

CONGRESS, INTERSTATE RELATIONS, AND ARTICLE IV

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INTRODUCTION

Article IV of the Constitution² is in many ways the backbone of national union. Known as the states' relations article,³ it prohibits the states from discriminating against one another—be it through not respecting sister state judgments, laws, and criminal proceedings, or by denying out-of-state residents the right to work and engage in economic activity. In the words of the Supreme Court, without such prohibitions “the

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² The text of Article IV is as follows:

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.

³ *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 378-79 (1978).

Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.’⁴

Yet Article IV’s antidiscrimination prescriptions are only one side of the constitutional equation when it comes to union; the other consists of Congress’ constitutional powers to regulate interstate relations. Nearly a century and a half of precedent holds that Congress can authorize the states to engage in exactly the type of economic discrimination against out-of-staters that Article IV prohibits. Even Article IV itself speaks in two voices. At the same time as it prohibits state discrimination, Article IV grants Congress broad control over aspects of interstate relations without expressly subjecting Congress to equivalent antidiscrimination requirements. The major instance is Article IV’s Effects Clause, which provides that Congress shall have power to declare the effect that one state’s acts, records, and judicial proceedings will have in sister states, subject only to the requirement that Congress must act by “general laws.”⁵

Squaring these two constitutional features requires an account of the scope of congressional power over Article IV, and of Congress’ role in mediating interstate relations more generally. Federalism is most commonly envisioned as addressing federal-state relationships, what is sometimes called the vertical dimension of federalism. Thus, recent federalism cases address the scope of Congress’ power to regulate in areas traditionally subject to state control and to impose duties on the states or remove their immunity from suit.⁶ But any system of government based on union of otherwise sovereign entities also must address the relationship among those entities. The resultant rules and doctrines governing interstate relationships are the horizontal dimension of federalism.

Surprisingly, given the mountain of federalism precedent accumulated in the over two hundred years since the Constitution’s adoption, the Court has barely addressed the question of Congress’ powers in the horizontal federalism context. The Court has never ruled, for example, on whether Congress can contract the antidiscrimination obligations Article IV’s Full Faith and Credit and Privileges and Immunities Clauses impose on the states.⁷ Moreover, when the Court has done so—such as in decisions upholding

⁴ *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-81 (1869); *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998).

⁵ U.S. Const. art. IV, § 1. Another example is the New State Clause, which authorizes Congress to admit new states to the union but says nothing express about the powers new states must enjoy or their relationships to existing states, other than protecting existing states from being divided or combined into new states against their will. *Id.*, § 3.

⁶ See, e.g., *Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997).

⁷ See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality opinion) (“While Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 n. 1 (Blackmun, J., concurring and dissenting in part) (noting that the

Congress' power to authorize state burdens on interstate commerce—its decisions fail to provide much clarification of the proper bounds of Congress' role or to address the seeming conflict between the upheld congressional authority and Article IV's protections against discrimination. Meanwhile, although writing on vertical federalism abounds, the challenges and dilemmas of horizontal federalism are underappreciated in American constitutional scholarship. This is especially true of the question of Congress' powers over interstate relationships, which has gone largely unanalyzed.⁸

Part of the explanation for this lack of attention is that Congress only infrequently sanctions interstate discrimination. Congressional authorization of laws burdening interstate commerce are relatively rare, particularly compared to the number of state laws that the Court strikes down on dormant Commerce Clause grounds.⁹ Even more uncommon is congressional authorization of state discrimination against other states' judgments and laws. Indeed, only recently has Congress exercised its powers under Article IV's Effects Clause in any substantive fashion, and its recent efforts are largely instances where Congress has sought to expand rather than contract the respect states must pay to laws and judgments of sister states.¹⁰

Court had “no occasion to determine whether Congress may authorize . . . what otherwise would be a violation of th[e Privileges and Immunities] Clause” and stating that the “question may present considerations different from . . .the dormant Commerce Clause”).

⁸ The main commentary on Congress' powers over interstate relations and Article IV is an insightful 1982 article by William Cohen. See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 413, 395-96, 399-400 (1982); see also Jonathan Varat, *State “Citizenship” and Interstate Equality*, 48 U. Chi. L. Rev. 487, 570-71 (1981) (discussing Congress' powers over the Privileges and Immunities Clause in the course of a broader exposition of the Clause's import). In addition, Congress' enactment of the Defense of Marriage Act sparked a number of articles addressing Congress' powers under the Full Faith and Credit and Effects Clauses. See *infra* notes ___ - ___.

⁹ *But see* Norman Williams, *Why Congress May Not “Overrule” The Dormant Commerce Clause 2* (Draft 1/12/05) (“Given this open-ended invitation [to authorize state regulations that burden or discriminate against interstate commerce, Congress has done precisely that.”). Congress has acted to remove the states from certain dormant Commerce Clause constraints regarding insurance, see McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015, banking, see Bank Holding Company Act, originally codified at 12 U.S.C. § 1842(d) but since repealed, and liquor regulation, see Webb-Kenyon Act, codified at 27 U.S.C. § 122; Wilson Act, codified at 27 U.S.C. § 121—although the Court recently held that the latter exemption, now embodied in the 21st Amendment, did not extend to authorizing state liquor regulation that discriminated against interstate commerce. See *Granholm v. Heald*, 125 S. Ct. 1885 (2005). Norman Williams has helpfully collected these and a few other examples. See Williams, *supra* note ?, at 2-3.

¹⁰ Examples include the Parental Kidnapping Preventing Act of 1980, the Full Faith and Credit for Child Support Orders Act of 1994, the Violence Against Women Act of 1994, and the Violence Against Women Act of 2000. See Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 Nw. U. L. Rev. 827, 851-74, 881-88 (2004).

Congress' historic reluctance to authorize interstate discrimination merits emphasis, as it suggests that discriminatory measures will not automatically result if the Court were to acknowledge that Congress has broad power to do so. The cause of this reluctance, however, is unclear. Perhaps it indicates the extent to which Congress takes seriously Article IV's condemnation of such discrimination as incompatible with national union. Alternatively, it may simply reflect that such discriminatory measures are politically hard to adopt, perhaps because such measures often are opposed by powerful national economic interests which prefer open markets, or because members of Congress fear their states will end up losing.

In any event, this reluctance should not be oversold. Notable instances exist in which Congress has sanctioned state discrimination against sister states. Such is the case regarding insurance and banking,¹¹ while measures are currently pending to authorize state prohibitions on out-of-state waste and to authorize tax incentives that otherwise might be found unconstitutionally protectionist.¹² Even closer to enactment is the Child Interstate Abortion Notification Act (CIANA).¹³ CIANA makes it a federal crime to transport a minor out-of-state to escape her resident state's parental notification requirements or to perform an abortion on a minor from another state without ensuring her parents are notified.¹⁴ At first glance, CIANA appears to authorize extraterritorial state regulation rather than interstate discrimination. But not only is authorization of extraterritorial legislation a form of congressional control over interstate relations, the Act has a latent discriminatory edge. Congress is essentially providing that some states' decisions to require parent notification will trump other states' decisions to forego such measures for minors seeking abortions within their borders.¹⁵

¹¹See *supra* note 9; see also 42 U.S.C. § 604(c) (authoring states to apply rules of welfare program of family's prior state of residence if family moved to current state within last 12 months), held unconstitutional in *Saenz v. Roe*, 526 U.S. 489, ___ (1999).

¹² See Solid Waste Empowerment and Enforcement Act of 2005, H.R. 70, 109th Cong., 1st Sess. (authorizing states to impose limits on importation of solid waste from other states); Economic Development Act of 2005, S. 1066, 109th Cong., 1st Sess. (Authorizing states to provide tax incentives for the purposes of economic development provided, among other requirements, that the availability of the tax incentive does not depend on state of incorporation, commercial domicile, or residence).

¹³ H.R. 748, 109th Cong., 1st Sess. The House passed CIANA on April 21, 2005 and is currently awaiting action in the Senate. The Act incorporates provisions pending in Congress for many years as the Child Custody Protection Act, H.R. 1755, 108th Cong., 1st Sess.; S. 851, 108th Cong., 1st Sess.

¹⁴ §§ 2(a), 3(a). The Act also authorizes civil actions by parents against individuals who violate its provisions. §§ 2 (d), 3(c).

¹⁵ Indeed, as discussed below, CIANA operates to mandate parental notification for all interstate abortions involving minors, even when the minor's resident state and the state where the abortion is performed have no such requirements; moreover, in these circumstances the Act imposes a mandatory 24 hour waiting period. See *infra* notes ___ - ___.

Perhaps the most prominent recent example of congressional authorization of interstate discrimination is the 1996 Defense of Marriage Act (DOMA), which provides that states need not recognize acts, records, or judicial proceedings respecting same-sex marriages performed in other states.¹⁶ DOMA's practical bite is mitigated by the fact that under traditional choice of law principles, a state is allowed to refuse recognition to marriages performed elsewhere that violate its fundamental public policies. Hence, even absent DOMA, a state's refusal to recognize a same-sex marriage was unlikely to violate Article IV's full faith and credit demand.¹⁷ But if Congress can enact DOMA, then why can it not go further and prohibit states from recognizing same-sex marriages performed in other states, rather than leaving the question of recognition to state discretion? Although not yet proposed, such a mandatory nonrecognition act seems within the realm of possibility; it would be far easier to adopt than a constitutional amendment prohibiting same-sex marriage in the United States, yet would ensure that Massachusetts' recent recognition of same-sex marriage was contained at that state's borders.¹⁸

Parsing Congress' powers over interstate relations is critical to assessing whether these measures are constitutional, and thus has increasing practical significance. It is equally important on a more conceptual level, in clarifying the relationship of Congress and the Supreme Court in horizontal federalism disputes. How can Congress authorize states to engage in behavior that, absent congressional intervention, would be found to violate the Constitution? That is hardly the standard view of Congress' powers vis-a-vis the Court. Yet if Congress lacks power to sanction state violations of Article IV, the well-established rule that it can authorize discriminatory state commercial regulations seems untenable. The Court, however, regularly invokes Congress' revisory power in justifying dormant

¹⁶ 28 U.S.C. § 1738C, § 2.

¹⁷ See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L. J. 1965, 1970-76 (1997). As discussed below, however, DOMA does have practical significance in authorizing states to refuse to recognize judgments involving same-sex marriages. See *infra* notes __ - __ and accompanying text. DOMA also has relevance in expanding the contexts in which states are able to refuse to recognize other states' same-sex marriage laws, as the public policy exception does not clearly apply in some contexts—for example, where a state's contacts with the same-sex couple are limited or where particular incidents of marriage are at issue. See *id.*, at 1974-75; Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2152-63 (2005) [hereinafter Koppelman, *Interstate Recognition*]; Linda Silberman, *Same-Sex Marriage: Refining the Conflicts of Laws Analysis*, 153 U. Pa. L. Rev. 2195, 2204-08 (2005).

¹⁸ For proposed constitutional amendments prohibiting same-sex marriage, see S.J. Res. 1 & 13, 109th Sess., 1st Cong.; H.J. Res. 39, 109th Cong., 1st Sess; see also *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding Massachusetts' prohibition on same-sex marriage violates the state's constitution). In Vermont, a similar state supreme court determination has led to a state law authorizing same-sex civil unions. [CITE]. Such a federal nonrecognition act might seem unnecessary, given that forty states have passed "mini-DOMAs" that prohibit recognition of same-sex marriages. See Koppelman, *Interstate Recognition*, *supra* note __, at 2165 (Appendix A). Some states have suggested that they will recognize same-sex marriages performed in other states, although their laws do not allow same-sex marriages to be performed within their borders. See Op. N.Y. Att. Gen. __; CHECK California.

Commerce Clause doctrine. Thus, if Congress in fact lacks such a power, then the Court's approach to dormant Commerce Clause cases also needs to be rethought.

For these reasons, the scope of Congress' power over Article IV and interstate relations more generally is ripe for sustained inquiry. The goal of this article is to provide such an examination. My conclusion is that Congress enjoys broad authority over interstate relations, including power to contract or expand Article IV's requirements on the states. 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 for the most part only in the absence of congressional action to the contrary. While limits exist on Congress' power to structure interstate relationships, these limits come not from Article IV or principles of federalism but instead from the Fourteenth Amendment.

The analysis here focuses primarily on extrapolating the constitutional "structures and relationships"¹⁹ that govern the division of power between the different levels and branches of government in horizontal federalism contexts. It also pays attention to other standard sources of constitutional meaning—specifically, constitutional text, precedent, and history. Less emphasis is put on justifying the scope of Congress' power from a more strictly normative or policy perspective. This might seem to some a significant omission, as strong normative and policy arguments could be leveled against granting Congress broad power to revise the Constitution's interstate antidiscrimination requirements. Congressionally-authorized state discrimination may undermine national economic growth, by encouraging state barriers to free trade; at a minimum, it seems likely to lead to multiple and potentially conflicting systems of state regulation, with inefficiencies an inevitable result. Alternatively, the examples of DOMA and CIANA raise concerns that Congress will exploit its interstate powers to advance a restrictive social agenda in areas otherwise thought outside its purview, at the cost of individual liberty. At a minimum, these examples suggest that Congress may pander to political constituencies, rather than to mediate interstate conflicts with an eye to preserving union.

I share many of these concerns about the wisdom and rightness of congressionally-authorized interstate discrimination. But I believe these policy and normative arguments should be made to Congress, not the courts. To be sure, some interstate relations measures enacted by Congress may be unconstitutional, but because they violate independent constitutional protections of individual liberty and property, not because they otherwise exceed Congress' powers. Moreover, caution is needed before condemning congressional authority to sanction interstate discrimination. Interstate discrimination itself is not always a bad thing, viewed in economic terms or from a concern with individual rights. Perhaps more importantly, the demands of union have no preset, acontextual content. What is needed to ensure union at the outset of a fragile federation or in situations where norms and rules of attachment are weak is not what is needed where national

¹⁹ Charles Black, *Structure and Relationship in Constitutional Law* 7 (1969).

identity and union ties are strong. Congress is institutionally the best positioned to identify instances of interstate discrimination that ultimately accrue to the national interest.

The article begins in Part I with the structural arguments for broad congressional power over Article IV and interstate relations. Several central features of the interstate relations context—the need for a federal umpire; the Constitution’s emphasis on congressional supervision in a variety of interstate relations contexts; differences between vertical and horizontal federalism regarding the danger of congressional self-dealing; and institutional competency concerns—support giving Congress the preeminent regulatory role. Part I then turns to an examination of constitutional text, history, and precedent. It argues that none of these sources precludes granting Congress this preeminent role.

One theme that emerges from Part I is the importance of examining Article IV’s provisions in context—both in the context of Article IV as a whole, and against the background of the entire Constitution, particularly Article I. Article IV is not often considered as a single entity; indeed, its four sections were cobbled together during the last minutes of the constitutional convention. Moreover, while the article’s first two sections clearly target states’ relations with each other, its last two sections appear to address states’ relations with the federal government. In fact, however, even the last sections of Article IV contain an interstate dimension and reflect issues—conflict over western lands and the felt need for common republican principles—that arose in forging the states into a national union. Viewing Article IV as a whole, and in conjunction with Article I, clarifies Congress’ central role in interstate relations, as well as dissolves Article IV’s seeming textual clarity and complicates any historical case for viewing Article IV’s requirements as absolute.

Part II takes up the question of what limits exist on Congress’ power to mediate interstate relations. It begins with examining the limits imposed by state sovereignty. Viewing Article IV as a whole is also helpful here, as its latter sections suggest core federalism postulates—such as state autonomy, state equality, and state territoriality—with which any account of Congress’ powers over the initial, more overtly interstate provisions of the article must adhere. Yet investigation demonstrates that these federalism postulates have little constraining effect on Congress in its structuring of interstate relations; they only preclude extreme measures that Congress is unlikely to enact in any event. Instead, the real limit on Congress comes not from Article IV or federalism at all, but from the Fourteenth Amendment: In regulating interstate relations, Congress cannot authorize states to violate the Fourteenth Amendment’s prohibitions.

This Fourteenth Amendment restriction on Congress’ interstate relations authority necessitates a nuanced assessment of Article IV’s interstate requirements, to discern which have strong Fourteenth Amendment counterparts (and indeed are perhaps best understood in Fourteenth Amendment terms), and which instead are fundamentally interstate relations measures subject to congressional control. Part III undertakes this inquiry, using an analysis of specific types of measures as the prism through which to assess the scope of Congress’ power over the Full Faith and Credit, Effects, and Privileges and Immunities Clauses of Article IV. Part III focuses on two actual statutes, DOMA and CIANA, as

well as a hypothetical measure authorizing residency requirements for membership in a state bar. It concludes that all three measures fall within Congress' powers over interstate relations.

Regarding DOMA, Article IV's full faith and credit requirement has a significant Fourteenth Amendment analog only when recognition of judgments are at issue. In that context, DOMA's authorization for states to refuse to enforce judgments involving same-sex marriages implicates the Fourteenth Amendment's protections for property. But it is difficult to envision refusal to recognize judgments as amounting to a Fourteenth Amendment violation, at least absent the situation where DOMA's authorization serves to make judgments respecting same-sex marriage in practice unenforceable. Transforming DOMA into a measure that mandates, rather than simply authorizes, nonrecognition of same-sex marriage laws and judgments certainly makes the measure more offensive from a federalism standpoint, but does not significantly affect alter Congress' powers.

