themselves of their obligations, thereby harming the obligees who remain in the state in which the same-sex marriage occurred.<sup>250</sup>

On the other hand, requiring enforcement of such postdissolution judgments undeniably would constitute significant interference with the forum state’s ability to regulate its citizens as it sees fit. It is important to remember that postdissolution judgments typically are not one-shot requirements to pay money or act in a certain manner, but instead regulate relations among the former spouses for a considerable time (for example, until minor children reach the age of majority). Accord-

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249. Indeed, one readily can imagine the argument that such an obstacle itself constitutes a deprivation of the constitutional right to travel, though current legal interpretations of the doctrine do not support such a claim. See Rosen, *supra* note 115, at 913–19 (offering a normative argument in support of the contemporary approach).

250. This might be an infrequent occurrence, for even obligors might be reluctant to relocate to a state whose policies do not accommodate their sexual preferences.

ingly, postdissolution judgments frequently require considerable judicial and executive branch involvement; officials regularly modify orders, and police and other executive branch officials routinely intervene to address the high rates of noncompliance. Such governmental activity by the forum state is the functional equivalent of ongoing legal regulation. As such, if a same-sex divorcee resettles in a state that does not recognize same-sex marriage, requiring the new state to enforce the former state's judgment is tantamount to requiring the new home state to regulate its (new) citizen under another state's law for the postdissolution judgment's duration. This displaces the new home state's ability to regulate its citizens in accordance with its public values; states design laws to encourage some behaviors and discourage others, signal values to citizens, and socialize citizens, and requiring the new home state to enforce the former home state's postdissolution judgment over an extended period of time undermines these ends.<sup>251</sup> The former home state would in effect commandeer the new home state's public policy and undermine the new home state's ability to advance its social agenda. Indeed, these very real interests of the new home state are the reason that heterosexual postdivorce decrees are "nonfinal," allowing the courts of the new home state to modify them in accordance with the law of the new home state.<sup>252</sup>

In short, the effect that is to be given to judgments in connection with the dissolution of same-sex marriages presents profoundly difficult policy questions that go to the heart of the character of our country's federal union. Does the "unification" principle behind full faith and credit mean that states cannot burden a person's ability to readily relocate by disregarding the legal rights that the person's former home state created? Or does the "meaningful empowerment" principle behind full faith and credit mean that the new home state cannot be effectively forced to regulate its new citizen under the regulatory regime of the citizen's former state?

The answer cannot be arrived at through logic alone but instead reflects a political decision that will shape the identity

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251. Durability distinguishes postdissolution judgments from ordinary judgments that enforce another polity's law. The long-term character of postdissolution judgments transforms their enforcement into de facto displacement of the forum law.

252. See *Worthley v. Worthley*, 283 P.2d 19, 21 (Cal. 1955); *SCOLES ET AL.*, *supra* note 110, at 676.

of our federal union. For that reason, the political branches of government bear the primary responsibility for answering the question. If Congress forthrightly considered the matter and intentionally made a decision in a hypothetical DOMA-2 that states need not enforce postdissolution judgments, it would be hard to conclude that its decision, while difficult, was unreasonable. Thus, a clear congressional decision in DOMA-2 authorizing states to refuse to enforce judgments relating to the dissolution of same-sex marriages would not be unconstitutional. As a practical matter, however, states that permit same-sex marriage can significantly reduce the real-world costs of DOMA-2. Part IV discusses in detail how states can largely guaranty the enforcement of postdissolution judicial orders, effectively transforming DOMA-2 into a penalty-default rule.<sup>253</sup>

#### IV. THE CONSTITUTIONAL STATUS OF THE “PLACE OF CELEBRATION” RULE

##### A. PROFESSOR SINGER’S ARGUMENT

In a recent article, Professor Joseph Singer argued that DOMA is unconstitutional because full faith and credit requires that there be “a single answer to the question of whether a couple is or is not married” and that the answer must be supplied by the place of celebration.<sup>254</sup> Even where a same-sex couple living in a jurisdiction that does not recognize same-sex marriage (say Rhode Island) gets married in a state that grants same-sex marriage (say Massachusetts), Singer concludes that the Full Faith and Credit Clause demands that all other states treat the couple as married.<sup>255</sup> Singer’s conclusion is predicated

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253. For a general discussion of penalty default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 105–06 (1989).

