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CONGRESS, ARTICLE IV, AND INTERSTATE RELATIONS

Gillian E. Metzger

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## CONGRESS, ARTICLE IV, AND INTERSTATE RELATIONS

Gillian E. Metzger\*

*Article IV imposes prohibitions on interstate discrimination that are central to our status as a single nation, yet the Constitution also grants Congress broad power over interstate relations. This raises questions with respect to the scope of Congress's power over interstate relations, what is sometimes referred to as the horizontal dimension of federalism. In particular, does Congress have the power to authorize states to engage in conduct that otherwise would violate Article IV? These questions are of growing practical relevance, given recently enacted or proposed measures — the Defense of Marriage Act (DOMA) being the most prominent example — in which Congress has sanctioned interstate discrimination and other state measures seemingly at odds with fundamental precepts of horizontal federalism. These questions also are significant on a more conceptual level, as they force clarification of the proper relationship between Congress and the Supreme Court in horizontal federalism disputes.*

*This Article contends that the Constitution grants Congress expansive authority to structure interstate relationships and that in wielding this interstate authority Congress is not limited by judicial interpretations of Article IV. Rather than constituting unalterable demands of union, the antidiscrimination provisions of Article IV are best understood, like the dormant commerce clause, as constitutional default rules. These provisions are judicially enforceable against the states, but their enforceability is contingent on the absence of congressionally authorized discrimination. Congress's power to authorize discrimination has limits; however, those limits derive not from Article IV or principles of federalism, but instead from the Fourteenth Amendment.*

*Constitutional text, precedent, normative and functional concerns, and history all support such congressional primacy in interstate relations. Ultimately, however, the basis for broad congressional interstate authority is constitutional structure. Most of the Article is devoted to a close analysis of these standard sources of constitutional meaning to determine the appropriate parameters of the congressional role in interstate relations. The Article closes with an examination of the practical implications of such a broad view of Congress's powers, assessing the constitutionality of DOMA and the recently proposed Child Interstate Abortion Notification Act.*

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## INTRODUCTION

Consider three potential federal statutes:

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

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

Those questions are of increasing practical importance. Conjuring up these statutes requires no great feat of legal imagination. The first, of course, is already enacted law, in the form of Section 2 of the 1996 Defense of Marriage Act (DOMA).<sup>2</sup> The third may soon become law; it mirrors Section 2 of the Child Interstate Abortion Notification Act (CIANA), which the House passed in 2005 and which the Senate adopted in the form of the Child Custody Protection Act (CCPA) in 2006.<sup>3</sup> Only the second statute is (for now) purely hypothetical. However, measures authorizing interstate economic discrimination — such

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

<sup>2</sup> 28 U.S.C. § 1738C (2000).

<sup>3</sup> See CCPA, S. 403, 109th Cong. § 2 (as passed by Senate, July 25, 2006); CIANA, H.R. 748, 109th Cong. § 2 (as passed by House, Apr. 27, 2005). The 109th Congress ended without agreement between the House and Senate on which measure to adopt. Although the two measures are identical in the penalties they impose on out-of-state abortions that violate a resident state's parental notification requirements, CIANA is significantly broader than CCPA. Section 3 of CIANA, for example, separately mandates parental notice and a minimum twenty-four-hour delay for minors obtaining abortions regardless of whether the minor's home state or the state in which the abortion is sought imposes such requirements. See H.R. 748, § 3; *infra* pp. 1536–37. To avoid confusion and to highlight the additional constitutional concerns that CIANA raises, the discussion here focuses on CIANA. CIANA was reintroduced in the new session of Congress on February 15, 2007. See H.R. 1063, 110th Cong. (2007).

as proposals to allow states to grant discriminatory tax incentives to foster in-state economic activity or to ban importation of other states' waste — have been introduced recently in Congress.<sup>4</sup>

The scope of congressional authority over interstate relations is also important on a more conceptual level, both in clarifying the role of Article IV in our constitutional structure and in delineating the respective responsibilities of Congress and the courts in horizontal federalism disputes. Any system of government based on a union of otherwise “sovereign” entities must address the relationship among those entities. The resultant rules and doctrines governing interstate relationships are the horizontal dimension of federalism. Article IV is one of the least familiar components of the original Constitution,<sup>5</sup> but it is central to our horizontal federalism framework. Known as the States' Relations Article,<sup>6</sup> its principal provisions limit the states' ability to discriminate against one another — whether by not respecting sister state judgments, laws, and criminal proceedings, or by denying out-of-state residents the right to engage in economic and other activity within the

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<sup>4</sup> See State Waste Empowerment and Enforcement Provision Act of 2007, H.R. 70, 110th Cong. (authorizing states to impose limits on importation of solid waste from other states); Economic Development Act of 2005, S. 1066, 109th Cong. (authorizing states to provide tax incentives for the purpose of economic development provided, among other requirements, that availability of the tax incentive does not depend on state of incorporation, commercial domicile, or residence).

<sup>5</sup> Indeed, its unfamiliarity is such that Article IV's text may be worth setting out in full:

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV.

<sup>6</sup> See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 378–79 (1978).

state. In the words of the Supreme Court, without such prohibitions “the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”<sup>7</sup>

Article IV’s prohibitions are phrased categorically and, given their importance to securing union, would seem to admit to no exceptions. Yet Article IV’s antidiscrimination prescriptions are only one side of the constitutional equation when it comes to horizontal federalism; the other consists of Congress’s ability to regulate interstate relations. Article I’s Commerce Clause grants Congress affirmative power to “regulate Commerce . . . among the several States.”<sup>8</sup> From this provision, courts have inferred a prohibition on state discrimination against interstate commerce; this prohibition, known as the dormant commerce clause, represents another core horizontal federalism postulate. Where economic activity of nonresident individuals is involved, the demands of the dormant commerce clause and Article IV largely overlap. Yet nearly a century and a half of deeply entrenched precedent holds that Congress can authorize states to engage in interstate economic discrimination that, absent such congressional approval, would violate the dormant commerce clause.<sup>9</sup> In like vein, Article I’s Section 10 expressly grants Congress power to sanction certain otherwise prohibited forms of state interaction.

These two constitutional features stand in some tension with one another and create confusion about the nature of our horizontal federalism system. Do Article IV’s prohibitions limit Congress’s ability to structure interstate relations, or does Congress have power to override and expand Article IV’s seemingly categorical limits on state action?

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<sup>7</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (addressing Article IV’s Privileges and Immunities Clause); *see also Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (“The animating purpose of the full faith and credit command . . . ‘was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . .’” (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935))).

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

<sup>9</sup> *See infra* notes 32–45 and accompanying text. The most prominent examples of such congressionally sanctioned discrimination are the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2000); Section 3(d) of the Bank Holding Company Act of 1956, ch. 240, § 3(d), 70 Stat. 133, 135, before that provision was amended by Section 101(a) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101(a), 108 Stat. 2338, 2339; the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e (2000); the Webb-Kenyon Act, 27 U.S.C. § 122 (2000); and the Wilson Original Packages Act, 27 U.S.C. § 121 (2000). *But see* *Granholt v. Heald*, 125 S. Ct. 1885, 1905–06 (2005) (holding that the Wilson Act, now embodied in the Twenty-first Amendment, did not extend to authorizing state liquor regulation that discriminated against interstate commerce). Congress recently added another measure to this list, the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, enacted as Section 6036 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6036, 119 Stat. 231, 289–90.

Resolving this tension and understanding the fundamental principles of horizontal federalism requires developing a comprehensive account of the scope of congressional authority in the interstate arena. Such an account, however, is currently lacking; indeed, the challenges and dilemmas of horizontal federalism have been generally underappreciated in American constitutional law scholarship. Overwhelmingly, the scholarly commentary on DOMA assesses Congress's authority to control interstate comity under Article IV's Effects Clause in isolation, without seeking to develop an integrated understanding of congressional power with regard to Article IV as a whole.<sup>10</sup> Similarly, only occasionally does scholarship on the dormant commerce clause engage the question of Congress's power to authorize violations of the dormant commerce clause<sup>11</sup> or how that power relates to congressional authority under Article IV. Serious analysis of congressional power to authorize relaxation of Article IV's Privileges and Immunities Clause is particularly rare.<sup>12</sup> Nor has the Court provided much guidance on

<sup>10</sup> The scholarly commentary on DOMA's constitutionality is too extensive to be cited in full. Some examples of the thoughtful contributions are Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997); Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 NEW ENG. L. REV. 361, 400-08 (2006); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 21-24 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006); Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827 (2004); Mark Strasser, Baker, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998); Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365 (2005); and 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).

<sup>11</sup> For nearly sixty years, the leading article on Congress's power to authorize dormant commerce clause violations has been Noel T. Dowling, *Interstate Commerce and State Power — Revised Version*, 47 COLUM. L. REV. 547 (1947). See also Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 15-17 (1975) (discussing this congressional power as a form of constitutional common law). Professor Norman Williams recently authored a sustained critique of Congress's ability to authorize dormant commerce clause violations, but he does not analyze whether Congress can sanction state violations of Article IV's Privileges and Immunities Clause and instead presumes that it cannot. See Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 158 (2005).

<sup>12</sup> Two efforts to take a more comprehensive view of Congress's powers over interstate relations and Article IV are 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-35 (3d ed. 2000), and William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 395-96, 399-400 (1983). See also Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1773-77 (2004) (arguing that Congress lacks authority to authorize Article IV privileges and immunities violations). In addition, Professor Douglas Laycock of-

these issues. Despite the mountain of federalism precedent accumulated in the over two hundred years since the Constitution's adoption, the Court has scarcely addressed the question of Congress's powers in the interstate context.<sup>13</sup> Moreover, when the Court has addressed such questions — as, for example, in decisions sustaining congressional power to authorize state burdens on interstate commerce — it has provided little broader guidance on the proper bounds of Congress's role.

Greater understanding of the scope of congressional authority over interstate relations is increasingly imperative. DOMA and the ongoing debate over CIANA indicate that Congress is beginning to assert greater control over interstate relationships. Indeed, with Massachusetts's recent recognition of same-sex marriage,<sup>14</sup> the issue of whether DOMA's Section 2 exceeds Congress's powers may well come before the Supreme Court in the near future.<sup>15</sup> Equally important, a real

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fers an integrated analysis of Article IV's Full Faith and Credit and Privileges and Immunities Clauses, though he does not address Congress's powers under these provisions. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 270–73 (1992); see also Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 570–71 (1981) (expressing the view that Congress cannot authorize interstate economic discrimination that would violate the Privileges and Immunities Clause in the course of a broader discussion of the clause's meaning).

<sup>13</sup> It has never directly ruled on, for example, whether Congress can contract the antidiscrimination obligations that courts have read Article IV as imposing on the states. See *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 273 n.18 (1980) (plurality opinion) (“[W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”); see also *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 216 n.1 (1983) (Blackmun, J., concurring in part and dissenting in part) (noting that the Court had “no occasion to determine whether Congress may authorize . . . what otherwise would be a violation of th[e Privileges and Immunities] Clause” and stating that the “question may present considerations different from those presented by the dormant Commerce Clause”).

<sup>14</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that Massachusetts's prohibition on same-sex marriage violated the state's constitution). In Vermont, a similar state supreme court determination led to a state law authorizing same-sex civil unions. See *Baker v. State*, 744 A.2d 864 (Vt. 1999); see also *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006) (holding that New Jersey's statutory ban on same-sex marriage violates the state constitution but that this violation could be cured by the state's authorizing same-sex civil unions instead of same-sex marriages). For a list of pending state constitutional law challenges to statutory prohibitions on same-sex marriage, see Lambda Legal, Status Update on the “Next Frontier” of Pending Cases, <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1488> (last visited Mar. 10, 2007).

<sup>15</sup> Challenges to the constitutionality of DOMA's Section 2 have been rejected by lower federal courts, although no such litigation is pending as of this writing. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005); see also *Smelt v. County of Orange*, 447 F.3d 673, 682–86 (9th Cir. 2006) (affirming district court's ruling that plaintiffs lacked standing to challenge constitutionality of DOMA's Section 2). In addition, legislation is currently pending in Congress to deny federal courts jurisdiction over questions arising under DOMA. See Marriage Protection Act of 2005, H.R. 1100, 109th Cong. § 2.

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conflict exists between Congress's established power to validate state dormant commerce clause violations and Article IV's prohibitions on interstate discrimination. Accordingly, regardless of whether Congress aggressively asserts broad power over interstate relationships in the immediate future, clarification is needed.

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

Hence, rather than constituting the unalterable demands of union, the antidiscrimination provisions of Article IV are best understood, like the dormant commerce clause, as constitutional default rules. While these provisions are judicially enforceable against the states, their enforceability is contingent on the absence of congressional authorization of interstate discrimination. This does not mean, however, that Congress is wholly free to reset the bounds of acceptable state behavior in interstate contexts. On the contrary, Congress is constitutionally constrained, but the relevant limits derive from the Fourteenth Amendment instead of Article IV.<sup>16</sup>

This expansive view of Congress's interstate powers might seem incompatible with the unconditional prohibitions on state discrimination expressly contained in Article IV. But Article IV's text is ambiguous when it comes to the question of *congressional* authority. At the same time as it prohibits state discrimination in absolute terms, Article IV also grants Congress broad control over aspects of interstate relations without expressly subjecting Congress itself to equivalent antidiscrimi-

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<sup>16</sup> The same principle would apply to other individual rights amendments that bind the states. The discussion here references only the Fourteenth Amendment because that amendment is most salient to the interstate context; in addition, by their terms other amendments apply to Congress as well as the states, and thus Congress's inability to authorize state violations of their requirements is more evident.

nation requirements.<sup>17</sup> The textual equation is further complicated by the need to take into account express grants of congressional power contained elsewhere in the Constitution, most significantly in Article I's Commerce Clause. In fact, as I argue below, an examination of constitutional text ends up supporting claims for broad congressional power. I also contend that assigning Congress primary control over interstate relations accords with precedent, federalism values, functional concerns, and history.<sup>18</sup>

My primary focus, however, lies in extrapolating the proper bounds of congressional authority from the "structure of federal union" embedded in the Constitution and the relationships created between the federal and state governments.<sup>19</sup> The lack of textual clarity here makes arguments of constitutional structure especially central. As is often true in federalism contexts, "[b]ehind the words of the constitutional provisions are postulates which limit and control"<sup>20</sup> and on which the constitutional allocation of power ultimately turns. Precedent also plays a particularly significant role in my account, offering both strong corroborative evidence for the structural model I discern and an independent basis for according Congress primacy over interstate relations.

Part I begins with the arguments for broad congressional power over Article IV and interstate relations. Several central features of the interstate relations context — the need for a federal umpire, the Constitution's emphasis on congressional supervision in a variety of inter-

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<sup>17</sup> For example, after setting out the requirement that states must provide full faith and credit to the acts, records, and judicial proceedings of other states, Article IV proceeds to grant Congress power to declare the effect that such out-of-state measures will have, without expressly subjecting Congress to the full faith demand. See U.S. CONST. art. IV, § 1. Similarly, Article IV's New State Clause authorizes Congress to admit new states to the union, but other than protecting existing states from being divided or combined against their will, it says nothing about the powers new states must enjoy or their relationships to existing states. *Id.* art. IV, § 3.

<sup>18</sup> For two leading accounts of these standard forms of constitutional argument, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* 1–119 (1982), and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987). This Article is not the occasion for, nor does it require, a full-dress justification of my views on constitutional interpretation. But some prefatory comments orienting this Article against the background of constitutional scholarship seem in order. As the methodological description above suggests, I am fairly "conventionalist" in my approach, in that I believe it is necessary to take seriously insights offered by the variety of standard sources of constitutional interpretation. See Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 32–33 (1998); see also Fallon, *supra*, at 1240–43 (describing the strong if "implicit norms of our practice of constitutional interpretation" toward constructing a uniform, coherent account from standard constitutional sources). But in any event, given its relative obscurity in constitutional scholarship, consideration of Article IV's full background is merited, whatever one's view of the proper metes and bounds of constitutional analysis.

<sup>19</sup> See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 11 (1969).

<sup>20</sup> *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

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state relations contexts, and the benefits of flexibility and political accountability in mediating interstate disputes — support recognizing such expansive congressional authority. Part I also demonstrates that, contrary to the conventional view, acknowledging Congress's preeminent regulatory role in interstate relations, including its power to authorize state conduct that otherwise would violate Article IV, accords with the Constitution's text. This Part concludes with an examination of the evidence on how the Framers and subsequent generations understood Congress's interstate role, arguing that the historical record sheds little definitive light on this question.

One core theme that emerges from Part I is the importance of examining Article IV's provisions against the background of both Article I and Article IV as a whole. Article IV is not often considered as a single entity — understandably so, given that its four sections were cobbled together during the last hours of the Constitutional Convention.<sup>21</sup> Moreover, the article's core interstate prohibitions (the Full Faith and Credit, Privileges and Immunities, and Extradition Clauses) are located in its first two sections, whereas the latter half of the article (comprising the New State, Territory and Property, and Guarantee Clauses) is facially more focused on federal-state relations. Yet these last sections also contain an interstate dimension, and they are notable in the extent to which they address potential sources of interstate conflict by granting power to Congress. Hence, viewing Article IV as a whole is important to developing a comprehensive account of Congress's role in interstate relations. Even more critical is assessing Article IV in conjunction with Article I and the Commerce Clause, especially in light of dormant commerce clause precedent granting Congress power to authorize interstate economic discrimination. The connection between these provisions is further evident from their shared interstate focus, overlapping field of application, and history.

Part II takes up the question of what limits, if any, the Constitution imposes on congressional power to structure interstate relationships. It begins by examining the constraints imposed by state sovereignty. Viewing Article IV as a whole is helpful here also, because its latter sections suggest core federalism postulates — specifically, state autonomy, state equality, and state territoriality — to which any account of Congress's powers over the initial, more overtly interstate provisions of the article must adhere. But careful investigation demonstrates that these federalism postulates have little cabining effect on Congress's

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<sup>21</sup> Compare 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 590, 601–02 (Max Farrand ed., 1911) [hereinafter FARRAND] (providing version of the Constitution reported by the Committee of Style, containing Article IV in its current form), *with id.* at 565, 577–78 (providing version submitted to the committee, in which each section of Article IV was a separate article).

ability to structure interstate relations; they preclude only extreme measures that Congress is exceedingly unlikely to enact. Instead, the real limit on Congress comes from the Fourteenth Amendment. In regulating interstate relations, Congress cannot authorize states to violate that amendment's prohibitions.

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

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

Some national umpire over interstate relations is essential to ensure union. This imperative follows from the dual governmental structure of our constitutional system. The alternative is to have the states themselves, through either their political branches or their courts, determine when they have transgressed the Constitution's interstate demands. Granting the states alone such power would create obvious dangers of bias and retaliation, as the record of interstate discrimina-

tion under the Articles of Confederation made clear. Indeed, that federal courts were granted diversity jurisdiction and jurisdiction over disputes between two or more states<sup>22</sup> confirms the Framers' recognition of the need for a federal arbiter of interstate disputes.<sup>23</sup> In *The Federalist No. 80*, Alexander Hamilton notably linked the grant of diversity jurisdiction to Article IV, arguing that diversity jurisdiction was needed to ensure "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled."<sup>24</sup>

Thus, the ultimate question is not whether the federal government should have power to mediate interstate relations; it does. Nor is it whether both Congress and the Court should be authorized to play this umpiring role; both are. Instead, the real question is which of these two branches of federal government should exercise primary control over interstate relations. In general, I submit, the Constitution assigns the primary role of interstate umpire to Congress.<sup>25</sup>

This Part sets out the affirmative case for assigning primary responsibility over interstate relationships to Congress. It argues that the constitutional model for interstate relations — evident in both the dormant commerce clause and Article IV — consists of judicially enforced antidiscrimination norms that are subject to congressional override. This model derives its greatest support from structural inferences drawn from Congress's institutional role and the interplay of Article I and Article IV, as well as from established precedent under the dormant commerce clause. In addition, the model is reflected in the express text of several constitutional provisions addressing interstate relations, as well as in aspects of Article IV's history. Congressional primacy also accords with normative and institutional competency concerns. Interstate discrimination can further the goal of national union and also protect the states against unnecessary intrusions, but Congress is the institution best positioned to determine whether such interstate discrimination is justified, as well as to discern when it is occurring.

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<sup>22</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>23</sup> See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

<sup>24</sup> THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>25</sup> On some discrete issues, the Constitution appears to point to the Court as umpire — providing, for example, that some cases in which a state is a party fall within the Court's original jurisdiction. See U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (2000). But this jurisdictional grant does not preclude Congress from fashioning the rule of decision applicable to the interstate dispute in question, assuming the subject matter of dispute lies within its enumerated powers. In addition, debate over the New State Clause at the Constitutional Convention indicates that the Framers expected the Court would determine land claim disputes, although efforts to include a specific instruction to that effect were defeated. See FARRAND, *supra* note 21, at 466.

*A. Congressional Power To Authorize State Violations  
of the Dormant Commerce Clause*

The grant of the commerce power is particularly instructive on congressional primacy in ordering interstate relationships. Discriminatory state commercial regulation and resultant state retaliation formed a key part of the impetus behind the Constitutional Convention.<sup>26</sup> Even so, the constitutional response was to give Congress power to regulate interstate commerce, with only limited prohibitions on Congress's ability to discriminate among the states.<sup>27</sup> Of course, the Commerce Clause could have been read as granting Congress exclusive control over interstate commerce, and thus as excluding state regulation in this area altogether. Indeed, *Gibbons v. Ogden*,<sup>28</sup> an early landmark, indicated sympathy for this view.<sup>29</sup> However, invoking one standard or another, subsequent decisions established that states possess concurrent power to regulate activities deemed within interstate commerce.<sup>30</sup> By the middle of the twentieth century, the Court had arrived at a steady formula for its dormant commerce clause jurisprudence. That formula, still in force, posits a judicially enforceable prohibition on discriminatory or unduly burdensome state regulation.<sup>31</sup>

Of special importance here, however, is that the Court has long recognized congressional power to authorize state measures that oth-

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<sup>26</sup> See, e.g., *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533–34 (1949); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827); Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 266–84 (2005); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 52–55 (1988). For a recent description of the scholarly debate over whether the extent of such discrimination was as great as the Framers had claimed, and for a review of the historical evidence, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005–2006).

<sup>27</sup> See Colby, *supra* note 26, at 258–59; see also Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429–35 (1982) (emphasizing congressional power to burden free trade among the states).

<sup>28</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>29</sup> See *id.* at 209–10; see also *id.* at 227 (Johnson, J., concurring in the judgment) (adopting the exclusive view of the commerce power). Ultimately, however, *Gibbons* rested on the Court's conclusion that the New York statute at issue was preempted by federal law. See *id.* at 210–21 (majority opinion).