Authorization of state discrimination against nonresident economic activity falls even more clearly within Congress' powers, given the minimal scrutiny accorded economic regulation under the Fourteenth Amendment. True, such authorization also burdens the Article IV right to travel, which guarantees nonresidents the right to be a welcome visitor when temporarily present in a state. But that form of the right to travel does not receive strong Fourteenth Amendment protection, and thus does not limit congressional power under the approach advocated here.

CIANA presents the closest question of congressional power. On the one hand, insofar as CIANA relates to states' regulation of their residents, it arguably presents no Article IV issue at all, and a state's power to make regulatory choices affecting its residents is at the core of state identity. On the other, granting a state power to prohibit its residents from engaging in actions that are legal in the jurisdiction where undertaken has the effect of eviscerating their Article IV right to be a welcome visitor, as they cannot take advantage of rights enjoyed by residents of the state they are visiting. More importantly, robust accounts of the meaning of state residency seem at odds with the Fourteenth Amendment's Citizenship Clause, which makes state residency and citizenship a mechanistic determination. While recognition of a state's special relationship to its minors should suffice to limit the Fourteenth Amendment obstacles regarding CIANA itself, other authorizations of state regulation of residents' out-of-state activities may go beyond Congress' powers.

II. THE FUNCTIONAL DEMANDS OF UNION: THE CASE FOR BROAD CONGRESSIONAL POWER OVER INTERSTATE RELATIONSHIPS

A functionalist account of the demands of union establishes both the need for a federal umpire and the Constitution's primary allocation of this umpiring role to Congress. Such an allocation is particularly evident in regard to interstate commerce and undergirds precedent upholding Congress' power to authorize discriminatory state measures that otherwise would violate the dormant Commerce Clause. Support for congressional

primacy also exists, however, in regard to Article IV. Moreover, fears of congressional self-dealing at the expense of the states and constitutional federalism principles are substantially mitigated in the horizontal federalism context; in fact, congressional power here often serves to enhance state regulatory options rather than the opposite. Congress moreover has a comparative institutional advantage over the courts in both discerning state discrimination and determining when such discrimination is justified.

A structural constitutional analysis thus leads to positing broad congressional power over interstate relations, including the power to expand or contract Article IV's prohibitions on state discrimination. While little in the dormant Commerce Clause's "text" or precedent supports a contrary conclusion, Article IV's text and history—in particular, the express imposition of interstate nondiscrimination demands, combined with the lack of a grant of power to Congress over many of these demands and the article's union-forging purpose—might seem more problematic. But closer examination demonstrates that broad congressional power over Article IV is not precluded by its text or history.

A. *Structural Arguments for Broad Congressional Power: Congress as Federal Umpire*

A first structural insight is that some federal umpire over interstate relations is essential for ensuring union. The alternative is to have the states themselves, either through their political branches or their courts, determine when they have transgressed the Constitution's interstate demands. Granting the states alone that power creates obvious dangers of bias and retaliation, as the history of interstate discrimination under the Articles of Confederation made clear. The grant of diversity jurisdiction to the federal courts, as well as jurisdiction over disputes between two or more states,²⁰ demonstrates the framers' recognition of the need for a federal arbiter of interstate disputes.²¹ Moreover, in the *Federalist*, Hamilton 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."²²

Thus, the question is not whether the federal government should have power to mediate interstate relations. Nor is it whether both Congress and the Court are authorized to play this umpiring role; both are. Instead, the real question is which of these two branches of federal government should exercise primary control over interstate relations. On some discrete issues, the Constitution indicates an expectation that the Court will decide interstate disputes; for example, providing that some cases in which a state is a

²⁰ U.S. Const., art. III, para. 1.

²¹ *Martin v. hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346-47 (1816);

²² *Federalist* 80 (Hamilton), *supra* note ?, at 478.

party fall within the Court's original jurisdiction.²³ In general, however, the Constitution's text and structure suggest that the role of interstate umpire is primarily one for Congress.

1. *Congressional Power to Authorize State Violations of the Dormant Commerce Clause.* The grant of the commerce power is particularly instructive. Discriminatory state commercial regulation and resultant state retaliation formed a key part of the impetus behind the constitutional convention.²⁴ Yet even so, the approach the Constitution took was to grant Congress the power to regulate interstate commerce, with only limited prohibitions on Congress' ability to discriminate among states.²⁵ Of course, the Commerce Clause could be read as granting Congress exclusive control of interstate commerce, and thus as prohibiting state regulation in this area altogether. Indeed, in *Gibbons v. Ogden*, an early decision on the scope of the commerce power, Chief Justice Marshall indicated some sympathy for this view.²⁶ *Gibbons*, however, ultimately rested on the Court's determination that the New York statute at issue was preempted by federal law.²⁷ Subsequent decisions established that states possess a concurrent power to regulate activities deemed interstate commerce, but inferred from the Commerce Clause a judicially-enforceable prohibition on discriminatory or unduly burdensome state regulation.²⁸

²³ U.S. Const., art. III, § 2, para. 2; *see also* Federalist 42 (Madison), *supra* note ?, at ___ (describing certain grants of judicial power as intended to achieve harmony and proper intercourse among the states); 28 U.S.C. § 1251. 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* 2 FARRAND, *supra* note ?, at 466.

²⁴ *See, e.g., H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827); Thomas R. Colby, *Revitalizing The Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 266-84 (2005); Richard B. Collins, *Economic Union As a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 52-57 (1988). For a discussion of scholarship questioning whether the extent of such discrimination was as great as the framers claimed, *see id.*, at 57-58.

²⁵ *See* Eule, *supra* note ?, at 429 -35. The antidiscriminatory provisions that the Constitution does impose include the uniformity requirement for duties and taxes and the prohibition on port preferences. U.S. Const. art. I., Sec 8, cl. 1 ("all Duties, Imposts, and Excises shall be uniform throughout the United States"); *id.*, sec. 9.

²⁶ 22 U.S. (9 Wheat.) 1, 209 (1824) (describing arguments in favor of the commerce power being exclusive as having "great force"); *see also id.*, at 199-209 (discussing and rejecting arguments in favor of viewing the commerce power as concurrent); *id.* at 227- (Johnson, J. concurring in the judgment) (adopting the exclusive view of the commerce power).

²⁷ *See id.* at 210-221.

²⁸ *See* *Cooley v. Board of Wardens*, 53 U.S. 299, 318 (1851) (arguing that Congress' commerce power is only exclusive regarding matters of a nature that require uniform regulations); *Wilson v. Black Bird Creek*, 27 U.S. 245, 250 (1829)(upholding Delaware statute? authorizing construction of a dam blocking a navigable stream, notwithstanding that subject fell within Congress' commerce power). For statements of current dormant Commerce Clause doctrine, *see* *American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2423 (2005); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Hence dormant Commerce Clause doctrine was born. Of particular note, however, the Court has long held that Congress has power to authorize state measures that otherwise would violate dormant Commerce Clause prohibitions.²⁹ Intimations of such a power in Congress came early. In 1851, for example, the Court in *Cooley v. Board of Wardens* emphasized that Congress had provided for continued state regulation of river and harbor pilots in finding that this was not an area requiring uniform national regulation.³⁰ On a slightly different note, a 1855 decision, *Pennsylvania v. Wheeling & Belmont Bridge Company*, upheld an act of Congress authorizing two bridges over the Ohio river, notwithstanding that the Court previously had found the bridges to obstruct navigation on the Ohio.³¹ By 1891, the Court was willing to uphold a congressional statute authorizing state regulation of imported liquor—even though the year before it had found such state regulation, absent congressional sanction, to violate the dormant Commerce Clause.³²

As others have argued, why Congress has power to authorize state action that violates the dormant Commerce Clause is not self-evident, nor are the Court's explanations of this rule very satisfying.³³ The leading modern case attesting to the proposition that Congress' commerce power extends to authorizing state discrimination against interstate commerce is *Prudential Insurance Co. v. Benjamin*.³⁴ There, the Court upheld the constitutionality of a South Carolina tax that applied only to out-of-state insurance companies, on the ground that the tax was authorized by the McCarran-

²⁹ For recent reiterations of this rule, see, e.g., *Hillside Dairy Inc. v. Lyons*, 123 S. Ct. 2142, 2147 (2003); *New York v. United States*, 505 U.S. 144, 171 (1992); see also *Granholm v. Heald*, 125 S. Ct. 1885, 1990-02 (2005) (discussing pre-Prohibition congressional acts authorizing state regulation of alcohol to determine if the acts authorized state discrimination against out-of-state alcohol).

³⁰ See 53 U.S. at 319-20

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

³² *In re Rahrer*, 140 U.S. 545, 560-63 (1891); see also *Leisy v. Hardin*, 135 U.S. 100, 109-10 (1890) (holding Iowa lacked power to ban sale of imported liquor that remained in its original package, but signaling that congress could authorize such state action if it chose). The Court again upheld Congress' power to authorize state prohibitions on liquor importation in *James Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311, 325-31 (1917).

³³ See, e.g., Noel T. Dowling, *Interstate Commerce and State Power-Revised Version*, 47 Colum. L. Rev. 547, 554 (1947); Henry P. Monaghan, *The Supreme Court, 1974 Term: Foreword—Constitutional Common Law*, 89 Harv. L. Rev. 1, 15 (1975); Norman Williams, *Why Congress May Not "Overrule" The Dormant Commerce Clause* (Draft 1/12/05); see also *Benjamin*, 328 U.S. at 425 (noting that the Court had given different rationalizations for its decisions upholding congressional power to authorize state discrimination).

³⁴ 328 U.S. 408 (1946); see also *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174-75 (1985).

Ferguson Act.³⁵ According to the Court, that the South Carolina statute might violate the dormant Commerce Clause absent the McCarran-Ferguson Act was of no moment; the Commerce Clause imposed no limit on Congress' power to regulate interstate or foreign commerce other than to require that what is being regulated "affect [such commerce] sufficiently to make [c]ongressional regulation necessary or appropriate."³⁶ If Congress were bound by dormant Commerce Clause limitations, whether acting "alone or in coordination with state legislation," then its "power over commerce would be nullified to a very large extent."³⁷ 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."³⁸

Benjamin's emphasis on the presence of coordinated federal-state action is somewhat perplexing, for it is hard to see why such coordination, considered alone, could affect the South Carolina statute's constitutionality.³⁹ 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."⁴⁰ Why, then, should congressional authorization make any difference to the constitutionality of state legislation that otherwise would violate the dormant Commerce Clause? Congressional power to conclusively determine the meaning of a constitutional prohibition, let alone *de facto* overrule prior judicial determinations that a particular form of state regulation is unconstitutional, seems

³⁵ 328 U.S. at 429-33. The Court devoted little space to defending this interpretation of the McCarran-Ferguson Act, and its conclusion on this score is debatable. Under current doctrine, the Court appears to require a clearer congressional expression of intent to authorize state discrimination than is present in the McCarran-Ferguson Act. See *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

³⁶ 328 U.S. at 423.

³⁷ *Id.* at 422.

³⁸ *Id.* at 435-36.

³⁹ See Dowling, *supra* note ?, at 556; Williams, *supra* note ?, at . William Cohen, by contrast, identifies *Benjamin's* reference to coordination of state and federal authority (an argument first invoked in 1852 in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 430 (1852)), as central. See Cohen, *supra* note ?, at 395-96, 399-400. However, Cohen does not contend that coordination would allow either federal or state government to undertake action in the face of a constitutional prohibition applicable to that level of government; his point instead is that Congress can validate state action that violates constitutional prohibitions to which Congress is not subject. See *id.* at 400, 406.

⁴⁰ *Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005); see also *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935) ("The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.")

fundamentally at odds with *Marbury*'s instruction that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁴¹

The better answer lies implicit in *Benjamin*'s concern that precluding Congress from authorizing state burdens on interstate commerce would infringe too much on Congress' power under the Commerce Clause. Congress' commerce power is plenary; Congress itself can enact legislation that imposes burdens on or discriminates against interstate commerce.⁴² 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. Moreover, if Congress has power to enact a discriminatory measure itself, then precluding Congress from instead granting states discretion over whether to impose such a measure only undermines the cause of union. Such a rule forces Congress to mandate restrictions on interstate commerce by all states if it wants to allow some states to be able to discriminate. While this may make Congress more reluctant to authorize discrimination in general, it also leads to greater burdens on interstate commerce than Congress—or even the states—considers necessary in particular contexts.

This argument treats congressional authorization of discriminatory state legislation as no different from any other form of congressional commerce legislation. As a matter of constitutional structure and political economy, such a characterization might at first seem implausible. After all, the Constitution did not vest the power to regulate interstate commerce with the states, but with Congress. That considered decision appears overturned if Congress can simply turn around and delegate the power to regulate

⁴¹ 5 U.S. (1 Cranch.) 137, 177 (1803). Conceivably, congressional authorization might be relevant to the question of whether a state statute, as a factual matter, discriminates against interstate commerce. But *Benjamin* expressly rejected this rationale and not surprisingly, as the discriminatory character of South Carolina's statute was evident from its face. See *Benjamin*, 328 U.S. at 425-26; Monaghan, *supra* note ?, at 15. Another justification, occasionally suggested in decisions, is that in invalidating state measures under the dormant Commerce Clause the Court is simply giving effect to the congressional judgment, manifested by congressional silence, that an area of activity be free from regulation. See *Welton v. Mississippi*, [CITE]; *In re Rahrer*, 140 U.S. 545, 560-63 (1891). This concept of "legislation by silence" is hardly free of constitutional problems of its own. See Monaghan, *supra* note ?, at 16-17; Cohen, *supra* note ?, at ____]. In addition, it belies reality to view the Court's myriad dormant Commerce Clause decisions as enforcing congressional policy; in many (if not most) instances congressional silence is simply silence. See Williams, *supra* note ?, at ____.

⁴² Generally, but not always. For example, Congress is prohibited from giving preference to "the Ports of one State over those of another," and is also prohibited from imposing "Duties, Imposts and Excises" that are not "uniform throughout the United States." U.S. Const. art. I, §§ 8,9. This Uniformity Clause of Article I may explain *Benjamin*'s emphasis on the presence of "coordinated" federal-state action, as it suggests Congress itself could not provide that out-of-state insurers be taxed at differing rates than in-state insurers. See, e.g., *Benjamin*, 328 U.S. at 434, 438; Cohen, *supra* note ?, at 405. In addition, at the extreme, state equality limits may constrain Congress' ability to adopt disuniform regulation. See *infra* Part II.A.2.

interstate commerce back to the states.⁴³ But in fact, a determination by the national legislature that state regulation, even state discrimination, is the best regulatory response in a particular context is simply not equivalent to a state's decision to discriminate absent such authorization.⁴⁴ “[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.

⁴³ *McCulloch v. Maryland*'s argument for federal immunity from state taxation also seems pertinent here: “In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with power of controlling measures which concern all, in the confidence it will not be abused.” 4 Wheat. (17 U.S.) 316, 431 (1819); *see also* Jesse H. Choper, *Judicial Review and the National Political Process* 205-06 (1980).

⁴⁴ 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 should be viewed differently. While federal administrative agencies may lack the local interests of a state, they may have equivalent parochial agendas of their own. *See* Thomas Merrill, *Capture Theory and the Courts*, 72 Chi.-Kent L. Rev. 1039, 1043-48, 1067-74 (1997) (describing accounts of agencies as essentially driven by private interests offered by public choice and agency capture theories). Certainly, administrative agencies also lack the national representative and political character of Congress, and the effect of administrative delegations is to allow adoption of substantive regulatory rules without going through the structural checks of bicameralism and presentment. *See* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* 47-96 (1985); Peter H. Aranson, Ernest Gellhorn, & Glenn O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 40-45, 55-62 (1982); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 97 Colum. L. Rev. 612 (1996); *see also* Jerry Mashaw, *Greed, Chaos, and Governance* 132-56 (1987) (arguing that agencies are politically accountable). One difference between delegations to administrative agencies and to the states, however, is that actions by the states may be harder to oversee. *See* [CITE] *hlev* offering this account as justification for the dCC].

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 ?, at 401-10. Thus, for example, the grant of power to Congress to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States,” U.S. Const. art. I, sec. 8, cl. 4?, might be thought to preclude congressional authorization of state bankruptcy rules; similarly, the grant of congressional power “to establish an uniform Rule of Naturalization,” combined with the federal government’s power over foreign affairs, might be said to preclude congressional authorization of state regulation targeting immigrants. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493 (2001). Notably, though, the Court has not to date taken this view; on the contrary, it has upheld incorporation of state bankruptcy rules in the federal bankruptcy code, *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902), and refused to reach the question of whether the states are constitutionally preempted from the field of foreign affairs, *see Crosby v. National Foreign Trades Council*, 530 U.S. 363, 374 n. 8 (2000).

Such a federal exclusivity argument would have little impact on the question of Congress’ power to authorize state violations of Article IV. Implicit in Article IV’s targeting the states with the Full Faith and Credit and Privileges and Immunities Clauses is the recognition that the states have power to regulate in these areas—otherwise the imposition of prohibitions against discrimination would make little sense. Article IV thus represents an arena of concurrent state power, not exclusive federal power. On the other hand, a much stronger case can be made that certain prohibitions on the states in Article I’s Section 10—such as the ban on states coining money—are intended to be exclusive powers, given the contrast of these prohibitions with the grant of power to Congress to engage in precisely these activities earlier in Article I (or, in the case of entering treaties, subsequently in Article II).