254. See Singer, *supra* note 7, at 45–46.

255. Singer decides on the basis of traditional conflict of laws principles that the same-sex couple’s home jurisdiction (Rhode Island in the example in the text above) should treat the couple as being married in Rhode Island because they are legally married in Massachusetts. *Id.* at 30. He then provides several policy arguments supporting the proposition that marriage is a type of law that is “entitled to recognition by other states even if this allows . . . one state to export its law to the whole country.” *Id.* at 35. Singer’s constitutional argument does not explicitly address out-of-state same-sex couples traveling to Massachusetts simply to get married, but the policy needs he identifies are equally applicable to these couples as to couples who reside in Massachusetts. Indeed, when Professor Singer reviewed this manuscript and provided many helpful criticisms, he did not dispute the position attributed to him above.

on the assertion that there is a “need in an interstate system to have a single answer to the question of whether one is or is not married.”<sup>256</sup> Otherwise, Singer argues, there will be a “problem of inconsistent legal obligations” in such matters as protecting offspring, allocating property interests, and sorting out other marital responsibilities.<sup>257</sup> Such differences of legal obligations would permit a same-sex spouse to “evade [her] legal obligations under Massachusetts law” by relocating to a jurisdiction that refused to recognize judgments relating to same-sex marriage.<sup>258</sup> Let us call this the “obligation-evasion” problem.

The issues Singer identifies are real, but the solution he offers is deeply problematic for three reasons: first, Singer’s proposal is contrary to the rule that has been in place for the entirety of constitutional jurisprudence; second, there is precious little doctrinal basis for his novel solution; and finally, far less drastic means that are more protective of state interests can address the legitimate concerns that Singer raises.

## B. THREE CRITIQUES

### 1. Contrary to Constitutional Jurisprudence

To begin, Singer’s solution—creating a new constitutional rule requiring states to recognize the marriages that are valid in the place where the marriage was celebrated—is contrary to the constitutional rule that has been in place for our nation’s history. Courts and commentators at all times have understood that the Full Faith and Credit Clause does not obligate state *B* to recognize a marriage lawfully performed in state *A*.<sup>259</sup> This is so despite the widely divergent marriage rules found in different states at various times in our nation’s history. For instance, until the 1960s, some states prohibited interracial marriages, and when courts in such states were confronted with interracial marriages that had been performed in states where such marriages were legal, the forum engaged in a nonconstitutional choice-of-law analysis to determine whether the interracial marriage should be recognized.<sup>260</sup> The risks associated with

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256. *Id.* at 36.

257. *Id.*

258. *Id.* at 6.

259. See Currie, *supra* note 61, at 10–11; Koppelman, *supra* note 4, at 10.

260. For a fascinating study examining how forum states with antimiscegenation treated interracial marriages performed in states not barring miscegenation, see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and*



creating “inconsistent legal obligations” for marriage were present,<sup>261</sup> yet the nation survived without the constitutional rule Singer propounds. To be clear, Singer acknowledges that his argument is difficult to “support based on historical interpretations of the Full Faith and Credit Clause.”<sup>262</sup> Important to any effort to assess the proposal’s desirability, however, is a full appreciation of how drastically his proposal breaks with past practice.

## 2. Analogizing Singer’s Approach to *Williams v. North Carolina*

Second, there is little doctrinal basis for Singer’s radical proposal. The Supreme Court has held that the Full Faith and Credit Clause does not require that a single state’s law apply to a particular transaction or occurrence (nor, *a fortiori*, does it provide any criteria for determining which state’s law appropriately applies).<sup>263</sup> Rather, with respect to laws, the Court has folded full faith and credit into the due process doctrine that serves as a threshold test to insure that a state seeking to regulate has the constitutionally required minimum contact necessary to legitimate its action.<sup>264</sup> More specifically, the test is

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*Public Policy*, 76 TEX. L. REV. 921 (1998). There of course would have been no state case law for Professor Koppelman to study if the place of celebration rule had been a constitutional requirement. Antimiscegenation laws were not ruled unconstitutional in America until 1967. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding that Virginia’s law prohibiting interracial marriages violated the Fourteenth Amendment).

261. Singer, *supra* note 7, at 36.

262. *Id.* at 34.

263. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307, 308 n.10 (1981). This has not always been the case. For some time the Court understood full faith and credit as a doctrine determining which state’s law appropriately applied. See, e.g., *Rosen*, *supra* note 115, at 960–62 & n.447 (discussing *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 163 (1932) (Stone, J., concurring)); see also *id.* at 947 & n.392. More recent cases have narrowed *Clapper* to its facts. See *Nevada v. Hall*, 440 U.S. 410, 421–22 (1979); *Rosen*, *supra* note 115, at 961 & n.447 (reviewing the *Nevada* decision). I have championed a revival of *Clapper*’s approach, suggesting that the Full Faith and Credit Clause appropriately invites judicial scrutiny of whether state *A*’s interests pale in comparison to those of state *B*’s such that state *B*’s law must be applied. *Rosen*, *supra* note 115, at 960. This method admittedly requires a “reworking of contemporary full faith and credit doctrine.” *Id.* It would not lead, however, to Singer’s proposed solution that “place of celebration” alone determines which state’s law applies. *Cf. id.* at 934–41 (explaining why using a single factor to determine which law applies unduly imperils state interests and is unfair vis-à-vis parties).