<sup>30</sup> See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 318–19 (1852) (arguing that Congress's commerce power is exclusive only regarding matters that require uniform regulations); *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding a New York statute that required the master of a vessel to report names and residences of passengers as a police regulation). See generally FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937).

<sup>31</sup> See, e.g., *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2423 (2005). *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), is the classic modern statement of the doctrine.

erwise would violate the dormant commerce clause.<sup>32</sup> Intimations of such a power in Congress came early. In 1852, for example, *Cooley v. Board of Wardens*<sup>33</sup> emphasized that Congress had provided for continued state regulation of river and harbor pilots in concluding that uniform national regulation was not required in this area.<sup>34</sup> On a slightly different note, an 1856 decision, *Pennsylvania v. Wheeling & Belmont Bridge Co.*,<sup>35</sup> upheld an act of Congress authorizing two bridges over the Ohio River, notwithstanding that the Court previously had found the bridges to obstruct navigation on the Ohio.<sup>36</sup> By 1891, the Court unanimously upheld a congressional statute authorizing state regulation of imported liquor<sup>37</sup> — even though the year before it had found a similar state regulation, absent congressional sanction, to violate the dormant commerce clause.<sup>38</sup>

As others have noted, why Congress has power to authorize state action that violates the dormant commerce clause is not self-evident; nor are the Court's explanations for this rule very satisfying.<sup>39</sup> But the doctrine is nonetheless firmly entrenched. *Prudential Insurance Co. v. Benjamin*<sup>40</sup> is the leading modern decision. There, the Court sustained the constitutionality of a South Carolina statute taxing only out-of-state insurance companies, on the ground that the federal McCarran-Ferguson Act<sup>41</sup> authorized the tax.<sup>42</sup> That the tax otherwise would

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<sup>32</sup> For recent reiterations of this rule, see *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *New York v. United States*, 505 U.S. 144, 171 (1992); and *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174–75 (1985). See also Granholm v. Heald, 125 S. Ct. 1885, 1900–02 (2005) (discussing pre-Prohibition congressional acts authorizing state regulation of alcohol to determine if those acts authorized state discrimination against out-of-state alcohol).

<sup>33</sup> 53 U.S. (12 How.) 299.

<sup>34</sup> See *id.* at 319–20. *Cooley* is one step short of the current formula because the Court did not give conclusive effect to the federal statute. See *id.*

<sup>35</sup> 59 U.S. (18 How.) 421 (1856).

<sup>36</sup> *Id.* at 430–31. The Court emphasized that its prior decision, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), had turned on its determination that obstructing navigation of the Ohio River conflicted with prior acts of Congress, which had been superseded by the new legislation. See *id.* at 569, 578.

<sup>37</sup> See *In re Rahrer*, 140 U.S. 545, 560–63 (1891).

<sup>38</sup> See *Leisy v. Hardin*, 135 U.S. 100, 124–25 (1890) (holding Iowa lacked power to ban sale of imported liquor that remained in its original package, but signaling that Congress could authorize such state action if it chose). The Court again upheld Congress's power to authorize state prohibitions on liquor importation in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311, 325–31 (1917).

<sup>39</sup> See, e.g., Dowling, *supra* note 11, at 554; Monaghan, *supra* note 11, at 15; Williams, *supra* note 11, at 156–58; see also *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 424–25 (1946) (noting that the Court has given different rationales for its decisions upholding congressional power to authorize state discrimination).

<sup>40</sup> 328 U.S. 408.

<sup>41</sup> 15 U.S.C. §§ 1011–1015 (2000).

<sup>42</sup> *Benjamin*, 328 U.S. at 433.

have violated the dormant commerce clause was of no moment; Congress's power to regulate interstate or foreign commerce was limited only by a requirement that what was being regulated "affect [such commerce] sufficiently to make congressional regulation necessary or appropriate."<sup>43</sup> Were Congress itself bound by dormant commerce clause prohibitions, whether acting "alone or in coordination with state legislation," then its "power over commerce would be nullified to a very large extent."<sup>44</sup> Instead, the only additional limits on congressional action under the Commerce Clause were those constitutional restrictions "designed to forbid action altogether by any power or combination of powers in our governmental system."<sup>45</sup>

*Benjamin's* emphasis on the presence of coordinated federal-state action is troublesome, for it is hard to see how such coordination, considered alone, could affect the constitutionality of the South Carolina statute.<sup>46</sup> The Court has stated repeatedly how important restraints on interstate commercial discrimination are to our status as a nation, most recently identifying the dormant commerce clause's antidiscrimination requirements as "essential to the foundations of the Union."<sup>47</sup> Why, then, should congressional authorization make any difference to the validity of state legislation that otherwise contravenes the dormant commerce clause? Moreover, congressional power to conclusively determine the meaning of a constitutional prohibition, let alone de facto overrule prior judicial determinations that a particular form of state regulation is unconstitutional, seems fundamentally at odds with the instruction of *Marbury v. Madison*<sup>48</sup> that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>49</sup>

<sup>43</sup> *Id.* at 423.

<sup>44</sup> *Id.* at 422.

<sup>45</sup> *Id.* at 434–35.

<sup>46</sup> See Dowling, *supra* note 11, at 556; Williams, *supra* note 11, at 157–58.

<sup>47</sup> *Granholt v. Heald*, 125 S. Ct. 1885, 1895 (2005); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.")

<sup>48</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>49</sup> *Id.* at 177; see also Williams, *supra* note 11, at 154–55. Conceivably, congressional authorization might be relevant to the question of whether a state statute, as a factual matter, discriminates against interstate commerce. But *Benjamin*, not surprisingly, expressly rejected this rationale, as the discriminatory character of South Carolina's statute was evident from its face. See *Benjamin*, 328 U.S. at 425–26 & n.32; Monaghan, *supra* note 11, at 15–16. Another justification, occasionally suggested in decisions, is that in invalidating state measures under the dormant commerce clause the Court is simply giving effect to a congressional judgment, manifested by congressional silence, that an area of activity should be free from regulation. See, e.g., *In re Rahrer*, 140 U.S. 545, 562 (1891). This concept of legislation by silence, however, is hardly free from "constitutional problems of its own." Monaghan, *supra* note 11, at 16; see also Williams, *supra* note 11, 182–88. Professor Henry Monaghan argues that the dormant commerce clause is best viewed as a form of constitutional common law — rooted in constitutional text, to be sure, but not

More convincing is *Benjamin's* concern that precluding Congress from authorizing state burdens on interstate commerce would infringe far too much on Congress's acknowledged power under the Commerce Clause. That power is plenary; as noted, Congress can enact legislation that imposes burdens on interstate commerce or discriminates among states.<sup>50</sup> Put differently, there is no "uniformity" requirement in the Commerce Clause, and thus Congress can incorporate, by reference, discriminatory state law as federal law.<sup>51</sup> That being the case, Congress should also be able to conclude that the most appropriate approach is one that vests regulatory power in the states, even to the extent of authorizing states to adopt discriminatory legislation. If Congress itself can enact a discriminatory measure, then precluding Congress from instead granting states discretion over whether to impose such a measure could undermine the cause of national union. Such a rule would force Congress to mandate discrimination by all states when it concludes that discrimination is justified rather than pursue the more moderate tack of allowing states to discriminate if they choose.<sup>52</sup> While this result may make Congress more reluctant to authorize discrimination, it also may lead to greater burdens on interstate commerce than Congress and some states consider necessary in particular contexts.

This argument treats congressional authorization of discriminatory state legislation as no different than any other form of congressional commerce legislation. At first blush, that characterization might seem implausible. After all, the Framers vested the power to regulate interstate commerce not with the states, but with Congress. Their considered decision appears overturned if Congress can simply turn around and "delegate" the power to regulate interstate commerce to the states.<sup>53</sup> Moreover, the regulatory product of state legislatures will

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intended to have the binding force on Congress enjoyed by other constitutional limits. See Monaghan, *supra* note 11, at 17.

<sup>50</sup> This is true generally, but not always. For example, Congress is prohibited from giving preference to "the Ports of one State over those of another," U.S. CONST. art. I, § 9, cl. 6, and from imposing "Duties, Imposts and Excises" that are not "uniform throughout the United States," *id.* art. I, § 8, cl. 1. The Uniformity Clause of Article I may explain *Benjamin's* emphasis on the presence of "coordinated" federal-state action, as it suggests Congress itself could not provide that out-of-state insurers be taxed at differing rates than in-state insurers. See *Benjamin*, 328 U.S. at 434, 438; Cohen, *supra* note 12, at 405-06.

<sup>51</sup> Professor Thomas Colby argues it was originally understood that Congress was required to treat the states uniformly in regulating interstate commerce, despite the lack of a uniformity requirement in the Commerce Clause itself. Significantly, however, Professor Colby further contends that congressional authorization of state regulation is constitutional. See Colby, *supra* note 26, at 303-04, 311-17, 339-40.

<sup>52</sup> This is why the Court did not treat the federal statute as conclusive in *Cooley*. See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319-21 (1852).

<sup>53</sup> The argument in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), for federal immunity from state taxation also seems pertinent here: "In the legislature of the Union alone, are all

likely differ significantly from that which emerges from the national political process. It seems fair to expect that states will downplay harms to out-of-state interests for in-state gain, at least when out-of-state interests lack effective in-state surrogates. Congress, by contrast, will be more responsive to interest groups with national political presence and national economic clout.<sup>54</sup>

But a determination by the national legislature that state regulation, even state discrimination, is the best response in a particular context is simply not equivalent to a state's decision to discriminate absent such authorization. "[W]hen Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one."<sup>55</sup> Congress's structural composition as the national elected body, containing representatives from all the states, puts it in a unique position when it comes to authorizing interstate discrimination.

This is not to suggest, of course, that Congress is "disinterested" in some platonic sense when it comes to state regulation of interstate commerce. To the contrary, members of Congress can be expected to advance their own policy preferences or those of particular interest groups — businesses and residents in their states, perhaps, or powerful

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represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused." *Id.* at 431; see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 205–06 (1980).

<sup>54</sup> See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. REV.* 1353, 1370–72, 1386–88 (2006); Williams, *supra* note 11, at 197–202; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process* 16–21 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Research Paper No. 27, 2003), available at <http://ssrn.com/abstract=412000>. This argument features in dormant commerce clause doctrine, where lack of in-state interests that are similarly harmed by legislation can trigger more rigorous scrutiny. See *S.C. Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187 (1938); Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *YALE L.J.* 219, 228–30 (1957); Eule, *supra* note 27, at 444–46.

<sup>55</sup> *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984). An additional response is that such arguments against delegation have not prevented congressional delegations to administrative agencies, and it is hard to see why state delegations are fundamentally that different. Indeed, if anything, delegations to states seem more in keeping with the Constitution, which makes almost no reference to administrative officials but clearly envisions a continuing role for the states as governing institutions. Conceivably, a structural argument could be made against allowing Congress to authorize state regulation in those areas reserved by the Constitution for exclusive federal control. For discussion of such an argument, see Cohen, *supra* note 12, at 401–10. Notably, though, the Court has not to date taken this view. See, e.g., *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 184 (1902). In any event, such a federal exclusivity argument would have little impact on the question of Congress's power to authorize state violations of Article IV. Implicit in Article IV's targeting the states with the Full Faith and Credit and Privileges and Immunities Clauses is recognition that the states have power to regulate in these areas — otherwise the imposition of a prohibition against discrimination would make little sense.

national enterprises and associations.<sup>56</sup> But the grant of the commerce power to Congress, combined with that grant's plenary character, bespeaks a constitutional choice to leave determinations of national economic policy to a process that balances competing interests. It is this structural choice that the Court properly recognized and upheld in *Benjamin*.

In sum, the rule that Congress can authorize states to adopt measures that otherwise would violate the dormant commerce clause is correct, and follows from respecting Congress's constitutionally allocated powers as well as from structural differences between Congress and the states. In my view, moreover, that rule's longstanding pedigree provides additional reason to accord it continuing authority.<sup>57</sup> This is all the more true given the central role that congressional power to authorize dormant commerce clause violations plays in justifying this line of constitutional doctrine. Concerns about the lack of textual basis for the Court's enforcement of dormant commerce clause limits and the Court's limited competency in identifying discriminatory regulation are regularly pushed aside on the ground that Congress can rectify any judicial mistakes.<sup>58</sup> As a result, renouncing the rule that Congress can authorize discriminatory state commercial regulations would significantly undermine dormant commerce clause jurisprudence as a whole.

#### B. Congressional Power over Section 2 of Article IV

Section 2 of Article IV, which contains the Privileges and Immunities, Fugitive Slave, and Extradition Clauses, differs from the dormant commerce clause in that its prohibitions on the states are express.<sup>59</sup> Section 2 also stands out from Article I, and indeed from the remainder of Article IV, in lacking any reference to Congress. Nonetheless,

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<sup>56</sup> There is no need here to debate the merits of public choice theory or alternative accounts of elected officials' behavior. See generally JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE (1997) (describing and critiquing public choice accounts of official action). Whether their preferences derive directly from base self-interest or more altruistic concerns, members of Congress will have particular views regarding what should be interstate policy in a given area and in that sense are not disinterested.

<sup>57</sup> For a sustained defense of precedent and stare decisis as a restraint on constitutional interpretation, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748-67 (1988). See also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 897-98, 904-05, 913-16 (1996) (outlining traditionalist and conventionalist arguments for adhering to precedent).

<sup>58</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588 (1997); *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992).

<sup>59</sup> Several commentators invoke this textual difference to argue that the Court should disavow its dormant commerce clause jurisprudence and rely on Article IV's Privileges and Immunities Clause instead. See, e.g., Eule, *supra* note 27, at 446-48; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 606-12.

the scope of Congress's power under the Commerce Clause holds important lessons for an assessment of congressional authority under this section of Article IV.

1. *The Overlap of the Commerce Power and the Privileges and Immunities Clause.* — Congress's dormant commerce clause authority is especially significant to congressional power under the Privileges and Immunities Clause, given the overlap between the activities to which both clauses apply.<sup>60</sup> Although the Privileges and Immunities Clause prohibits only state discrimination that affects nonresidents' fundamental rights,<sup>61</sup> much of nonresidents' economic activity falls into that category for Article IV purposes. Thus, invoking that clause the Court has struck down state laws that tax nonresidents at rates higher than residents, charge nonresidents higher license fees for engaging in commercial activities, and impose residency requirements as a prerequisite for certain forms of employment.<sup>62</sup>

These cases involve not only economic activities, but economic activities with a clear interstate link; hence, they plainly come within the ambit of the Commerce Clause as currently interpreted.<sup>63</sup> The overlap between the commerce power and Article IV privileges and immunities, however, is not simply a product of expansive post-New Deal interpretations of the Commerce Clause. On the contrary, the overlap exists even under the narrowest originalist understanding of commerce as encompassing only "trade or exchange of goods,"<sup>64</sup> because trade

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<sup>60</sup> See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 407 (1948) (Frankfurter, J., concurring) (noting overlap between Privileges and Immunities Clause and dormant commerce clause); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1122–28 (1988) (arguing that privileges and immunities were originally defined in terms of rights of trade and commerce).

<sup>61</sup> See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978). "Fundamental rights" is a term with different meanings in different contexts; as discussed below, for due process and equal protection purposes, economic rights are not deemed fundamental. See *infra* p. 1539.

<sup>62</sup> See, e.g., *Supreme Court v. Piper*, 470 U.S. 274, 288 (1985) (striking down in-state residency requirements for bar membership as violating the Privileges and Immunities Clause); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 218–22 (1984) (holding residency requirement for employment on state-funded projects is subject to privileges and immunities scrutiny); *Austin v. New Hampshire*, 420 U.S. 656, 665–68 (1975) (holding state imposition of higher tax rate for nonresidents violates the Privileges and Immunities Clause); *Toomer*, 334 U.S. at 396–403 (holding higher commercial shrimp license fees for nonresidents violate the clause).

<sup>63</sup> See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2205–09, 2211 (2005); see also *Granholtz v. Heald*, 125 S. Ct. 1885, 1894–97, 1905–07 (2005) (treating requirement that out-of-state wineries must open branch offices in state as a condition for licensure as a residency requirement and invalidating it on dormant commerce clause grounds); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429–36 (1946) (upholding congressional authorization of state imposition of differential insurance tax rates as falling within the commerce power); *City of New York v. New York*, 730 N.E.2d 920, 927–31 (N.Y. 2000) (invalidating tax on out-of-state commuters on both Article IV Privileges and Immunities and dormant commerce clause grounds).

<sup>64</sup> Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112 (2001) (emphasis omitted); see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1393–95 (1987); see also *United States v. Lopez*, 514 U.S. 549, 585 (1995)

was similarly at the core of activities originally understood to be subject to Article IV privileges and immunities protections. Indeed, in the early and seminal decision *Corfield v. Coryell*,<sup>65</sup> Circuit Justice Washington identified “[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade” as one of “the particular privileges and immunities of citizens.”<sup>66</sup> In fact, the Privileges and Immunities Clause’s progenitor in the Articles of Confederation contained an express reference guaranteeing “all the privileges of trade and commerce.”<sup>67</sup> That language was omitted from the current version not because interstate trade was no longer thought a proper subject of privileges and immunities concern, but because the reference to trade and commerce was deemed redundant.<sup>68</sup>

Given the overlap of the two clauses, Congress’s ability to authorize dormant commerce clause violations by the states would seem to entail that Congress also possesses power to authorize discriminatory state regulations that are currently prohibited by the Privileges and Immunities Clause. On the other hand, if Congress lacks power to contract Article IV privileges and immunities protections in this fashion, then in practice its power to authorize state discrimination under the Commerce Clause is considerably more limited than generally thought. Congress would still have some ability to authorize state discrimination, because these two clauses have different scopes of application. Of greatest practical importance is the doctrine that corporations can maintain dormant commerce clause challenges but are excluded from the scope of privileges and immunities protections — an anachronistic rule at odds with many modern decisions, but one that

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(Thomas, J., concurring) (“At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”).

<sup>65</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>66</sup> *Id.* at 552. Nor was the Commerce Clause’s limitation to “commerce among the several states” thought to limit the overlap, for as *Gibbons v. Ogden* early on made clear, “[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior” to encompass commerce which “extend[s] to or affect[s] other States.” 22 U.S. (9. Wheat.) 1, 194 (1824); see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446–47 (1827) (emphasizing that the commerce power encompasses authority to regulate intrastate sale of goods imported from another state).

<sup>67</sup> ARTICLES OF CONFEDERATION art. IV, para. 1 (U.S. 1781).

<sup>68</sup> See *Austin v. New Hampshire*, 420 U.S. 656, 660–61 & n.6 (1975); THE FEDERALIST NO. 42 (James Madison), *supra* note 24, at 269–70 (remarking on the “confusion of language” and redundancies in the Articles of Confederation version and thereby suggesting that the additional language was omitted in part for clarity’s sake). Professor David Bogen suggests that this omission also reflects the Constitution’s grant of the commerce power to Congress. See David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 824–25, 835–36 (1986). See also *id.* at 832–41 (detailing other differences between the two privileges and immunities clauses and providing background on the constitutional clause’s drafting and discussion during ratification).

remains settled law today.<sup>69</sup> Nonetheless, the clauses' topical overlap is quite broad, and thus Congress's ability to authorize state discrimination with regard to individuals' economic activities would be substantially curtailed were Congress forced to adhere to privileges and immunities restrictions on the states.

More generally, little reason exists to distinguish between congressionally sanctioned state violations of the dormant commerce clause and congressionally sanctioned state violations of Article IV's Section 2.<sup>70</sup> The Court has never directly considered Congress's powers under the Privileges and Immunities Clause, either to implement that clause's protections or to authorize states to disregard its requirements.<sup>71</sup> The Court has noted, however, that the Privileges and Immunities and Commerce Clauses share a "mutually reinforcing relationship" and "common origin in the Fourth Article of the Articles of Confederation."<sup>72</sup> Diametrically different conceptions of congressional power under these clauses therefore seem unjustifiable. Nor is a solid policy justification apparent for such a divergence. The underlying logic of the Commerce Clause model is that Congress is best positioned to judge what the national interest requires. If, therefore, Congress determines that certain dormant commerce clause restrictions are unnecessary to serve national economic and political union, then Congress should have the power to lift them. The same logic would seem to apply to privileges and immunities restrictions and indeed to almost all limitations imposed on the states by the Constitution in the name of national union.

As a result, congressional authority over the dormant commerce clause and Article IV's Privileges and Immunities Clause should be interpreted in tandem; whatever authority Congress enjoys to authorize

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<sup>69</sup> See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); see also *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657-67 (1981) (describing erosion of the legal underpinnings for *Paul's* holding that states can grant corporate privileges on whatever terms they choose); Eule, *supra* note 27, at 449-54; Redish & Nugent, *supra* note 59, at 610-11. But see Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 394, 406-07 (2003) (defending the exclusion of corporations).

<sup>70</sup> See Cohen, *supra* note 12, at 414; Varat, *supra* note 12, at 570-71.

<sup>71</sup> The closest the Court has come is its decision in *Saenz v. Roe*, 526 U.S. 489 (1999), where the Court held that Congress lacks power to authorize state violations of the right to move to a new state and be treated like existing citizens, an element of the right to travel protected by the Fourteenth Amendment. See *id.* at 492, 507-08. Because Article IV's Privileges and Immunities Clause protects another aspect of the right to travel, see, e.g., *Doe v. Bolton*, 410 U.S. 179, 200-01 (1973), *Saenz* could be read as establishing that Congress is similarly limited regarding Article IV. This view of *Saenz* accords with the Court's passing comment in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), that the right to travel "does not derive from the negative Commerce Clause, or else it could be eliminated by Congress." *Id.* at 277 n.7. For fuller discussion of *Saenz*, see *infra* section II.B.3, pp. 1529-30.

<sup>72</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

violations of the former it should also enjoy with respect to the latter. Of course, that leaves the possibility of concluding that Congress should lack such a revisory power in both contexts, but the arguments enumerated above in favor of Congress's dormant commerce clause authority counsel strongly against that view.

2. *The Extradition and Fugitive Slave Clauses.* — Up to now, the argument has centered on Section 2's Privileges and Immunities Clause. The remainder of Section 2 — the Extradition Clause and the Fugitive Slave Clause, the latter rendered inoperative by the Thirteenth Amendment — presents somewhat different considerations, given that the activities subject to these clauses less clearly fall within the Commerce Clause or other enumerated congressional powers.<sup>73</sup> Insofar as such an overlap does exist, however, the same conclusion concerning congressional power should apply.