Furthermore, if a State is in such a position, the decision to allow it is a collective one.”⁴⁵

Put differently, the constitutional judgment underlying the grant of a plenary commerce power is that Congress is the best judge of the national interest in this context. Thus, inferring limits on state regulation from the Commerce Clause is one thing, but applying those limits also to Congress quite another.⁴⁶ Indeed, the Court often invokes Congress’ powers to authorize discriminatory state regulation in defense of its dormant Commerce Clause decisions invalidating state regulation. Concerns about the lack of textual basis for the doctrine, as well as the Court’s dubious competency in identifying discriminatory regulation, are pushed aside on the grounds that Congress can rectify any mistakes the Court makes.⁴⁷ Hence, the conclusion that Congress lacks the power to do so might force the Court to abandon or at least significantly curtail judicial enforcement of the dormant Commerce Clause, rather than render dormant Commerce Clause constraints absolute.

2. *The Constitutional Model for Interstate Regulation: Constitutional Default Rules Subject to Congressional Override.* The model thereby created regarding interstate commercial relations, as the Court’s dormant Commerce Clause jurisprudence makes clear, is one of constitutional default rules prohibiting state discrimination that are subject to congressional override. Notably, this model is then echoed expressly in Section 10 of Article I. That section imposes numerous prohibitions on the states. Some of these, such as the prohibition on states impairing contracts, are unconditional. Many others, however—including ones directly addressing interstate relations, such as the ban on interstate compacts and restrictions on states’ ability to impose duties—are made waivable by Congress.⁴⁸

⁴⁵ *South-Central Timber Dev., Inc. v. Wunnicke*, [104 S Ct 2237, 2243 (1984)]

⁴⁶ Henry Monaghan has argued that the dormant Commerce Clause is best viewed as a form of constitutional common law; rooted in constitutional text, to be sure, but not intended to have the binding force on Congress enjoyed by other constitutional limits. See Monaghan, *supra* note ?, at ___. The plenary nature of commerce power provides the explanation for why the dormant Commerce Clause should be understood in this fashion.

⁴⁷ See *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 586 (1997) (“If there is need for a special exception [exempting state tax exemptions for nonprofits from the dormant Commerce Clause], Congress not only has the power to create it, but also is in a far better position than we to determine its dimensions.”); *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (“[O]ur decision [to adhere to precedent holding that requiring an out-of-state mail order house without physical presence in a state to collect use taxes on goods purchased from it by residents in that state violates the dormant Commerce Clause] is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.”).

⁴⁸ U.S. Const. art. I, sec. 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War, in time of Peace, enter into any Agreement or Compact with

This same model of constitutional rules applicable to the states combined with congressional discretionary authority is evident in Article IV, in the coupling of the Full Faith and Credit and Effects Clauses of Article IV's Section 1. Rather than stopping after stipulating that each state shall accord other states' acts, records, and judicial proceedings full faith and credit—as its forerunner provision in the Articles of Confederation had done—Article IV proceeds to grant Congress power to “by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Not surprisingly, given the dearth of Effects Clause legislation, little precedent exists on the scope of Congress' power under the Effects Clause, particularly regarding Congress' power to contract the credit due state laws and judgments.⁴⁹ The parallel of the Commerce Clause and Article I, however, supports reading the Effects Clause as granting Congress power to contract as well as expand the full faith and credit demand on the states. Like the Commerce Clause, the presence of the Effects Clause demonstrates a clear expectation that Congress would legislate in this area of interstate relations. Yet despite this expectation, nowhere is Congress expressly made subject to the antidiscrimination requirement the Full Faith and Credit Clause imposes on the states.

This point applies to the remainder of Article IV as well. Like the Commerce and Effects Clauses, all of the grants of congressional power in Article IV are notably broad in scope.⁵⁰ Moreover, the powers granted to Congress to regulate federal territory and

another State, or with a foreign Power, or engage in War”); cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports”); *see also* Thomas Lee [Nw U L Rev]. The Court has read the requirement of congressional consent in Article I § 10 as only applying to interstate compacts that threaten the federal-state balance. *See United States Steel Co. v. Multistate Tax Comm'n*, [CITE].

⁴⁹ In very occasional dicta, the Court has indicated that Congress has the power to change judicially-prescribed full faith and credit requirements using its Effects Clause power. *See, e.g., Sun Oil v. Wortman*, 486 U.S. 717, 728-29 (1988) (holding Congress could deem statutes of limitations and other matters non-procedural for conflict of laws purposes, thereby altering established choice-of-law rules); *Pac. Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939) (suggesting Congress could require a state to apply another state's statute, even though the Full Faith and Credit Clause alone did not require that result). The Court has stated that Congress' ability to contract full faith requirements is an open question. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality opinion); *Williams v. North Carolina*, 317 US 287, 303 (1942) (citations omitted). The recent enactment of DOMA may provide the courts with an opportunity to address Congress' power to contract the states' full faith and credit obligations. *See* [Fla dCt decision].

⁵⁰This 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. The Guarantee Clause facially is most limited; it not only makes the obligation to guarantee republican government and defend the states against invasion mandatory on the federal government, but in addition requires a legislative or executive request of assistance before the federal government can intervene in cases of intrastate violence. Even here, however, Congress' powers are potentially quite broad, depending on how the term “republican government” is construed, as demonstrated by Congress' reliance on the Guarantee Clause as partial authorization for the military governments imposed upon the southern states during

property, admit new states, and guarantee republican government all have implications for interstate relations. Historically, the basis for the federal territory power was rivalries among the states regarding western land claims, and control over federal territories and admission of new states subsequently became a central area of contention in interstate battles over slavery.⁵¹ Even outside the battle over slavery, the terms on which new states are admitted affects interstate relations as it establishes the basis for their relationship with existing states. The Guarantee Clause, in turn, sets certain minimal requirements regarding the form of government and protections against spread of violence that states are entitled to demand of other states as a condition of union.⁵²

Again, however, despite the grant of broad power to Congress, these sections of Article IV impose few conditions on Congress' ability to discriminate among the states. The New State Clause, for example, contains no requirement that new states be admitted on equal terms, and records from the constitutional convention demonstrate that this omission was intentional.⁵³ Instead, the restrictions that the New State Clause contains

Reconstruction. See William M. Wiecek, *The Guarantee Clause of the U.S. Constitution 166-203* (1972); see also *id.* at ("John Adams complained late in life that 'the word *republic* as it is used, may signify anything, everything, or nothing.'").

⁵¹ On the relationship of interstate disputes over western land grants to the territory and property power, see Appel, *supra* note ?, at 16-26; see also Federalist 7 (Hamilton) *supra* note ?, at __ (arguing that absent union dispute over the western territories would lead the states to wage war with one another). On the way that the interstate divide over slavery manifested itself in regard to regulation of federal territories and admission of new states see Fehrenbacher, *supra* note ?, 100-187; see also Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions imposed on States Entering the Union*, 46 *Am. J. Legal. Hist.* 119,140-41 (2004) (discussing relationship of slavery and admission of Nebraska and Nevada after the Civil War).

⁵²The 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 Bonfield, *supra* note ?, at 522; Madison stated this point most clearly in Federalist 43:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess the authority to defend the system against aristocratic or monarchical innovations. In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess the authority to defend the system against aristocratic or monarchical innovations.

Federalist 43, *supra* note ?, at 273.

⁵³As initially included in the August 6th draft, the Clause required that "new States shall be admitted on the same terms with the original states." 2 FARRAND, *supra* note ?, at 188. Despite some delegates' arguments "for fixing an equality of privileges by the Constitution," Gouvenor Morris successfully urged that this language be deleted so as not "to bind down the Legislature to admit Western States on the terms here stated" was adopted. Morris' proposal was fueled by a concern that an equality requirement would entitle the new states to equal representation in the Senate and thereby "throw the power into the[] hands" of those settling the western lands. *Id.* at 454; see also *id.* (remarks by Williamson).

echo *Benjamin*'s emphasis on coordinated national and state action, requiring both congressional and state consent before a state is divided in two or amalgamated into a new state.⁵⁴

Section 2 of Article IV, which contains the Privileges and Immunities, Fugitive Slave, and Extradition Clauses, stands out from the remainder of the article in lacking any reference to Congress. But the scope of Congress' power under the dormant Commerce Clause holds important lessons for an assessment of its authority under this section of Article IV as well. This is particularly true regarding Congress' power under the Privileges and Immunities Clause, given the overlap of the activities to which this clause applies and those regulatable by Congress under the commerce power.⁵⁵ For example, under the Privileges and Immunities Clause the Court has struck down state laws that tax nonresidents at higher rates than residents, charge nonresidents higher license fees for engaging in commercial activities, or impose residency requirements as a prerequisite for certain forms of employment.⁵⁶ These cases all involve not just economic activities, but further economic activities with a clear interstate link, and thus would appear fall under the Commerce Clause as well.⁵⁷ But if so, Congress would seem to have power to authorize the states to adopt discriminatory regulations that the states are currently prohibited from enacting under the Privileges and Immunities Clause.

On the other hand, if Congress lacks the 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 potentially quite limited. Congress would still have some ability to do so, because these two clauses have a different scope of

⁵⁴ U.S. Const., art. IV, § 3.

⁵⁵ See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 407 (1948) (Frankfurter, J., concurring) (noting overlap between Privileges and Immunities Clause and dormant Commerce Clause); Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1222-28 (1988) (arguing that privileges and immunities were originally defined in terms of rights of trade and commerce)

⁵⁶ See *Austin v. New Hampshire*, 420 U.S. 656, ___ (1975) (holding state imposition of higher tax rate for nonresidents violates the Privileges and Immunities Clause); *Toomer*, 334 U.S. at ___ (invalidating higher commercial shrimp license fees for nonresidents under the Clause); *United Building Constr. & Trades Council v. Camden* [holding residency requirement for employment on government-funded projects is subject to privileges and immunities scrutiny]; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (striking down in-state residency requirements for bar membership as violating the Privileges and Immunities Clause).

⁵⁷ See *Gonzales v. Raich* [CITE: restating 3 part & econ activity emphasis]. Income taxes, after all, are imposed on income-generating activities within a state, and commercial licenses are clearly tied to commercial activity. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429-32 (1946) (upholding congressional authorization of state imposition of differential insurance tax rates as falling within the Commerce Clause power). For a discussion of why provision of legal services falls within the commerce power, see *infra* notes ___-___ and accompanying text [Part III.B].

application.⁵⁸ The dormant Commerce Clause covers a broader array of measures, prohibiting facially neutral measures that impose an undue burden on interstate commerce or that have the effect of favoring in-state activity, as well as measures that facially discriminate between residents and nonresidents; the Privileges and Immunities Clause, by contrast, is currently limited to the latter.⁵⁹ Of perhaps even greater practical impact, corporations can bring dormant Commerce Clause challenges but are excluded from the scope of Privileges and Immunities protections—an anachronistic rule at odds with many modern decisions that yet remains the law today.⁶⁰ Even so, given the clauses’ topical overlap, Congress’ ability to authorize discrimination would likely be substantially curtailed were it 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.⁶¹ The Court has noted the “mutually reinforcing relationship” and “common origin in the Fourth Article of the Articles of Confederation”⁶² of the Privileges and Immunities and Commerce Clauses, descriptions that equally apply to the Full Faith and Credit Clause. Diametrically different accounts of congressional power under these clauses thus seems unlikely.⁶³ In particular, the similar structure of

⁵⁸ These differences, in addition to the fact that Congress has not authorized a lot of interstate economic discrimination under the commerce power, explain why no head-on collision between Congress’ power to authorize violations of the dormant Commerce Clause and the Privileges and Immunities Clause has yet occurred.

⁵⁹ See *Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003); *Pike v. Bruce Church*, 397 U.S. 137 (1970) (describing the undue burden test of dormant Commerce Clause analysis); Denning, *supra* note ?, at 392, n.22 (arguing that some form of express discrimination between residents and nonresidents is required for a privileges and immunities violation); see also Donal Regan, [CITE] [Mich L Rev piece on dCC] (noting that the Court does not actually invalidate state legislation on strictly undue burden grounds). In *Hillside Dairy*, the Court held that facial discrimination on the basis of citizenship or residency was not necessary to state a Privileges and Immunities claim. The Court left open, however, left open whether some form of express discrimination against nonresidents is required to trigger the Privileges and Immunities Clause, or whether simply a discriminatory effect will suffice. See 123 S. Ct. at 2147; see also Denning, *supra* note ?, at 392–__ (discussing *Hillside*). If discriminatory effect is held sufficient, that will expand the overlap between these two clauses.

⁶⁰ See *Paul v. Virginia*, 8 Wall. 168, 180 (1869); see also *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657–67 (1981) (describing erosion of the legal underpinnings for *Paul*’s holding that grant of a corporate privilege is a special privilege that the state could grant on whatever terms it chose); Eule, *supra* note ?, at 449–54; Redish & Nugent, *supra* note ?, at 610–11. *Contra* Denning, *supra* note ?, at 406–07.

⁶¹ See Cohen, *supra* note ?, at 414; Varat, *supra* note ?, at 570–71.

⁶² *Hicklin*, 437 U.S. at 531–32.

⁶³ Unlikely, but not unfamiliar. In addition to the doctrinal differences noted above, see *supra* note 58, the Court has also asymmetrically read the dormant Commerce Clause as containing a market participant exception not replicated in the privileges and immunities context, the explanation in part for the seeming

combining prohibitions on the states with a grant of power to Congress, evident in the Commerce Clause and Section 10 of Article I and also in the first section of Article IV, makes such a divergence in Congress' powers under the two articles an odd result. Further, the underlying logic of the Commerce Clause model appears to be that Congress is an adequate judge of the national interest. If Congress determines that certain restrictions on the states are unnecessary to serve national economic and political union, then it should have power to lift them. This logic would seem to apply equally to almost all limitations imposed on the states by the Constitution in the name of national union.

Equally important, little basis exists to distinguish between Congress' power to expand versus contract Article IV's demands. Article IV and the Constitution as a whole aim at creating "a more perfect union"⁶⁴ while simultaneously preserving the sovereignty and separate existence of the states. As the Court famously said in *Texas v. White*, "[t]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."⁶⁵ Imposing excessive prohibitions on the states is as harmful to the system of "Our Federalism" as imposing insufficient prohibitions. Once the possibility of any congressional readjustment of states' relations is accepted—and acceptance of this proposition underlies the view that Congress can expand Article IV's antidiscrimination requirements—why should Congress be precluded from rectifying excessive restrictions on the states? True, Congress clearly lacks power to legislate away the essential attributes of federal union, but congressional easing of Article IV's demands is hardly equivalent to dissolving the nation.

3. *The Difference Between Vertical and Horizontal Federalism.* Such congressional primacy in structuring interstate relations, with the courts assigned a subsidiary role, might seem implausible in light of recent decisions emphasizing the Court's role as ultimate arbiter of constitutional federalism.⁶⁶ A crucial variable distinguishes these decisions, however: they involved the vertical dimension of federalism. Structural differences between vertical and horizontal federalism justify according Congress far broader power in the latter context.

inconsistent treatment of local hire statutes in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), and see *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208, 220-21 (1981), that routinely puzzles first-year constitutional law students. Notably, *United Building* represented the first occasion on which the Court held that a type of measure that did not trigger dormant Commerce Clause protections nevertheless triggered searching scrutiny under the Privileges and Immunities Clause, and even so the Court did not actually rule on whether the local hire requirement at issue was unconstitutional.

⁶⁴ U.S. Const., preamble.

⁶⁵ *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

⁶⁶ For discussion of this feature of the Court's recent jurisprudence, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L. J. 1943, 1964-65, 1966-71, 1980-84 (2003).

In vertical federalism, the underlying issue is one of federal versus state power: can Congress impose an obligation on the states, expose them to financial liability, or preempt their field of operation. Horizontal federalism, on the other hand, involves state versus state contexts. The factor of congressional intervention does not change this dynamic, at least when Congress acts to authorize state discrimination. To begin with, congressional authorization of state discrimination does not work a reduction in state powers. True, one state's discriminatory measures can result in significant burdens on other states; states and localities that are major waste generators will suffer if states are allowed to ban importation of solid wastes.⁶⁷ But even these burdened states do not suffer a diminution in their constitutional powers, as their ability to export solid wastes was always subject to direct congressional prohibition under the commerce power. Moreover, these states, like their sisters, gain the power to limit incoming wastes. Nor do grants of state authority to discriminate mark a change in the federal government's powers. The result may be state regulation in lieu of direct federal regulation, but Congress can always enact a preempting federal regime. For example, Congress retains full constitutional power to repeal its authorization of state regulation of insurance, although its longstanding reliance on state regulation may make such a move politically difficult.

At first glance, congressional expansion of Article IV's requirements might seem to fall more in the vertical federalism mold, with Congress imposing a federal duty that limits the states' ability to engage in what otherwise would be constitutionally-sanctioned discrimination. But even here the horizontal federalism aspect surfaces and yields greater congressional leeway. To begin with, Article IV's prohibitions against interstate discrimination are generally quite strict. For example, where privileges and immunities protections apply, the Court only upholds state measures discriminating based on residency if it finds that such discrimination is closely related to a substantial government objective; at times it has gone so far as to require that nonresidents "constitute a peculiar source of the evil at which the statute is aimed."⁶⁸ Even in its recent decisions emphasizing limits on Congress' [powers to remedy constitutional violations, the Court has been most willing to grant Congress broad discretion to impose duties on the states when enforcing a strong constitutional prescription.⁶⁹

Where Article IV's direct constitutional prohibitions are less demanding, moreover, as in the case of application of full faith and credit requirements to other states' law, the article expressly grants Congress power to enhance the states' obligations. Congressional expansion of Article IV's requirements thus is easier to justify as simply enforcing the

⁶⁷ See *supra* note 9.