264. See *Allstate*, 449 U.S. at 307–08.

whether the state that seeks to apply its law to a given transaction or occurrence has a “significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>265</sup> Notably, the full faith and credit inquiry does not compare which of several states has the greater interest in regulating but only proscribes regulation from states lacking the minimum contact.<sup>266</sup> Accordingly, the full faith and credit question under contemporary doctrine is whether domicile is a “significant contact” that creates interests on the part of a state (let us say Rhode Island) such that application of its marriage laws is neither arbitrary nor fundamentally unfair. The answer unquestionably is yes, for domicile long has been held to be a contact that justifies a state’s regulatory jurisdiction.<sup>267</sup>

Singer’s doctrinal argument primarily relies on the 1942 case of *Williams v. North Carolina*.<sup>268</sup> The *Williams* Court held that North Carolina was obligated to recognize a divorce issued by Nevada despite the fact that North Carolina had been the marital domicile, that the abandoned spouse still resided in North Carolina, that only one of the spouses had been present in Nevada (and the other spouse, in fact, had never been in Nevada), and that Nevada law permitted divorce under circumstances that North Carolina (at the time) did not.<sup>269</sup> As a purely doctrinal matter, *Williams* has never been understood to create Singer’s rule that all states are constitutionally required to recognize marriages valid in the place of celebration.<sup>270</sup> Divorce decrees, unlike marriages, are court judgments, and the full faith and credit doctrine long has distinguished between judgments and other “acts” of states.<sup>271</sup>

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265. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate*, 449 U.S. at 313).

266. *See generally* Rosen, *supra* note 115, at 960–61 (explaining that the Full Faith and Credit Clause limits the home state and host states alike).

267. *See id.*

268. 317 U.S. 287 (1942), *vacated*, 24 S.E.2d 256 (N.C. 1943).

269. *See id.* at 289–90, 303–04.

270. Indeed, the fact that the Full Faith and Credit Clause does not mandate recognizing marriages performed in another jurisdiction was the predicate for one of Professor Koppelman’s constitutional challenges to DOMA, namely, that DOMA accomplished nothing and hence is irrational insofar as states were constitutionally permitted to decline recognition of other states’ marriages even before it was enacted. *See* Koppelman, *supra* note 4, at 10.

271. *See supra* Part II.

Singer's proposal thus amounts to an argument for extending the *Williams* rule to marriages.<sup>272</sup> This would be unfortunate. *Williams* has been trenchantly critiqued since it was decided,<sup>273</sup> and for good reason. The *Williams* rule problematically diluted state sovereignty by giving states with the most lenient divorce laws the constitutional power to export their rules to more restrictive jurisdictions. Indeed, in the wake of the *Williams* ruling, "Nevada solidified its position as the nation's leading capital of migratory divorce, shortening its residence requirements and expanding its grounds for divorce."<sup>274</sup> The *Williams* decision hence undermined the extent to which other states could efficaciously maintain stricter divorce laws that reflected their political community's policy preferences, undercutting federalism's promise of permitting divergent policies and experimentation with substantive policies that are not themselves unconstitutional.<sup>275</sup> *Williams* is unlikely to be overruled on account of its age, but its pernicious effects on state sovereignty and policy diversity constitute solid reasons to resist its extension. Furthermore, there is no policy basis for extending *Williams* because, as I'll soon discuss, there are far less drastic mechanisms for solving the problems that motivate Singer's solution.

Singer also relies on the dormant Commerce Clause's "internal affairs" doctrine to support his claim that states should be constitutionally required to recognize same-sex marriages celebrated in jurisdictions permitting them.<sup>276</sup> The internal affairs doctrine is a federal choice-of-law rule tied to the dormant Commerce Clause; it makes law of the place of incorporation the operative rule on such matters as shareholder voting rights and the legal relations between shareholders and managers.<sup>277</sup> This dormant Commerce Clause rule, however, has no application to family law. According to the Supreme Court, the internal affairs doctrine is applicable to "subjects that 'are in their

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272. See Singer, *supra* note 7, at 39–40 ("It would be odd if the Constitution required the several states to recognize Nevada divorces but allowed states to ignore Massachusetts marriages.").

273. See, e.g., *Williams*, 317 U.S. at 304–07 (Frankfurter, J., concurring); Currie, *supra* note 61, at 9.

274. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2039 (2000).

275. See Rosen, *supra* note 115, at 882–91.

276. See Singer, *supra* note 7, at 41–42.

277. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–89 (1987).

nature national, or admit only of one uniform system, or plan of regulation.”<sup>278</sup> The internal affairs doctrine sensibly selects one state’s laws to govern shareholder voting rights because it would be unworkable if multiple states’ divergent voting-rights rules applied to a single corporation; each act of corporate governance otherwise could be subject to inconsistent and mutually inconsistent state law requirements. Similarly, it would “threaten the free flow of interstate commerce”<sup>279</sup> if each state were able to set maximum limits on train lengths, which is why the dormant Commerce Clause displaces these type of state laws as well.