In addition, these clauses' imposition of duties on the states offers structural support for inferring congressional power to enforce their requirements, and indeed all of Section 2, as the Court has long held. The well-known decision in *Prigg v. Pennsylvania*<sup>74</sup> involved a challenge to the constitutionality of Pennsylvania's personal liberty law, enacted to prevent slaveowners and their agents from kidnapping individuals claimed to be fugitive slaves and then removing them from the state.<sup>75</sup> In his opinion for the Court holding that Pennsylvania's law was unconstitutional, Justice Story concluded that Congress had not only the power but also an obligation to enact legislation enforcing the Fugitive Slave Clause of Section 2.<sup>76</sup> Congressional power and duty followed from the inclusion of the right to enforce delivery of fugitive slaves in the national constitution: "The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also."<sup>77</sup> Indeed, Justice Story went so far as to hold that Congress's power to enforce the clause precluded states from legislating on the subject, at least in ways that added burdens for claimants seeking to recapture slaves.<sup>78</sup> Shortly thereafter, in *Kentucky v. Dennison*,<sup>79</sup> the Court reached a similar conclusion regarding

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<sup>73</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 609–27 (2000) (rejecting the claim that the economic effects of violent crime suffice, on their own, to bring such activity within the commerce power). Yet even here the commerce power may often come into play. For example, the Extradition and Commerce Clauses may overlap today in regard to extradition for economic crimes, or those aspects of extradition involving the channels and instrumentalities of interstate commerce.

<sup>74</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>75</sup> See *id.* at 608, 610.

<sup>76</sup> See *id.* at 615–16.

<sup>77</sup> *Id.* at 619.

<sup>78</sup> *Id.* at 617. This aspect of the decision provoked the strongest objections. See, e.g., *id.* at 627–28 (opinion of Taney, C.J.). For discussion of what scope of state action *Prigg* allowed, see Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 641–57 (1993).

<sup>79</sup> 65 U.S. (24 How.) 66 (1861).

Section 2's Extradition Clause, holding that the duty to "provid[e] by law the regulations necessary to carry [the clause] into execution . . . manifestly devolved upon Congress."<sup>80</sup>

3. *Section 2's Text.* — This leaves the question of whether recognition of congressional power over Article IV's Section 2 accords with the provision's text. At first glance, that text might appear to preclude any congressional power, particularly of the revisory variety.<sup>81</sup> As noted above, Section 2's prohibitions on the states are express; further, Section 2 is bereft of any reference to Congress. This absence is especially salient because all the adjacent sections of Article IV expressly invest Congress with power to act. Moreover, the contrast between the express nature of Section 2's demands and the dormant commerce clause's implied status might be thought ample basis to support a distinction in the scope of congressional authority in these two contexts.

On closer examination, however, these textual arguments become less persuasive. To begin with, focusing on the presence or absence of express grants of congressional power in Article IV ignores a key part of the textual equation: grants of congressional power elsewhere. In fact, the Constitution does contain an express textual grant of power to regulate much of the subject matter that arises under Article IV's Section 2, or at least under the Privileges and Immunities Clause — and that grant is the Commerce Clause of Article I.<sup>82</sup> Once Article I is added to the picture, the textual question radically changes. Instead of asking whether Section 2's silence regarding Congress precludes that body from legislating regarding the states' privileges and immunities obligations, the question becomes whether this silence limits Congress's otherwise broad power to act under the Commerce Clause.

<sup>80</sup> *Id.* at 104; *see also* *Roberts v. Reilly*, 116 U.S. 80, 94 (1885) ("There is no express grant to Congress of legislative power to execute this provision, and it is not, in its nature, self executing; but a contemporary construction, contained in the act of 1793, ever since continued in force, . . . has established the validity of its legislation on the subject." (citation omitted)). *Dennison* also emphasized that Congress's power under the Effects Clause authorized congressional legislation stipulating the method by which states authenticate judicial proceedings that form the basis for extradition demands. *See* 65 U.S. (24 How.) at 105.

<sup>81</sup> Many commentators have so concluded. *See, e.g.*, KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 317 (15th ed. 2004) ("[T]he Privileges and Immunities Clause is a rights provision, not a grant of authority to Congress, and so is arguably nonwaivable by Congress."); 1 *TRIBE*, *supra* note 12, § 6-1, at 1021-23; *id.* § 6-35, at 1243-44 & n.35; Charles L. Black, Jr., *Perspectives on the American Common Market, in* *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* 59, 65 (A. Dan Tarlock ed., 1981) (arguing the "impersonally peremptory language" of the Privileges and Immunities Clause makes that clause "a check on Congress's powers"); Chen, *supra* note 12, at 1773-77; Denning, *supra* note 69, at 394, 412 (arguing that the text of the Privileges and Immunities Clause appears to preclude Congress from authorizing interstate discrimination); Redish & Nugent, *supra* note 59, at 608 (describing the clause as a constitutional absolute that Congress lacks power to waive). *But see* Cohen, *supra* note 12, at 388; Eule, *supra* note 27, at 454.

<sup>82</sup> *See supra* notes 60-63 and accompanying text.

Viewed in this light, Section 2's failure to limit Congress's role seems to support claims of congressional power; at a minimum, arguing for a limit on a power expressly and unconditionally granted to Congress based on silence elsewhere in the Constitution is a much harder sell.

Indeed, as noted above, the Court has never viewed Section 2's silence as preclusive of congressional power. *Prigg* was a highly contentious decision, criticized by slavery opponents and supporters alike.<sup>83</sup> But the Court has never disowned the conclusion in *Prigg* and *Dennison*: Section 2's silence notwithstanding, Congress has implied power to enforce its requirements. In fact, recent decisions have reaffirmed *Dennison*'s holding that Congress has power to legislate under the Extradition Clause.<sup>84</sup> Moreover, the Court's willingness to rely on implied congressional power in these decisions accords with much of its federalism jurisprudence, which often looks beyond express constitutional text in determining the bounds of congressional power.<sup>85</sup>

This latter point also undermines the suggestion that the express form of Section 2's prohibitions imposes greater limits on Congress than the implied prohibitions of the dormant commerce clause. Ordinarily, no distinction is drawn between the legal significance of express

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<sup>83</sup> Antislavery forces condemned the Court's sanction of federal involvement in returning fugitive slaves and its invalidation of state efforts to prevent free blacks from being kidnapped; slavery supporters attacked the Court's conclusion that Congress could not force the states to enforce the Fugitive Slave Clause, claiming that it made "the clause . . . a 'dead letter,' as there were not enough federal judges to do the job." DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861*, at 184 (2005) (quoting Senator Mason of Virginia); see also CARL B. SWISHER, *THE TANEY PERIOD, 1836-64*, at 535-47 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Vol. 5, 1974). Interestingly, however, response to the decision was muted at first. See THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861*, at 104-07 (1974). Although *Prigg*'s holding of federal exclusivity provoked more criticism, a few members of Congress and several state courts denied that Congress possessed any power to enforce the Fugitive Slave Clause. See CURRIE, *supra*, at 185-94 (discussing congressional debates over the constitutionality of the 1850 fugitive slave law and whether to prohibit slavery in the territories); Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 269-73 (discussing prior case law on Congress's power to enforce the Fugitive Slave Clause).

<sup>84</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 908-09 & n.3 (1997); *California v. Superior Court*, 482 U.S. 400, 407 (1987). *Dennison*'s further determination that the federal government lacks the power to compel states to perform the mandatory duties imposed by the Extradition Clause and implementing legislation has not fared as well. In *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), the Court ruled that the duties imposed by the Extradition Clause and the Extradition Act were judicially enforceable. See *id.* at 229-30.

<sup>85</sup> See, e.g., *Printz*, 521 U.S. at 918-19; *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996). While implied prohibitions are more commonly found than implied powers, the latter are certainly not strangers to our constitutional tradition. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-18 (1936); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819); see also Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (providing a detailed historical account of the evolution of claims of inherent powers).

and implied constitutional prohibitions; both can have binding effect on Congress. To be sure, dormant commerce clause prohibitions are implied from a grant of congressional power,<sup>86</sup> but it is hard to see why that should make a difference, other than perhaps to call into question the validity of the dormant commerce clause altogether.<sup>87</sup> In any event, the express character of the Privileges and Immunities Clause should not obscure the fact that, as applied to Congress, this clause too is an implied prohibition — and moreover one that would similarly operate to limit the scope of the commerce power.

Indeed, when considered against the background of Article I, Section 2's silence regarding Congress ends up supporting congressional power to authorize state contraventions of its provisions. Given their obvious topical overlap, if the Privileges and Immunities Clause were intended to limit congressional action under the Commerce Clause, one might expect that intent to have been stated clearly in Article IV or alternatively in Article I. Notably, Section 9 of Article I contains several limitations on Congress's exercise of the commerce power, such as the prohibition on Congress's giving preference to the ports of one state over those of another, that demonstrate the Framers' awareness of how congressional commercial regulation could affect interstate relations.<sup>88</sup> Yet Section 9 is barren of restrictions on Congress that in any way mirror the specific provisions of Article IV, providing a further textual argument against inferring from these provisions a limit on Congress.

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These arguments suggest that, at a minimum, Congress should have broad authority to waive or expand prohibitions in Article IV's Section 2 that relate to activities Congress can independently regulate. The source of this authority is simply power elsewhere conferred upon Congress, in particular under the Commerce Clause. Support also exists for implying congressional power to enforce Section 2's anti-discrimination demands directly from that section itself. A more difficult question is whether Congress can authorize state violations of Section 2 invoking only this latter, implied power. The logic of the structural argument for congressional primacy in interstate relations suggests that Congress's power should extend that far. That is, Congress should be able to authorize state deviation from Section 2's re-

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<sup>86</sup> See, e.g., 1 TRIBE, *supra* note 12, § 6-35, at 1238.

<sup>87</sup> See, e.g., Redish & Nugent, *supra* note 59, at 581-99 (arguing against the legitimacy of imposing dormant commerce clause prohibitions on the states on textual grounds).

<sup>88</sup> See U.S. CONST. art. I, § 9, cl. 6; *see also id.* art. I, § 9, cl. 1 (preventing Congress from abolishing the slave trade before 1808); *id.* art. I, § 9, cl. 5 (prohibiting Congress from imposing taxes or duties on articles exported from any state); THORTON ANDERSON, CREATING THE CONSTITUTION 102-06 (1993); Colby, *supra* note 26, at 273-84.

quirements when it concludes that so doing eases interstate tension and promotes the national interest. But here textual arguments against congressional power carry significant weight: deriving such revisory congressional authority from a text that simply imposes prohibitions on the states seems a rather remarkable feat of textual exegesis, all the more so given that the need to make these prohibitions effective is the basis for implying congressional power in the first place. For now, however, it is sufficient to note that the scope of activity subject to Section 2 but not coming within the commerce power is relatively narrow. Accordingly, denial of congressional authority to waive Section 2's prohibitions in a non-commerce context would limit Congress's revisory power in only a few instances.

*C. Express Support for Broad Congressional Power  
in Other Constitutional Interstate Relations Provisions*

The text of the Constitution's other interstate relations provisions reinforces the foregoing arguments for expansive congressional authority over Article IV and interstate relations more generally. Most significant are Section 1 of Article IV and Section 10 of Article I, both of which impose antidiscrimination demands on the states that are expressly subject to congressional control.

1. *The Full Faith and Credit and Effects Clauses of Article IV, Section 1.* — By its coupling of the Full Faith and Credit and Effects Clauses, the first section of Article IV displays the same model of constitutional rules applicable to the states combined with congressional discretionary authority that is evident in the dormant commerce clause context. The basic rule is that states must give full faith and credit to each other's acts, records, and proceedings, but the Effects Clause grants Congress power to "by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."<sup>89</sup> Not surprisingly, given the dearth of Effects Clause legislation, little precedent exists on the scope of Congress's power under that clause, particularly regarding congressional power to contract the credit otherwise due state laws and judgments.<sup>90</sup> The text of Section 1, however, supports reading the Effects Clause in a parallel fashion to Congress's power under the Commerce Clause, resulting in

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<sup>89</sup> U.S. CONST. art. IV, § 1, cl. 2.

<sup>90</sup> In very occasional dicta, the Court has indicated that Congress has the power to expand judicially prescribed full faith and credit requirements using its Effects Clause power. *See, e.g.,* Sun Oil Co. v. Wortman, 486 U.S. 717, 728–29 (1988); *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939). The Court has stated that Congress's ability to contract full faith and credit requirements is an open question. *See* *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272–73 n.18 (1980) (plurality opinion); *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

Congress having authority to enact recognition requirements that might be broader or narrower than those imposed by the courts.

The Effects Clause itself is broad and unconditional in phrasing. The only express condition imposed by the clause is that in specifying the effect of out-of-state laws and judgments or their manner of proof, Congress must proceed by means of “general laws.” The import of this requirement is somewhat ambiguous; “general laws” could be read as preventing measures targeting a specific state’s laws and judgments (akin to the Constitution’s prohibitions on bills of attainder), or alternatively, as preventing measures targeting a narrow category of laws and judgments for special treatment.<sup>91</sup> The former seems the better reading. The latter requires some constitutional benchmark against which the breadth or narrowness of congressional legislation could be adjudged. How such a baseline should be established is far from clear; could Congress, for example, establish choice of law rules governing product liability actions alone, or must it legislate regarding all tort actions? In other contexts, the Court has essentially refused to review congressional determinations that a measure is sufficiently general in its benefits or scope to meet analogous constitutional requirements,<sup>92</sup> and a similar approach is warranted here.

Under either interpretation, however, the general laws provision by itself would not prevent Congress from providing that classes of acts, records, and proceedings deemed sufficiently general should receive more or less credit than they would under the Full Faith and Credit

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<sup>91</sup> On these contrasting interpretations of the general laws requirement, compare Letter from Michael W. McConnell to Sen. Orrin G. Hatch (July 10, 1996), in *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Judiciary Comm.*, 104th Cong. 56, 57 (1996), and Rosen, *supra* note 10, at 941–44, with MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 134–38 (1997), and 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, 1639–43 (1997).

<sup>92</sup> See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (stating, in rejecting a challenge to a spending measure as not for the general welfare, that “[t]he line must still be drawn between . . . particular and general. Where this shall be placed cannot be known through a formula in advance . . . . The discretion belongs to Congress, unless the choice is clearly wrong”); see also *South Dakota v. Dole*, 483 U.S. 203, 207 & n.2 (1987) (suggesting that a “general welfare” restriction on spending may not be judicially enforceable); *Reg’l Rail Reorg. Act Cases*, 419 U.S. 102, 158–61 (1974) (holding that a bankruptcy statute applying only to eight railroads in a particular geographic region did not violate the “uniform laws” requirement of the Bankruptcy Clause). Bankruptcy provides a particularly pertinent comparison, as the general laws requirement is textually similar to the requirement of “uniform laws” in bankruptcy. Indeed, the congressional power over bankruptcy was first proposed during discussion on the Full Faith and Credit Clause. *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 471 (1972). Underlying adoption of the Bankruptcy Clause and its uniformity requirement was concern about state enactment of private bankruptcy laws. For this reason, the Court has read “uniform laws” as precluding laws applying to particular debtors, not as prohibiting laws specific to particular contexts. See *id.* at 471–72. By analogy, the general laws requirement of the Effects Clause suggests concern with congressional legislation that singles out specific states’ laws and judgments for lack of recognition.

Clause as judicially enforced. Similarly, nothing in the phrase “the effect thereof” precludes Congress from determining that certain state laws and judgments should receive more or less credit than they would absent such congressional action.<sup>93</sup> Indeed, on its face this language would allow Congress to prescribe that some laws and judgments should be given no effect; after all, it is perfectly compatible with standard usage to reply “none” or “no effect” when asked to specify the effect something should have.<sup>94</sup> Section 5 of the Fourteenth Amendment provides a useful contrast; that section’s grant of power to Congress to “enforce” the amendment’s substantive protections<sup>95</sup> does imply that congressional enactments dramatically restricting those protections would be invalid.<sup>96</sup> But even if “the effect” is read as requiring some positive effect, as Professor Laurence Tribe argues,<sup>97</sup> Congress could still authorize states to refuse to recognize certain classes of laws and judgments. By so doing, Congress would not be mandating no effect, but rather providing that such laws and judgments simply would have whatever effect other states choose to give them. Moreover, such laws

<sup>93</sup> See Letter from Michael W. McConnell to Sen. Orrin G. Hatch, *supra* note 91, at 57; Rosen, *supra* note 10, at 952–54; Whitten, *supra* note 10, at 377–86; see also EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 246–55 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978) (stating that “Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States” in order to achieve uniformity).

<sup>94</sup> See, e.g., 5 *THE OXFORD ENGLISH DICTIONARY* 78–79 (2d ed. 1989) (defining “effect” in part as “[s]omething accomplished, caused, or produced; a result, consequence” and listing “of no effect” as a standard phrase in which the word appears).

<sup>95</sup> See U.S. CONST. amend. XIV, § 5.

<sup>96</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); see also Letter from Michael W. McConnell to Sen. Orrin G. Hatch, *supra* note 91, at 57–58 (contrasting meanings of “enforce” and “prescribe . . . the effect”). This distinction finds support in late-eighteenth-century dictionaries, which equate “enforce” with strengthening or invigorating, but define “effect” more neutrally as a consequence or something produced. See 1 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 335, 348 (8th ed. 1786); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* 232, 239 (4th ed. 1789). But see Letter from Laurence H. Tribe to Sen. Edward M. Kennedy (May 24, 1996), in 142 Cong. Rec. 13,359, 13,361 (1996) (arguing that Congress’s limitation under Section 5 to enforcing the Fourteenth Amendment supports viewing Congress as similarly lacking power to abrogate full faith and credit demands under the Effects Clause, but not discussing the textual differences between these two provisions). Whether Section 5’s “enforce” language should be read as giving Congress limited power to deviate from judicial constructions of the Fourteenth Amendment has been the subject of much recent scholarship. See *infra* note 246 and accompanying text.

<sup>97</sup> See Letter from Laurence H. Tribe to Sen. Edward M. Kennedy, *supra* note 96, at 13,360 (stating that “it is as plain as words can make it” that “the congressional power to ‘prescribe . . . the effect’ of sister-state acts, records, and proceedings” does not extend to “prescrib[ing] that some acts, records and proceedings that would otherwise be entitled to full faith and credit under the . . . Clause as judicially interpreted shall instead . . . be entitled to no faith or credit at all” (first omission in original)).

and judgments would continue to have effect at least in their state of issuance.<sup>98</sup>

Thus, the strongest textual basis for viewing Congress's power under the Effects Clause as limited comes not from the language of the Effects Clause itself, but rather from the Full Faith and Credit Clause, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."<sup>99</sup> The two clauses are closely linked, with the Effects Clause even textually referring to the Full Faith and Credit Clause.<sup>100</sup> Several commentators have argued that the mandatory and uncompromising nature of the Full Faith and Credit Clause militates against reading the Effects Clause to allow Congress to limit the credit otherwise due state laws and judgments. As Dean Larry Kramer has put it, the "unqualified 'full' and mandatory 'shall' [of the former clause] lose some (though obviously not all) of their meaning if Congress can simply legislate the requirement away."<sup>101</sup>

To be sure, the presence of express prohibitions on state discrimination in the Full Faith and Credit Clause marks a significant difference between that provision and the dormant commerce clause. But again, the importance of this distinction should not be exaggerated. As was true regarding Section 2 of Article IV, Congress is nowhere expressly subjected to the full faith and credit requirement; instead, that requirement by its terms references only the states. This textual absence is particularly striking given that the presence of the Effects Clause demonstrates a clear expectation that Congress would legislate in this area of interstate relations. It may be that, nonetheless, giving fair weight to the Full Faith and Credit Clause precludes Congress from *entirely* legislating away interstate comity, but congressional relaxation of the credit due particular classes of laws and judgments does not rise to that extreme.<sup>102</sup>

Equally important, as Professor Mark Rosen cogently argues, the Full Faith and Credit Clause has not been literally construed; instead,

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<sup>98</sup> Further, Professor Tribe's argument appears to mean that Congress is precluded from prescribing that a state's acts, records, and proceedings have no effect in certain circumstances even if that situation would obtain directly under the Full Faith and Credit Clause, which seems an implausible result.

<sup>99</sup> U.S. CONST. art. IV, § 1, cl. 1.

<sup>100</sup> Indeed, both clauses are often singly referred to as the Full Faith and Credit Clause. *See, e.g.,* *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005). The Effects Clause is separately identified here for the sake of clarity.

<sup>101</sup> Kramer, *supra* note 10, at 2003; *see also* Koppelman, *supra* note 10, at 21 ("The second sentence [of Article IV, Section 1] should not be read in a way that contradicts the first."); Strasser, *supra* note 10, at 312-13.

<sup>102</sup> A broad retraction of comity might well fail on rationality grounds in any event, as it is hard to see how such a measure could plausibly relate to any legitimate interest Congress might have in exercising its Effects Clause power.

the Court itself has upheld several exceptions.<sup>103</sup> Thus, the real question is whether Congress is able to reduce states' obligations created by judicial interpretations of the Constitution's full faith and credit demand. The conjoining of the Full Faith and Credit and Effects Clauses suggests that Congress does have an important role to play in determining what full faith and credit entails, and thus supports granting Congress that power.<sup>104</sup> In addition, viewing Congress as limited by judicial interpretations of full faith and credit has perverse consequences, for it renders the Effects Clause largely nugatory as a means of mediating conflicting choice of law rules among the states. Under this reading, Congress would lack power to specify which acts, records, or judgments should receive credit in any context where those of more than one state have a legitimate claim to recognition. In other words, the result would be to disable Congress from acting under the Effects Clause in precisely those contexts where congressional action is most needed to ensure uniformity.<sup>105</sup>

Finally, the drafting history of the two clauses further undermines any claim that Congress is precluded from restricting the scope of the full faith and credit demand. When the clauses emerged from the Constitutional Convention's Committee on Detail, Congress was limited to determining the effects of judgments; more importantly, Congress's responsibility to legislate in the area was mandatory, whereas the initial full faith and credit instruction to the states was hortatory.<sup>106</sup> In the ensuing debate, the Constitutional Convention expanded the scope of the Effects Clause to grant Congress authority to specify the effect of acts and records as well as judicial proceedings, and at the same time adopted a proposal by James Madison to reverse

<sup>103</sup> See Rosen, *supra* note 10, at 952–57.

<sup>104</sup> See *id.* at 960–61.

<sup>105</sup> See *id.* at 944.

<sup>106</sup> The Effects Clause originated in a suggestion by James Madison that Congress “might be authorized to provide for the *execution* of judgments,” with Madison stating that he thought such a role for Congress “was justified by the nature of the Union.” FARRAND, *supra* note 21, at 448. Only Edmund Randolph objected, arguing “there was no instance of one nation executing the judgments of the Courts of another.” *Id.* Gouverneur Morris then proposed adding language that would give Congress even broader responsibilities, specifically that “the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings.” *Id.* This proposal was submitted to the Committee on Detail, but as noted, the version that emerged from the Committee was more limited. It provided:

Full faith and credit ought to be given in each State to the public acts, records, and Judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, Records, and proceedings shall be proved, and the effect which Judgments obtained in one State shall have in another.