⁶⁸ *United Building & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, ___ (1984) (quoting *Toomer v. Witsell*, 334 U.S. 385 (1948)).

⁶⁹ See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, ___ (2003).

constitutional scheme.⁷⁰ More generally, Article IV's text accords a breadth of congressional power over the states greater than that expressly granted elsewhere. The Effects Clause, for example, does not limit Congress to enforcing the Full Faith and Credit Clause, as Section 5 of the Fourteenth Amendment does regarding that amendment's provisions.⁷¹ As a result, whatever debate exists regarding Congress' power to contract constitutional full faith and credit demands, according to the Court "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."⁷² This breadth of congressional control is mirrored in the plenary terms of the Commerce Clause, and thus seems to reflect the sense that Congress should be able to mandate greater horizontal controls when the national interest so demands.⁷³

These different features mean that, among other things, congressional power in horizontal federalism contexts raises fewer concerns of congressional aggrandizement. And such concerns appear in large part to underlie the Court's assertions of judicial supremacy in recent decisions addressing vertical federalism. For example, in justifying greater judicial scrutiny of Section 5 legislation in *City of Boerne v. Flores*, the Court invoked the fox-in-the-henhouse reasoning of *Marbury v. Madison*, arguing that otherwise Congress would be able to set the limits on its own power.⁷⁴ Similarly, in its anticommandeering decisions—*New York v. United States* and *Printz v. United States*—the Court expressed concern that by forcing the states to regulate on its behalf Congress could duck the political heat for its regulatory choices.⁷⁵

Indeed, *New York* and *Printz* are good indications of how much more comfortable the Court is with congressional regulation of interstate relations than with other instances of congressional regulation of the states. In *New York*, the Court upheld Congress' power to authorize state bans on interstate commerce in low-level nuclear waste

⁷⁰ See *Printz v. United States*, 521 U.S. 898, 909 & n. 3 (1997); see also *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality opinion) (stating Congress clearly has power to expand full faith and credit). 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).

⁷¹ See *infra* Part I.B.1.

⁷² *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n. 18 (1988) (plurality op.).

⁷³ Perhaps the most extreme form of deference to Congress under Article IV, albeit infrequently invoked, is the Court's refusal to judicially enforce the Guarantee Clause. Although usually Guarantee Clause challenges involve attacks on one state's political rules and thus fit more in the vertical federalism mold, at times Guarantee Clause challenges have a decided horizontal aspect. See, e.g., *Texas v. White* (GC and civil war/reconstruction governments).

⁷⁴ 521 U.S. 507, 536 (1997); see also *Hibbs*, 538 U.S. at 728. CHECK CITES.

⁷⁵ *New York*, 505 U.S. 144, 168-69 (1992); *Printz v. United States*, 521 U.S. 898, 2380-82 (US cites missing in WL).

at the same time as it prohibited Congress from demanding that states either create in-state waste sites or take title to such wastes generated in their midst.⁷⁶ Meanwhile, in *Printz* the Court held unconstitutional congressional use of the commerce power to impose regulatory duties on state executive officials. Yet it distinguished congressional imposition of duties on state executive officials under the 1793 Extradition Act, arguing that this form of commandeering was justified because Congress was acting under the Constitution's Extradition and Effects Clauses.⁷⁷

4. *Considerations of Institutional Competency.* A final point that merits note concerns comparative institutional competency of Congress and the Court when comes to the interstate arena.⁷⁸ 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."⁷⁹ To avoid this result, current doctrine posits that the Clause "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"⁸⁰ This means that a state need apply another state's law only when it lacks significant contacts with the parties or the event underlying the litigation, hardly a rigorous standard or one that intuitively reflects the clause's demand that the states grant each others' laws *full* faith and credit.⁸¹ 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.⁸²

⁷⁶ See 505 U.S. at 166-68, 173-74; see also *id.* at 180-81 (arguing not that Congress has no constitutional role in mediating interstate disputes but that Congress must do so by regulating directly under its commerce power, not by mandating state regulation).

⁷⁷ 521 U.S. 898, 909 & n. 3 (1997).

⁷⁸ On the importance of institutional competency considerations to federalism, see Post & Siegel, *supra* note ?, at __; Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensatory Adjustments*, 46 William & Mary L. Rev. 1733, 1185-43 (2005). On the need for comparative institutional assessments in constitutional law generally, see Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 196-270 (1994); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885 (2003).

⁷⁹ *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

⁸⁰ *Baker*, 522 U.S. at 663 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)).

⁸¹ 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).

⁸² Compare *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), with *Alaska Packers Assoc. v. Industrial Acc. Comm'n*, 294 U.S. 532 91935), with *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*,

Similarly, 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 for making this determination are immediately apparent: the Clause could require a state to accord citizens of other states a predetermined set of rights, or the Clause could mean that a state must grant other states' citizens the same rights and privileges it grants its own citizens. The Court early on rejected the former, natural law, account of the Clause for the latter, equal protection, view, but it also has rejected the view that the Clause prohibits all distinctions between in-state and out-of-state residents. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States."⁸³ As a result, the Court has held that the Clause only protects fundamental rights, by which it means those rights that are "basic to the maintenance or well-being of the Union."⁸⁴ The Court's efforts to determine what this standard means in practice are again not the model of consistency; it has held that states can impose discriminatory recreational license fees but not commercial license fees,⁸⁵ and that resident-hiring requirements for state-funded projects trigger the Clause notwithstanding the exemption of such requirements from dormant Commerce Clause analysis under the market participant exception.⁸⁶

Inconsistencies and theoretical tensions are also evident in the Court's dormant Commerce Clause jurisprudence. One question with which the Court has struggled nobly, for example, is in distinguishing a state's legitimate use of its resources to favor its own

306 U.S. 493 (1939); see Kramer, *supra* note ?, at 1977-78; Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 Wash. & Lee L. Rev. 47, 51-57 (2001). Moreover, addressing this inconsistency through judicial construction of uniform federal choice of law rules in cases based on state law was precluded by *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941), which held such development of such rules was inconsistent with *Erie's* rejection of general federal common law.

⁸³ *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868). For the argument that the Court erred in rejecting the natural law view, see Chester J. Antineau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967). But see Bogen, *supra* note ?, at 841-45 (arguing that the natural law interpretation is inconsistent with the structure and history of Article IV).

⁸⁴ *Baldwin*, 436 U.S. at 388.

⁸⁵ Compare *Baldwin*, 436 U.S. at 388 (upholding discriminatory fees in hunting licenses where used for sport) with *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) (invalidating discriminatory commercial fishing license fees)

⁸⁶ Compare *United Building Constr. Trades Council v. Camden with White*. For efforts to rectify the analytic gap that exists as a result of the Court's failure to explain why some state discriminations are constitutional under the Privileges and Immunities Clause and some not, see Laycock, *supra* note ?, at 270-73; Varat, *supra* note ?, at ___.

from unconstitutional protectionism.⁸⁷ While the Court has developed mechanisms that increase its decisional consistency, such as its rule that facial discriminatory measures are virtually per se invalid, these mechanisms are prone to criticisms of their own. Measures can be facially discriminatory but not protectionist or otherwise at odds with the values the dormant Commerce Clause is intended to protect, whereas facially neutral measures may on closer inspection appear pernicious.⁸⁸ Not surprisingly, the Court's handiwork is often held up for criticism as empirically flawed, or worse, constitutionally illegitimate.⁸⁹

Part of the explanation for the Court's difficulties is that the practical import of these constitutional provisions is not clear, hardly a problem unique to the interstate relations context nor one that in general suffices to call the propriety of judicial involvement into question. But part of the explanation is also that applying these provisions requires the Court to make determinations that it is institutionally ill-equipped to make. Identifying violations often turns on assessing the relative burdens and benefits of discriminatory measures and the importance of interstate uniformity or equality in particular contexts. Such determinations intuitively fall more within Congress' competency than the Court's. Congress' factfinding capacity allows it to investigate particular areas and legislate on discrete problems as they emerge, such as interstate child custody disputes, without facing the challenge of devising rules capable of some degree of principled application. Moreover, past experience supports the view that Congress (particularly Congress combined with federal administrative agencies) is more competent in this area, as the

⁸⁷ Compare *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) with *White v. Massachusetts*. For a discussion of this issue, see Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 Yale L.J. 965 (1998). The Court will make another attempt at clarifying this question this Term in *Cuno v. Daimler-Chrysler*, [CITE], but the case may end up dismissed on standing grounds.

⁸⁸ See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (Scalia, J., dissenting); *Minnesota v. Clover Leaf or Exxon* (flat bans that had a disproportionate burden out of state). Nor is it always clear when a measure is facially discriminatory. *C & A Carbone* [CITE].

⁸⁹ See Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217, 234-51 (arguing that the Court fails to accurately identify discriminatory state legislation); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 Cardozo L. Rev. 1745, 1754-61 (1991) (arguing that Court is unable to identify instances where discrimination may be beneficial). For broader criticisms, see *Tyler Pipe Indus. v. Washington*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and concurring in the judgment) (arguing that dormant Commerce Clause jurisprudence is unjustified if it goes beyond invalidating discriminatory state regulation); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, ___ (1997) (Thomas, J., dissenting) (arguing that the entire dormant Commerce Clause inquiry is unjustified and should be replaced by application of the Import-Export Clause to domestic legislation) (CHECK); Eule, *supra* note , at (arguing judicial intervention in defense of Congress's regulatory prerogatives is no longer justified given the breath of federal regulation and the availability of administrative agencies); Regan, *supra* note , at 1110-43, 1174-82, 1284-87 (arguing that the only justified inquiry in movement of goods cases is one into whether state legislation was enacted out of purposeful protectionism, and that this reflects the Court's actual practice, notwithstanding its stated adherence to a balancing test). For a defense of the dormant Commerce Clause, see Collins, *supra* note ?.

Court has demonstrated little sophistication in identifying discriminatory state legislation under the dormant Commerce Clause.⁹⁰

In addition, Congress' political accountability makes it a better barometer of when interstate restrictions threaten national union and when they do not, as well as gives it greater legitimacy in legislating substantive limits on the states.⁹¹ The claim that political safeguards are adequate to guard against congressional encroachment on the states has come in substantial criticism.⁹² But the case for political safeguards has more merit in the interstate relations context, at least when Congress acts to authorize state discrimination. As William Cohen cogently put it over twenty years ago, whatever debate exists about the adequacy of political safeguards as a check on Congress imposing excessive restrictions on the states, "it is harder to argue that there is a need to monitor decisions by the national legislature that exalt state power at the expense of national power."⁹³ It merits noting in this regard that Congress has not authorized all that much state discrimination against interstate commerce, despite its long-established power to do so.⁹⁴ DOMA and recently proposed measures may suggest that Congress is becoming more willing to sanction state discrimination, but it is still a leap to conclude that these measures demonstrate the failure—as opposed to the proper functioning—of political safeguards.

B. *Article IV's Text and History Do Not Preclude Granting Congress Broad Power Over Interstate Relations*

These arguments for according Congress broad control over interstate relations, including the power to contract or expand the interstate prohibitions imposed on the states by the Constitution, are largely structural. They rest ultimately on claims about the relationship between Article I and Article IV, as well as inferences from the powers

⁹⁰ See, e.g., Heinzerling, *supra* note ?, at 234-51; Friedman, *supra* note ?, at 1756-60 (arguing for the institutional advantages of agencies).

⁹¹ See Gottesman, *supra* note ?, at 21-22.

⁹² See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, ___ (1985) (holding that political processes provide primary protection against federal impositions on the states); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial review of Federalism Issues*, 80 Nw. U. l. Rev. 577, 622-31, 635-46 (1985).

⁹³ Cohen, *supra* note ?, at 406; see also David Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 191 (critiquing rule that Congress cannot adopt existing nonuniform state admiralty laws).

⁹⁴ *But see* Williams, *supra* note ?, at 2. One complication in assessing how willing Congress is to authorize state discrimination is that the Court is reluctant to read Congress as authorizing such discrimination, requiring a clear and fairly specific statement from Congress before it will find Congress has authorized state discriminatory legislation. See *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

granted Congress under these articles and the nature of the federal role in the interstate context. Significantly, however, nothing in the Constitution’s text and history, or for that matter in the Court’s precedent, precludes this view of Congress’ powers. Regarding the commerce power, this should come as no surprise, given the absence of textual references to the states and the little attention the Commerce Clause received at the constitutional convention—not to mention the Court’s longstanding and frequently reaffirmed view that Congress can authorize state violations of the dormant Commerce Clause.⁹⁵

But Article IV seems at first a different story. Two textual points—the linkage of the Full Faith and Credit and Effects Clauses, and the absence of any express grant of power to Congress in Section 2—appear to counsel against inferring broad congressional authority over Article IV’s scope, as does the historical role of the article in achieving union. In fact, however, Article IV’s text and history do not preclude—and indeed, can be read to support—granting Congress broad control over the scope of the article’s interstate prohibitions.

1. *The Text and History of the Effects Clause.* The Effects Clause itself is broad and unconditional in tone.⁹⁶ The only express condition imposed by the Clause is that Congress must proceed by means of “general laws.” The import of this requirement is somewhat ambiguous; “general laws” could alternatively be read as preventing measures targeting a specific state’s laws or a specific judgment (akin to Constitution’s prohibitions on bills of attainder⁹⁷) or instead as limiting Congress’ ability to target a narrow category of laws and judgments for special treatment.⁹⁸ The former seems the better reading. The alternative view requires some constitutional yardstick against which the breadth or narrowness of congressional legislation will be adjudged. How that 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

⁹⁵ See [CITES] Abel/Rakove/Anderson on lack of discussion at the convention. To be sure, some commentators have questioned the breadth of the commerce power, insisting that it was originally intended to be far narrower than it is today. See[CITES: Barnett; Pusey & in Iowa; Abel.] But these arguments do not challenge the view that, as to matters within the commerce power’s proper scope—however narrowly that is defined—Congress can authorize state violations of the dormant Commerce Clause. Similarly, Tom Colby’s recent argument that the framers intended Congress to have to legislate uniformly under the Commerce Clause does not take issue with this aspect of Congress’ power. [CITE] Norman Williams offers the most direct attack on Congress’ ability to authorize dormant Commerce Clause violations, but his argument is largely structural, and is responded to above. [CITE]

⁹⁶ U.S. Const., art. IV, § 1 (“It provides that “the Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”)

⁹⁷ U.S. Const. art I, §§ 9, 10.

⁹⁸ For a discussion of the meaning of the general laws requirement, see Julie L. B. Johnson, *Comment, The Meaning of “General Laws”: The Extent of Congress’ Power Under the Full Faith and Credit Clause and The Constitutionality of the Defense of Marriage Act*, 145 U. Pa. L. Rev. 1611, 1639-43 (1997); *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Judiciary Comm., 104th Cong. 42, 57* (1996) (Letter from Michael W. McConnell to Senator Orrin G. Hatch).

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 requirements, and a similar approach is appropriate here.⁹⁹

Either way, however, by itself the “general laws” provision would not prevent Congress from providing that broad classes of acts, records, and proceedings should receive more or less credit than they would under the Full Faith and Credit Clause alone. Similarly, nothing in the phrase “the effect thereof” precludes reading the Clause as granting Congress broad power over the scope of the Constitution’s full faith and credit demand. On its face this language seems perfectly compatible with Congress determining that certain state laws and judgments should receive greater credit than they would absent congressional action, as well as with concluding that their effect should be nil.¹⁰⁰ A useful contrast here is to Section 5 of the Fourteenth Amendment, where the grant of power to Congress to “enforce” the amendment’s substantive protections does imply that

⁹⁹ See, e.g., *Helverig v. Davis*, 301 U.S. 619, ___ (1937) (stating, in rejecting a challenge to spending measure as not for the general welfare, “[t]he line must still be drawn between . . . particular and general. Where this shall be placed cannot be known through a formula in advance. . . . The discretion belongs to Congress, unless the choice is clearly wrong.”); *regional Rail Reorg’n Act Cases*, 419 U.S. 102, 158-59 (1974) (holding that bankruptcy statute applying only to eight railroads in a particular geographic region did not violate the “uniform laws” requirement of the Bankruptcy Clause).

Bankruptcy is a particularly pertinent analogy here. The general laws requirement is textually similar to the requirement of “uniform laws” in bankruptcy; indeed, the congressional power over bankruptcy provision was first proposed during discussion on the Full Faith and Credit Clause. 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 bankruptcy laws specific to particular types of contexts. *Railway Labor Execs’ Ass’n v. Gibbons*, 455 U.S. 457, 471-72 (1981). By analogy, the general laws requirement of the Effects Clause suggests concern with full faith and credit demands that target particular judgments or states.