By contrast, the criteria for marriage do not belong to those “subjects that ‘are in their nature national, or admit only of one uniform system, or plan of regulation.’”<sup>280</sup> On the contrary, it is in respect of such social policies about which citizens are deeply divided that preserving the possibility of diverse state regimes is most important.<sup>281</sup> The mere fact that the marriage law selected by a state may have effects on interstate commerce does not mean that the dormant Commerce Clause properly displaces the state law, for “there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.”<sup>282</sup>

### 3. Alternative Approaches

Third, Singer exaggerates the novelty and dimensions of obligation evasion and overlooks far less intrusive solutions that can leave intact state prerogatives to differ substantively on matters about which the Constitution does not demand national uniformity. Less intrusive solutions are preferable because the Full Faith and Credit Clause is not appropriately used as a foil for diverse state policies not deemed unconstitutional.<sup>283</sup>

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278. *Id.* at 88–89 (quoting *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1852)).

279. *Rosen*, *supra* note 115, at 929.

280. *CTS Corp.*, 481 U.S. at 88–89 (quoting *Cooley*, 53 U.S. at 319).

281. *See Rosen*, *supra* note 115, at 929; *see also id.* at 886–91 (explaining the benefits of permitting different states to select different policies).

282. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 762 (1945)). For an excellent discussion of this idea, see Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785, 806 (2001).

283. *See generally Rosen*, *supra* note 115, at 882–91 (arguing that extrater-

Singer's analysis overstates the problem because family law has long been susceptible to attempts at "obligation evasion" and the complex child support and property problems they create. In the context of heterosexual marriages, individuals (typically men) have married and had children in state *B* despite an existing marriage in state *A*.<sup>284</sup> Sometimes the second family is not discovered until after the man's death, and the law must determine how the bigamous husband's estate will be distributed. And in some cases, the man does not enter into a second marriage but carries on an adulterous relationship that results in children. The law has devised solutions regarding child support and inheritance in such situations. These circumstances are not very different from the scenario Singer identifies of a gay spouse who tries to "skip out on [her] obligations" by abandoning her same-sex family and relocating to a jurisdiction that does not recognize same-sex marriages.<sup>285</sup> The law's solutions to these problems in the context of heterosexual marriage suggest that there are solutions in the same-sex marriage context as well.

The major difference between abandonment in the heterosexual and homosexual marital contexts is that all states prohibit successive heterosexual marriages (absent divorce, annulment, or death), whereas states that do not recognize a same-sex marriage may not view a successive heterosexual marriage as bigamous.<sup>286</sup> Singer's proposed solution would eliminate this difference by constitutionally requiring all states to recognize a same-sex marriage performed in a jurisdiction allowing such marriages. But Singer's approach does not permit different states to have different policies on a matter in which the Constitution and other federal law do not (as of yet, at least) require national uniformity: same-sex marriage.

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ritorial regulation of citizens to curb "travel-evasion" of state policy is fair).

284. For a recent example, see *State v. Fitzgerald*, 726 P.2d 1344, 1345 (Kan. 1986).

285. Singer, *supra* note 7, at 43.

286. States that do not recognize same-sex marriage could nonetheless treat as bigamous a heterosexual marriage that followed a same-sex marriage that had not been properly wound down, just as many states that prohibited interracial marriages elected to recognize such marriages that were performed in jurisdictions that permitted them. See generally Andrew Koppelman, *Same Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 952-62 (1998) (describing case law in which forums that prohibited interracial marriage nonetheless recognized interracial marriages performed outside the jurisdiction).

Fortunately, there is another way to address obligation evasion without sacrificing state sovereignty and jeopardizing federalism's benefits with regard to diversity across states among policies that are neither constitutionally required nor proscribed. Instead of demanding that all states treat same-sex marriages as valid marriages, the state that validates same-sex marriages unilaterally can ensure that a spouse who relocates to a jurisdiction that does not recognize same-sex marriage does not evade maritally created obligations. For example, states permitting same-sex marriages can criminalize the abandonment of spouses, the cessation of child support payments, and the like. Should abandonment or other criminal offenses occur, the state accepting same-sex marriage can demand extradition of the offending party. That state can then subject the evader to its laws and judicial procedures.

This "extradition" solution works well both doctrinally and normatively. Doctrinally, it is well established that the asylum state (i.e., the state that does not recognize same-sex marriage) has no discretion to deny a valid extradition request issued by a sister state; there is no "public policy exception" with regard to extradition,<sup>287</sup> nor must the alleged offense be criminal in the asylum state.<sup>288</sup> This means that Massachusetts could validly prosecute the same-sex spouse who had fled Massachusetts, even if she is domiciled in a jurisdiction that does not recognize same-sex marriages. States have the power to criminally prosecute noncitizens' out-of-state activities if those "[a]cts done outside a jurisdiction [are] intended to produce and produc[e] detrimental effects within it."<sup>289</sup> Individuals can be extradited for misdemeanors and for the failure to support minor children.<sup>290</sup> Moreover, it is well established that even if the act that completes the crime (such as celebration of the second marriage

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287. See *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987) ("We reaffirm the conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum State.").