*Id.* at 485. The Effects Clause engendered little comment during the ratification debates, see Kramer, *supra* note 10, at 2004, and thus the history of its drafting from the Constitutional Convention is the main record of how it was understood.

the mandatory and discretionary character of the two clauses.<sup>107</sup> These simultaneous moves to make the Full Faith and Credit Clause mandatory and the Effects Clause discretionary weigh against reading the former's mandatory language as directed at Congress. A more plausible explanation is that the Framers sought to make full faith and credit self-executing, thereby ensuring that congressional inaction did not prevent enforcement of the full faith and credit demand, but also intended to leave Congress with power to legislate regarding the effects of laws and judgments if it so chose.

2. *The New State, Territory and Property, and Guarantee Clauses of Article IV, Sections 3 and 4.* — The grants of congressional power in the remainder of Article IV are similarly expansive in scope.<sup>108</sup> These latter sections do not include express prohibitions on the states, and thus are less clearly instances where Congress is assigned authority over interstate relationships. However, the powers these sections grant to Congress — to regulate federal territory and property, admit new states, and guarantee republican government — all have important implications for interstate relations. Historically, rivalries among the states regarding Western land claims provided a significant basis for granting the federal territory power.<sup>109</sup> Subsequently, control over federal territories and admission of new states became central areas of contention in interstate battles over slavery.<sup>110</sup> Even outside the battle over slavery, the terms on which new states are admitted affect interstate relations as they establish the basis for new states' relationships with existing states. The Guarantee Clause, in turn, sets certain minimal requirements (regarding type of government and protections against spread of violence) that states are entitled to demand of other states as a condition of union.<sup>111</sup>

<sup>107</sup> See FARRAND, *supra* note 21, at 488–89.

<sup>108</sup> This is particularly true of the Territory and Property Clause, which requires that congressional regulations regarding federal territory and property be “needful” — seemingly a minimal constraint — but does not otherwise limit Congress in regard to the content, duration, or geographic range of the regulations it enacts. See U.S. CONST. art. IV, § 3, cl. 2.

<sup>109</sup> See Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 16–26 (2001); see also THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 24, at 61–62 (arguing that, absent union, dispute over the Western territories would lead the states to wage war with one another).

<sup>110</sup> See DON E. FEHRENBACHER, THE DRED SCOTT CASE 100–87 (1978); see also Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 140–43 (2004) (discussing relationship between slavery and admission of Nebraska and Nevada after the Civil War).

<sup>111</sup> The states' adherence to similar republican principles was seen as necessary for their successful union, as was assurance that they would come to each others' defense. See THE FEDERALIST NO. 43 (James Madison), *supra* note 24, at 274–78; Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 522 (1961). Professor Tom Lee speculates that the Guarantee Clause may have been animated by the idea that republican states would be unlikely to go to war with one another. See Thomas H. Lee,

Significantly, despite their grants of broad power to Congress, these sections of Article IV similarly impose few express conditions on Congress's ability to discriminate among the states. The New State Clause, for example, contains no textual requirement that new states be admitted on equal terms with existing states, and records from the Constitutional Convention demonstrate that this omission was intentional.<sup>112</sup> Instead, the restrictions that the New State Clause does contain echo *Benjamin's* emphasis on coordinated national and state action, requiring both congressional and state consent before a state can be divided in two or amalgamated into a new state.<sup>113</sup> Moreover, although the Court ultimately held in *Coyle v. Smith*<sup>114</sup> that Congress must admit new states on equal terms, notwithstanding the absence of an express state equality requirement, it simultaneously emphasized that Congress could impose conditions on particular states using its other powers, such as those enumerated under Article I.<sup>115</sup>

3. *Article I, Section 10.* — A final core interstate provision in the Constitution is Section 10 of Article I, which imposes numerous prohibitions on the states. Some of these are unconditional. Many others, however, are made expressly waivable by Congress. Of particular note, congressional waiver authority is granted with respect to those state prohibitions that most directly address interstate relations, such as the ban on interstate compacts and restrictions on the states' authority to impose duties.<sup>116</sup>

At first glance, Section 10's articulation of congressional waiver power might seem to undermine the argument for implying congres-

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*Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1036, 1052–53 (2002).

<sup>112</sup> As initially included in the August 6th draft, the clause required that “new States shall be admitted on the same terms with the original States.” FARRAND, *supra* note 21, at 188. Despite some delegates' arguments “for fixing an equality of privileges by the Constitution,” Gouverneur Morris's proposal that this language be deleted so as not “to bind down the Legislature to admit Western States on the terms here stated” was adopted. *Id.* at 454. Morris's proposal was fueled by a concern that an equality requirement would entitle the new states to equal representation in the Senate and thereby “throw the power into the[] hands” of those settling the Western lands. *Id.*; *see also id.* (remarks by Hugh Williamson). Madison argued that Western states should not be degraded in rank, but the view that Congress should have flexibility on this question appears to have carried the day. *See id.*; *see also* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 243–45 (2001) (concluding that the Framers rejected state equality, although arguing this rejection is at odds with the principle of enumerated powers). The more interesting question is what the Framers meant by state equality, and in particular whether Congress could attach ongoing and permanent conditions to admission, such as a prohibition on slavery. This issue rose to the fore with the admission of Missouri. *See id.* at 219–49.

<sup>113</sup> *See* U.S. CONST. art. IV, § 3.

<sup>114</sup> 211 U.S. 559 (1911).

<sup>115</sup> *See id.* at 574–75.

<sup>116</sup> *Compare* U.S. CONST. art. I, § 10, cl. 1, *with id.* art. I, § 10, cls. 2, 3.

sional power to authorize violations of Article IV's Section 2. On closer scrutiny, however, important distinctions between Section 10 and Article IV emerge that explain why congressional waiver authority is expressly stated in the former. Many of Section 10's absolute prohibitions are not wholly interstate in focus but instead extend to the states' interactions with their own citizens, and appear motivated by general beliefs about abuse of power.<sup>117</sup> That Congress would lack power to waive these limitations is not surprising, and indeed Congress itself is subject to several identical restrictions in Article I's Section 9.<sup>118</sup> Other absolute prohibitions in Section 10 are mirrored by express grants of power to Congress to regulate the activities at issue, thereby creating a case for inferring a constitutional mandate of federal exclusivity stronger than exists in the Article IV context.<sup>119</sup> By contrast, the restrictions made waivable by Congress involve matters that fall less clearly within Congress's other enumerated powers.<sup>120</sup>

In short, rather than supporting a conclusion about Congress's interstate powers in general, Section 10's inclusion of express congressional waiver authority appears closely tied to the specific state prohibitions contained in that provision. What nonetheless remains notable about Section 10 is that it represents an express articulation of the interstate model also evident in the other constitutional interstate provi-

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<sup>117</sup> A case in point: Section 10's financial prohibitions — barring states from coining money, issuing bills of credit, or making anything other than gold or silver tender for paying debts — were no doubt important to securing union, both in ensuring the viability of a national economy and in protecting other states from the economic fallout of one state's machinations. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 477 (1941) (describing Section 10's financial prohibitions as keyed to protecting interstate and international commerce). But like the Contracts Clause, these prohibitions also reflected the Framers' fear that state legislatures had too little respect for private property and would abuse their financial powers to ease pressures on debtors generally, a fear that was not limited to interstate contexts. See ANDERSON, *supra* note 88, at 44–45, 81–82, 106–08 (discussing overlap between many Framers' support for stronger national government and their fear of democracy, and discussing their desire to limit state access to paper money); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 23 (1999) (noting that state adoption of debtor relief laws led to retaliation by states with large numbers of creditors).

<sup>118</sup> Compare U.S. CONST. art. I, § 9, cl. 3 (prohibiting ex post facto laws and bills of attainder), with *id.* art. I, § 10, cl. 1 (prohibiting states from passing the same).

<sup>119</sup> Prime examples here are Section 10's prohibitions on states coining money and issuing letters of marque and reprisal. Compare *id.* art. I, § 10, cl. 1, with *id.* art. I, § 8, cls. 5, 11. In like vein, Section 10's prohibition on states entering treaties, see *id.* art. I, § 10, cl. 1 — itself qualified, at least in practice, by that section's grant of power to Congress to approve state agreements with foreign powers, *id.* art. I, § 10, cl. 3 — is followed by Article II's grant of the power to make treaties to the President, subject to two-thirds approval by the Senate, see *id.* art. II, § 2, cl. 2. On the presumption of concurrent state power in Article IV, see *supra* note 55.

<sup>120</sup> For example, the Uniformity Clause, U.S. CONST. art. I, § 8, cl. 1, might otherwise be read to prevent Congress from authorizing state imposts and duties, or Congress might otherwise be thought to lack control over state compacts addressing matters outside its enumerated powers.

sions — that is, prohibitions on the states that are independently binding but subject to ultimate congressional control.

*D. Normative and Functional Considerations*

Constitutional text, structure, and precedent thus all support concluding that Congress enjoys primary responsibility for setting the parameters of interstate relationships. Normative and functional considerations, specifically recognition of the benefits of interstate discrimination and Congress's greater institutional competency in this area when compared to the Court's, further reinforce the case for expansive congressional interstate authority.

1. *The Positive Value of Interstate Discrimination.* — Underlying claims for a congressional revisory power over interstate relations is the belief that interstate discrimination can be a positive good. A variety of legitimate national considerations might lead Congress to allow a state to favor its own. For example, Congress might conclude that discrimination is warranted as a means of protecting states against exploitation, whether by allowing them to reserve certain benefits to their residents or by limiting harmful externalities of other states' actions.<sup>121</sup> Alternatively, Congress might conclude that, although economically inefficient when viewed from the perspective of the nation as a whole, state economic protectionism nonetheless is legitimate in some circumstances to encourage development or maintenance of certain industries.<sup>122</sup> Congress might also conclude that discrimination is justified by substantial interstate strife over an activity or to preserve traditions of local regulation in particular contexts.<sup>123</sup> Finally, Congress might conclude that freeing states from antidiscrimination constraints is necessary to allow effective state regulation. State taxation

<sup>121</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 151–54 (1992) (describing the Low-Level Radioactive Waste Policy Amendments Act of 1985, in which Congress allowed states to bar access to their waste disposal facilities to states that failed to adopt measures for disposing of low-level waste generated within their borders); H.R. REP. NO. 104-664, at 6–10 (1996), as reprinted in 1996 U.S.C.A.N. 2905, 2910–14 (stating one purpose of DOMA is to protect states from the effects of Hawaii's recognition of same-sex marriage); see also *Martinez v. Bynum*, 461 U.S. 321, 328–30 (1983) (upholding constitutionality of residency requirements for public education).

<sup>122</sup> International trade scholars are suspicious about the “infant industries” justification for deviation from free trade principles, arguing that in those instances where investing in an industry is or ultimately will be economically efficient, firms will do so without subsidies. See, e.g., Robert E. Baldwin, *The Case Against Infant-Industry Tariff Protection*, 77 J. POL. ECON. 295 (1969). But even if it is economically inefficient, long-term industry protection still may be normatively justified, for example, as a way of preserving communities otherwise facing economic extinction or ensuring that states can protect themselves against interstate competition perceived as particularly threatening on noneconomic grounds.

<sup>123</sup> See, e.g., *New York*, 505 U.S. at 150–51 (describing concerns of states with nuclear waste facilities); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 413–17, 429–31 (1946) (detailing tradition of state regulation of insurance that motivated the congressional determination in the McCarran-Ferguson Act that such regulation should continue).

of electronic commerce is a prime example here. To effectively tax such transactions, states may need to impose tax collection responsibilities on entities that lack physical presence within their borders, but under current doctrine states lack the power to legislate extraterritorially in this fashion without congressional authorization.<sup>124</sup>

One way of understanding the benefits of interstate discrimination is in terms of the Constitution's rejection of purely national government in favor of a federal system under which the states retain independent governing authority.<sup>125</sup> "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States . . ." <sup>126</sup> Allowing Congress to authorize interstate discrimination thus accords with the Constitution's concern to preserve the salience of the states as sovereign entities, because imposing excessive discrimination prohibitions on the states is as harmful to "Our Federalism" as imposing insufficient ones. As the Court famously stated in *Texas v. White*,<sup>127</sup> "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."<sup>128</sup>

But it is also important to realize that congressional authorization of interstate discrimination can also serve the goal of preserving union. Several scholars disagree, insisting, in Dean Kramer's words, that "commitment to Union is itself a fundamental constitutional value. . . . Congress should not be permitted to redefine its terms at will or to legislate away the minimum requirements of mutual respect and recognition it entails."<sup>129</sup> To begin with, this argument presumes exactly the point at issue: that the terms of union are constitutionally fixed and

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<sup>124</sup> See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312-17 (1992); Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 TAX L. REV. 425, 480-90, 503-05 (1997); Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 171-82 (2002) (noting Court's willingness to accept extraterritorial taxes when necessary for ease of administration). Congress has responded to concerns about state and local taxation of electronic commerce with a temporary moratorium on such taxes applied to Internet access and on multiple or discriminatory taxes. See Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, 118 Stat. 2615 (2004) (extending moratorium to November 2007).

<sup>125</sup> See THE FEDERALIST NO. 39 (James Madison), *supra* note 24, at 246 ("The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both."). For discussions of the defining characteristics of federal systems, see DANIEL J. ELAZAR, EXPLORING FEDERALISM 5-9, 157-68 (1987), and Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

<sup>126</sup> *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

<sup>127</sup> 74 U.S. (7 Wall.) 700 (1869).

<sup>128</sup> *Id.* at 725; see also *Rosen*, *supra* note 10, at 935-37 (emphasizing that the Full Faith and Credit Clause "aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct polities").

<sup>129</sup> Kramer, *supra* note 10, at 2006; see also Letter from Laurence H. Tribe to Sen. Edward M. Kennedy, *supra* note 96, at 13,360-61.

not ultimately left up to Congress. More importantly, as the examples just noted suggest, caution is needed before condemning congressional authority to sanction interstate discrimination as inherently at odds with the Constitution's commitment to national union. Viewed functionally, the demands of national union have little preset, acontextual content. Some measures — congressional sanction of state secession is perhaps the clearest example — are clearly inimical to national union. But congressional easing of Article IV's demands is hardly equivalent to a *pro tanto* dissolution of the union. Indeed, the fact that Congress has wielded its established power to authorize state dormant commerce clause violations sparingly<sup>130</sup> indicates that recognizing congressional revisory authority over interstate relations might lead to little discrimination in practice. While DOMA and CIANA suggest that congressional legislation may be more likely in contexts of sharp public contestation, those are also the contexts in which permitting interstate discrimination may better advance interstate harmony and attachment than would unbending adherence to antidiscrimination principles.

2. *Institutional Competency.* — Consideration of the comparative institutional competency of Congress and the Court when it comes to the interstate arena further supports granting Congress ultimate control over interstate relations.<sup>131</sup> The Court has struggled to make sense of the interstate relations provisions of Article IV. Read literally, the Full Faith and Credit Clause suggests “the absurd result that, wherever the conflict [between different states’ laws] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”<sup>132</sup> To avoid such an anomalous result, current doctrine recognizes that the clause “does not compel ‘a state to substitute the statutes of other states for its own statutes [when] dealing with a subject . . . [on] which it is competent to legislate.’”<sup>133</sup> This means that a state must apply another state’s law instead of its own only when it lacks significant contacts with the parties or the event underlying the

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<sup>130</sup> For the few examples when Congress has done so, see sources cited *supra* note 9. For a similar assessment, see Chen, *supra* note 12, at 1769, 1784. *Contra* Williams, *supra* note 11, at 155 (“[G]iven this open-ended invitation [to authorize state regulations that burden or discriminate against interstate commerce], Congress has done precisely that.”). One complication in assessing how willing Congress is to sanction state discrimination is that the Court is reluctant to read Congress as doing so, and therefore requires a clear and fairly specific statement from Congress before such authorization is found. See *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

<sup>131</sup> On the importance of institutional competency considerations to federalism, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815–44 (2005). See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 196–270 (1994).

<sup>132</sup> *Ala. Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935).

<sup>133</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

litigation, hardly a demanding standard or one that intuitively reflects the clause's demand that the states grant each others' laws *full* faith and credit.<sup>134</sup> Yet the Court's earlier efforts to enforce a more robust full faith and credit requirement resulted in inconsistencies, due to the difficulty of ascertaining which states' interests were paramount in a particular case.<sup>135</sup>

In turn, enforcing Article IV's Privileges and Immunities Clause requires an initial determination of what constitutes a privilege and immunity of state citizenship. Two contrasting possibilities are immediately apparent: the clause could require that a state accord citizens of other states either a predetermined set of rights or alternatively only those rights it grants its own citizens. Early on, the Court rejected the former, natural law-based account of the clause for the latter, equal protection-based view.<sup>136</sup> But it also has rejected the argument that the clause prohibits all distinctions between in-state and out-of-state residents, emphasizing that some such discrimination is necessitated by the nation's division into states.<sup>137</sup> It is for this reason that the Court has held that the clause protects only "fundamental" rights, which in this context means those rights that are "basic to the maintenance or well-being of the Union."<sup>138</sup> The Court's efforts to render this standard operational again have not been models of consistency; it has held, for example, that states can impose discriminatory recreational but not commercial license fees.<sup>139</sup> While this distinction reveals the commercial flavor of the Court's view of the Privileges and Immunities Clause, it leaves unexplained why resentment and retaliation outside the commercial context is less threatening to the nation's well-being.<sup>140</sup>

Inconsistencies and theoretical tensions are also evident in the Court's dormant commerce clause jurisprudence. Here, too, the Court

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<sup>134</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–13 (1981) (plurality opinion).

<sup>135</sup> Compare *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), with *Pac. Employers*, 306 U.S. 493, and *Ala. Packers*, 294 U.S. 532. For analysis of these inconsistencies, see Kramer, *supra* note 10, at 1977–78, and Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 51–57 (2001).

<sup>136</sup> See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

<sup>137</sup> See *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978); *Paul*, 75 U.S. (8 Wall.) at 180–81. For the argument that the Court erred in rejecting the natural law view, see Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967). But see Bogen, *supra* note 68, at 841–45 (arguing that the natural law interpretation is inconsistent with the structure and history of Article IV).

<sup>138</sup> *Baldwin*, 436 U.S. at 388.

<sup>139</sup> Compare *id.* (upholding discriminatory fees for hunting licenses where used for sport), with *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) (invalidating discriminatory commercial fishing license fees).

<sup>140</sup> For efforts to rectify this analytic gap, see Laycock, *supra* note 12, at 270–73, and Varat, *supra* note 12, at 516–40.

has been concerned with matters commercial, trying — within the limits that inhere in judicial lawmaking — to implement a vision of a national common market. One tension with which the Court has struggled nobly is in distinguishing a state's legitimate use of its resources to favor its own from unconstitutional economic protectionism.<sup>141</sup> While the Court has developed mechanisms to increase decisional consistency, such as its rule that facially discriminatory measures are virtually *per se* invalid,<sup>142</sup> these mechanisms are vulnerable to criticisms of their own. Measures can be facially discriminatory but not protectionist, and facially neutral measures may on closer inspection appear pernicious.<sup>143</sup> Not surprisingly, the Court's handiwork is often held up for criticism as empirically flawed, or worse, constitutionally illegitimate.<sup>144</sup>

Part of the explanation for the Court's difficulties is that applying these constitutional provisions requires the Court to make determinations that it is institutionally ill-equipped to make.<sup>145</sup> Identifying violations often turns on assessing the relative benefits and burdens of discriminatory measures and the importance of interstate uniformity or equality in particular contexts. Intuitively, such determinations seem

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<sup>141</sup> Compare *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984), with *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

<sup>142</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997).

<sup>143</sup> See, e.g., *id.* at 596–98, 602–03 (Scalia, J., dissenting) (arguing that denial of charitable tax benefit was not discriminatory even though it facially distinguished between institutions serving in-state individuals and those serving out-of-state individuals); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (sustaining even-handed ban on sale of milk in plastic but not pulpwood nonreturnable containers, notwithstanding that plastic containers originated out-of-state and pulpwood containers were manufactured in-state). Nor is it always clear when a measure is facially discriminatory. See, e.g., *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 403–04 (1994) (O'Connor, J., concurring in the judgment) (arguing that requirement that all trash generated in locality be processed at a particular facility created a monopoly but was not discriminatory); *id.* at 413–23 (Souter, J., dissenting) (same).

<sup>144</sup> See Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745, 1754–61 (1991) (arguing that the Court is unable to identify instances where discrimination may be beneficial); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 234–51 (arguing that the Court fails to accurately identify discriminatory state legislation). But see Chen, *supra* note 12, at 1790–95 (maintaining that “the Supreme Court has handled the dormant Commerce Clause with considerable skill”). Others have made broader attacks on the whole concept of the dormant commerce clause. See, e.g., *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that dormant commerce clause jurisprudence is unjustified if it goes beyond invalidating discriminatory state regulation); Eule, *supra* note 27, at 435–36 (arguing that judicial intervention in defense of Congress's regulatory prerogatives is no longer justified given the breadth of federal regulation and the availability of administrative agencies); Redish & Nugent, *supra* note 59, at 605–17 (arguing that textual, structural, and policy arguments fail to justify continued application of the dormant commerce clause).

<sup>145</sup> Another factor contributing to the Court's difficulties is that the practical import of these provisions is not clear. This problem, of course, is not unique to the interstate relations context and does not itself suffice to call the propriety of judicial involvement into question.

to fall more within Congress's competency than the Court's. Congress's factfinding capacity and its ability to choose and compromise among conflicting values allow it to investigate particular areas and legislate on discrete problems as they emerge without the necessity of devising rules capable of more general and principled application.<sup>146</sup>

Most importantly, Congress's political accountability makes it a better barometer of when interstate restrictions threaten national union and when they do not, as well as provides it with greater legitimacy in legislating substantive limits on the states.<sup>147</sup> "Congress comprises all interested parties and therefore is more likely to take account of all costs that a given rule imposes on states."<sup>148</sup> The claim that the political safeguards of Our Federalism are adequate to guard against congressional encroachment on the states has garnered substantial criticism.<sup>149</sup> But the case for political safeguards has more merit in the interstate relations context, particularly when Congress acts to authorize state discrimination.<sup>150</sup> As Professor William Cohen cogently put it

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<sup>146</sup> See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 304 (1997) (invoking such institutional competency concerns in rejecting a dormant commerce clause challenge); see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2030–32 (2003) (arguing, in the Section 5 context, that "[b]ecause of the institutionally specific ways that Congress can negotiate conflict and build consensus, it can enact statutes that are comprehensive and redistributive, and so vindicate constitutional values in ways that courts cannot").