¹⁰⁰ Laurence Tribe has argued otherwise, maintaining 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.” Tribe, *supra* note ?, at S5392. Tribe’s argument appears to be that “the effect thereof” requires that at least *some* effect be given, but this seems a strained reading; no effect is one form of effect. See McConnell, *supra* note ?, at 57 (“To ‘prescribe the effect’ of something is to determine what effect it will have. In the absence of powerful evidence to the contrary, the natural meaning of these words is that Congress can prescribe that a particular class of acts will have no effect at all.”). Moreover, despite his caveat to the contrary, Tribe’s argument appears to mean that Congress is precluded from prescribing that a state’s acts, records, or proceedings have no effect in certain circumstances even if that result is what would obtain directly under the Full Faith and Credit Clause, which seems an implausible result. For similar views that the words “effect thereof” do not preclude Congress from providing that laws or judgments should receive less credit than they otherwise would be accorded, see Daniel Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and the Implications for the Defense of Marriage Act*, 6 Geo. Mason L. Rev. 307, 313 (1998); Corwin, *The Constitution and What It Means Today* 255 (14th ed.).

congressional enactments dramatically restricting or expanding these protections would be invalid.¹⁰¹

Instead, the textual basis for viewing Congress' power under the Effects Clause as limited comes from the Full Faith and Credit Clause. The two clauses are closely linked, with the Effects Clause even textually referring to the Full Faith and Credit Clause.¹⁰² Several commentators have argued that the mandatory and uncompromising nature of the Full Faith and Credit Clause militates against reading the Effects Clause as allowing Congress to limit the credit that otherwise would be due state judgments and laws. As Larry Kramer has put it, the "unqualified 'full' and mandatory 'shall' [of the former clause] lose some (though obviously not all) of their meaning if Congress can simply legislate the requirement away."¹⁰³

To be sure, the presence of express prohibitions on the states in the Full Faith and Credit Clause—as well as in the provisions of Article IV's Section 2—marks an important difference between Article IV and the Commerce Clause. In the end, however, reading Congress as limited by the terms of the Full Faith and Credit Clause is not a plausible account. One obvious point against such a reading is the fact that nowhere is Congress expressly subjected to the full faith and credit requirement; instead, that requirement by its terms applies only to the states. More significantly, reading Congress as so limited has perverse consequences, and indeed renders the Effects Clause largely nugatory as a means

¹⁰¹ U.S. Const. amend XIV, § 5; see *City of Boerne v. Flores*, 521 U.S. 507, __ (1997); Mark Strasser argues to the contrary that *City of Boerne* and the Section 5 power support viewing Congress' power to deny effect to laws and judgments as limited, but does not address whether "enforce" and "effect" carry the same limiting connotations. See Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 Brook. L. Rev. 307, 326 (1998); see also Letter for Laurence H. Tribe to Senator Edward M. Kennedy, 142 Cong. Rec. S5931, S5933 (daily ed. June 6, 1996) (maintaining that Congress' enforcement power under section 5 represents "perhaps the closest analogy" to its Effects Clause power but not discussing textual differences between the two); compare McConnell, *supra* note ?, at 57-58 (contrasting meaning of "enforce" and "prescribe. . . effect"). This is not to claim that Section 5's "enforce" language is appropriately read as giving Congress very limited power to deviate from judicial constructions of the Fourteenth Amendment. As others have argued, some congressional deviations—both in the form of expansions of Fourteenth Amendment rights and to some extent contractions—arguably fall with the meaning of "enforce." See, e.g., William Cohen, *Congressional Power to Interpret Due process and Equal Protection*, 27 Stan. L. Rev. 603, 606-08 (1975) [Hereinafter Cohen, *Congressional Power*]; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 199-201, 206-11, 228-29 (1971). Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 161-63, 169-74 (1997). The point here is simply that "enforce" does impose some constraints on Congress that are absent in the Effects Clause context.

¹⁰² Indeed, often both clauses are singly referred to as the Full Faith and Credit Clause. See, e.g., [DOMA case]. The Effects Clause is separately identified here for the sake of clarity.

¹⁰³ Kramer, *supra* note ?, at 2004; see also Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1, 21 (1997) ("The second sentence [of the Full Faith and Credit Clause] should not be read in a way that contradicts the first."); Strasser, *supra* note ?, at 308-13 (same).

of mediating conflicting choice of law rules among the states. Under this reading, Congress would lack power to specify which acts or laws should receive full faith and credit in any context where the laws or judgments of more than one state have a legitimate claim to recognition, because a necessary corollary of Congress' doing so is to deny effect to the laws and judgments not meeting the congressional criteria.¹⁰⁴ The result would be to disable Congress from acting under the Effects Clause in cases of "true conflicts"—exactly the contexts where congressional action is needed to ensure uniformity.¹⁰⁵

The drafting history of the two clauses further undermines the claim that Congress is bound by the full faith and credit demand.¹⁰⁶ As the clauses emerged from the Committee on Detail, Congress was limited to determining the effects of judgments; more importantly, Congress' responsibility to legislate in the area was mandatory, whereas the initial full faith and credit instruction to the states was hortatory.¹⁰⁷ In the ensuing debate, the convention expanded the Effects Clause to grant Congress power to specify the effect of acts and records as well as judicial proceedings, and at the same time adopted a proposal by Madison to reverse the mandatory and discretionary character of the two clauses.¹⁰⁸ This simultaneous move to make the Full Faith and Credit Clause mandatory

¹⁰⁴ See McConnell, *supra* note , at 58; Sack, *supra* note ?, at 893.

¹⁰⁵ See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L. J. 1, 5-6 (1991) (defining true conflicts as those situations where more than one state has an interest in applying its law).

¹⁰⁶ The Effects Clause engendered little comment during the ratification debates, see Kramer, *supra* note ?, at 2004, and thus the history of its drafting from the constitutional convention is the main record of how it was understood.

¹⁰⁷The Effects Clause originated in a suggestion by James Madison that Congress "might be authorized to provide for the execution of judgments," with Madison stating that he thought such a role for Congress "was justified by the nature of the Union." 2 FARRAND, *supra* note ?, at 448. Only Randolph objected, arguing "there was no instance of one nation executing the judgments of another nation." He instead proposed language, which the convention did not adopt, specifying how acts of a state would be proven and when such acts would be binding. *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, however, the version that subsequently 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.

¹⁰⁸ *Id.* at 488-89. While this drafting history appears to support a broad view of Congress' Effects Clause power, Lynn Wardle overstates the case in claiming that this history "clearly refutes" the view that Congress' Effects Clause power is limited to expanding the full faith and credit obligation. Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 Creighton L. Rev. 365, 410-15 (2005). While it is true that the framers adopted a more expansive phrasing of the Effects

and the Effects Clause discretionary weighs against reading the former's mandatory language as aimed at Congress. A more logical explanation is that the framers sought to make full faith and credit self-executing, to ensure that congressional inaction did not prevent enforcement of the full faith and credit demand, but intended to leave Congress with power to legislate regarding the effects of laws and judgments if it so chose.¹⁰⁹

2. *Section 2's Textual Silence Regarding Congress.* Perhaps the most notable feature of Article IV's text, from the perspective of Congress' powers, is the absence of any reference to Congress in Section 2 of the article. This absence is particularly salient given that all of the surrounding sections of Article IV expressly grant Congress power to act. Section 2's lack of a textual grant of congressional power also stands in sharp contrast to Section 10 of Article I, which as noted above authorizes Congress to waive a variety of prohibitions on the states.¹¹⁰ Particularly given the enumerated powers limitation on the federal government, the omission of any reference to Congress in Section 2 appears dispositive: Congress lacks any power to implement Section 2 or alter the scope of its requirements on the states.

The Court, however, has not viewed Section 2's silence as dispositive. The Court has never addressed the question of Congress' powers under the Privileges and Immunities Clause, either to implement the Clause's protections or to authorize states to violate its requirements.¹¹¹ But it has long held that Congress has power to enact legislation to

Clause than Madison at first proposed or than came out of the Committee on Detail, the historical evidence also indicates that they viewed the Effects Clause as a means of ensuring that the Constitution's full faith and credit demand in the Articles of Confederation. *See infra* note 116; *see also* Paige Chamorra, 76 Neb. L. Rev. (reading the history of the Effects Clause to support the claim that Congress can only expand the Constitution's full faith demands).

¹⁰⁹ Andrew Koppelman maintains that the absence of language expressly authorizing Congress to deviate from the mandatory command of the Full Faith and Credit Clause supports concluding that Congress lacks such a power, particularly in comparison to the Exceptions Clause of Article III, which provides that the Supreme Court "shall have appellate Jurisdiction" over most cases coming under the federal judicial power, but adds "with such Exceptions, and under such Regulations, as Congress shall make." U.S. Const., art. III, § 2; Koppelman, *supra* note ?, at 21. But this seems to presuppose the very question at issue: whether the grant of power to "prescribe the effect" should be read as an express grant of power to withdraw certain acts, records, and proceedings from the scope of the full faith and credit demand. In any event, Koppelman's argument works only if the Full Faith and Credit Clause is understood as speaking to Congress, and one notable distinction between the Clause and Article III is that federal court jurisdiction is viewed primarily as a matter of congressional control.

¹¹⁰ *See supra* notes ___ - ___ and accompanying text.

¹¹¹ *See supra* note 7 and accompanying text. The general presumption, however, is that Congress lacks power to authorize violations of the Clause. *See, e.g., Piper v. New Hampshire*, 723 F.2d 110, 113 (1st Cir.) (opinion of Bownes & Coffin, JJ.) (positing that Congress lacks power to abrogate the guarantees of the Privileges and Immunities Clause but offering no analysis); Charles Black, *Structure and Relationship in Constitutional Law* 65 (1985) (arguing the "impersonally preemptory language" of the Privileges and Immunities Clause suggests it might bind Congress); Kathleen Sullivan & Gerald Gunther, *Constitutional Law* 306 (14th ed. 2001) ("[T]he Privileges and Immunities Clause is a rights provision, not a grant of

enforce the remainder of Section 2's demands. *Prigg v. Pennsylvania*,¹¹² a pre-Civil War decision, involved a challenge to the constitutionality of Pennsylvania's personal liberty law, enacted to prevent slaveowners and their agents from kidnaping individuals claimed to be fugitive slaves in Pennsylvania and removing them from the state. In his opinion for the Court holding that Pennsylvania's law was unconstitutional, Justice Story ruled that Congress had not only power but an obligation to enact legislation enforcing the Fugitive Slave Clause of Section 2.¹¹³ This power and obligation followed from the inclusion of the right to enforce delivery of fugitive slaves in the national constitution, and the absence of any express enumeration of congressional authority to act was irrelevant: "The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also."¹¹⁴ Indeed, Story went so far as to hold that Congress'

authority to Congress, and so is arguably nonwaivable by Congress"); 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 (2003) ("[T]he text of the Clause seems to foreclose the ability of Congress to permit discrimination, as it can under the [dormant Commerce Clause doctrine], by clearly delegating that power to the states."); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, __ (acknowledging congressional power to authorize state discrimination but stating, without explanation, that Congress lacks power to authorize state privileges and immunities violations). *But see* Cohen, *supra* note __, at __ (arguing that Congress is not limited by constitutional provisions, such as Article IV, which do not apply to it directly); Eule, *supra* note __, at 455 ("Congress . . . arguably enjoys broader scope to provide for resident/nonresident distinctions than do the states.").

This presumption was reinforced by the decision in *Saenz v. Roe*, 526 U.S. 489 (1999), which involved a challenge to the constitutionality of a California statute limiting newly arrived state residents to the level of welfare benefits they would receive in their prior state of residence until they had lived in California for a year. The Court ruled that the statute violated that part of the right to travel which guarantees "the newly arrived citizen . . . the same privileges and immunities enjoyed by other citizens of the same State." *Id.* at 502-07. In so ruling, the Court quickly dispensed with the suggestion that Congress's authorization of one-year state durational residency requirements of the kind California enacted could render California's statute constitutional. According to the Court, while "Article I . . . grants Congress broad power to legislate in certain areas," the powers therein granted are limited "by the principle that they may not be exercised in a way that violates the Constitution." *Id.* at 508 (internal quotations omitted).

Saenz does not directly address Congress' ability to authorize violations of Article IV privileges and immunities because the Court located the dimension of the right to travel there at issue in the Fourteenth Amendment's Privileges or Immunities and Citizenship Clauses; moreover, the Court emphasized that the Fourteenth Amendment's protection for the right to travel rooted was more absolute than Article IV's. *See id.* at 502-03. Nonetheless, the fact that the Court was so dismissive of the possibility that Congress authorize violations of constitutional prohibitions, combined with the shared link of the right to travel, implicitly suggest that congressional authorization of state violations of the Privileges and Immunities Clause would not meet a hospitable reception. *See* Laurence H. Tribe, 1 *American Constitutional Law*, __ (3d ed. 2000); Williams, *supra* note __, at __. For greater discussion of *Saenz* and the distinctions between the Fourteenth Amendment and Article IV, *see* Parts III and II.B, respectively.

¹¹²41 U.S. 59 (1842).

¹¹³ *See id.* at 615-16.

¹¹⁴ *Id.* at 618-19.

power to enforce the Fugitive Slave Clause was exclusive, precluding states from legislating on the subject. The Court reached a similar conclusion regarding Section 2's Extradition Clause in *Ex Parte Kentucky v. Dennison*, where it ruled that duty to “provid[e] by law the regulations necessary to carry [it] into execution . . . manifestly devolved upon Congress.”¹¹⁵ *Dennison*'s conclusion that Congress has power to legislate under the Clause has withstood the test of time, with recent decisions reaffirming Congress' power to enact extradition legislation.¹¹⁶

More to the point, focusing on the presence or absence of express grants of congressional power in Article IV ignores a key part of the textual equation: grants of congressional power elsewhere. In fact, the Constitution *does* contain an express textual grant of power to regulate much of the subject matter that arises under Article IV's Section 2, or at least under the Privileges and Immunities Clause,¹¹⁷ that grant being the Commerce Clause of Article I. When read against the background of Article I, Section 2's silence regarding Congress ends up supporting congressional power to authorize state violations of its provisions. Given their obvious topical overlap, if the Privileges and Immunities Clause were intended to limit Congress in its exercises of its Commerce Clause power, one would expect that intent to be stated clearly in Article IV's text. At a minimum, the textual question changes once Article I is added to the picture. Instead of being whether Section 2's silence regarding Congress precludes Congress from legislating regarding the states' privileges and immunities obligations, the textual question becomes whether this silence serves to limit Congress' otherwise broad power to act under the Commerce

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

¹¹⁶ *See, e.g., Printz v. United States*, 521 US 898, 908-09 & n.3 (1997) (distinguishing Congress' imposition of duties on state officials under the Extradition Act as being “in direct implementation . . . of the Extradition Clause of the Constitution itself” and authorized by the Effects Clause); *California v. Superior Court*, 482 U.S. 400, 407 (1987) (reaffirming *Dennison*'s holding regarding congressional power); *see also New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 152 (1998) (per curiam) (“The Extradition Act provides the procedures by which th[e] constitutional command [of the Extradition Clause] is carried out.”). *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.*

¹¹⁷ Extradition of criminal fugitives is much harder to classify as coming under the Commerce Clause, *see United States v. Morrison*, 529 U.S. 598 (2000) (rejecting the claim that the economic effects of violent crime suffice, on their own, to bring such activity within the commerce power), although conceivably reachable on the theory that extradition necessarily utilizes channels and instrumentalities of interstate commerce or in regard to economic crimes. Extradition of fugitive slaves would seem an easier fit, notwithstanding the local character of slavery regulation, given the property status of slaves.

Clause. No textual reason exists to interpret Section 2's silence differently in these two contexts. Hence, if silence on the role of Congress precludes Section 2 from authorizing congressional action, then the same silence should also preclude it from limiting congressional exercise of powers elsewhere granted.

3. *The Union-Forging Purpose of Article IV.* The provisions that ultimately became Article IV, particularly the prohibitions on interstate discrimination contained in the Article's first two sections, provoked little discussion at either the constitutional convention or during ratification. No doubt a major explanation was the close similarity between these antidiscrimination requirements and those already contained in the Articles of Confederation.¹¹⁸ It is nonetheless clear that the framers intended the article, especially Sections 1 and 2, to help bind the states into closer union. This is evident in part from their 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."¹¹⁹ It is equally attested to by the framers' motivating concern that interstate economic discrimination had become rampant.¹²⁰ The Court has

¹¹⁸ Thus, the text of Full Faith and Credit and Extradition Clauses are essentially identical to their forebears in the Articles. See Articles of Confederation art. IV paras. 2, 3 (1777). One difference is that under the Articles, the full faith and credit obligation extended to judicial determinations—"the records, acts and judicial proceedings of the courts and magistrates"—while the Constitution extended the obligation to cover legislative proceedings by including a state's "public Acts" within its scope as well as its "Records, and judicial Proceedings." This inclusion of a state's legislation within the full faith demand did not, however, spark debate, and was present from the Clause's first appearance as Article XVI in the August 6th draft. See Kramer, *supra* note ?, at 2004 n.139.