288. *Id.* at 225 (upholding *Kentucky v. Dennison*, 65 U.S. (22 How.) 66 (1860), which "rejected the position . . . that the Extradition Clause required only the delivery of fugitives charged with acts which would be criminal by the law of the asylum State").

289. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911), discussed in *Rosen*, *supra* note 115, at 864–71 (showing that *Strassheim's* rule has been incorporated into the Model Penal Code).

290. See Leslie W. Abramson, *Extradition in America: Of Uniform Acts and Governmental Discretion*, 33 BAYLOR L. REV. 793, 822 (1981).

without having terminated the prior same-sex marriage) occurred outside of the demanding state, the demanding state may still validly request extradition so long as some of the acts in relation to the crime occurred there.<sup>291</sup> Plans to abandon one's same-sex spouse—and perhaps even the same-sex marriage itself—should satisfy this requirement.<sup>292</sup>

To anticipate a likely objection, it does not matter that the activity completing the criminality occurred in a jurisdiction that does not criminalize the conduct. The Model Penal Code provides that a state can exercise legislative jurisdiction if the “actor purposely or knowingly caused the result within the State” even though “causing a particular result is an element of an offense and the result is caused by conduct occurring outside the State that would not constitute an offense if the result had occurred there.”<sup>293</sup> Under this provision, Massachusetts can criminalize as bigamous a heterosexual marriage occurring in Rhode Island where one of the parties to the marriage previously entered into a same-sex marriage in Massachusetts that was not lawfully terminated prior to the Rhode Island marriage. The Model Code provision means that Massachusetts can criminalize the conduct even if Rhode Island would not treat the Rhode Island marriage as bigamous because it does not

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291. See *Strassheim*, 221 U.S. at 285 (“[T]he criminal need not do within the State every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. For all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there, and his overt act becomes retrospectively guilty when the contemplated result ensues.” (citations omitted)).

292. Moreover, there may be no requirement that the defendant have undertaken any acts in furtherance of her crime while she was in the demanding state or indeed that she ever have been in the demanding state. State regulatory jurisdiction extends to persons who undertake acts outside the state that are intended to have pernicious consequences in the state. See Rosen, *supra* note 115, at 880–81. If there is no such requirement, the mere fact that the person is outside of the jurisdiction she has harmed should qualify her as a “fugitive” for purposes of the federal statute that implements the Extradition Clause. See 18 U.S.C. § 3182 (2000) (requiring extradition of a “fugitive from justice”). Asylum states may statutorily adopt rules that permit extradition more readily than does federal law, and the Uniform Criminal Extradition Act permits the extradition of persons who commit criminal acts in states where they were never physically present. See Abramson, *supra* note 290, at 828–29 (noting this but suggesting that the Constitution does “not appear to” require extradition under such circumstances).

293. MODEL PENAL CODE § 1.03(3) (1985).

recognize Massachusetts's same-sex marriage as a valid marriage.

But would the extradition solution be available under DOMA? One might think that DOMA would free the executive in the asylum state from offering up a person whose crime relates to obligations in connection to her same-sex marriage in another state. In fact, the executive's obligation pursuant to the Extradition Clause would trump DOMA. The Supreme Court has construed the Extradition Clause's charge that fugitives "shall . . . be delivered up" as creating a categorical duty on the part of the chief executive of the asylum state.<sup>294</sup> In contrast to the Effects Clause, there is no language in the Extradition Clause granting Congress authority to provide an alternative to what the Supreme Court has said the Extradition Clause requires.

Even if the Full Faith and Credit Clause applied to executive orders under the Extradition Clause, empowering Congress pursuant to the Effects Clause to determine the effect of such orders, Congress's Effects Clause powers would not extend to eliminating the Extradition Clause's categorical requirement that the asylum state comply with the demanding state's extradition request. Congress lacks the power under the Effects Clause because deciding that executive orders need not be categorically respected would not be "reasonable"; there are significant benefits to the federal Union and virtually no costs to a categorical requirement giving effect to extradition orders. Conversely, there are significant costs and almost no benefits to a noncategorical rule. The benefit of the categorical extradition requirement is that it "preclude[s] any state from becoming a sanctuary for fugitives from justice of another state."<sup>295</sup> This smoothes relations among states and helps states enforce their laws.

These benefits come at virtually no cost to the asylum state because, as the Supreme Court has noted, the extradition obligation is merely ministerial in nature.<sup>296</sup> The asylum state is not permitted to pass judgment on the wisdom of the demanding state's decision to criminalize a particular behavior but instead must hand over fugitives solely for the purpose of strengthening the federal Union. Thus, the delivery of fugitives

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294. See *Puerto Rico v. Branstad*, 483 U.S. 219, 224 n.3 (1987) (quoting U.S. CONST. art. IV, § 2, cl. 2).

295. *Michigan v. Doran*, 439 U.S. 282, 287 (1978).