<sup>147</sup> See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 21–22 (1991); see also Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1573–74 (2005) (arguing that this institutional difference justifies exempting Congress from dormant commerce clause constraints).

<sup>148</sup> Rosen, *supra* note 10, at 950–51; see also *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

<sup>149</sup> See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001). For the classic account of the political safeguards argument, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>150</sup> Professors Lynn Baker and Ernest Young argue forcefully to the contrary, insisting that Congress's political attentiveness to state interests offers no protection against (indeed, may worsen) the danger that states representing a dominant view on an issue will, at the expense of the minority of states who disagree, seek to harness federal power to their cause. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 109–28 (2001); see also Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 1010–12 (2006) (arguing that, if federalism's only safeguards are political, "a block of states with sufficient voting power may, through their federal representatives, legitimately divest a state . . . of power to exercise what historically many public officials viewed as sovereign prerogatives of each state"). The problem with this argument lies in its presumption that this dynamic represents abuse of the constitutional system — or, as Professors Baker and Young term it, "horizontal aggrandizement" — as opposed to proper constitutional functioning. After all, the Constitution creates Congress as a national representative body, subject to few supermajority requirements or overt prohibitions on its discriminating among the states. These features make it impossible to view a measure that falls within the core of Congress's enumerated powers as aggrandizement, even if the measure benefits some states significantly more than oth-

over twenty years ago, whatever debate exists about the adequacy of political safeguards as a check on Congress imposing excessive restrictions on the states, “it is harder to argue that there is a need to monitor decisions by the national legislature that exalt state power at the expense of national power.”<sup>151</sup>

On the other hand, Congress also faces institutional obstacles in overseeing the interstate arena. Ensuring that the states do not advance their parochial interests to the detriment of the nation requires the ability to consider a large number of specific state measures and the ability to act quickly to stop abuses, both of which Congress may lack. In these regards, the Court could have a comparative advantage over Congress, as many scholars have argued in defense of the dormant commerce clause doctrine.<sup>152</sup> Thus, the institutional limitations of the Court described here do not necessarily imply that the Court should absent itself from interstate questions altogether, even if such a result were compatible with Article IV’s text. They do, however, strongly counsel toward seeing judicially enforced interstate antidiscrimination requirements as subject to congressional override.

#### *E. Arguments from History*

The history of Article IV’s drafting and ratification is more ambiguous, and may provide grounds for upholding a narrower congressional role. Nonetheless, this evidence, as well as subsequent congressional practice, offers additional support for broad congressional authority over interstate relations.

The provisions that ultimately became Article IV, particularly the prohibitions on interstate discrimination contained in the article’s first two sections, generated little discussion either at the Constitutional Convention or during ratification.<sup>153</sup> It is nonetheless clear that the Framers intended the article, especially Sections 1 and 2, to help forge

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ers. Critically, however, as noted above much congressional regulation of interstate relations will involve matters that fall within this core. Moreover, absent a presumption that the Constitution assigns control over interstate relationships to the courts, state aggrandizement cannot be inferred from the fact that a congressional measure authorizes state actions that would otherwise be found unconstitutional.

<sup>151</sup> Cohen, *supra* note 12, at 406; see also David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158, 191 (critiquing rule that Congress cannot adopt existing nonuniform state admiralty laws).

<sup>152</sup> See, e.g., 1 TRIBE, *supra* note 12, § 6-1, at 1026–27; Brown, *supra* note 54, at 222; Chen, *supra* note 12, at 1771; see also Friedman, *supra* note 144, at 1754–60 (acknowledging that although Congress is otherwise better suited than the courts to determine when discrimination is justified, it does not have the institutional resources to police the states, and thus that role should be played by federal administrative agencies).

<sup>153</sup> No doubt a major explanation for this silence was the close similarity between these antidiscrimination requirements and those already contained in the Articles of Confederation. For discussion of alterations in the text of the Privileges and Immunities Clause, see *supra* p. 1487.

the states into a closer union. This is evident in part from the article's immediate predecessor, Article IV of the Articles of Confederation, which opened with the words: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union."<sup>154</sup> The Court has frequently emphasized the union-forging purpose of Article IV, describing it as animated by the purpose of making the states "integral parts of a single nation"<sup>155</sup> and as constituting "an essential part of the Framers' conception of national identity and Union."<sup>156</sup>

Article IV's union-forging provisions were centrally implicated in the escalating fights over slavery in the antebellum period. Increasingly, they yielded to the profound strains of sectional division. Northern states adopted the view that bringing a slave into a non-slave state, even as part of travel to a slave state, served to free the slave; Southern states prohibited entry by free blacks and refused to recognize judgments of other states that granted rights to free blacks.<sup>157</sup> Northern states enacted personal liberty laws to protect free blacks claimed as fugitive slaves and refused to extradite individuals accused of encouraging slaves to run away; Southern states supported aggressive fugitive recapture efforts and refused to extradite alleged kidnappers of free blacks.<sup>158</sup> Both sides contended that the other's actions violated the comity demands contained in Article IV.<sup>159</sup> In fact, this period was Article IV's heyday: never before or since has it figured so dominantly in political and legal discussion. In particular, the issue of Congress's power to ban slavery in the territories consumed years of congressional attention and debate.<sup>160</sup>

<sup>154</sup> ARTICLES OF CONFEDERATION art. IV, para. 1 (U.S. 1781).

<sup>155</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935)) (addressing the Full Faith and Credit Clause); *see also* *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (same); *Estin v. Estin*, 334 U.S. 541, 546 (1948) (describing the clause as having "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns").

<sup>156</sup> *California v. Superior Court*, 482 U.S. 400, 405 (1987) (addressing the Extradition Clause); *see also* *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 380-81 & n.19 (1978) (addressing the Privileges and Immunities Clause).

<sup>157</sup> *See* CURRIE, *supra* note 83, at 41-48 (discussing limits on travel by free blacks); FEHRENBACHER, *supra* note 110, at 68-73 (same); PAUL FINKELMAN, AN IMPERFECT UNION 101-235, 285-312 (1981) (tracing development of Northern restrictions on travel with slaves and Southern resistance to Northern emancipation laws).

<sup>158</sup> *See* CURRIE, *supra* note 83, at 183-94 (detailing Southern success in resisting procedural protections for claimed fugitives in the 1850 Fugitive Slave Act); FINKELMAN, *supra* note 157, at 6-8; *see generally* MORRIS, *supra* note 83 (describing evolution of personal liberty laws).

<sup>159</sup> *See* CURRIE, *supra* note 112, at 246; FINKELMAN, *supra* note 157, at 5, 11-13; Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 285.

<sup>160</sup> *See* DAVID M. POTTER, THE IMPENDING CRISIS: 1848-1861, at 49, 54-62 (1963) (describing different views of the federal territorial power with regard to the debate over slavery). Article

The central importance placed by Article IV, especially its first two sections, on securing union might counsel against recognizing congressional power to contract the article's antidiscrimination prohibitions. On this premise, it may seem more plausible that the Framers granted power to Congress in order to enable that body to augment Article IV's interstate demands.<sup>161</sup> This account, in turn, readily leads to a one-way ratchet view under which Congress could expand, but not contract, the Constitution's full faith and credit requirement.<sup>162</sup> Subsequent history also offers some support for this view. Even those who argued that Congress could ban slavery in the territories did not contend more generally that Congress could authorize violations of Article IV. Instead, if anything, a few members of Congress debated whether Congress had power to enforce Article IV's requirements on the states at all, a debate that carried over to Reconstruction and contributed to the adoption of the Fourteenth Amendment.<sup>163</sup>

But the historical record also offers support for a more expansive view of congressional power. None of Article IV's grants of congressional power sparked much concern or debate, notwithstanding that they all represented departures from Article IV's progenitor in the Articles of Confederation and, at least on their face, appeared to grant Congress quite broad authority.<sup>164</sup> Indeed, the drafting history of the Effects and New State Clauses reveals efforts by the Constitutional Convention to expand Congress's powers.<sup>165</sup> Some concerns about the

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IV's various provisions surface repeatedly in Professor David Currie's volume on this period in his *The Constitution in Congress* series. See CURRIE, *supra* note 83, at 41-48, 138-56, 170, 183-90, 223.

<sup>161</sup> See, e.g., Kramer, *supra* note 10, at 2004-06 (describing the Effects Clause in these terms); Letter from Laurence H. Tribe to Sen. Edward M. Kennedy, *supra* note 96, at 13,360 (same).

<sup>162</sup> For articulations of the one-way ratchet view of Congress's Effects Clause power, see Chabora, *supra* note 10, at 606-07, 621-29; Letter from Laurence H. Tribe to Sen. Edward M. Kennedy, *supra* note 96, at 13,360-61.

<sup>163</sup> See CURRIE, *supra* note 83, at 133-72 (describing debates over Congress's power to ban slavery in the territories); FEHRENBACHER, *supra* note 110, at 100-87 (same). Some members of the Reconstruction Congress and President Johnson claimed Congress lacked power to enforce Article IV and thus to enact the Civil Rights Act of 1866, leading to the adoption of the Fourteenth Amendment. See CURRIE, *supra* note 83, at 170 n.71; EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 39, 55, 63-66 (1990). Given *Prigg* and *Dennison*, however, the most likely basis for this claim appears to be that the act addressed a state's treatment of its own citizens as well as nonresidents, a relationship Article IV had not been interpreted to reach, rather than that Congress lacked power to enforce Article IV at all. See *supra* pp. 1489-91.

<sup>164</sup> For example, only Edmund Randolph opposed Gouverneur Morris's motion to expand Congress's Effects Clause power to cover laws and records on the ground that Congress's powers would be too broad. FARRAND, *supra* note 21, at 488-89.

<sup>165</sup> For discussions of the drafting history of the Effects and New State Clauses, see *supra* notes 106-107, 112 and accompanying text. Gouverneur Morris proposed language nearly identical to the current Territory and Property Clause during debate on what was then the new state article. See FARRAND, *supra* note 21, at 466. Despite the facial breadth of the proposed language, Mor-

potential breadth of federal power were raised in regard to the Guarantee Clause, but the debates show that even there general agreement existed on the importance of including such a federal guarantee.<sup>166</sup>

This lack of concern about broad grants of congressional power may simply reflect the Framers' expectation that Congress would use its powers to provide further protections against interstate discrimination. On the other hand, the absence of debate might instead reflect widespread agreement that granting Congress discretion over interstate relations was a better means of achieving union than relying on absolute constitutional prohibitions. Support for this alternative view comes from the latter sections of Article IV. Although lacking the direct interstate focus of the first two sections of Article IV, as noted above the New State, Territory and Property, and Guarantee Clauses were understood to have an interstate dimension.<sup>167</sup> Yet the Framers chose to address these areas of potential interstate contention by granting authority to Congress. This point stands out even more clearly in the Framers' decision to deal with interstate commercial discrimination primarily through vesting the commerce power in Congress. Providing Congress with this power was viewed by many delegates as one of the Constitution's most important purposes,<sup>168</sup> and it was understood as a means of securing union and regulating relations among the states.<sup>169</sup> Moreover, the separate grant of the commerce power may

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ris's amendment passed without much debate, and the Territory and Property Clause also largely escaped comment during ratification. See Appel, *supra* note 109, at 25–30. Morris was not the first to suggest such a power; earlier, Madison had proposed giving Congress power to “dispose of . . . unappropriated lands” and “institute temporary Governments for New States arising therein.” FARRAND, *supra* note 21, at 324. As Professor David Currie argues, the choice of Morris's more general and empowering phrasing “seems to suggest the propriety of a broad construction.” David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers*, 1836–64, 1983 DUKE L.J. 695, 734 n.251.

<sup>166</sup> See FARRAND, *supra* note 21, at 466–67, 628–29; see also WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 60–73 (1972); Bonfield, *supra* note 111, at 519–22.

<sup>167</sup> See *supra* notes 109–111 and accompanying text.

<sup>168</sup> See *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1871); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827); THE FEDERALIST NO. 42 (James Madison), *supra* note 24, at 267–68; Abel, *supra* note 117, at 443–46 (detailing consensus on the value of the commerce power).

<sup>169</sup> For example, Madison laid weight on the commerce power in his list of congressional powers that “provide for the harmony and proper intercourse among the States” and also justified the commerce power in part on the grounds that the states' prior experiences proved the “necessity of a superintending authority over the reciprocal trade of confederated States.” THE FEDERALIST NO. 42 (James Madison), *supra* note 24, at 267–68. *But see* Abel, *supra* note 117, at 450–51, 470–76 (arguing that the commerce power was understood narrowly as a means of preventing interstate discrimination).

explain why the Framers failed to provide for congressional power in the Privileges and Immunities Clause itself.<sup>170</sup>

Similarly, early congressional practice offers grounds for inferring a more expansive view of congressional power over interstate relations. Measures adopted in 1789 and 1790 provided for state regulation of ship pilots and for federal enforcement of state inspection laws, thereby demonstrating, as Professor David Currie puts it, that “the First Congress saw no constitutional obstacle to such cooperative uses of federal power.”<sup>171</sup> The Second Congress in turn saw no obstacle to enacting legislation enforcing the Fugitive Slave and Extradition Clauses, adopting a measure to that effect in 1793.<sup>172</sup> In the antebellum period, it appears that most members of Congress continued to believe that Congress had authority to enforce the Fugitive Slave Clause, focusing their debate instead on whether Congress should do so and on the limited protections for free blacks contained in the 1850 Fugitive Slave Act.<sup>173</sup> Given the political contentiousness of the 1850 Act, the fact that few of its opponents seriously contested Congress’s power to enact the measure is noteworthy.<sup>174</sup> The history of this period also underscores the importance of congressional power to securing union. For many years, two congressional measures — the Missouri Compromise of 1820 and, to a far lesser extent, the 1850 Compromise — played a central role in preserving the nation in the face of increasing sectional divides.<sup>175</sup>

#### F. *The Constitutional Model of Horizontal Federalism*

The constitutional model of interstate relations that emerges from the foregoing analysis is one of judicially enforceable constitutional default rules<sup>176</sup> prohibiting state discrimination that are subject to an ultimate congressional override. Congress has broad ability to authorize state actions that, absent such authorization, would be found by the

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<sup>170</sup> This point draws support from accounts that trace both the commerce power and the Privileges and Immunities Clause back to Article IV of the Articles of Confederation. See *Hicklin v. Orbeck*, 437 U.S. 518, 531–32 (1978); Bogen, *supra* note 68, at 835–36.

<sup>171</sup> DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 65 (1997); see also *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 315 (1852).

<sup>172</sup> See Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

<sup>173</sup> See CURRIE, *supra* note 83, at 184–94.

<sup>174</sup> It is also noteworthy that some members of Congress advocated imposing procedural protections on the rendition of fugitive slaves, such as jury trials, that went against *Prigg*’s suggestion that the Fugitive Slave Clause required summary proceedings. See *id.* at 190. Those advocating for these protections thus appeared to have believed that Congress had authority not just to implement the clause but in the process to alter its requirements.

<sup>175</sup> See, e.g., *id.* at 157–200; POTTER, *supra* note 160, at 53–57, 118–20.

<sup>176</sup> For an interesting discussion of default rules in the context of constitutional law more generally, see John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825 (2006).

courts to violate the Constitution's interstate requirements. Congress also can impose interstate demands not held by courts to be constitutionally mandated. In some instances, the source of this congressional authority is express grants of power contained in the Constitution's interstate provisions themselves. In others — most specifically Section 2 of Article IV — the source is simply powers conferred upon Congress elsewhere, in particular under the Commerce Clause, as well as an implementation or enforcement authority implied from the imposition of antidiscrimination duties on the states.

The resultant congressional authority could be defined as the power to waive violations of the Constitution's interstate provisions or to add restrictions those provisions do not contain. Alternatively, it could be characterized as the power to redefine the requirements that these provisions impose, the latter being more theoretically consistent with our understanding of the Constitution as binding on Congress. In practical terms, however, the result is the same: Congress enjoys primary responsibility to set the constitutional parameters of interstate relationships, with the courts assigned a subsidiary role.

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

Fully accepting this model of congressional primacy in interstate relations still leaves in question the exact magnitude of congressional power in this context. In particular, what limits, if any, exist on Congress's ability to structure interstate relationships and to contract or expand Article IV's interstate antidiscrimination demands? The discussion in Part I demonstrated that the text of Article IV and its union-preserving focus impose fewer constraints on Congress than ordinarily thought. Nonetheless, other constitutional limits may exist. Two likely sources, analyzed below, are state sovereignty and individual rights guarantees. On examination, core principles of state sovereignty support little curtailment on congressional control of interstate relations. Individual rights guarantees represent a more potent restriction on Congress, but this is true only of those guarantees that receive strong protection independent of the interstate context. As a result, the limits that exist on congressional power over interstate relations are best viewed as coming not from Article IV but from the Fourteenth Amendment.

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

Determining the extent to which state sovereignty limits Congress's ability to regulate interstate relations poses a formidable antecedent difficulty, that of establishing the meaning of state sovereignty. Existing federalism precedent suggests three overlapping yet distinct con-

ceptions of state sovereignty in the interstate context: state autonomy, state equality, and state territoriality. All three reflect basic ingredients of federalism, and all three are clearly immanent in the New State and Guarantee Clauses of Article IV, thereby again demonstrating the benefits that result from considering the article as a whole. None, however, ultimately supports the existence of robust limits on Congress's powers to order interstate relations.

1. *State Autonomy*. — State autonomy is generally invoked to defend the states from federal impositions, and in that context it is used to cover two very different ideas: the states' own immunity from federal regulation, and their freedom to regulate private conduct as they see fit.<sup>177</sup> Yet state autonomy also has a less prominent horizontal dimension, embodying the idea that each state is free to pursue the policies it believes best, subject to constitutional requirements and federal preemption but free from unwanted interference by its sister states. Although largely implicit in the Constitution, this horizontal dimension is fundamental to our federal order.

Fundamental though it may be, however, the state autonomy principle does not readily translate into constraints on congressional control over interstate relations. To begin with, congressional relaxation of Article IV duties seems likely to foster state autonomy by allowing states to pursue otherwise forbidden regulatory options. Of course, congressionally authorized state discrimination may result in significant burdens on some states. As a case in point, congressional authorization of state bans on waste importation would have a substantial economic, political, and environmental impact on states that are major waste generators, an impact these states could otherwise have avoided under the dormant commerce clause. But these states would suffer no diminution in the scope of their constitutional powers as a result of such congressional authorization because their ability to export wastes was always subject to direct congressional prohibition under the commerce power. In other words, provided that Congress acts within the scope of its enumerated powers, state autonomy provides little defense against congressional authorization of state discrimination. Indeed, it seems particularly odd to raise state autonomy as a barrier if the alternative is for Congress itself to impose the discrimination in question, thereby denying states the option of choosing an anti-discriminatory approach.

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<sup>177</sup> Decisions such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), uphold the first type of autonomy; *United States v. Lopez*, 514 U.S. 549 (1995), and *New York v. United States*, 505 U.S. 144 (1992), uphold the second. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 13–15, 23–32 (2004) (defining state autonomy and contrasting autonomy and immunity models of federalism).

Similarly, state autonomy imposes few constraints on congressional expansion of prohibitions on interstate discrimination beyond what the courts have held Article IV to require. Notably, Article IV's prohibitions against interstate discrimination are generally quite strict. For instance, where privileges and immunities protections apply, the Court upholds state measures discriminating on the basis of residency only if it concludes that such discrimination is closely related to a substantial government objective.<sup>178</sup> Indeed, at times the Court has gone so far as to require a demonstration that nonresidents "constitute a peculiar source of the evil at which the statute is aimed."<sup>179</sup> This suggests that any power to discriminate against sister states and their residents is not an important aspect of state autonomy for constitutional purposes and that by expanding prohibitions on interstate discrimination Congress is simply enforcing the constitutional scheme.<sup>180</sup> In addition, Article IV accords a breadth of congressional power over the states greater than that expressly granted elsewhere, as the contrast discussed above between the Effects Clause and Section 5 of the Fourteenth Amendment indicates.<sup>181</sup>

More generally, strong structural and functional grounds exist to support congressional power to enlarge antidiscrimination protections. Interstate discrimination presents a real danger of political process failure, given the lack of direct political representation for affected out-of-state interests. Congress's greater representative status makes it better able to weigh fairly the harms particular forms of discrimination may pose to the nation as a whole. Allowing Congress to expand anti-discrimination protection thus fosters the democracy-reinforcing principles that Professor John Hart Ely famously argued lie immanent in constitutional structure.<sup>182</sup> It also fosters the Constitution's commit-

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<sup>178</sup> *Supreme Court v. Piper*, 470 U.S. 274, 284 (1985).

<sup>179</sup> *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 222 (1984) (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)).

<sup>180</sup> *Cf. Printz v. United States*, 521 U.S. 898, 908–09 & n.3 (1997) (describing Extradition Act of 1793 as within Congress's power despite its provisions exceeding the Extradition Clause's directives). Similarly, in its recent decisions addressing limits on Congress's powers to remedy constitutional violations, the Court has been most willing to grant Congress broad discretion to impose duties on the states when Congress is enforcing an independently strong constitutional prescription. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735–36 (2003).

<sup>181</sup> *See supra* p. 1495. *Compare City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (denying that Section 5 grants Congress power to expand the content of Fourteenth Amendment guarantees, although acknowledging that Congress can enact prophylactic measures to preserve those guarantees if an appropriate showing of need is made), *with Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273 n.18 (1980) (plurality opinion) ("Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State . . .").

<sup>182</sup> *See JOHN HART ELY, DEMOCRACY AND DISTRUST* 73–104 (1980).

ment to national union, since even constitutionally permissible interstate discrimination can spark resentment and retaliation.

Indeed, the restricted scope of state autonomy here helps explain how the model of congressional primacy in structuring interstate relations accords with recent precedent emphasizing the Court's role as ultimate arbiter of constitutional federalism.<sup>183</sup> Crucially, these decisions involved the vertical dimension of federalism, where the underlying issue is one of federal versus state power: whether Congress may impose an obligation on the states, expose them to financial liability, or preempt their field of operation.<sup>184</sup> According to the Court, deferring to Congress in such a context raises too great a danger of congressional self-dealing and aggrandizement.<sup>185</sup> But the dangers of congressional aggrandizement are mitigated in interstate or horizontal federalism contexts because much interstate regulation falls clearly within Congress's enumerated powers.<sup>186</sup>

This difference is evident in the Court's horizontal federalism precedent. In dormant commerce clause cases, when no doubt exists that the activity at issue falls within the scope of the commerce power and the issue instead concerns interstate relations, the Court emphasizes Congress's ability to revise judicial decisions.<sup>187</sup> The Court's anticommandeering decisions further demonstrate that the Court is much more comfortable with congressional regulation of interstate relations than with other kinds of congressional regulation of the states: In *New York v. United States*,<sup>188</sup> the Court sustained Congress's power to authorize state bans on interstate commerce in low-level nuclear waste at the same time that it prohibited Congress from forcing states to create in-state waste sites or take title to such wastes generated in their

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<sup>183</sup> See, e.g., *Hibbs*, 538 U.S. at 728. For discussion of this feature of the Court's recent federalism jurisprudence, see Post & Siegel, *supra* note 146, at 1964–65, 1966–71, 1980–84.