Although also closely similar to the privileges and immunities protection in the Articles, the Privileges and Immunities Clause excluded language in the Articles' version that expressly guaranteed "free ingress and regress," "all the privileges of trade and commerce," and a nonresident's right to remove property from a state. Art. Confed. art. IV para. 1; see also David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. L. Rev. 794, 796-832 (1986) (describing history of the Articles' privileges and immunities protections and predecessors in colonial charters and English law). The deletion of this additional language, however, seems not to have been intended to alter the provision's substantive meaning. No discussion of the differences between the proposed clause and its Articles forebear is reported in the convention record. See Bogen, *supra* note ?, at 834-40 (detailing instances in which the Privileges and Immunities Clause was discussed). In the *Federalist*, Madison remarked on the "confusion of language" and redundancies in the Articles' version, suggesting that the additional language was omitted in part for clarity's sake. *Federalist* 42, *The Federalist Papers* 269-70 (Clinton Rossiter, ed. 1961); Bogen, *supra* note ?, at 835-36. An additional explanation for the omission was the new grant of power to Congress to regulate interstate commerce. The ability to guard against discriminatory state commercial regulation through congressional legislation provided another reason to view inclusion of a specific prohibition against discrimination in the Privileges and Immunities Clause as unnecessary. See Bogen, *supra* note ?, at 835-36. Indeed, the Supreme Court has identified the Articles' requirement that states not discriminate against people from other states in regard to trade and commerce as the origin of the Constitution's Commerce Clause. See *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978); *Baldwin Fish & Game Comm'n*, 436 U.S. 371, 379-80 (1978).

¹¹⁹ Art. Confed., art. IV. cl. 1. (1777).

¹²⁰ See [CITES] Collins, etc. on perceived discrimination; see also Thomas Lee, *Nw U. L. Rev.* (Article IV as imposing international law recognition requirements on the states).

frequently emphasized this focus on uniting the states, describing the interstate provisions of Article IV as animated by the purpose of making the states “integral parts of a single nation”¹²¹ and constituting “an essential part of the Framers' conception of national identity and Union.”¹²²

The central importance placed on these clauses for securing union counsels against Congress having power to contract their antidiscrimination prohibitions on the states. It seems more likely, given their overall concern to create a stronger and more unified nation than had existed under the Articles, that the framers gave power to Congress so it could augment Article IV's interstate demands. The Effects Clause, for example, seems motivated by the framers' belief that congressional power was needed to ensure that the Full Faith and Credit Clause had real practical bite.¹²³ This would lead, for example, to a one-way ratchet view of the Effects Clause, under which Congress can expand, but not contract, the Constitution's full faith and credit demand.¹²⁴

Yet the historical record also provides evidence against this limited view of Congress' powers. One notable point is that none of the grants of congressional power in Article IV sparked much concern or debate, notwithstanding that all these grants represented departures from the article's progenitor in the Articles of Confederation and

¹²¹ *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (addressing the Full Faith and Credit Clause); see also *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (same); *Estin v. Estin*, 334 US 541, 545-46 (1948) (describing the clause as having “substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns.”).

¹²² *California v. Superior Court* 482 U.S. 400, 403 (1987) (addressing the Extradition Clause); see also *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 380-81 & n.19 (1978) (stating of the Privileges and Immunities Clause: “No provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in other States, . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”) (quoting *Paul v. Virginia*, 8 Wall. 168, 180-81 (1869)). In the *Federalist*, Hamilton spoke in similar terms, stating that the Privileges and Immunities Clause “may be esteemed the basis of the Union” and justifying Article III's grant of diversity jurisdiction as needed to ensure “the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled.” *Federalist* 80 (Hamilton), *supra* note ?, at —.

¹²³ See, e.g., Kramer, *supra* note ?, at 2006; Tribe, *supra* note ?, at S5932. Support for this view is offered by Madison's commentary on the Effects Clause in the *Federalist Papers*. After identifying the Effects Clause as falling into the class of powers given the federal government in order to “provide for the harmony and proper intercourse among the States,” Madison stated that Congress' power under the Clause “was a marked improvement on the clause relating to this subject in the Articles of Confederation. The meaning of the latter is extremely indeterminate” and “[t]he power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous states.” *Federalist* 42, *supra* note ?, at 271.

¹²⁴ For articulations of this one-way ratchet view, see Chamorra, *supra* note ?, at —; Strasser, *supra* note ?, at —; Tribe, *supra* note ?, at S5932.

on their face appeared to grant Congress broad authority.¹²⁵ Indeed, the drafting history of the Effects and New State Clauses demonstrates efforts by the convention to expand Congress' powers.¹²⁶ Concerns about the potential breadth of federal power were really only raised in regard to the Guarantee Clause,¹²⁷ but the debates also show that even there general agreement existed on the importance of including such a federal guarantee.¹²⁸

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.¹²⁹ Yet the lack of debate may also reflect that the framers believed that granting Congress discretion over interstate relations was a better means of

¹²⁵ For discussions of the drafting history of the Effects and New State Clauses, *see supra* notes ___ - ___. The Territory and Property Clause emerged out of debate over the New State Clause. Maryland and other small states opposed the addition to that Clause of territorial protections for existing states, viewing it as large state protectionism at the expense of small states. Their objections led Gouverneur Morris to propose language nearly identical to the current Territory and Property Clause to what was then the new state article. *See id.* at 466. Despite the facial breadth of the proposed clause, Morris' amendment passed without much debate, and the Territory and Property Clause also largely escaped comment during ratification. *See Appel, supra* note ___, at 25-30. Morris was not the first to suggest such a power; earlier Madison had proposed giving Congress power to "dispose of unappropriated lands" and "institute temporary Governments for New States arising therein." 2 FARRAND, *supra* note ___, at 324. As David Currie has argued, the choice of Morris' more general and empowering phrasing "suggest[s] the propriety of a broad construction." David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-64*, 1983 Duke L. J. 695, 734 n. 251.

¹²⁶ *See supra* notes ___ - ___ and accompanying text.

¹²⁷ For example, only Edmund Randolph opposed Morris' motion to expand Congress' Effects Clause power to cover laws and records on the grounds that that Congress' powers would be too broad. 2 FARRAND, *supra* note ___, at 489.

¹²⁸ 2 FARRAND, *supra* note ___, at 466-67, 628-29; *see also* Wiecek, *supra* note ___, at 60-62. This concern surfaced in debate over whether the state executive as well as the state legislature should be allowed to invoke the Guarantee Clause's protections. 2 FARRAND, *supra* note ___, at 466-67, 628-29; *see also* Wiecek, *supra* note ___, at 60-62. Concerns about the Guarantee Clause's breadth were not echoed during ratification, where the dispute was instead over whether the Clause's protections went far enough. *See* Wiecek, *supra* note ___, at 63-73; *see also* Arthur Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 519-22 (1961). Both Madison and Hamilton defended the Clause as intended to provide the states with federal protection against internal violence and usurpation of power by a minority, in order to counter fears that the Clause would justify "official [federal] interference in domestic concerns." Federalist 21 (Hamilton), *supra* note ___, at 139-40; Federalist 43 (Madison), *supra* note ___, at 275 (arguing that the Clause would not preclude the States from choosing a new form of government, as long as "they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered a grievance"). Indeed, what the framers and ratifiers thought republican government meant is not clear. *See* Wiecek, *supra* note ___, at 17-18, 27-50, 55-56; Bonfield, *supra*, at 517-19.

¹²⁹ Albert (?) Abel makes a similar argument regarding the Commerce Clause, maintaining that Congress' power over interstate commerce provoked little discussion because the framers expected it would rarely be exercised. [CHECK & CITE]

achieving union than relying on absolute constitutional prohibitions. Support for the latter 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.¹³⁰ Yet the framers chose to address these areas of potential interstate contention through granting broad power to Congress. This point holds even more clearly in regard to the framers' choice to address interstate commercial discrimination primarily through vesting the commerce power in Congress. Providing Congress with this power was viewed by many delegates as one of the Constitution's most important achievements,¹³¹ and was understood as a means of securing union and regulating relations among the states.¹³²

In the end, however, the most that reliably can be claimed is that the historical record of Article IV's drafting and ratification is simply too limited to support conclusive assertions one way or another. As a result, analysis of Congress' power over the article's interstate prohibitions ultimately must rest on other sources of constitutional meaning.

II. LIMITS ON CONGRESS' POWERS OVER INTERSTATE RELATIONS

The foregoing justifies granting Congress broad power over interstate relations and the scope of Article IV's requirements. In particular, the Constitution establishes Congress as the best judge of what is in the interests of union and the nation. But that leaves the question of how broad is Congress' power in this area. Are there any limits on Congress' ability to structure interstate relations and contract or expand the antidiscrimination demands the Constitution imposes on the states? State sovereignty might seem a likely source of such constraints, yet in fact it supports little meaningful curtailment on Congress' control of interstate relations. Individual rights guarantees represent a more potent restriction on Congress, but only those guarantees that have significant weight independent of the interstate context play this limiting role.

¹³⁰ See *supra* notes 40-41 and accompanying text.

¹³¹ See *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1871); *Brown vv. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827); Federalist 42 (Madison), *supra* note ?, at 267-68; Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 443-46 (1941)(detailing consensus on the value of the commerce power).

¹³² For example, Madison laid weight on the commerce power in his list of congressional powers that "provide for harmony and proper intercourse among the States" and also justified the commerce power in part on the grounds that other states' experience proved the "necessity of a superintending authority over reciprocal trade of confederated states." Federalist 42 (Madison), *supra* note ?, at 267-68. Of course, even here contrary evidence exists of how Congress' powers were understood, with Madison remarking in an 1829 letter that the commerce power "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged." Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *reprinted in* 3 FARRAND, *supra* note ?, at 478; see also Abel, *supra* note ?, at 450-51, 470-76 (arguing that the commerce power was understood narrowly as a means of preventing interstate discrimination).

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

To what extent does state sovereignty limit Congress' ability to regulate interstate relations and expand or contract the demands of Article IV? Answering this poses an antecedent difficulty, namely establishing the meaning of state sovereignty. A variety of definitions are possible, ranging from power to set regulatory policy independently to freedom from federally-imposed financial penalties.¹³³ An additional complication is that state sovereignty as it is relevant to Congress' power over interstate relations involves determining what constitutes undue interference in a state by its sister states as well as by Congress.

Examination of federalism case law suggests three overlapping yet distinct principles of state sovereignty: state autonomy, state equality, and state territoriality or the requirement of territorial limits on state authority (most frequently expressed in the form of a prohibition on extraterritorial state regulation). All three represent basic principles of federalism, and all three lie imminent in the New State and Guarantee Clauses of Article IV, thus reinforcing the benefits of considering the article as a whole. None, however, ultimately supports robust limits on Congress's powers to order interstate relations.

1. State Autonomy. State autonomy is a highly amorphous concept; limning its meaning and practical import is an important challenge of federalism. 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.¹³⁴ 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 fundamental to our federal order, this horizontal dimension of state autonomy lies largely implicit in the Constitution.¹³⁵ Indeed, the same is true of state autonomy as a constraint on direct regulation of the states by the federal government,

¹³³ See Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 Tex L Rev. 1, 13-50 (2004).

¹³⁴ Decisions such as *National League of Cities v. Usery* [CITE] 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, 168-69 (1992), the latter. See Young, *supra* note , at 13-15, 23-32 (defining state autonomy and contrasting autonomy and immunity models of federalism).

¹³⁵ Thus, for example, this horizontal aspect of state autonomy is embodied in the frequent description of our system as one of *dual* sovereignty, state and federal, see *New York/U.S. Term Limits* (AMK concurrence), and not tripartite (state, regional, federal); in the Constitution's provision for multistate government through interstate compact, thus requiring state (as well as congressional) consent, see, e.g., U.S. Const. art. I. § 10; and in the Tenth Amendment's statement that "The powers not delegated to the United States by this Constitution, nor prohibited to the States, are reserved to the States *respectively*." (emphasis added).

which must be inferred from the Constitution's diverse grants of protection to state governments or the principle of enumerated powers combined with the Tenth Amendment.¹³⁶ One of these sources is Article IV's Guarantee Clause. As Deborah Jones Merritt has argued, although the Guarantee Clause authorizes federal intervention in the states, it also supports the principle of state autonomy in mandating that the federal government respect state self-government. Indeed, from one perspective the Guarantee Clause's support for state autonomy is particularly significant; it does not simply allow the states to exercise powers not granted elsewhere, or offer a shield against certain federal intrusions, but imposes a positive duty on the federal government to protect a state's right to self-government and internal security.¹³⁷

Fundamental though it may be, however, the principle of state autonomy does not easily translate into meaningful constraints on congressional control over interstate relations. As discussed above, congressional relaxation of Article IV duties seems likely to foster state autonomy by allowing states to pursue regulatory options that are otherwise constitutionally forbidden. It is particularly odd to raise state autonomy as a barrier if the alternative is for Congress itself to impose the discrimination in question, thereby denying states the option of choosing an antidiscriminatory approach. That is not to say that congressional authorization of state discrimination does not also limit state choice. For example, a state may lose the ability to demand that other states treat its citizens like their own or force other states to respect its regulatory choices. But these limits relate more to state equality and extraterritoriality concerns, rather than to a general concern with state autonomy.

State autonomy similarly imposes few limits on congressional expansion of Article IV's prohibitions on interstate discrimination. Again, as noted above, these prohibitions are independently quite substantial, suggesting that the power to discriminate against sister states and their residents is not an important aspect of state autonomy for constitutional purposes.¹³⁸ An additional key point is that the Court has held that Congress can impose duties on the states when it regulates pursuant to the commerce power. True, *Garcia v. San Antonio Metropolitan Transit Authority's* determination that congressional impositions of generally-applicable duties on the states are largely judicially unreviewable provoked sharp dissents, and the subsequent decision in *Printz v. United States* could have been read as an effort to overrule *Garcia* sub silencio.¹³⁹ But notwithstanding its

¹³⁶ See *Printz v. United States*, 521 U.S. 898, *2376 (1997).

¹³⁷ For the strongest exposition of this view, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, __ (1988); see also David Shapiro, *Federalism: A Dialogue* __ (19__) (agreeing that the Guarantee Clause offers strong support for some form of state autonomy).

¹³⁸ See *supra* Part I.A.3.

¹³⁹ See 469 U.S. 528, 548-55 (1985); see, e.g., *id.* at 579 (Rehnquist, J., dissenting); *Printz*, 521 U.S. at 932; see also Varat, *supra* note ?, at 565-68 (arguing, prior to *Garcia*, that state autonomy concerns

recent federalism revival, the Court has not sought to reconsider directly its decision in *Garcia*.¹⁴⁰ In addition, the Court has fairly consistently sanctioned broad congressional power to regulate the states when they are engaging in commercial activities.¹⁴¹ It did so again in *Reno v. Condon*, its most recent decision addressing this issue, when the Court upheld federal regulation of driver license information compiled by the states.¹⁴²

As long as the Court formally adheres to *Garcia*, congressional expansion of Article IV requirements raises few state autonomy concerns. Notably, the rationales for upholding some forms of state discrimination against Article IV challenges—for example, that the activities in question involve state spending rather than state regulation, the danger of sister-state free riding, or that public policies the state deems fundamental are at stake—do not support a distinction between congressional expansion of Article IV and other regulation of the states under the commerce power.¹⁴³ *Reno* left open the issue of whether Congress can impose state-specific duties when acting under that power,¹⁴⁴ but congressional expansions of Article IV rights seem unlikely to target the states any more than the measure at issue in *Reno*. A congressional measure prohibiting any higher educational institution from charging out-of-state students a larger tuition seems as much a generally applicable statute as one that limits any disclosure of driver license information; no doubt it is overwhelmingly public universities that use such differential tuition rates, but it is also overwhelmingly state motor vehicle departments that generate and sell driver license information.¹⁴⁵

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

under *National League of Cities* may limit Congress' power to expand states' privileges and immunities obligations).

¹⁴⁰ See, e.g., *West v. Anne Arundel County*, 137 F.3d 752, 760-61 (4th Cir.), cert. denied, 119 S. Ct. 607 (1998).

¹⁴¹ See, e.g., *New York v. United States*, 326 U.S. 572 (1946).

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

¹⁴³ See, e.g., *Garcia*, 469 U.S. at 554-56 (upholding application of FLSA notwithstanding financial costs on states), *Crosby v. National Foreign Trades Council*, 530 U.S. 363, 374 n. 8 (2000) (noting Congress can preempt state spending choices); *United States v. Darby*, 312 U.S. 100, 121 (1941) (holding Congress has power to regulate intrastate commerce to insure interstate commerce is not used to foster unfair competition).

¹⁴⁴ 528 U.S. at 146.

¹⁴⁵ State-specific enactments are more likely under the Effects and Extradition Clauses, but such enactment are also clearly sanctioned by the nature of those clauses' requirements.

into play;¹⁴⁶ such measures arguably violate the Guarantee Clause and seem tantamount to destroying the states as distinct political entities. Similarly, the Court's decisions limiting Congress' ability to abrogate states' Eleventh Amendment immunity under Article I would prevent Congress from imposing money damages in suits by private parties for violations of Article IV under its commerce power or Article IV power.¹⁴⁷ But move even a little away from the extremes or settled law, 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.¹⁴⁸ Meanwhile, Congress may have power to abrogate states' Eleventh Amendment immunity regarding Article IV protections that are translatable into Fourteenth Amendment terms, for example as an aspect of due process. The net result is that state autonomy is unlikely to prove a significant limit on Congress' powers to contract or expand the requirements of Article IV and in other ways regulate interstate relations.

2. *State Equality*. The principle of state equality received its most cogent judicial formulation in *Coyle v. Smith*, where the Court held that Congress lacked power to require that Oklahoma make the city of Guthrie its state capital for seven years as a condition of admission into the union.¹⁴⁹ *Coyle* is the most prominent statement of the "equal footing" doctrine, which requires that "a new state is admitted into the Union . . . with all the powers of sovereignty and jurisdiction which pertain to the original states, and such powers may not be constitutionally diminished . . . by any conditions. . . which would

¹⁴⁶ See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978); see also *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972); Laycock, *supra* note , 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.")