296. See *Branstad*, 483 U.S. at 226.



cannot plausibly constitute the asylum state's endorsement of the policy choices behind the demanding state's criminal law. Further, the asylum state need do absolutely nothing beyond delivering the fugitive; prosecution, imprisonment, and so forth all are undertaken solely by the demanding state. As such, the asylum state's compliance with the demanding state's order does not compromise the asylum state's ability to advance its public policies. This means that the asylum state has no valid interest in resisting the extradition order; the asylum state has no legitimate interest in interfering with other states' lawful regulation of persons, even of the asylum state's own citizens, if such persons act so as to trigger the demanding state's regulatory jurisdiction.<sup>297</sup> A noncategorical extradition obligation, by contrast, would interfere with the demanding state's policies. A categorical extradition requirement thus brings benefits to both the asylum and demanding states, whereas a noncategorical requirement harms the demanding state without bringing corresponding benefits to the asylum state.

Solving the evasion obligation problems Singer identifies by means of the Extradition Clause is normatively attractive for several reasons. First, the Extradition Clause has long been understood as the doctrinal vehicle designed to deal with the evasory problem of persons seeking to escape obligations by crossing a state's border. As the Court recently put it, the Extradition Clause is designed to "preclude any state from becoming a sanctuary for fugitives from justice of another state."<sup>298</sup> Second, the extradition solution permits the demanding state (i.e., the state that recognizes same-sex marriage) to defend its interests in protecting its citizens without unduly interfering with the asylum state's policy preferences. There is a meaningful difference between requiring the asylum state to deliver a fugitive to the demanding state and making same-sex marriages valid nationwide. For the reasons discussed above, the asylum state's delivery of fugitives does not constitute the asylum state's endorsement of the policy choices behind the demanding state's criminal law. By contrast, Singer's solution radically interferes with the asylum state's ability to advance its vision of the good, for it displaces the asylum state's substantive law when it mandates that all states recognize same-sex marriages as valid.

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297. For a discussion of the circumstances under which a state has a legitimate interest in regulating a person, see Rosen, *supra* note 115, at 956–58.

298. *Doran*, 439 U.S. at 287.

It is true that the extradition solution does not solve all potential problems of the sort Professor Singer identifies, but incompleteness is not a reason to support Professor Singer's proposal. The extradition solution does not solve the problem of obligation evasion if the state that accepts same-sex marriage does not criminalize abandonment (or the other acts of obligation evasion) or if the state fails to conscientiously enforce those laws with extradition demands. Merely identifying a problem, however, does not mean that the appropriate solution comes from the Constitution. And that is the case here—a state's failure to ensure the efficacy of its laws is a state political problem that is appropriately remedied by the state, not by federal constitutional law.<sup>299</sup>

The extradition solution also does not solve the problem of obligation evasion if the state accepting same-sex marriage is unable to locate the fleeing spouse who elects to remarry elsewhere without informing authorities in her new state that she was previously married. This is not a consideration that weighs in favor of Professor Singer's approach, however, because this danger would persist if his solution were adopted. After all, obligation-evasion problems remain in the context of heterosexual marriages that follow undissolved heterosexual marriages when the bigamous party does not make her prior marriage known to the second jurisdiction, notwithstanding the fact that all states would recognize the first marriage and treat the second marriage as a bigamous union that hence is null and void. In any event, the state recognizing same-sex unions can seek to discourage such devious behavior by criminalizing it. For example, Massachusetts can criminalize the failure of a Massachusetts-married spouse to inform authorities and parties in another jurisdiction of her prior same-sex marriage. Another possibility would be for Massachusetts to require, upon pains of criminal liability, all same-sex spouses to notify the state of a pending marriage in another jurisdiction.

Differences between a prior same-sex and a prior heterosexual marriage admittedly may arise if the second marriage is discovered: both states will declare the second marriage null and void as bigamous in the latter context but not necessarily in the former.<sup>300</sup> This distinction, however, is less significant

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299. See, e.g., *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005).

300. I say "not necessarily" because it is possible that the second state would give effect to a same-sex marriage celebrated in a jurisdiction that rec-

than may at first appear. It likely would have little if any effect on child-support obligations, which states increasingly determine without regard to whether the parents were married.<sup>301</sup> Whether a child's parents were married admittedly is relevant to inheritance in many states, though even the significance of this is diminishing, as "most if not all states" have enacted statutes that "permit an illegitimate child to inherit at least from its mother."<sup>302</sup>

In the end, the major distinction between the two cases (where the prior marriage is same-sex and where it was heterosexual) is that whereas both states will declare void the heterosexual marriage following a prior heterosexual marriage that was not properly terminated, the second marriage may be deemed valid in the state that does not accept same-sex marriages while the first marriage may be deemed valid (and the second marriage invalid) in the state that accepts same-sex marriage. In short, each state may recognize as valid a different marriage.