<sup>184</sup> See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 517–34 (2004); *United States v. Morrison*, 529 U.S. 598, 607–27 (2000); *Printz*, 521 U.S. at 918–23.

<sup>185</sup> See *City of Boerne*, 521 U.S. at 529 (“If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.’” (omission in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803))).

<sup>186</sup> It may be, as Professors Baker and Young contend, that interstate competition will lead to greater federal regulation, with states trying to harness congressional power to their own advantage. See Baker & Young, *supra* note 150, at 117–33. But, as discussed above, see *supra* note 150, this is not aggrandizement in a constitutional sense — i.e., an effort to expand Congress’s might in a way that deviates from the constitutional allocation of federal and state authority — if the resultant measure falls within the scope of Congress’s enumerated powers.

<sup>187</sup> See *supra* p. 1485.

<sup>188</sup> 505 U.S. 144 (1992).

midst.<sup>189</sup> In *Printz v. United States*,<sup>190</sup> the Court invalidated congressional use of the commerce power to impose affirmative regulatory duties on state executive officials; yet it distinguished congressional imposition of duties on state executive officials under the 1793 Extradition Act, arguing that this form of commandeering was justified because Congress was acting pursuant to the Constitution's Extradition and Effects Clauses.<sup>191</sup>

In any event, congressional power to expand prohibitions on interstate discrimination accords with current Commerce Clause jurisprudence. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>192</sup> the Court held that, acting under its commerce power, Congress can impose generally applicable duties on the states that are largely beyond judicial challenge.<sup>193</sup> Notwithstanding its recent federalism revival, the Court has not sought to reconsider *Garcia* directly.<sup>194</sup> Instead, in *Reno v. Condon*,<sup>195</sup> its most recent decision addressing this issue, the Court upheld federal regulation of states' sale of driver's license information.<sup>196</sup> So long as the Court formally adheres to *Garcia*, congressional expansion of Article IV requirements is doctrinally unproblematic. *Reno* left open whether Congress can target the states for regulation,<sup>197</sup> but many congressional expansions of Article IV rights need not target the states any more than did the measure restricting disclosure of driver's license information there at issue.<sup>198</sup>

To be sure, some enactments seem plainly beyond the constitutional pale, such as congressional prohibition of all residency requirements for voting or election to state office. At this extreme, the Court's insistence on preserving state political autonomy and prohibiting federal

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<sup>189</sup> *Id.* at 166–68, 173–77; see also *id.* at 180 (accepting that Congress constitutionally can play a role in mediating interstate disputes, but requiring that Congress do so by regulating directly under its commerce power, rather than by mandating state regulation).

<sup>190</sup> 521 U.S. 898 (1997).

<sup>191</sup> *Id.* at 908–09 & n.3. For criticism of *Printz*'s effort to distinguish the 1793 Act from other instances of congressional commandeering of the states, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2197–99 (1998).

<sup>192</sup> 469 U.S. 528 (1985).

<sup>193</sup> See *id.* at 548–55. But cf. Varat, *supra* note 12, at 565–68 (arguing, prior to *Garcia*, that state autonomy concerns under *National League of Cities v. Usery*, 426 U.S. 833 (1976), may limit Congress's power to expand states' privileges and immunities obligations).

<sup>194</sup> See, e.g., *West v. Anne Arundel County*, 137 F.3d 752, 757–60 (4th Cir. 1998), *cert. denied*, 525 U.S. 1048 (1998).

<sup>195</sup> 528 U.S. 141 (2000).

<sup>196</sup> *Id.* at 148, 151; cf. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2000) (noting that the Eleventh Amendment bars only private suits for money damages and that federal prohibitions on employment discrimination against the disabled are enforceable through other means).

<sup>197</sup> 528 U.S. at 146.

<sup>198</sup> State-specific enactments are more likely under the Effects and Extradition Clauses, but such enactments are also clearly sanctioned by the nature of those clauses' requirements.

commandeering of state legislative or executive branches would come into play.<sup>199</sup> But such extreme measures are unlikely to present themselves.<sup>200</sup> A more common phenomenon will be instances when Congress appears to be using its control over interstate relations to impose policies on the states that it otherwise lacks power to legislate directly.<sup>201</sup> Yet this possibility alone seems an insufficient basis on which to conclude that such an interstate relations measure is outside of Congress's powers or should be subject to heightened scrutiny. The fact that Congress is seeking to advance its own substantive agenda in an area traditionally reserved for the states generally does not suffice to put a measure outside the commerce power, and it is unclear why a different rule would apply when Congress is legislating directly on state relationships.<sup>202</sup> In the end, therefore, state autonomy is unlikely to erect much of a barrier to Congress's powers to contract or expand the requirements of Article IV and otherwise regulate interstate relations.

2. *State Equality.* — Long a staple of nineteenth-century political discourse, the state equality principle received its most articulate judicial exposition in *Coyle*. There, the Court held that Congress lacked power to compel Oklahoma to make the city of Guthrie its state capital for seven years as a condition of admission into the union.<sup>203</sup> *Coyle* contains the most prominent statement of the "equal footing" doctrine, which requires that "a new state [be] admitted into the Union . . . with all of the powers of sovereignty and jurisdiction" of existing states.<sup>204</sup>

<sup>199</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978); see also Laycock, *supra* note 12, at 270–72 (arguing that the right of each state to "reserve the exercise of government power, including the vote, to its own citizens . . . [is] required by[] the Founders' dual purpose of achieving national unity and preserving the states as separate polities" (footnote omitted)).

<sup>200</sup> Move even a little away from such extremes, moreover, and the proper scope of congressional power quickly becomes murky. For example, the constitutionality of a federal prohibition on residency requirements for public employees who do not have policy formation or execution responsibilities is already a much closer question. Cf. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (noting that a state's exclusion of noncitizens from its civil service was not limited to those employees who directly participate in policy formation in holding exclusion insufficiently tailored to withstand equal protection challenge).

<sup>201</sup> DOMA is an obvious example. See *infra* p. 1533.

<sup>202</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548–55 (1985); *United States v. Darby*, 312 U.S. 100, 115 (1941). In addition, it is well established that Congress can employ its spending power to achieve results that it lacks power to directly mandate. See *South Dakota v. Dole*, 483 U.S. 203, 207, 209 (1987). Thus, by analogy, subject-matter limitations on Congress under Article I should not carry over to its exercise of powers under Article IV, in particular under the Effects Clause. For further discussion of subject-matter limitations and aggrandizement concerns with respect to Effects Clause legislation, see *infra* p. 1520.

<sup>203</sup> *Coyle v. Smith*, 221 U.S. 559, 567, 579 (1911).

<sup>204</sup> *Id.* at 573; but cf. Biber, *supra* note 110, at 123–24 (arguing that Congress has continued to impose conditions that appear to violate the equal footing requirement). For an earlier statement of the equal footing doctrine, see *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 216 (1845).

In justifying this doctrine, the Court stated that “[e]quality of constitutional right and power is the condition of all States of the Union, old and new,”<sup>205</sup> and that “constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized.”<sup>206</sup>

Although rhetorically powerful, *Coyle* offered little by way of constitutional analysis to support its conclusion that states must be admitted on equal terms, and the absence of any such equality demand in the text of the New State Clause — an intentional absence at that — might give pause.<sup>207</sup> Nonetheless, *Coyle*’s intuition appears correct.<sup>208</sup> While the New State Clause does not expressly require that states enter on equal terms, the restrictions it imposes on Congress’s ability to carve up or consolidate existing states embody state equality concerns. So, too, does the Effects Clause’s requirement that Congress act by means of “general laws.”<sup>209</sup> The Constitution also contains other manifestations of state equality concerns in regard to Congress, the strongest perhaps being the requirement of equal representation in the Senate, a structural feature critical to the Constitution’s adoption and the only constitutional provision that is formally unalterable without unanimous state consent.<sup>210</sup>

But the principle of state equality, like state autonomy, fails to justify robust limits on Congress’s powers to authorize state discrimina-

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<sup>205</sup> *Coyle*, 221 U.S. at 575 (quoting *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883)).

<sup>206</sup> *Id.* at 580.

<sup>207</sup> *Coyle* relied largely on seemingly distinguishable precedent invoking the equal footing doctrine to govern interpretation of otherwise ambiguous statutes and treaties. The Court also sought to derive the equal footing doctrine from the language of the New State Clause, arguing that the clause’s references to “states” and “this Union” required that the admitted states be entities identical in powers to the original thirteen, *see id.* at 573, but this amounted to little more than the Court’s defining the Constitution’s terms (“states” and “Union”) to fit its results. *Coyle*’s most successful argument was that the equal footing doctrine was required by the constitutional principle that Congress is limited to enumerated powers, as otherwise Congress might enjoy additional powers in regard to some states stemming from conditions in their acts of admission. *See id.* at 567. An obvious rejoinder is that the New State Clause itself is an enumeration of a power, but as the Court noted, that clause does not clearly authorize imposition of conditions continuing into the future, as opposed to conditions that can be fulfilled upon or prior to admission. *See id.* at 568; *see also* CURRIE, *supra* note 112, at 243–45.

<sup>208</sup> *Cf.* Laycock, *supra* note 12, at 288 (describing state equality as a principle that “[t]he Constitution assumes, without ever quite saying so”); *cf. also* Kramer, *supra* note 10, at 1980–87 (discussing the “[e]quality [c]omponent” of the Full Faith and Credit Clause).

<sup>209</sup> *See supra* p. 1494.

<sup>210</sup> *See* U.S. CONST. art. I, § 3; *id.* art. V. Other equality provisions include the prohibition of port preferences and the uniform taxation requirements of Article I. *Id.* art. I, § 9, cls. 5–6. On the other hand, Section 9 of Article I distinguishes among the states in providing that Congress cannot prohibit “the Migration or Importation of such Persons as *any of the States now existing* shall think proper to admit” before 1808. *Id.* art. I, § 9, cl. 1 (emphasis added). This provision could signal either that the Framers accepted that new states might have lesser powers, or (by operation of the *expressio unius* maxim) that in all other regards the states were to be equal.

tion in violation of Article IV. Most significantly, interstate discrimination does not necessarily lead to state inequality.<sup>211</sup> Professor Douglas Laycock disagrees, arguing that in the conflict of laws context state equality means that “[s]tates must treat sister states as equal in authority to themselves.”<sup>212</sup> On his account — with which Dean Kramer agrees — a state must apply sister state law regardless of its view of the law’s merits, and thus the established doctrine that a state may reject sister state law that offends its strong public policy is unconstitutional.<sup>213</sup> This position is unconvincing; if all states retain equal authority to reject sister state law on public policy grounds, in what sense are they systematically unequal?<sup>214</sup>

More plausibly, state equality might operate to preclude measures that single out particular states for distinct treatment. Again, however, the text of the Commerce Clause does not impose such a uniformity requirement on Congress, and the Court has stated that Congress can subject the states to distinct regulatory regimes.<sup>215</sup> It is also clear that Congress can enact measures that, though facially uniform, have a disproportionate burden on some states, at least absent substantial evidence of “failings in the national political process.”<sup>216</sup> As the Court recently noted, to allow state regulatory choices to limit Congress in the exercise of its enumerated powers “would turn the Supremacy Clause on its head” and would reflect a model of dual federalism “long since . . . rejected.”<sup>217</sup>

The situation is somewhat different when Congress legislates under its Effects Clause power, given that clause’s “general laws” mandate.

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<sup>211</sup> For an analogous argument, see John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 185–91 (1981), contending that conflict of law rules under which states grant nonresidents only those benefits that nonresidents would receive under their home states’ laws should satisfy Article IV’s Privileges and Immunities Clause.

<sup>212</sup> Laycock, *supra* note 12, at 250.

<sup>213</sup> See *id.* at 313; Kramer, *supra* note 10, at 1986–91.

<sup>214</sup> For this reason, Professor Tom Colby acknowledges that congressional authorization of state regulation does not violate the uniformity requirement he believes attaches to Congress under the commerce power. Although the net result is a nonuniform regulatory system across the nation as a whole, such congressional authorization of state regulation itself treats the states uniformly. Colby, *supra* note 26, at 314–17.

<sup>215</sup> See *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982); *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950); *supra* p. 1483; see also *Coyle v. Smith*, 221 U.S. 559, 568, 570 (1911) (indicating that Congress can impose ongoing conditions on new states when the conditions rest not on the New State Clause but on Congress’s regulatory powers).

<sup>216</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); see also *South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988) (rejecting political process failure claim, noting that “South Carolina has not even alleged . . . that it was singled out in a way that left it politically isolated and powerless”); *Hodel v. Indiana*, 452 U.S. 314, 332–33 (1981) (rejecting equality claims against a surface mining scheme that impacted Midwestern mining operations more harshly than those in other regions).

<sup>217</sup> *Gonzales v. Raich*, 125 S. Ct. 2195, 2213 n.38 (2005).

As discussed above, this mandate is best understood as imposing a uniformity requirement, and thus it precludes Congress from facially distinguishing among the states, even if it can do so under the commerce power.<sup>218</sup> But again, nothing in the text of the Effects Clause prevents Congress from adopting a facially general measure that in practice has disproportionate impact on particular states. Similarly, no basis exists on which to conclude that state equality requires Congress to legislate in a value-neutral fashion when exercising its Effects Clause power.<sup>219</sup> No such demand of value-neutrality applies to Congress's other powers or appears on the face of the clause.

In the end, the strongest argument for greater scrutiny of congressional value choices under the Effects Clause lies not in state equality, but instead, as in *Coyle*, in a vertical federalism fear that Congress might otherwise evade substantive limits on its Article I enumerated powers. This argument presumes, however, that these substantive limits are equally applicable to the Effects Clause and that the clause grants no additional substantive authority of its own. But the Effects Clause's text supports a broader view, imposing no topical limits on Congress's ability to specify the extraterritorial effect of state measures. Furthermore, reading the clause as adding no substantive authority would render it redundant; such a view would mean that Congress's power to alter the extent of full faith and credit states must provide is limited to areas that already come under its Article I authority.<sup>220</sup>

3. *State Territoriality*. — State territoriality is a third state sovereignty limit warranting consideration. The principle that states are territorially bound polities permeates the Constitution and finds explicit textual manifestation in the New State Clause's protection of an existing state's territory.<sup>221</sup> This principle is most frequently encountered as a prohibition on extraterritorial state legislation. Perceived efforts by the states to regulate the legal consequences of actions occurring outside their borders often provoke strong judicial condemnation on federalism grounds.<sup>222</sup> More recently, in the punitive damages con-

<sup>218</sup> See *supra* p. 1494.

<sup>219</sup> But cf. *Cox*, *supra* note 10, at 400–08.

<sup>220</sup> This redundancy argument assumes, as do most scholars, see, e.g., *id.* at 391; Laycock, *supra* note 12, at 291–92, that the Full Faith and Credit Clause is self-executing, such that congressional legislation is not required to render its demands operative.

<sup>221</sup> See U.S. CONST. art. IV, § 3, cl. 1; Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1335–38 (1994) (emphasizing the importance of Article IV's territorial guarantee for states).

<sup>222</sup> Cf. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1887–91 (1987) (describing the extraterritoriality prohibition as representing a structural principle of federalism).

text, the Court insisted that a state “does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the state] or its residents.”<sup>223</sup> According to the Court, federalism requires that “each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.”<sup>224</sup> Similarly, in cases arising under the dormant commerce clause, the Court has said that “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.”<sup>225</sup>

But inferring a limit on Congress from the extraterritorial prohibition is quite another matter. To begin with, the extent of the prohibition on the states themselves should not be overstated. In practice, states exert regulatory control over each other all the time. Perhaps the most prominent instance is Delaware’s corporate law, which has de facto nationwide application due to the number of major companies incorporated there.<sup>226</sup> California’s automobile emission standards also have a regulatory effect in other states.<sup>227</sup> The prohibition on extraterritorial legislation is thus understood only to constrain a state from formally asserting legal authority outside its borders. Even in this guise, however, the prohibition is hardly absolute. On occasion, the Court has accepted state claims of authority over individuals and activities outside their borders, the most salient example being the Court’s switch from strong territorial limits on state assertions of personal jurisdiction to a minimum contacts and fundamental fairness approach.<sup>228</sup> Underlying these exceptions to the prohibition is the

<sup>223</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996).

<sup>224</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). For a critique of the Court’s reliance on extraterritoriality to limit punitive damages awards, see generally Michael P. Allen, *The Supreme Court, Punitive Damages, and State Sovereignty*, 13 *GEO. MASON L. REV.* 1, 30–54 (2004). *But see* Issacharoff & Sharkey, *supra* note 54, at 1421–24 (suggesting that spillover effects justify the extraterritorial limit on punitive damages awards).

<sup>225</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)); *see also* *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989); *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975). To some extent, the extraterritoriality prohibition is more a specific application of the principles of state autonomy and state equality than a distinct restriction in its own right. *See* Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 *WASH. U. L.Q.* 377, 384, 402 (1985) (linking state territoriality to state equality).

<sup>226</sup> *See* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *HARV. L. REV.* 1435, 1442–44 (1992) (describing the national impact of Delaware’s corporate law). A large literature exists on the merits of interstate competition regarding corporate law. For a description of the leading scholarship, *see id.* at 1444–51.

<sup>227</sup> The Clean Air Act exempts California’s limits from federal preemption and allows states to adopt these limits instead of the otherwise applicable federal standards. *See* 42 U.S.C. §§ 7543(a)–(b), 7507 (2000); *see also* *Motor Vehicle Mfrs. Ass’n, Inc. v. N.Y. State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 524–28 (2d Cir. 1994) (describing the history of these provisions).

<sup>228</sup> *Compare* *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878), *with* *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–19 (1945). The Court has issued other decisions taking a kindlier view of extraterritorial legislation. *See, e.g.,* *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 669–

Court's realization that a state's geographic territory does not mark the outer limit of its legitimate regulatory concern. In our federal system, which combines state regulatory control with a national common market and interstate mobility, some extraterritoriality is not only inevitable, but appropriate.

It would be odd, then, if Congress did not enjoy some additional leeway to authorize extraterritorial state regulation. Navigating the border between a state's legitimate regulation and illegitimate intrusion on a sister state's sovereignty is precisely the type of interstate relations question over which Congress should have paramount authority. Indeed, extraterritoriality prohibitions imposed under the dormant commerce clause are presumably within the control of Congress, just like other dormant commerce clause restrictions. Moreover, the Effects Clause, in granting Congress the power to determine the effect that one state's laws will have in other states, expressly allows Congress to mandate extraterritoriality.<sup>229</sup>

Of course, some measures may fall beyond congressional power because they represent too great a compromise of a state's independence from, and equality with, its sister states. For example, Congress cannot grant Texas direct legislative authority over the territory of Massachusetts and the individuals therein, even if so doing might resolve interstate tensions sparked by that blue state's liberal social policies.<sup>230</sup> But again, measures so extreme are highly unlikely to win congressional approval.

More significantly, the extraterritoriality prohibition is rooted in due process and individual rights protections as well as federalism. Its appearance in recent punitive damages decisions, for example, came in the course of the Court's elucidation of due process limits on such damages, and restrictions on a state's ability to assert personal juris-

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70 (1981) (holding a retaliatory tax's purpose of "apply[ing] pressure on other States to maintain low taxes on California insurers" to be legitimate); *Skiriotes v. Florida*, 313 U.S. 69, 76-77 (1941) (upholding the application of a Florida criminal statute to a Florida citizen even though offense took place upon the high seas).

<sup>229</sup> See Rosen, *supra* note 10, at 940 (arguing that "regulat[ing] the extraterritorial effects of state policies" is an "eminently federal function").

<sup>230</sup> Indeed, any formal displacement of a state's regulatory control over its own territory would probably transcend Congress's powers. Aside from tripping on structural state equality concerns, such displacement would seem to run afoul of the spirit, if not the text, of the New State Clause's territorial guarantee. See U.S. CONST. art. IV, § 3, cl. 1. Further support for this conclusion comes from the Enclave Clause, which prohibits Congress from permanently ending a state's authority over federal property within its borders without the state's consent. See U.S. CONST. art. I, § 8, cl. 17. If Congress must seek state approval before taking this step regarding federal property, then surely state consent is needed before Congress does the same regarding areas not in its possession — assuming Congress can do so at all.

diction have a similar due process basis.<sup>231</sup> In addition, a state's attempt to regulate its citizens' extraterritorial actions is often attacked as unconstitutionally burdening their right to travel.<sup>232</sup> Thus, the extent to which Congress can authorize extraterritorial legislation implicates the separate question discussed below: whether — and if so, how — congressional power over interstate relations is limited when Article IV implicates individual rights.

*B. Congress, Article IV, and the Fourteenth Amendment*

1. *Congressional Power and Individual Rights.* — The discussion so far has treated Article IV primarily as a provision that regulates interstate relations. But Article IV is not just about interstate relations; it is also about individual rights. This individual rights aspect is clearest with respect to the Privileges and Immunities Clause, which by its terms prohibits states from discriminating against another state's "citizens."<sup>233</sup> To the extent that Article IV is seen as an individual rights guarantee, the case for a revisory congressional power seems intuitively more problematic.<sup>234</sup> Central to our contemporary idea of constitutional rights is a conviction that they represent restrictions on government that the political organs ordinarily cannot disregard.<sup>235</sup> If constitutional rights turned simply on the political branches' willingness to recognize them, they would differ little from the protections afforded by ordinary positive law.<sup>236</sup> Here, the distinction between Arti-

<sup>231</sup> See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–14 (1987).

<sup>232</sup> See, e.g., Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 462, 479 (1992).

<sup>233</sup> U.S. CONST. art. IV, § 2, cl. 1. Some scholars have emphasized the Privileges and Immunities Clause's protection of individuals as what distinguishes it from the dormant commerce clause, which protects interstate commerce. See Collins, *supra* note 26, at 115–16; Laycock, *supra* note 12, at 263–64; Varat, *supra* note 12, at 499. The significance of this difference should not be overstated. The protections of the dormant commerce clause, after all, are asserted by particular businesses and individuals. In like vein, the Full Faith and Credit Clause speaks to the states, but it is beyond dispute that an individual can assert her right under that clause to ensure recognition of a prior judgment.

<sup>234</sup> See 1 TRIBE, *supra* note 12, § 6-35, at 1246.