¹⁴⁷ See *Seminole Tribe v. Florida*, 517 U.S. 44, __ (1996). Although *Seminole Tribe* did not address Congress' Article IV powers, Article IV similarly antedated the Eleventh Amendment and thus by *Seminole Tribe*'s logic offers no basis for abrogation. Indeed, this result may accord with more limited views of the Eleventh Amendment as being targeted to diversity cases, given the interstate focus of Article IV disputes. For discussions of the diversity view, see *id.* (Stevens, J., dissenting); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan L Rev 1033 (1983).

¹⁴⁸ Cf. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). Indeed, some have argued that such discrimination independently violates the Privileges and Immunities Clause, see [Simpson, U. Pa. L. Rev. CITE.] The Court, although striking resident hire requirements attached to state resources, has not yet gone so far. See *United Building Constr. v. Camden* (holding a resident hiring requirement for government-funded projects trigger searching scrutiny under the Privileges and Immunities Clause but not ruling on whether requirement survived such scrutiny).

¹⁴⁹ 221 U.S. 559, 567, 579 (1911).

not be valid and effectual if the subject of congressional legislation after admission.”¹⁵⁰ In justifying this doctrine the Court stated:

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

...

[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may be a free people, but the Union will not be the Union of the Constitution.¹⁵¹

Although rhetorically powerful, *Coyle* offers 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.¹⁵² Nonetheless, *Coyle*’s intuition appears correct. While the New State Clause does not expressly require that states enter on equal terms, the restrictions it imposes on Congress’ ability to carve up or consolidate existing states into new states embody state equality concerns. So, too, does the Effect Clause’s requirement that Congress must act by means of “general laws.”¹⁵³ The Constitution contains other manifestations of state equality concerns in regard to Congress, with perhaps the strongest support coming from the states’ equal representation in the Senate, a structural feature that

¹⁵⁰ *Id.* at 573; see also Biber, *supra* note , at 124 (arguing that Congress has continued to impose conditions that appear to violate the equal footing requirement). For earlier statements of the equal footing doctrine, see *Pollard v. Hagan*, 44 U.S. 212, 216 (1845).

¹⁵¹ 221 U.S. 559, 575, 580 (quoting *Escanaba & L.M. Transp. v. Chicago*, 107 U.S. 678, 688); see also Laycock, *supra* note ?, at 288 (describing state equality as a principle that “[t]he Constitution assumes, without ever quite saying so.”); Kramer, *supra* note ?, at 2006 (arguing that state equality “represents the very idea of what it means to be in a Union.”).

¹⁵² *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 states admitted be entities identical in powers to the original thirteen, 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. But the Court never took on the obvious rejoinder that the New State Clause is itself an enumerated power.

¹⁵³ See *supra* Part I.B.1.

was critical to the Constitution's adoption and is the only constitutional provision that is essentially unalterable.¹⁵⁴

As a result, the principle of state equality does seem to lie at the core of our federal union in a way that precludes a congressional revisory power. The real challenge, however, is determining when congressional action violates this principle. In the conflict of laws context, Douglas Laycock and Larry Kramer have argued that the principle of state equality means that "[s]tates must treat sister states as equal in authority to themselves."¹⁵⁵ In their view, this means that a state must apply sister state law regardless of its view of the law's merits, and therefore the established exception under which a state can reject sister state law that offends its strong public policy is unconstitutional.¹⁵⁶ But discrimination does not necessarily lead to inequality. If all states retain the same authority to reject sister state law on public policy grounds, in what sense are they systematically unequal? More to the point, even if a state's independent decision to reject a particular sister state's law as too offensive were an unconstitutional attack on the sister state's equality, it would not follow that Congress was similarly limited in legislating conflicts of laws principles for the nation as a whole. Indeed, whatever its ambiguities, the Effects Clause makes clear that in this area Congress has power that the states lack.¹⁵⁷

To take another example, does state equality require that Congress legislate uniformly regarding the states? The Court has rejected such a uniformity requirement, holding that Congress can instead subject the states to distinct regulatory regimes.¹⁵⁸ Tom Colby has attacked this precedent as at odds with original understanding, arguing that the uniformity requirements on Congress should be read more broadly than their text suggests.¹⁵⁹ Even if true, this leaves the difficulty in distinguishing between legislating disuniformly and acknowledging relevant differences among the states. Does a federal statute that prohibits sports gambling in all states except Nevada, Delaware, Oregon and

¹⁵⁴ U.S. Const. art. I, art. V. Other provisions include the no port preference, uniform taxation requirements of Article I.

¹⁵⁵ Laycock, *supra* note ?, at 250.

¹⁵⁶ See Laycock, *supra* note ?, at 313, Kramer, *supra* note ?, at 1986-91.

¹⁵⁷ Kramer argues that Congress is equally precluded from authorizing such discrimination because if "commitment to Union is itself a fundamental value . . . Congress should not be permitted to define its terms at will or legislate away the minimum requirements of mutual respect and recognition it entails." Kramer, *supra* note ?, at 2006. But this presumes that the terms of union are constitutionally preset, as opposed to left to Congress, exactly the point at issue.

¹⁵⁸ See *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982); *Hodel v. Indiana*, 452 U.S. 314, 331-33 (1981); *Currin v. Wallace*, 306 U.S. 1, 14 (1939). Even *Coyle* supports disuniform congressional regulation, as the Court there distinguished specific conditions imposed on new states "which are within the scope of conceded powers Congress over the subject." *Coyle*, 221 U.S. at 568, 570.

¹⁵⁹ Colby, *supra* note ?, at 301-04, 311-12.

Montana, because these states had legalized such gambling before the federal prohibition was enacted, violate state equality and uniformity requirements or instead represent a federal effort to take a relevant distinction among the states into account?¹⁶⁰ To be sure, one way of accommodating legitimate state differences is to subject laws that facially distinguish among the states to searching scrutiny.¹⁶¹ But doing so serves to make the courts the ultimate arbiters of what counts as legitimate differences among the states, whereas the arguments discussed above offer a strong basis for instead giving that responsibility to Congress. Moreover, Colby himself acknowledges that even a prohibition on facial discrimination leaves Congress with the option of authorizing states to engage in regulation, because although the net result is a nonuniform regulatory system, such congressional authorization of state regulation itself treats all the states uniformly.¹⁶²

Hence, the principle of state equality, like state autonomy, fails to justify robust limits on Congress' powers to authorize state discrimination in violation of Article IV. Once again, however, this principle may yield more discrete constraints. For example, under *Coyle*, state equality imposes some restrictions on Congress' ability to impose conditions on new states. Similarly, state equality concerns support reading the "general laws" requirement of the Effects Clause as precluding federal legislation that imposes special choice-of-law rules on particular states. State equality might also justify closer scrutiny of federal interstate regulation that singles out a particular state, or small number of states, for significant and disproportionate burdens. Such an approach parallels the line suggested in *Garcia*, which while generally rejecting judicial scrutiny of federal regulatory impositions on the states, left open the possibility of judicial scrutiny "to compensate for possible failings in the national political process."¹⁶³ Laws that single out particular states for burdens are potentially indicative of political process failure.¹⁶⁴ But even this last minimal constraint on Congress immediately raises the problems of differentiating legitimate and illegitimate measures identified above. As a result, if such a singling-out prohibition exists, it would need to be restricted to the truly exceptional case. Whether in that form the prohibition is worth the candle, or instead simply sows the seeds for unnecessary litigation, is an open question.

3. *State Territoriality*. A third state sovereignty limit warranting consideration is state territoriality. The principle that states are territorial entities is textually manifested in

¹⁶⁰ Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701, 3704.

¹⁶¹ This is the approach advocated by Tom Colby. See Colby, *supra* note ?, at 339.

¹⁶² *Id.* at 314-17.

¹⁶³ 469 U.S. 528, 554 (1985).

¹⁶⁴ *Cf. South Carolina v. Baker*, 485 U.S. 505, ___ (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.").

the New State Clause's protection of an existing state's territory.¹⁶⁵ This principle is more frequently encountered as a prohibition on extraterritorial state legislation. Perceived efforts by the states to regulate outside their borders often provoke strong judicial condemnation for being at odds with our federalist system.¹⁶⁶ Most recently, in the punitive damages context, the Court has insisted that "[a] state cannot punish a defendant for conduct that may have been lawful where it occurred. ... A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."¹⁶⁷ Similarly, in cases arising under the dormant Commerce Clause and addressing the limits of state judicial jurisdiction, the Court has stated that "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."¹⁶⁸ This prohibition on extraterritoriality is more of a specific application of the principles of state autonomy and state equality than a distinct restriction in its own right; the problem with extraterritorial state legislation is that it gives the enacting state elevated authority over its sister states and denies these other states the power to set policy within their borders.¹⁶⁹

But inferring a limit on Congress from this extraterritorial prohibition is another matter. To begin with, in practice states exert regulatory control over other states 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.¹⁷⁰

¹⁶⁵ See Richard Briffault, *What About the "Ism"?*, 45 Vand. L. Rev. 1303, 1335-38 (1994) (emphasizing importance of Article IV's territorial guarantee).

¹⁶⁶ See Donald 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, 1884-96 (1987).

¹⁶⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW v. Gore*, 517 U.S. 559, 572-73 (1996). For a critique of the Court's reliance on extraterritoriality to limit punitive damages awards, see generally Michael P. Allen, *The Supreme Court, Punitive Damages, and State Sovereignty*, 13 Geo. Mason L. Rev. 1 (2004).

¹⁶⁸ *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).

¹⁶⁹ See Arthur M. Weisbrod, *Territorial Authority and Personal Jurisdiction*, 13 Wash. U. L. Q. 377, 384, 402 (1985) (linking state territoriality to state equality).

¹⁷⁰ See Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1437, 1442-44 (1992) (describing the national impact of Delaware). A large literature exists on the merits of interstate competition regarding corporate law. For a description of the leading scholarship, see *id.*, at 1444-51. Another is California's limits on automobile emissions. The Clean Air Act exempts California's limits from federal preemption and allows states to adopt these limits instead of the otherwise applicable federal standards. See 42 U.S.C. §§ 7543(a)-(b), 7507; see also *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 524-28 (2d Cir. 1994) (describing history of these provisions of the CAA).

The prohibition on extraterritorial legislation is thus understood only to disable a state from formally asserting its legal authority outside its borders. Even in this form, however, the prohibition is hardly absolute. On occasion, the Court has accepted states' formal assertions of authority over individuals and activities outside their borders, the prime example being the Court's switch from strong territorial limits on state assertions of personal jurisdiction to a minimum contacts and fundamental fairness approach.¹⁷¹ Underlying these seeming inconsistencies is the Court's realization that a state's geographic territory does not mark the outer limit of its legitimate regulatory concern. In our federal system, which combines state regulatory control with a national market and interstate mobility, some extraterritoriality is not only inevitable, but appropriate.

As a result, it would be odd if Congress did not enjoy some additional leeway to authorize extraterritorial state regulation. Navigating the border between state's legitimate regulation and illegitimate intrusion on sister states 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 waivable by Congress, just like other dormant Commerce Clause restrictions. Moreover, the Effects Clause, in granting Congress' the power to determine the effect that one state's laws will have in others, by its terms allows Congress to mandate extraterritoriality.

Of course, some extreme measures are no doubt beyond Congress' powers because they represent too great an attack on a state's independence from, and equality with, its sister states. Congress cannot grant Texas direct legislative authority over the territory of Massachusetts and individuals therein, even if doing so might resolve interstate tensions sparked by a blue state's liberal social policies. Indeed, any formal displacement of one state's regulatory control over its territory in favor of another (as opposed to authorizing that the second state's regulation shall apply as well) arguably may be outside Congress' powers.¹⁷² At such extremes, however, the prohibition is unlikely to have much practical bite.

More significantly, the extraterritoriality prohibition is rooted in due process and individual rights protections as well as federalism. The prohibition's appearance in recent

¹⁷¹ Compare *Pennoy v. Neff*, 95 U.S. 714, 733 (1978) with *International Shoe Co. v. Washington*, 326 U.S. 310, 317-19 (1945). Other decisions taking a kindlier view of extraterritorial legislation also exist. See, e.g., *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 669-70 (1981) (holding retaliatory tax's purpose of "apply[ing] pressure on other States to maintain low taxes on California insurers" to be legitimate"); *Skiriotes v. Florida*, 313 U.S. 69, 76-77 (1941) (upholding application of Florida criminal statute to Florida citizen even if offense took place upon the high seas).

¹⁷² Aside from tripping on structural state equality concerns, such displacement of a state's regulatory control over its own territory would seem to run afoul of the spirit, if not the text, of the New State Clause's territorial guarantee, U.S. Const. art. IV, § 3. Further support this conclusion comes from the Enclave Clause, which prohibits Congress from permanently ending a state's authority over federal property within its borders without the state's consent. See U.S. Const. art. I, § 8, cl. ___. If Congress must seek state approval before taking this step regarding federal property, then surely state consent is needed before Congress does so regarding areas not in its possession—assuming Congress can do so at all.

punitive damages decisions, for example, came in the course of the Court's elucidation of due process limits on such damages; limits on a state's ability to assert personal jurisdiction similarly have a due process basis.¹⁷³ In addition, a state's efforts to regulate its citizens' actions in other states is often attacked as unconstitutionally burdening their right to travel.¹⁷⁴ Thus, the extent to which Congress can authorize extraterritorial legislation turns on the separate question discussed below: Whether—and if so, how—Congress' power over interstate relations is limited when Article IV implicates individual rights.

B. Article IV and the Fourteenth Amendment

1. *Congressional Power and Individual Rights.* The discussion so far has treated Article IV as simply an interstate relations provision. But Article IV is not just about interstate relations, it is also about individual rights. This is clearest in regard to the Privileges and Immunities Clause, which by its terms prohibits states from discriminating against another state's "citizens."¹⁷⁵ If Article IV is seen as an individual rights guarantee, the case for a revisory congressional power seems intuitively more problematic.¹⁷⁶ Central to the idea of constitutional rights in the U.S. system is that they represent restrictions on government that the political organs ordinarily lack ability to alter, and that courts will enforce.¹⁷⁷ Here, the distinction between Article IV expansion and contraction appears more significant. Whatever Congress' powers to expand Article IV's interstate requirements, and thus expand individuals' protection against discrimination, allowing Congress to contract Article IV protections appears fundamentally at odds with this account of constitutional rights.¹⁷⁸

¹⁷³ See, e.g., *BMW*, 517 U.S. at __; *Asahi Metal Industry, Inc. v. Superior Court of Cal.*, 480 U.S. 102, 113-14 (1987) (internal quotations omitted).

¹⁷⁴ See, e.g., Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451, 489 (1992).

¹⁷⁵ 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 ?, at 115-16; Varat, *supra* note ?, at 499; Laycock, *supra* note ?, at 263-64. Though an interesting textual distinction, the significance of this difference should not be overstated. The protections of the dormant Commerce Clause, after all, are asserted by individuals. In like vein, the Full Faith and Credit Clause speaks to the states, but it is beyond dispute that an individual can assert her right under that Clause to recognition of a prior judgment.

¹⁷⁶ See Laurence H. Tribe, 1 *American Constitutional Law*, § 6-35 at 1246 (3d ed. 2000).

¹⁷⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 162-63, 176 (1803); see also Gillian E. Metzger, *Privatization As Delegation*, 103 *Colum. L. Rev.* 1347, __ (2003) (discussing concept of constitutional accountability).

¹⁷⁸ See *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them

One response is to argue that, as the individual rights protections of Article IV apply directly only to the states, they are irrelevant to assessing Congress' powers. According to William Cohen, a forceful advocate of this view, Congress is free to authorize state violations of constitutional rights whenever "Congress is not constitutionally prohibited from directly adopting the same policy itself."¹⁷⁹ Supporting Cohen is the insight that rights involve relationships. They run against particular individuals or institutions; they are not freefloating entities that can be asserted against interference, regardless of its source.¹⁸⁰ Cohen is also right that Article IV's silence regarding Congress, except in the context of enumerating congressional powers, 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 more weight on Article IV's textual silence regarding Congress than it legitimately can bear. The Court elsewhere has rejected the claim that textual silence is determinative of the question of whether constitutional rights apply against the federal government. Notwithstanding the absence of any express application of equal protection requirements to Congress in the Constitution's text, the doctrine of "reverse incorporation" achieves this result by reading the Fourteenth Amendment's equal protection guarantee into the Fifth Amendment Due Process Clause.¹⁸¹ *Prigg*, *Dennison*, and *Coyle* further reject the proposition that Article IV's silence is determinative of the scope of Congress' power under Article IV. As these examples demonstrate, the question of whether a constitutional provision authorizes or prohibits action by the federal government sometimes cannot be answered solely by reference to constitutional text.

More importantly, perhaps, the broad claim that Congress has power to authorize state violations of any rights to which it is not directly subject fails in structural terms. What distinguishes the federal and state governments structurally is their different composition, powers, and responsibilities. Congress, as representative of the nation, can claim a special responsibility for discerning and acting upon the national interest, and the powers granted to it often intuitively require national treatment—interstate commerce, immigration and naturalization, foreign affairs, and so on. It is Congress' special expertise and stature as

beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); *see also* Ronald Dworkin, *Taking Rights Seriously* 84-86, 190-92 (1977) (setting out idea of rights as trumps); *see generally* Richard A. Primus, *The American Language of Rights* (1999).