Though this may seem odd at first, it is an acceptable by-product of our federal system's commitment to supporting divergent state choices on matters in which the Constitution and other federal law do not mandate national uniformity. As I have demonstrated at length elsewhere, concurrent regulatory authority among multiple polities is the ordinary state of affairs.<sup>303</sup> As a result, a given transaction or occurrence is frequently regulated simultaneously by more than one polity.<sup>304</sup> What is more, "regulatory authority is concurrent even when the states' regulations substantively conflict,"<sup>305</sup> and this is true for both civil and criminal regulation.<sup>306</sup> The omnipresence of concurrent regulatory jurisdiction is a consequence of many transactions and occurrences having effects extending beyond the borders of a single polity. Thus, multiple polities have legitimate interests. Federal law (both constitutional and statutory) typically does not select one of the polities as having regu-

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ognizes such marriages even though the second state itself does not permit such marriage. *Cf.* Koppelman, *supra* note 260, at 952–62 (showing that states that barred miscegenation nonetheless tended to recognize interracial marriages celebrated in jurisdictions that permitted such unions).

301. See 41 AM. JUR. 2D *Illegitimate Children* § 90 (2005).

302. See *id.* § 120.

303. See Rosen, *supra* note 115, at 946–55.

304. See *id.*

305. *Id.* at 949.

306. See *id.* at 946–49 (civil); *id.* at 949–54 (criminal).

latory jurisdiction but instead acknowledges that the states' have overlapping regulatory authority and leaves it to the states themselves—through the state law known as conflicts of law—to determine which among many potentially applicable state laws should apply in a given litigation.<sup>307</sup> In fact, full faith and credit cases often observe that

although the clause permitted the forum state to apply its law to the controversy, the nonforum state would have been free to apply *its* law to the self-same parties and occurrences had the lawsuit been filed there; this of course presumes that both states had regulatory powers over the parties and occurrence, and that the only question under full faith and credit was which state's laws were to be applied by the particular court that was hearing the matter.<sup>308</sup>

Viewed in this context, the prospect that two states may disagree about what constitutes a valid marriage is not terribly daunting. The disagreement reflects the fact that different political communities feel differently about what constitutes a valid marriage, and federalism's commitments to political diversity suggest that such differences should be embraced, not undermined, until and unless it is properly decided that there ought to be a uniform national rule. If it seems odd that two persons may be married in the eyes of one state but not others, that may stem from an inchoate sense that marriage ought to be a matter of national uniformity. To date, however, American law pointedly has not adopted this position.

To address another bogeyman, it frequently is argued that allowing some states to refuse recognition of same-sex marriage performed in Massachusetts would mean that the couple's status would change depending upon what state border they happened to cross.<sup>309</sup> This is not so. At all times, regardless of their physical location, Massachusetts recognizes their marital union and Rhode Island (let us say) does not. If an event occurs in another state that triggers a lawsuit—for example, an automobile accident in Rhode Island results in a lawsuit that raises the issue of potential recovery for loss of conjugal rights—the injured same-sex spouse can sue the defendant in Massachusetts. The Massachusetts court could decide under the choice-of-law doctrine of depeçage that Rhode Island tort law applies to the accident but that questions of family law for purposes of

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307. See *id.* at 946–47 & n.391.

308. See *id.* at 946–47 (footnote omitted).

309. See, e.g., Singer, *supra* note 7, at 13–14.

damages are to be governed by Massachusetts law.<sup>310</sup> If Massachusetts does not have personal jurisdiction over the Rhode Island defendant, the injured same-sex spouse would have to sue in Rhode Island and argue to the Rhode Island court that Massachusetts family should govern the question of whether she was married and hence eligible for certain marriage-related damages. Under this set of circumstances, Rhode Island's refusal under DOMA to recognize same-sex marriages would limit the same-sex spouse's legal interests. These are real costs, but they are the costs of federalism's respect for the preferences of different political communities.

Even if the states may disagree as to whether a particular couple is married, each state may protect the parties it deems to be married. The same-sex spouse who left, say, Massachusetts to take up a new life elsewhere is still subject to Massachusetts's jurisdiction if she has left a spouse and/or dependent there. The mere fact that she is no longer present in Massachusetts does not put her beyond Massachusetts's regulatory powers. Her same-sex marriage in Massachusetts, along with any spouse or dependents she left behind, give Massachusetts courts "continuing jurisdiction" and undoubtedly qualify as "significant contact[s]" that "creat[e] state interests, such that choice of [Massachusetts] law is neither arbitrary nor fundamentally unfair."<sup>311</sup> Massachusetts accordingly can prosecute her for bigamy, abandonment, and so forth because she has violated Massachusetts's public policies, even if her new state of residence would not recognize the "second" marriage as bigamous. Similarly, a Massachusetts court would have continuing jurisdiction over her if her abandoned same-sex spouse were to sue in Massachusetts for divorce or other marriage-related reasons.