<sup>235</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184–205 (1977). This view of constitutional rights requires substantial qualification, given the deference courts give to the views of political institutions in determining whether an individual rights violation has occurred, see *infra* p. 1526, as well as the way that most rights protect individuals only from government intrusions that are based on certain kinds of prohibited reasons, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–33 (1998).

<sup>236</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 162–63, 176 (1803); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

cle IV expansion and contraction appears to be a significant one. Whatever the scope of congressional power to expand Article IV's requirements beyond judicial interpretations, allowing Congress to authorize interstate discrimination that would otherwise violate Article IV appears fundamentally at odds with our understanding of constitutional rights.

One response is to argue that because the individual rights secured by Article IV take the form of restrictions on state conduct, they are irrelevant to assessing Congress's powers. Professor William Cohen, a forceful advocate of this view, argues that Congress is free to authorize state violations of constitutional rights whenever "Congress is not constitutionally prohibited from directly adopting the same policy itself."<sup>237</sup> The Hohfeldian insight that rights describe relationships provides support for Cohen's view. Rights run against particular individuals or institutions; they are not freestanding entities that can be invoked against any interference, regardless of its source.<sup>238</sup>

Cohen is right that Article IV's failure to expressly impose its anti-discrimination provisions on Congress is instructive; as noted, this silence reinforces the structural implication that Congress has broad power over interstate relations. In the end, however, Cohen's argument puts too much weight on Article IV's textual silence regarding Congress. Cohen himself acknowledges that the Court elsewhere has rejected the claim that textual silence is dispositive of the question whether constitutional rights apply against the federal government. One analogy concerns the Contracts Clause of Article I's Section 10; although that clause expressly applies only to the states, the Court has read a similar, albeit perhaps more deferential, prohibition against Congress into the Fifth Amendment's Due Process Clause.<sup>239</sup> At bottom, the question is whether the Court should treat Article IV's protections in a parallel fashion. Furthermore, *Prigg*, *Dennison*, and *Coyle*

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courts."); Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1034-35 (2004) (discussing the perceived tension between some understandings of popular constitutionalism and the concept of constitutional rights).

<sup>237</sup> Cohen, *supra* note 12, at 388, 406, 411-13.

<sup>238</sup> See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (emphasizing that constitutional rights run only against government actors, not private individuals); see also *Rosen*, *supra* note 147, at 1546-53 (arguing that the substantive content of constitutional rights is context-dependent and that the level of government against which a right is enforced is a particularly important contextual factor in determining its scope). See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1919).

<sup>239</sup> Cohen, *supra* note 12, at 411; see, e.g., *United States v. Winstar*, 518 U.S. 839, 876 (1996); see also *White v. Hart*, 80 U.S. 646, 649 (1872) (stating in dicta that Congress lacks power to authorize states to violate the Contracts Clause). The Court's enforcement of equal protection requirements against Congress through the Fifth Amendment is often invoked as another example. See *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

reject the proposition that Article IV's silence is determinative of the scope of congressional power under the article.

In addition, an unqualified claim that Congress possesses power to authorize state violations of any rights to which Congress is not directly subject fails on structural grounds. As the political representative of the nation, Congress can rightly claim a special responsibility for discerning and acting upon the national interest, and the powers granted to it often relate to subjects that intuitively require national treatment. It is Congress's special stature and expertise as the representative of the national interest that explain the constitutional model described above, in which constitutional default rules imposing obligations on the states in the name of union are ultimately subject to congressional control. Congress also regularly creates and limits individual statutory rights in the course of exercising its enumerated powers, and its Section 5 power indicates that Congress may act to ensure that Fourteenth Amendment rights are realized. The structural basis for congressional authority to limit individual constitutional rights is, however, considerably less evident. In that context, Congress's own majoritarian and electorally accountable status makes it an unreliable defender of the interests of individuals claiming rights against the similarly majoritarian and political branches of state government.<sup>240</sup>

For these reasons, the question of congressional power to authorize state violations of Article IV rights is more difficult than Cohen acknowledges. But the contrary view — that Congress lacks power to contract Article IV's interstate requirements whenever they take the form of individual rights guarantees — ignores the facts that Article IV has a core interstate dimension and that Congress legitimately can claim broad authority regarding interstate matters. At a minimum, some account is needed to show why the arguments supporting broad congressional power over interstate relations become irrelevant once the article's individual rights dimension is acknowledged.<sup>241</sup>

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<sup>240</sup> See Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 872–73 (1999) (arguing that due to their responsiveness to majorities, neither the legislative nor the executive branch is a reliable enforcer of constitutional limits on the states). For similar arguments, see CHOPER, *supra* note 53, at 175–76, 195–205, 205–09, and Wechsler, *supra* note 149, at 560 n.59. Interestingly, in an earlier essay assessing Congress's powers under the Fourteenth Amendment, Professor Cohen similarly distinguished between federalism limits, which Congress could waive, and liberty protections, over which Congress had no particular claim of authority. See William Cohen, *Congressional Power To Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 613–15 (1975).

<sup>241</sup> Such an account is particularly important because, if adopted, this view would seem to force a reconsideration of Congress's well-established power to authorize state violations of the dormant commerce clause, at least with respect to individuals. See *supra* section I.B.1, pp. 1486–88 (discussing the overlap in the application of the Privileges and Immunities Clause and dormant commerce clause).

Further, the view that the individual rights character of Article IV's guarantees removes them from congressional control is based on a false premise. Congressional power to limit the scope of individual rights is not in fact an alien concept in our constitutional order. In some instances, constitutional rights are treated as fundamental, and thus the views of the political branches concerning the scope of these rights are given little weight.<sup>242</sup> In others, however — particularly when economic and social rights are implicated — both federal and state governments have broad authority to determine what constitutional protections will mean in practice. True, the Supreme Court retains formal control over determining whether a particular regulatory measure is constitutional. But the standard of review the Court employs — whether there is “any reasonably conceivable state of facts that could provide a rational basis” for the legislation<sup>243</sup> — is so deferential that as a practical matter it allows the political branches to control the operative significance of the rights at stake. If Congress has such power over the shape of some constitutional rights, why should the Article IV guarantees, which at their core are also matters of interstate relations, be categorically free from congressional control?

2. *Fourteenth Amendment Limits on Congressional Interstate Authority.* — As a result, the question of Congress's power to revise Article IV's interstate requirements cannot be answered simply by treating these demands as a homogenous whole but instead requires an analysis of the specific provision at stake. One particularly salient factor in the analysis is the extent to which an Article IV requirement takes the form of an individual rights guarantee that receives strong protection independent of the interstate context. The argument in Part I supports granting Congress broad power to contract or expand any Article IV requirement centered upon the interstate arena, even if the requirement appears as a claim of individual right. But when an individual right carries substantial constitutional significance wholly independent of the interstate context, congressional power is necessarily more limited. In these instances, the congressional role in interstate relations may support allowing Congress to expand the requirement beyond its fundamental core, but not contract it.

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<sup>242</sup> First Amendment protection of political speech is perhaps the classic example, *see, e.g.*, *United States v. Eichman*, 496 U.S. 310, 319 (1990), but even here the Court sometimes defers to the political branches' judgments, *see, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 309–12 (2003). In other contexts, actions by the political branches are taken as evidence in determining the content of fundamental constitutional rights. *See* Ferejohn & Friedman, *supra* note 176, at 35–43.

<sup>243</sup> *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also* *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

At first, this distinction might appear unmanageable because it necessitates close analysis of the meaning of each Article IV right. A little reflection, however, makes clear that drawing such a distinction is essentially equivalent to saying that Congress's interstate authority is subject to the limitations of the Fourteenth Amendment. The reason is that Article IV rights with independent constitutional significance will receive substantial protection directly under the Fourteenth Amendment. Thus, rather than having to determine if an Article IV requirement is ever operative against Congress, it suffices to note that Congress lacks power to authorize states to violate the Fourteenth Amendment.<sup>244</sup>

Subjecting Congress to Section 1 of the Fourteenth Amendment in this fashion may seem odd given the extent to which that provision speaks to the states. Nonetheless, it fully accords with precedent, as the Court has repeatedly held that Section 5's grant to Congress of power to "enforce" the Fourteenth Amendment means Congress cannot authorize violations of Fourteenth Amendment guarantees.<sup>245</sup> Some commentators contend that Congress should enjoy greater ability to deviate from judicial interpretations of Fourteenth Amendment rights in exercising its Section 5 power than the Court currently allows.<sup>246</sup> Even so, Section 5's "enforce" limitation would appear to preclude Congress from significantly contracting the scope of judicially recognized Fourteenth Amendment rights.<sup>247</sup>

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<sup>244</sup> This is not to suggest that enactment of the Fourteenth Amendment altered the extent to which specific Article IV requirements bind Congress, but simply to note that adoption of the Fourteenth Amendment renders investigation into whether any Article IV rights have such a binding effect unnecessary.

<sup>245</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (stating that Section 5's grant of power to Congress to "enforce the guarantees of the Amendment . . . grants Congress no power to restrict, abrogate, or dilute these guarantees"); see also *Saenz v. Roe*, 526 U.S. 489, 508 (1999); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982).

<sup>246</sup> See, e.g., Cohen, *supra* note 240, at 606-08; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 199-201, 206-11, 228-29 (1971); Hills, *supra* note 159, at 332-34; Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 161-63, 169-74 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 467-73, 513-22 (2000).

<sup>247</sup> See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 826 (1999) ("[T]he most sensible reading of the Fourteenth Amendment would involve both courts and Congress in the task of protecting truly fundamental rights against states, with states generally held to whichever standard was stricter — more protective of fundamental freedoms — in any given instance."). Although many commentators argue that Congress cannot enact measures under Section 5 that violate constitutional rights, it is often unclear whether they root this prohibition in the scope of the enforcement power or in the independent application of individual rights guarantees to Congress. See, e.g., David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 56 (arguing that Congress should have the ability to create prophylactic rules to protect individual liberty, provided that the rules do not "infringe[] on a constitutionally protected liberty"); Douglas Laycock, *RFRA, Congress, and the*

Equally important, almost all Fourteenth Amendment rights receiving strong protection also apply directly to Congress through the Fifth Amendment.<sup>248</sup> In practice, congressional authorization of state discrimination will trigger Fourteenth Amendment challenges because individuals lack standing to sue Congress directly for such action and instead must target the resultant state measures.<sup>249</sup> Thus, Fourteenth Amendment rights' simultaneous protection through the Fifth Amendment does not render the Fourteenth Amendment superfluous as a limit on Congress. But such simultaneous protection does provide strong support for the conclusion that Congress lacks power to authorize violation of these rights by the states.

Nor is it anomalous to distinguish between Congress's powers under Article IV and under the Fourteenth Amendment.<sup>250</sup> As discussed above, textual restrictions on Congress akin to Section 5's "enforce" language are much harder to infer from Article IV's terms.<sup>251</sup> But a distinction with respect to congressional power in these two contexts would exist even if the Fourteenth Amendment did not contain Section 5. Critically, the Fourteenth Amendment lacks the interstate relations focus of Article IV. The Fourteenth Amendment's animating concern is the relationship between a state and its citizens (and others within its boundaries). Yet Article IV's interstate dimension is of course precisely what justifies congressional power to contract its requirements. Existing doctrine further supports the distinction between Article IV and the Fourteenth Amendment. Under recent decisions, Congress's commerce power is clearly of greater substantive scope than its Section 5 power. At the same time that the Court has emphasized limitations on congressional power to expand the scope of Fourteenth Amendment rights when acting under Section 5, it has underscored Congress's ability to do so when acting under the Commerce Clause.<sup>252</sup> The greater

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*Ratchet*, 56 MONT. L. REV. 145, 162-64 (1995) (same); see also Post & Siegel, *supra* note 146, at 2039-40 (identifying both the scope of the enforcement power and the application of rights guarantees against Congress as the source of the prohibition).

<sup>248</sup> See Cohen, *supra* note 12, at 411-22. The two amendments come apart with respect to the equal protection rights of immigrants, see *Mathews v. Diaz*, 426 U.S. 67, 84-87 (1976) (distinguishing between constitutional limits on state governments as compared to the federal government with respect to regulation of immigrants), and due process protections on personal jurisdiction, compare *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Congress has power . . . to provide that the process of every district court shall run into every part of the United States."), with *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-09 (1987) (holding due process precludes states from asserting personal jurisdiction over individuals or entities with whom they lack minimum contacts).

<sup>249</sup> See, e.g., *Saenz*, 526 U.S. 489; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

<sup>250</sup> See 1 *TRIBE*, *supra* note 12, § 6-35, at 1243-44 & n.35.

<sup>251</sup> See *supra* p. 1495.

<sup>252</sup> See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 & n.9 (2001) (noting that federal duties still apply and can be enforced even though Eleventh Amendment precludes use of claims for money damages to do so).

substantive breadth of the commerce power is especially significant here, given that Congress overwhelmingly utilizes the commerce power when it regulates interstate relations.

Of course, this effort to distinguish among different Article IV guarantees works only if state classifications between residents and nonresidents do not receive searching scrutiny under the Fourteenth Amendment's Equal Protection Clause. Otherwise, the distinction between rights tied to the interstate context and rights having significance independent of that context (and protected by the Fourteenth Amendment) collapses. The Court's caselaw is consistent with the approach advocated here. Although the Court has occasionally invalidated state residence classifications on equal protection grounds, it has held that such classifications trigger only ordinary rationality review.<sup>253</sup> Since all government action must survive that level of review, a state residence classification in theory adds nothing special to this undemanding species of equal protection analysis.

3. *Saenz v. Roe*. — The question remains as to whether the approach articulated here accords with the Court's 1999 decision in *Saenz v. Roe*.<sup>254</sup> *Saenz* is particularly important to consider in parsing the relationship between Article IV rights and Fourteenth Amendment rights because it involved a person's right to travel — a right that is perhaps unique in being intrinsically linked to both interstate relations and individual liberty.<sup>255</sup> In *Saenz*, the Court invalidated a provision of California's welfare program limiting participants who had resided in the state for less than a year to no more than the benefit amount that they would have received in the state where they previously had resided. In so doing, the Court linked the Privileges and Immunities Clause of Article IV with its companion clause in the Fourteenth Amendment, describing both as sources of a right to travel.<sup>256</sup> The Court also rejected the claim that California's measure was rendered constitutional by the fact that Congress authorized states to adopt such measures.<sup>257</sup> The Court thus underscored the individual rights aspect

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<sup>253</sup> See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 669–70 (1981); see also *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 875 (1985) (claiming to apply ordinary rationality review in ruling a state distinction between in-state and out-of-state insurance companies invalid on equal protection grounds).

<sup>254</sup> 526 U.S. 489 (1999).

<sup>255</sup> See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”); see also Laurence H. Tribe, *The Supreme Court, 1998 Term—Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 112 (1999).

<sup>256</sup> *Saenz*, 526 U.S. at 501–08.

<sup>257</sup> *Id.* at 507–08.

of Article IV guarantees, and its decision could be read to suggest that Congress lacks power to authorize violations of Article IV.<sup>258</sup>

Yet *Saenz* can also be read to support a distinction between Congress's powers under Article IV and the Fourteenth Amendment. The *Saenz* Court noted that the Article IV component of the right to travel ("the right to be treated as a welcome visitor") is subject to greater qualification than the component rooted in the Fourteenth Amendment ("the right to be treated like other citizens of that State" where one "elect[s] to become [a] permanent resident[']").<sup>259</sup> Moreover, the Court distinguished between the right to travel protections under these two provisions on the ground that "[p]ermissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident."<sup>260</sup> *Saenz* thus indicates that these two constitutional provisions cannot simply be equated despite their shared concerns. In this vein, it is particularly striking that in rejecting the claim that congressional sanction rendered California's statute constitutional, the Court stressed the Fourteenth Amendment basis of the right being violated: "Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States."<sup>261</sup>

As a result, on its face *Saenz* supports the conclusion that Congress has power to authorize states to violate Article IV but not Fourteenth Amendment rights. Nonetheless, a tension exists because *Saenz* can also be characterized as a case about interstate rather than in-state relations. As then-Chief Justice Rehnquist argued in dissent, at issue was the extent to which Congress could act to protect states from perceived harmful aspects of interstate travel.<sup>262</sup> Congress could be seen as presuming that those present in a state for less than one year are not bona fide residents, and therefore as exercising its control over interstate relations to authorize discrimination against such nonresidents. The Court's reference to the Citizenship Clause demonstrates that it views the Fourteenth Amendment as denying Congress authority to define residency and nonresidency. Why Congress's interstate powers should not allow it more leeway remains unclear, however, and *Saenz*'s

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<sup>258</sup> See, e.g., 1 TRIBE, *supra* note 12, § 6-35, at 1243-44 n.35 (adopting this view).

<sup>259</sup> *Saenz*, 526 U.S. at 500-04.

<sup>260</sup> *Id.* at 502.

<sup>261</sup> *Id.* at 507-08 (footnote omitted).

<sup>262</sup> See *id.* at 521 (Rehnquist, C.J., dissenting); see also Hills, *supra* note 159, at 298, 304-09, 331-35 (discussing the danger that states may lower welfare benefits in order to deter migration and how that possibility should factor in assessing congressional power).

failure to address the interstate dimension of the measure before it is a weakness in the decision.

Alternatively, *Saenz* could be seen as an instance when interstate and in-state simply are inseparable; under this interpretation, the opinion reinforces the need to investigate whether an interstate guarantee independently receives strong protection to determine the scope of Congress's power over it. Finally, despite its facial in-state focus, perhaps the decision is best viewed as standing for the proposition that the specific interstate right at issue — the right to migrate to other states — is binding on Congress. Even so read, however, the decision does not significantly curtail Congress's interstate authority, because the right to migrate is unique when compared to other interstate rights in the protection it receives through the Fourteenth Amendment's Citizenship Clause.

### III. APPLICATIONS

A brief restatement seems in order. The constitutional model for interstate relations is one of strong, judicially enforceable antidiscrimination requirements, but analysis shows that in fact these requirements are default rules, subject to congressional revision. Institutionally, Congress is best positioned to determine the national interest and the need for state restrictions, characteristics that find constitutional recognition in the grant to Congress of the commerce power and in Congress's other express controls over interstate relations. Assigning Congress the primary role in interstate contexts not only reflects constitutional text and structure, but also furthers federalism values and has some historical support. Core federalism postulates of state autonomy, state equality, and state territoriality yield few restrictions on Congress in this arena, barring only the most extreme forms of congressional regulation. Instead, the major limit on Congress — and potentially a quite significant one — is that Congress cannot authorize state violations of rights independently secured by the Fourteenth Amendment.

What remains is to explore how the approach articulated here would operate in practice, an important exercise given the necessarily abstract quality of some of the preceding discussion. The goal of this Part is to apply this approach to congressional legislation affecting the states' obligations under Article IV's Full Faith and Credit and Privileges and Immunities Clauses. DOMA and CIANA are two obvious measures to consider under the proposed analysis, since each represents an actual congressional effort to alter otherwise existing state obligations under these clauses. These measures could be challenged as bad policy or as unconstitutional on other grounds, but the question addressed here is simply whether the acts indeed do fall within Con-

gress's interstate relations authority. Examined under the proposed analysis, the answer is largely yes.

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

Section 2 of DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>263</sup>

Section 2's purpose, evident from its terms, is to ensure that states will not be required to recognize same-sex marriage by virtue of the Full Faith and Credit Clause. Under traditional choice of law principles, however, a state can refuse recognition to marriages performed elsewhere that violate its fundamental public policies. Accordingly, it is unlikely that a state's refusal to recognize a same-sex marriage would have violated Article IV's full faith and credit demand even absent DOMA, at least as applied to a same-sex marriage involving state residents.<sup>264</sup> But Section 2 does deviate from existing doctrine by authorizing states to refuse to recognize sister state judgments respecting a same-sex marriage, especially final money judgments. Ordinarily, the public policy exception is limited to sister state laws, not money judgments.<sup>265</sup> As the Court recently remarked, "the full faith and credit command 'is exacting' with respect to '[a] final judg-

<sup>263</sup> 28 U.S.C. § 1738C (2000).

<sup>264</sup> See Kramer, *supra* note 10, at 1970–76; Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2195 (2005). Variations on a state's relationship to the marriage affect its ability to invoke the public policy exception. Broad agreement exists that a state can invoke the exception to refuse to recognize marriages involving its residents performed out-of-state to evade restrictions in the state's marriage law. Most commentators also appear to agree that states can refuse to recognize marriages involving their residents, even if at the time of the marriage the parties were residents of the state where they married. *But see* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2153 (2005) (arguing that absent a statutory ban on same-sex marriages, a state's public policy interest will not justify denying recognition in this case). More complicated are instances in which a state seeks to invoke the public policy exception to deny recognition when it has more minimal contacts with the couple involved, or when only particular incidents of marriage are at issue. *See id.* at 2155–63; Kramer, *supra* note 10, at 1974–75.

<sup>265</sup> See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233–34 (1998); *see also* Cox, *supra* note 10, at 389–97 (discussing DOMA's application to judgments and its conflict with existing law on recognition of judgments); Wardle, *supra* note 10, at 372–74, 380–86 (same). Professor Wardle argues that DOMA allows nonrecognition of a sister state judgment involving a same-sex marriage only if the state has "a strong public policy against recognizing same-sex relationships . . . [and] some significant connecting interest in the matter of judgment enforcement that would implicate such state policy." *Id.* at 390. These qualifications on DOMA's application to judgments, however, are not evident on the statute's face.

ment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment.”<sup>266</sup> Yet even if Section 2 does contract the requirements of full faith and credit due judgments, it would not for that reason be beyond congressional power under the approach outlined here.

The Court frequently identifies marriage and domestic relations as areas outside of federal commerce power control.<sup>267</sup> Whether nonetheless the commerce power could support some applications of DOMA’s Section 2 is a nice question, but one that is unnecessary to address, because Congress has power to enact Section 2 under Article IV’s Effects Clause.<sup>268</sup> Although DOMA has a discriminatory aspect for Massachusetts alone, Section 2 on its face does not single out any particular state for disfavored treatment; its target is instead same-sex marriage.<sup>269</sup> And absent the unjustified assumption that the category of all marriages represents a constitutionally mandated baseline, targeting all same-sex marriages appears sufficiently general for Effects Clause purposes.<sup>270</sup>

Plainly, DOMA reflects Congress’s substantive opposition to same-sex marriage. But that Congress is seeking to advance its own substantive agenda in an area traditionally reserved for the states does not render DOMA beyond its Effects Clause powers, provided that the Act can be seen as a reasonable effort to further the national interest in interstate harmony and union.<sup>271</sup> That Section 2 of DOMA meets this standard seems clear, given the extent of national debate and contention over same-sex marriage and the fact that forty states recently have added statutory or constitutional prohibitions against recognizing such marriages.<sup>272</sup> Regardless of whether states’ fears that they would be forced to recognize same-sex marriages absent DOMA were justified, these fears themselves could have led to interstate strife.<sup>273</sup>

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<sup>266</sup> *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003) (alteration and omission in original) (quoting *Baker*, 522 U.S. at 233); see also Sterk, *supra* note 135, at 57–61, 77–96 (describing current doctrine on the full faith and credit due judgments).