Complications would arise if the abandoning same-sex spouse were involved in a lawsuit in her new home state that could deplete the assets that would be available to support her abandoned Massachusetts family. Though most lawsuits would not pose problems unique to the same-sex marriage context—the danger always exists for both heterosexual and same-sex families that a lawsuit in a foreign jurisdiction could lead to an impoverishing damages award—complications unique to same-

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310. See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.4, at 94–101 (4th ed. 2001) (explaining depechage).

311. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981)).

sex marriages occur with the legal dissolution of a subsequent heterosexual marriage. If the dissolution occurs outside of a jurisdiction that recognizes same-sex marriage, the question arises as to whether that jurisdiction will consider the financial obligation that the divorcing spouse already owes to her same-sex family when the court calculates how property should be distributed, ongoing support obligations, and so forth. If the court does not take account of those obligations tied to the divorcing spouse's abandoned same-sex family, then inadequate funds may remain when a lawsuit for divorce and support for the same-sex family goes forward in Massachusetts. Massachusetts and individuals can alleviate this problem. Massachusetts can impose disclosure requirements that the commonwealth and the same-sex spouse be apprised of a pending lawsuit to dissolve a subsequent heterosexual marriage and criminalize the failure to disclose. The parties entering into a same-sex union in Massachusetts can contractually include a sue-first requirement in Massachusetts, which other jurisdictions typically respect.

While I cannot hope in the course of this Article to anticipate all possible outcomes that may arise as a result of states' disagreement on what qualifies as a legitimate marriage, I do hope that I've shown that many of the problems can be obviated, or at the very least ameliorated, by states that recognize same-sex marriage. The problems that remain constitute the unavoidable costs of federalism's commitment to diverse state policies on matters about which people strongly disagree but with respect to which neither the Constitution nor other federal law requires a uniform national rule.

#### CONCLUSION

The *Lawrence* decision did not render DOMA unconstitutional. *Lawrence* equipped gay-rights activists with some favorable new constitutional principles, but it also embraced concepts that opponents of same-sex marriage can apply toward their cause. The *Lawrence* Court participated in the ongoing national dialogue concerning gay rights, yet deliberately left undecided the constitutional status of same-sex marriage. This is a good thing, for allowing a wide-ranging societal debate on gay-rights issues to continue has many benefits, and there are numerous dangers to the Court prematurely ruling on issues about which citizens are deeply divided and with respect to which societal norms are in a state of considerable flux. Time

will tell whether *Lawrence*'s new principles will develop into doctrines that provide strong constitutional protections to gays and (perhaps) other disfavored groups, or whether these new principles ultimately will be limited to their facts. What *is* clear is that *Lawrence* did not render DOMA unconstitutional—at least not yet.

Nor was DOMA unconstitutional before *Lawrence* was decided. This Article has rebutted the many arguments that have been made by numerous scholars—including Dean Larry Kramer and Professors Laurence Tribe, Andy Koppelman, Stanley Cox, and Emily Sack—that DOMA exceeded Congress's powers under the Full Faith and Credit Clause. Several critiques of DOMA recur in the scholarly literature. Claims that DOMA violates state sovereignty by interfering with a family law subject that appropriately falls to the domain of the states are premised on a mischaracterization of DOMA: it does not regulate family law but serves the quintessentially federal function of determining the extraterritorial effect of state law. Arguments that DOMA undermines full faith and credit's fundamental principle of unifying the country overlook the second animating principle behind full faith and credit—maintaining meaningfully empowering states—with which DOMA is fully consistent. Scholarly critiques of DOMA have assumed that it authorizes states to deviate from Supreme Court precedent regarding the enforcement of judgments, but this Article has demonstrated that DOMA actually fills a gap in Supreme Court jurisprudence in a manner fully consistent with precedent. Even were this not so, DOMA would not be unconstitutional, because Congress has authority to legislate full faith and credit rules that vary from the Supreme Court's. This analysis answers several other scholarly critiques that boil down to the unargued assertion that the Supreme Court has the final say in determining what the Full Faith and Credit Clause requires.

Finally, the Article has engaged Professor Singer's novel argument that the Full Faith and Credit Clause demands that marriages sanctioned by one state be recognized by all. The Full Faith and Credit Clause should not be used to thwart differences across constitutional, substantive state policies. The problems that Singer's proposal attempts to counter can be addressed by alternative methods that do not intrude as radically in state sovereignty. Where the Constitution does not (yet, at least) demand a uniform national rule, diverse state policies should not be hindered by the Full Faith and Credit Clause.

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In the end, DOMA is best understood as an example of congressional participation in the process of defining our country's constitutional culture. The Court has not yet decided the constitutionality of same-sex marriage, and DOMA reflects the political branches' contribution to the process of deciding how America should deal with the incidents of gay life. DOMA's actual effects on constitutional culture remain to be seen: will it shape societal views, prompt angry opposition, or something else? Until the Supreme Court takes a definitive position, and perhaps even after, other societal actors are entitled to react to Congress's views on same-sex marriage and thereby participate in the ongoing development of American constitutional culture.