<sup>267</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 615–16 (2000).

<sup>268</sup> Insofar as a same-sex marriage is invoked in connection with economic benefits, such as claims for health insurance, the Commerce Clause might well apply. Congress, however, identified the Effects Clause as the basis for enactment of DOMA’s Section 2. H.R. REP. NO. 104-664, at 24–26 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2929–32.

<sup>269</sup> Moreover, DOMA was enacted in 1996, prior to Massachusetts’s recognition of same-sex marriage and in response to the since-repealed protection of homosexuals’ right to marry under Hawaii’s Constitution.

<sup>270</sup> See *supra* p. 1494.

<sup>271</sup> See *supra* pp. 1517, 1520.

<sup>272</sup> See Koppelman, *supra* note 264, at 2165 (listing state DOMAs).

<sup>273</sup> Implicit in this argument that even unrealistic state fears could support DOMA is the claim that Congress has power to determine whether states’ opposition to enforcing laws and judgments relating to same-sex marriage is legitimate, and further that Congress can choose to make that determination on an across-the-board basis. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2211–15

DOMA's Section 2 thus represents a rational regulation of interstate relations that accords with the terms of the Effects Clause and with principles of federalism. Under the approach advanced here, therefore, its constitutionality turns on the intersection of full faith and credit and the Fourteenth Amendment. The full faith and credit distinction between laws and judgments is mirrored in Fourteenth Amendment due process precedent. Under current full faith and credit doctrine, a forum state is required to apply another state's law only if the forum state lacks sufficient contacts to legislate with regard to the subject matter at issue. This is essentially the same standard that due process imposes, and the Court has made clear that the demands imposed by full faith and credit and due process on state choice of law rules are often equivalent.<sup>274</sup> The Fourteenth Amendment thus offers little impediment to DOMA's Section 2 as applied to choice of law, because it will be rare that a state cannot claim the minimal contacts demanded with respect to a case properly brought in its own courts.<sup>275</sup>

Applied to recognition of final judgments, however, the matter is different. Money judgments are property, thereby receiving significant Fourteenth Amendment due process protection against arbitrary termination.<sup>276</sup> Indeed, money judgments arguably qualify as property under the Takings Clause as well, given a government's limited ability to terminate or refuse to recognize a judgment, particularly one it has issued.<sup>277</sup> Nor is it difficult to envision instances when an individual

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(2005) (upholding Congress's decision to include a narrower class of activities within a broader regulatory scheme as rational). *But see* Rosen, *supra* note 10, at 977–84.

<sup>274</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–13 (1981). Although the Court phrases its requirement as being that a state “must have a significant contact or significant aggregation of contacts,” *id.* at 313, the level of contacts deemed “significant” can be quite minimal. See Laycock, *supra* note 12, at 257–59.

<sup>275</sup> *But see* Cox, *supra* note 10, at 380–81 (noting some occasions where due process and full faith and credit requirements deviate, as when personal jurisdiction is based on temporary presence in the state and that presence is unrelated to the subject matter of the suit).

<sup>276</sup> See *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 267 (Colo. 1991) (holding that a judgment for exemplary damages is a constitutionally protected property interest); see also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 960–67 (2000) (identifying entitlement, monetary value, and nontermination as core aspects of property for due process purposes). Judgments providing equitable relief raise more complicated issues, but some forms of injunctive or declaratory relief — those entitling the beneficiary to ongoing services or treatment with clear monetary value, for example — seem similarly akin to property.

<sup>277</sup> The analogy of judgments to property for Fifth Amendment Takings Clause purposes is complicated for several reasons. First, money judgments do not take a corporeal form and money is fungible, which makes a core dimension of property for Fifth Amendment purposes, the right to exclude from specific assets, Merrill, *supra* note 276, at 970–74, less directly applicable. Moreover, DOMA's Section 2 is not an instance where the government is taking an individual's judgments for its own use. See *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion). An additional complication is that judgments are clearly subject to restriction without compensation in some circumstances, such as bankruptcy or statutes of limitations on enforcement. See, e.g., Wat-

might sue to enforce a judgment that involves a same-sex marriage — for example, a judgment that an insurer is liable to cover the costs of medical procedures under a health insurance policy covering spouses.<sup>278</sup> DOMA's Section 2 clearly allows states to refuse to recognize judgments of this sort, not simply in its retraction of full faith and credit for records and judicial proceedings, but further in its stipulation that “[n]o State . . . shall be required to give effect to . . . a right or claim arising from [a same-sex] relationship.”<sup>279</sup>

Section 2's application to judgments thus appears problematic, but in the end even here the statute appears to fall within Congress's powers. Critically, DOMA was in place before any state recognized same-sex marriage, and thus before any judgments relating to same-sex marriages arose. That makes proving reliance on out-of-state recognition and enforcement difficult. Lack of such reliance undermines the claim that a state's refusal to recognize and enforce such an out-of-state judgment constitutes a deprivation of property without due process or a taking for which compensation is due under the Fourteenth Amendment.<sup>280</sup> It would be difficult to succeed on a takings claim in any event, unless the effect of DOMA's Section 2 was to make such judgments for all intents and purposes unenforceable,<sup>281</sup> but the con-

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kins v. Conway, 385 U.S. 188 (1966). Even under the Full Faith and Credit Clause, as implemented by Congress, individuals must convert a sister state judgment into a judgment of the state where they desire to seek enforcement before it can be executed. *See* *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839). *See generally* DAVID P. CURRIE ET AL., *CONFLICT OF LAWS* 529–30 (6th ed. 2001). That said, no one disputes that financial assets can be property for Fifth Amendment purposes, that a judgment represents a specific financial interest (as opposed to general financial liabilities), and that the Court has found financial interests, even interests that are “conditional” in having no practical independent existence, to qualify as property sufficient to trigger the Takings Clause. *See* *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998). *But see* *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235–37 (2003) (concluding that lack of independent existence meant that no compensation was due when interest on clients' funds in lawyers' trust accounts was diverted to pay for indigent defense).

<sup>278</sup> *See* *Wardle*, *supra* note 10, at 378–80 (providing examples of possible judgments involving same-sex marriages).

<sup>279</sup> 28 U.S.C. § 1738C (2000).

<sup>280</sup> *Cf.* *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that the President did not effect a taking in nullifying petitioner's attachment against Iranian assets to enforce a judgment because the attachment was obtained clearly subject to the President's power of revocation and thus “petitioner did not acquire any ‘property’ interest in its attachments of the sort that would support a constitutional claim for compensation”). A due process claim may remain in some instances, however, such as when the parties can demonstrate that they obtained a judgment initially with the expectation of purely domestic enforcement but circumstances later changed. *See* *Cox*, *supra* note 10, at 397 (providing example of a lifelong Massachusetts same-sex couple that divorces and obtains a judgment dividing their financial assets, which one former spouse seeks to enforce against the other's out-of-state real estate).

<sup>281</sup> *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 326–27, 330–31, 342 (2002) (insisting that, absent physical occupation or obliteration of all economically beneficial use, the appropriate analysis is to assess whether a taking has occurred by

tinued availability of enforcement in the state of issuance makes that unlikely in most cases.

Of course, the fact that a same-sex marriage is involved may be an unconstitutional basis for denying a judgment's enforcement, either because it constitutes invidious discrimination against homosexuals or because it violates the fundamental right to marry.<sup>282</sup> Similar claims could be raised against DOMA as a whole. Bracketing these issues, however, under the analysis proposed here DOMA's Section 2 appears to fall within congressional power.

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

CIANA would enact substantial restrictions on a minor's access to out-of-state abortions. Section 2 of the Act would make it a federal crime, and a basis for civil liability, to "knowingly transport[] a minor across a State line, with the intent that such minor obtain an abortion, and thereby in fact abridge[] the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the minor resides."<sup>283</sup> CIANA's Section 2 thus represents a congressional effort to authorize a state to regulate activities undertaken by its residents outside its borders. Interestingly, CIANA does not authorize states to impose restrictions on abortion applicable only to out-of-state minors. Instead, in another section of the Act, Congress itself prohibits physicians from performing abortions on out-of-state minors without providing twenty-four-hour constructive notice to one of the minor's parents.<sup>284</sup> These notice and delay requirements apply regardless of whether the minor's home state, or the state where the abortion is performed, otherwise demand parental notification or impose a waiting period. The only way for a state to forestall application of these requirements is to enact a parental notification law that meets

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evaluating the impact a regulation has on the property as a whole, not just that aspect directly affected).

<sup>282</sup> For arguments that DOMA is unconstitutional on these grounds, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 123–82 (1996); Koppelman, *supra* note 10, at 4–9, 25–32. See also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 953, 959 (Mass. 2003) (claiming that a right for same-sex couples to marry follows from *Lawrence v. Texas*, 539 U.S. 558 (2003)). To the extent DOMA's Section 2 is used to deny recognition to an out-of-state custody decree, it might also violate substantive due process protections of parental and family rights. The question of DOMA's effect on custody determinations has arisen in recent litigation in Virginia. See *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006).

<sup>283</sup> H.R. 748, 109th Cong. § 2(a), 2(d) (2005). The Act exempts the minor herself and her parents from its scope of liability, *id.* § 2(b)(2), but applies to other family members, as well as to adults with whom a minor may reside but who are not legally recognized as guardians or as standing *in loco parentis*, see *id.* § 2(e)(4).

<sup>284</sup> *Id.* § 3(2).

Congress's minimum standards.<sup>285</sup> Although CIANA's Section 2 is facially focused on a state's relationship to its own residents, it is at its core an interstate relations measure; its underlying impetus is to protect states from having their regulatory schemes undermined by their residents' ability to engage in interstate travel.

Like DOMA, CIANA falls within the scope of Congress's interstate authority. Under the Commerce Clause, Congress has power to prohibit particular uses of the channels and instrumentalities of interstate commerce,<sup>286</sup> and the purchase of abortion services — like many activities residents undertake in other states — comes under the rubric of economic activity.<sup>287</sup> The interstate commerce aspects of the activity regulated by CIANA would seem to put the measure squarely within Congress's commerce power.<sup>288</sup> Moreover, state regulation of a resident's out-of-state activities also represents a choice of law issue, the question being whether those activities should be governed by the law of the resident's home state or by that of the state where they occurred. Thus, Congress has power to enact Section 2 of CIANA under the Effects Clause as well. This is not to deny that, from a vertical federalism perspective, CIANA's imposition of mandatory federal notification and delay requirements on interstate abortions is extraordinary, particularly given that abortion regulation and familial relationships are areas traditionally left for state control. In addition, these federal requirements seem likely to prove quite burdensome and may independently violate Fifth and Fourteenth Amendment individual liberty protections.<sup>289</sup>

Nor does the fact that Section 2 of CIANA authorizes extraterritorial state regulation suffice to place it outside congressional authority. As discussed above, to the extent the prohibition on state extraterritorial legislation rests on considerations of horizontal federalism and the

<sup>285</sup> *Id.* § 3(b)(1).

<sup>286</sup> See *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005).

<sup>287</sup> Kreimer, *supra* note 232, at 489.

<sup>288</sup> The extent to which the commerce power allows Congress to regulate aspects of abortion has arisen regarding the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2000), and the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. III 2003). See, e.g., *United States v. Wilson*, 73 F.3d 675, 677, 679–80 (7th Cir. 1995); Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441, 445–61 (2004). But CIANA's facial limitation to abortions involving minors who have traveled interstate, and the impact travel has on state parental notification requirements, makes its commerce power basis much less open to question.

<sup>289</sup> For example, although the Act provides an exception to preserve the life of the mother, see H.R. 748, § 2(b)(1), it does not contain a health exception, which the Court recently reiterated is constitutionally mandated. See *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 967 (2006). Were aspects of CIANA found unconstitutional, however, they might well be deemed severable from Section 2. See H.R. 748, § 5(a) (declaring provisions or applications of CIANA found unconstitutional to be severable); *Ayotte*, 126 S. Ct. at 967–69 (remanding for consideration of whether failure to include a health exception in a parental notification statute is severable).

needs of national union, it should be subject to congressional override. Indeed, it is by no means clear that all state efforts to regulate their residents' out-of-state activities are unconstitutional even absent congressional authorization. A state's ongoing relationship with its residents is in some contexts deemed sufficient to sustain its regulatory power over those residents wherever they are located; for example, the law of the resident or domiciliary state is generally assumed to govern family law matters.<sup>290</sup> Perhaps most importantly, state regulation of a resident's out-of-state activities does not fall within the scope of Article IV's Privileges and Immunities Clause, which the Court has held "has no application to a citizen of the State whose laws are complained of."<sup>291</sup>

That said, a state's regulation of its residents' extraterritorial activities is certainly a practical intrusion on their Article IV right to travel to another state and be treated the same as that state's residents. As Professor Seth Kreimer argues, "[a] system of personal law that empowered the home state to permit travel but to deny its object would undercut this liberty of movement just as surely as would a refusal on the part of the host state to allow newcomers to take advantage of the local laws."<sup>292</sup> Regulation of residents' out-of-state activities is also in tension with aspects of the right to travel aside from the Article IV right to be a welcome visitor. Most significantly, while such regulation does not erect a physical barrier to residents' ability to enter and leave the territory of their home states, it does prevent them from leaving their states qua legal jurisdictions. It means residents must carry their states' laws with them wherever they go.<sup>293</sup>

Of course, even if CIANA does implicate the right to travel, the question of congressional power remains. Framed in terms of the approach advocated here, the question is whether the particular manifestations of the right to travel that CIANA implicates receive strong enough Fourteenth Amendment protection to preclude congressional regulation. Certainly some manifestations of the right to travel receive such protection, whether because they constitute part of the privileges

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<sup>290</sup> Lea Brilmayer, *Interstate Preemption: The Right To Travel, The Right to Life, and the Right To Die*, 91 MICH. L. REV. 873, 887 (1993).

<sup>291</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138 (1873); see also *Zobel v. Williams*, 457 U.S. 55, 60 n.5 (1982); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 900-13 (2002). This result is not required by the clause's text, however. See Seth F. Kreimer, Response, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1003 (2002).

<sup>292</sup> Seth F. Kreimer, "*But Whoever Treasures Freedom . . .*": *The Right To Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 920 (1993); see also Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 324 (1987) ("Non-residents who are known to carry their domicile's law with them cannot participate as equals in the life of the state.")

<sup>293</sup> See Kreimer, *supra* note 232, at 510-19; Tribe, *supra* note 255, at 151-53.

and immunities of national citizenship or simply because they represent fundamental aspects of individual liberty.<sup>294</sup> According such protection to all exercises of the right to travel, however, would unduly limit Congress's authority over interstate relations.<sup>295</sup>

To see why some exercises of the right to travel should be subject to congressional regulation, consider *Supreme Court v. Piper*,<sup>296</sup> in which the Court held that state-imposed residency requirements for membership in a state bar violate Article IV's Privileges and Immunities Clause.<sup>297</sup> Exercising the commerce power, however, Congress should be able to authorize states to impose such bar residency requirements. Although traditionally an area for state regulation and often involving intrastate conduct, lawyering is a form of economic activity that readily falls within the scope of the commerce power. The provision of legal services also plainly has an impact on interstate commerce, as recent legislative measures addressing securities fraud litigation, medical malpractice, and product liability demonstrate.<sup>298</sup> Of particular significance, the right to engage in economic activity, while fundamental for Article IV purposes, has far more limited status outside of the interstate context. Indeed, under the Fourteenth Amendment, economic regulations trigger only the mildest forms of rationality review.<sup>299</sup> Nor does a residency requirement for employment have any effect on the right to travel separate from its impact on an individual's ability to engage in economic activity.

The point has general applicability. Congress should have broad power to narrow or enlarge application of privileges and immunities protections against state regulation of economic activity by nonresident individuals. This is an area in which congressional and not judicial determinations should hold sway. But that is not to say that Congress has carte blanche whenever economic activity is involved. Congressional authorization of a wholesale and permanent ban on nonresi-

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<sup>294</sup> See *Saenz v. Roe*, 526 U.S. 489, 501–03 (1999) (rooting aspects of the right to travel in Fourteenth Amendment privileges and immunities); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (identifying the right to travel as part of liberty protected by Fifth Amendment due process).

<sup>295</sup> Precedent is another obstacle. See *Saenz*, 526 U.S. at 500–02 (expressly rooting the right to be a welcome visitor in Article IV rather than the Fourteenth Amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–79 (1872) (distinguishing between privileges and immunities protected under Article IV and the Fourteenth Amendment).

<sup>296</sup> 470 U.S. 274 (1985).

<sup>297</sup> *Id.* at 288.

<sup>298</sup> See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, tit. 1, § 101(b), 109 Stat. 737, 743 (codified at 15 U.S.C. § 78u-4 (2000)); Medical Malpractice Reform Act of 2006, H.R. 4838, 109th Cong. § 2(a) (finding that health care liability litigation restricts health care access and burdens interstate commerce); Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 2(a)(3) (finding product liability system burdens interstate commerce).

<sup>299</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955).

dents working in a state may, inter alia, come too close to dismantling the nation, given the strong historical and practical connections between economic and political union.<sup>300</sup>

In addition, Congress very well may lack power to authorize state discrimination when the economic activity at issue implicates fundamental rights that receive independent Fourteenth Amendment protection. An example here concerns state bans on out-of-state women obtaining abortions within their borders, a type of measure held unconstitutional in *Doe v. Bolton*.<sup>301</sup> Although Congress should be able to authorize state violations of residency requirements of the *Piper* variety, affecting only ordinary economic activity, its ability to authorize violations of *Doe*'s ban on residency requirements for abortion is far more dubious. This is in part because the state discrimination at issue may itself violate the Fourteenth Amendment.<sup>302</sup> But it is also because the ability to enjoy fundamental constitutional freedoms without formal limitation based on state of residence is arguably one of the privileges of national citizenship that Congress cannot authorize states to abridge. To be sure, that a right is fundamental for constitutional purposes does not mean it is necessarily free from state-imposed burdens or restrictions. And in some circumstances, residency restrictions on access to fundamental rights are legitimate; states can, for instance, refuse to grant the right to vote to nonresidents.<sup>303</sup> Perhaps a state could legitimately prohibit out-of-state women from obtaining abortions at state facilities in order to ensure such facilities were available to resident women.<sup>304</sup> As a general matter, however, restrictions on fundamental constitutional rights based on state of residency seem incompatible with the character of such rights as guaranteed by the national charter to all.

In the case of CIANA's Section 2, the relevant aspect of the right to travel is the right to escape one's home state's jurisdiction, at least to the extent of undertaking activities that are lawful in the state where performed. Intuitively, freedom to travel to other states and take advantage of their legal regimes is part of individual liberty and national

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<sup>300</sup> See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523–24 (1935).

<sup>301</sup> 410 U.S. 179, 200 (1973).

<sup>302</sup> Such bans on nonresident abortions seem likely to create a substantial obstacle to abortion access for a large fraction of the women for whom they are relevant — women seeking abortions outside their states of residence — and thus would violate Fourteenth Amendment due process. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–79 (1992) (establishing the undue burden standard for assessing the constitutionality of abortion regulations).

<sup>303</sup> See *supra* note 199 and accompanying text.

<sup>304</sup> See *Doe*, 410 U.S. at 200 (leaving this possibility open); see also *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263–68 (1974) (invalidating a durational residency requirement for accessing free medical services but suggesting a simple residency requirement would be constitutional).

citizenship in a federated nation.<sup>305</sup> The Court has signaled a similar view when it has condemned, on due process grounds, state efforts to penalize activities lawful in the states where committed.<sup>306</sup> True, individuals are free to leave a state and establish residency in states with more conducive laws, but that does not mean states have the ability to put their residents to such a choice. Moreover, denying individuals any protection short of relocating to another state seems insufficiently responsive to legitimate due process concerns raised by some forms of extraterritorial regulation. Nor does such a robust account of what it means to be a state resident fit well with the Fourteenth Amendment's Citizenship Clause, which makes state citizenship automatic and preempts the states' power to choose their citizens.<sup>307</sup> It seems somewhat incongruous to hold that a state has power to force its residents to carry its laws with them wherever they go, when it lacks power to prevent its residents from moving from state to state as they please.

A key feature of CIANA's Section 2, however, is that it is limited to state regulation of minors, for whom the state in general bears special responsibilities. Further, at stake is minors' access to abortion, an area in which the Court has particularly emphasized that states have a "strong and legitimate interest in the welfare of [their] young citizens."<sup>308</sup> Even rights enjoying the greatest degree of constitutional protection ordinarily are not violated by measures that are closely tailored to serve compelling government interests. Hence, notwithstanding that Congress's ability to sanction state regulation of residents' out-of-state activities often may be constrained by the Fourteenth Amendment, CIANA's particular extraterritorial authorization may well fall within congressional power.

## CONCLUSION

Federalism jurisprudence and scholarship focus to a very considerable degree on the scope of congressional powers. But the question

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<sup>305</sup> See Kreimer, *supra* note 232, at 462, 479 (describing the right to travel and "take advantage of the legal entitlements of neighboring jurisdictions" as part of national citizenship); see also Tribe, *supra* note 255, at 151–53 (characterizing the principle that "[n]o state may enclose its citizens in a legal cage" as a core structural precept of constitutional federalism).

<sup>306</sup> See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996); see also *Bigelow v. Virginia*, 421 U.S. 809, 822–25 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

<sup>307</sup> See Kreimer, *supra* note 292, at 936; see also Hills, *supra* note 159, at 310–16, 322–26 (arguing that the Fourteenth Amendment's ascendancy of national citizenship precludes robust accounts of states as "affective communities").

<sup>308</sup> *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 966 (2006) (alteration in original) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990)) (internal quotation mark omitted).

addressed is overwhelmingly congressional power over federal-state relations, whether in the form of direct imposition of duties on the states or of regulation of private conduct that narrows the areas left for state control. Far less attention has been paid to congressional authority over interstate relations, the horizontal dimension of federalism. This Article has attempted to remedy that gap, taking as its focus Congress's powers over Article IV, the constitutional article most devoted to interstate relations and horizontal federalism. The conclusion that follows from this Article's analysis is that Congress enjoys broad power over interstate relations, including power to contract or expand the requirements of Article IV. The one limitation — that Congress lacks power to authorize states to violate the Fourteenth Amendment — seems on investigation not to be as substantial a constraint as might initially appear; neither of the congressional measures considered here falls outside of Congress's powers on this ground.

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