¹⁷⁹ Cohen, *supra* note ?, at 388, 406, 411-13.

¹⁸⁰ *Cf. DeShaney v. Winnebago Cty. Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (emphasizing that constitutional rights run only against government actors, not private individuals); W. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, and Other Legal Essays* (1919).

¹⁸¹ *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Similarly, although the Contracts Clause of Article I 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. *See, e.g., United States v. Winstar*, 518 U.S. 839, 876 (1996).

the representative of the national interest that explains the constitutional model described above, where constitutional default rules imposing obligations on the states in the name of union are ultimately subject to congressional control. The structural basis for congressional control over the scope of individual rights is considerably less evident.¹⁸² To be sure, the Section 5 power indicates that Congress has some responsibility for ensuring that Fourteenth Amendment rights are realized. The nationwide application of constitutional rights, combined with their contested nature and the extent to which claims of rights reflect political and moral assertions, provide further support for giving Congress some rights-defining role.¹⁸³ At the same time, however, Congress' own majoritarian and political status makes it an unreliable stand-in for the interests of individuals claiming rights against the political branches of state government.¹⁸⁴

For these reasons, the question of Congress' power to authorize state violations of Article IV rights, let alone other constitutional rights, is far more difficult than Cohen acknowledges. Yet the view that Congress lacks power to contract Article IV's interstate requirements because these requirements take the form of individual rights guarantees is also flawed. This view simply fails to address the interstate dimension of Article IV; at a minimum, some account is needed as to why the arguments supporting broad congressional power over interstate relations become irrelevant once the article's individual rights dimension is acknowledged. Such an account is particularly important given that, if adopted, this view would seem to force a retraction in Congress' well-established power to authorize state violations of the dormant Commerce Clause. As discussed above, the Privilege and Immunities Clause and dormant Commerce Clause both focus on economic activities; hence, if Congress lacks power to authorize state Privilege and Immunities violations, then its power to authorize dormant Commerce Clause violations will be *de facto* curtailed.¹⁸⁵

More fundamentally, 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

¹⁸² For a similar arguments along this vein, see Choper, *supra* note ?, at 175-76, 195-205, 205-209; 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, 560 n.59 (1954). Interestingly, Cohen acknowledged this distinction in an earlier essay assessing Congress' powers under the Fourteenth Amendment, where he distinguished between federalism limits, which Congress could waive, and liberty protections, over which Congress had no particular claim of authority. See Cohen, *Congressional Power*, *supra* note __, at __.

¹⁸³ How much a role Congress should have, particularly vis-a-vis the Court, is the central issue in recent section 5 cases. See, e.g. Post & Siegel, *supra* note ?, at __.

¹⁸⁴ See Carlos M. Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859, 872-73 (1999) (arguing that due to their majoritarian nature, neither Congress nor the executive branches is a reliable enforcer of constitutional limits on the states).

¹⁸⁵ See *supra* Part I.A.2.

in our constitutional order. In some instances, economic and social rights being the prime example, both federal and state governments have broad authority to determine what constitutional protections will mean in practice. True, the Supreme Court retains formal control over determining whether a particular regulatory measure is constitutional, but the standard of review it employs—“is there any reasonably conceivable set of facts that could provide a rational basis” for the legislation?¹⁸⁶—is so deferential as to allow the political branches to control the import of the rights at stake in most cases. If Congress has such power over the shape of other constitutional rights, why should Article IV guarantees, which at their core are also matters of interstate relations, be categorically free from congressional control?

2. *Congressional Power, Article IV, and the Fourteenth Amendment.* This suggests that the question of Congress’ power over Article IV’s interstate requirements cannot be answered simply by treating these requirements as a homogenous whole, and instead turns on the particular provision at stake. One particularly salient factor is the extent to which an Article IV requirement takes the form of an individual rights guarantee that has significance independent of interstate relations. Congress should have broad power to contract or expand any Article IV requirement centered upon the interstate arena, even if the requirement takes the form of a claim of individual right. But when the requirement also constitutes an individual right carrying constitutional significance outside the interstate context, Congress’ power should be 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.

A little reflection, however, makes clear that this is essentially equivalent to saying that Congress’ power over Article IV’s interstate demands is subject to the limitations of the Fourteenth Amendment. Article IV requirements that have significance independent of the interstate dimension will be accorded substantial protection directly under the Fourteenth Amendment. Indeed, that the Fourteenth Amendment also offers substantial protection is the best evidence of that an Article IV guarantee in fact has independent significance. Correspondingly, rights that are inherently connected to interstate relations may receive substantial protection under Article IV, but will lack a strong Fourteenth Amendment analog.

Arguably, the point can even be pushed further, to the broader claim that it is mistaken to view Article IV as a rights-creating provision in the first instance. Instead, notwithstanding that some of its clauses speak in individual rights terms, the article should be viewed primarily a structural provision, targeted at the relationship among the states. This is not meant to suggest any fundamental dichotomy between structural and individual rights provisions¹⁸⁷ or that individuals should not be able to assert Article IV rights in

¹⁸⁶ *FCC v. Beach Communications*, 508 U.S. 307, 313-14 (1993); see also *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

¹⁸⁷ See Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (1998)

litigation. Structural provisions regularly accrue to the benefit of individuals, and were intended to do so by the framers.¹⁸⁸ But recognizing the primarily structural character of Article IV helps clarify that individual rights emanating from it are best viewed as contingent and displaceable by Congress. Article IV rights that resist such contingent status are better reformulated as resting on the Fifth or Fourteenth Amendment.

It might seem anomalous to distinguish in this fashion between Congress' powers under Article IV and the Fourteenth Amendment. In fact, such a disjunction is fully justified. As the Court has held repeatedly, Section 5's grant to Congress of power to "enforce" the Fourteenth Amendment precludes allowing Congress to contract the scope of Fourteenth Amendment rights.¹⁸⁹ Similar restrictions on Congress are much harder to infer from Article IV's terms. Perhaps more importantly, the Fourteenth Amendment lacks the interstate relations focus of Article IV. Instead, although the Fourteenth Amendment speaks broadly to interactions between states and "any person," its originating concern was the relationship between a state and its own citizens. Article IV's interstate dimension is of course precisely what justifies congressional power to contract or expand its requirements. Moreover, the Court itself has stressed the distinction between congressional regulation under the Commerce Clause and under Section 5 in striking measures deemed to expand Fourteenth Amendment rights rather than simply remedy violations of such rights.¹⁹⁰

This effort to distinguish among different Article IV's guarantees only works, however, if state classifications between residents and nonresidents do not receive searching scrutiny under the Fourteenth Amendment's Equal Protection Clause. Otherwise, the distinction drawn between rights tied to the interstate context and rights having significance independent of that context and protected by the Fourteenth Amendment collapses. With one notable exception, the Court's precedent is largely consistent with this rule. Although the Court has on occasion invalidated resident-nonresident classifications on equal protection grounds, it has held that for equal protection purposes such classifications are not inherently suspect and only trigger rationality review.¹⁹¹ As all government action must survive rationality review, this means that a state residence classification in theory adds nothing to equal protection analysis. Moreover, the demands of rationality review in this context generally are quite minimal and impose little

¹⁸⁸ See, e.g., *United States v. Lopez*, Madison on paper barriers (Rakove).

¹⁸⁹ See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (stating that Section 5's grant of power to Congress to "enforce the guarantees of the Amendment . . . grants Congress no power to restrict, abrogate, or dilute these guarantees"); see also *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (quoting *Katzenbach*); *Miss. U. v. Hogan*, [CITE] (same).

¹⁹⁰ See *Board of Trustees v. Garrett*, 531 U.S. 356, 374 n. 9 (2000) (federal duties still apply and can be enforced even though Eleventh Amendment precludes use of claims for money damages to do so).

¹⁹¹ See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 669-70 (1981).

practical restriction on government. Not surprisingly, when the Court has stated that “Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment,” the rights at issue overwhelmingly have been ones that receive strong protection under the Fourteenth Amendment.¹⁹² Indeed, part of the explanation for why the Congress is able to authorize state discrimination against interstate commerce is that state economic regulation is only subject to minimal rationality review under the Fourteenth Amendment.

The exception is *Metropolitan Insurance Life Insurance Company v. Ward*.¹⁹³ There, the Court ruled invalid, on equal protection grounds, an Alabama statute that taxed out-of-state insurance companies at a higher rate than those incorporated and having their principal place of business within the state. According to the Court, the Alabama statute lacked any legitimate purpose, because “Alabama’s aim [was] purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations” and thus “constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.”¹⁹⁴ Notwithstanding its invocation of ordinary rationality review, *Ward* appears to signal that state residence classifications should receive far more searching scrutiny. More importantly, *Ward* gave no weight to the fact that Congress had sanctioned precisely such discriminatory taxation of insurers in the McCarran-Ferguson Act, leading the Court in *Benjamin* to uphold South Carolina’s application of a higher tax rate to out-of-state insurers against a Commerce Clause challenge.

Ward, however, is a seriously flawed decision. Among other criticisms, its reasoning is incompatible with numerous instances in which the Court upheld a state’s desire to foster local business as plainly legitimate.¹⁹⁵ Nor did the Court give a satisfying account of why Congress’ authorization of discriminatory taxes did not immunize such measures against equal protection challenges as well as dormant Commerce Clause

¹⁹² *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (right to travel); *Mississippi U. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (gender discrimination); see also *Katzenbach v. Morgan*, 384 U.S. 641, 651 n. 10 (1966) (discussing right to be free from invidious race and ethnic discrimination as well right to be free from literacy tests on voting, with the literacy tests being treated as only subject to rationality review). Even in regard to fundamental rights, Congress’ power seems broader than this statement allows. For example, whether Congress can authorize state violations of immigrants’ equal protection rights is a matter of dispute. In addition, congressional authorization may help justify some intentional state racial classifications. See *Miller/Bush* (avoiding violating VRA section 2 is a compelling governmental interest); *Adarand* (?? noting federal role).

¹⁹³ 470 U.S. 869 (1985).

¹⁹⁴ *Id.* at 878.

¹⁹⁵ See *id.* at 885-86, 893-98 (O’Connor, J., dissenting).

challenges.¹⁹⁶ *Ward* therefore offers little reason to deviate from the approach suggested here. In any event, in reaching its result the *Ward* majority emphasized that Congress did “not purport to limit in any way the applicability of the Equal Protection Clause” to state regulation of insurance.¹⁹⁷ Taken at face value, therefore, the *Ward* majority appeared to agree with the dissenters, and the argument here, that “[a]ny federalism component of equal protection is fully vindicated where Congress has explicitly authorized a parochial focus.”¹⁹⁸

III. APPLYING THE PROPOSED ANALYSIS

A brief restatement seems in order. A structural analysis supports allowing Congress broad power over interstate relations and thus over the scope of Article IV’s restrictions on the states. The constitutional model for interstate relations is one of strong judicially-enforceable antidiscrimination requirements, but these are default rules subject to congressional revision. Congress institutionally is in the best position to determine the national interest and the need for state restrictions; moreover, self-dealing concerns that dominate vertical federalism disputes are significantly reduced in the horizontal federalism context. Such broad congressional power is at least consistent with (and in some aspects supported by) Article IV’s text and history. Core federalism postulates of state autonomy, state equality, and state territoriality yield few restrictions on Congress in this arena, barring only 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 the Fourteenth Amendment.

What remains is to explore how the approach articulated here would operate in practice, an important exercise given the abstract quality of the discussion so far. The goal of this Part is to do so, by applying this approach to instances of congressional legislation affecting the states’ obligations under Article IV’s Full Faith and Credit and Privileges and Immunities Clauses. DOMA and CIANA are two obvious measures to consider under the proposed analysis, as these represent actual instances of congressional efforts to alter the states’ obligations under these clauses. Also considered below is the scope of Congress’ power to waive privileges and immunities protections for commercial activities, taking as an example congressional authorization of state residency requirements as a condition for membership in state bars. Although more hypothetical than DOMA or

¹⁹⁶ See *Ward*, 470 U.S. at 899 (O’Connor, J., dissenting) (“Surely the Equal Protection Clause was not intended to supplant the Commerce Clause, foiling Congress’ decision under its commerce powers” to authorize the discrimination in question); see also William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward*, 38 Stan. L. Rev. 1, 9-13 (1985).

¹⁹⁷ *Ward*, 470 U.S. at 880.

¹⁹⁸ *Id.* at 899 (O’Connor, J., dissenting).

CIANA, this type of measure is particularly relevant to the question of Congress' power to authorize violations of the dormant Commerce Clause.

All these measures can be challenged as bad policy; DOMA and CIANA may fall on independent constitutional grounds. But the question at issue is whether Congress has power to enact these measures in the first place. Examined under the analysis proposed here, the answer is largely yes.

A. Congress' Power Under the Effects Clause and DOMA

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.¹⁹⁹

As noted above, the public policy exception has always allowed a state to refuse to recognize a marriage, notwithstanding that it was lawful where performed, on the grounds that the marriage conflicts with the state's fundamental policy.²⁰⁰ Thus, DOMA does not appear to deviate from existing choice of law rules and full faith and credit doctrine, at least as applied by a state to refuse to recognize same-sex marriages involving state residents.²⁰¹ But DOMA does deviate from existing doctrine by authorizing states to refuse to recognize sister state judgments respecting a same-sex marriage; ordinarily, the public policy exception is limited to sister state laws.²⁰² As the Court recently remarked, "the full faith and credit command is exacting with respect to a final judgment rendered by a court with full adjudicatory authority over the subject matter and persons governed by the judgment."²⁰³

¹⁹⁹ 28 U.S.C. § 1738C.

²⁰⁰ See *supra* notes 14-16 and accompanying text.

²⁰¹ See Kramer; Silberman. Variations on the 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 its residents, even if at the time of the marriage the parties were residents of the state where they married. More complicated are instances when a state seeks to invoke the exception to deny recognition where it has more minimal contacts with the couple involved. See Silberman, *supra* note , at ___; Koppelman, *Interstate Recognition*, *supra* note , at ___.

²⁰² See *Baker v. General Motors*, 522 U.S. 222, 233-34 (1998); see also Wardle, *supra* note ?, at 372-74, 380-86 (discussing the DOMA's application to judgments and conflict with existing law on recognition of judgments). Wardle argues that DOMA only allows nonrecognition of a sister state judgment involving a same-sex marriage if the state has "a strong public policy against recognizing same-sex relationships. . . [and] some significant connecting interest in the matter of judgment enforcement that would implicate such policy." Wardle, *supra* note ?, at 390. These qualifications on DOMA's application to judgments, however, are not evident on the statute's face.

²⁰³ *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003); see also Sterk, *supra* note ?, at 57-61, 77-96 (describing current doctrine on the full faith and credit due judgments).

Even if DOMA does contract the requirements of full faith and credit, however, it would not for that reason be outside Congress' powers under the approach outlined here. Instead, DOMA's constitutionality turns on whether it represents a rational regulation of interstate relations that accords with the terms of the Effects Clause, principles of federalism, and the Fourteenth Amendment. Plainly, DOMA reflects Congress' substantive opposition to same-sex marriage. But that Congress is seeking to advance a substantive agenda in an area traditionally reserved for the states does not render DOMA outside of its powers, provided the Act serves the national interest in interstate harmony and union. Given the extent of national debate and contention over same sex marriage and the fact that 40 states recently added statutory or constitutional prohibitions on recognizing such marriages,²⁰⁴ it is simply not plausible to argue that section 2 of DOMA is unrelated to such an interest. Moreover, DOMA does not single out particular states; although the spark behind DOMA's enactment was the protection of homosexuals' right to marry under Hawaii's Constitution, a right that now only Massachusetts recognizes,²⁰⁵ DOMA's section 2 is phrased generally, as the Effects Clause requires.²⁰⁶ The section's voluntary character and limitation to laws or judgments respecting same-sex marriage make further evident that DOMA does not represent an extreme violation of principles of state autonomy, equality, and territoriality such as would be necessary to put the measure outside of Congress' powers.

Therefore, whether DOMA exceeds Congress' powers on the approach here rests on the intersection of full faith and credit and the Fourteenth Amendment. This in turn depends on whether recognition of a sister state's laws or judgments is at issue, given the

²⁰⁴ See Koppelman, *Interstate Recognition*, *supra* note ?, at 2165 (Appendix A). In other words, the national interest in avoiding national splits on the issue remains strong even though the federal government has no other direct stake in the issue, as section 3 of the statute separately excludes same-sex marriage from the definition of marriage for federal law purposes

²⁰⁵ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Ma. 2003). In addition, Vermont now recognizes civil unions. [CITE]. Current challenges alleging that statutory prohibitions on same-sex marriage violate the state constitution are pending in California, New York, and Washington. [Get CITES – LAMDA website].

²⁰⁶ Mark Strasser and others have argued that DOMA fails the "general laws" requirement because it singles out same-sex marriages and denies them the credit accorded other marriages. Strasser, *supra* note , at ___; see also Johnson, *supra* note , at . This argument raises the problem, noted above, of determining the appropriate baseline against which exceptions should be measured. See *supra* note ___ and accompanying text [Part I.B.1]. Why should this baseline be the category of all marriages, rather than that of all same-sex marriages? Would Congress be able to enact legislation establishing rules regarding the full faith and credit due civil union laws, even if it cannot separate out same-sex marriages for special treatment? If so, it seems as if Congress' powers depend on the terms by which states choose to provide protection for same-sex relationships, which fits odds with current federalism understandings, under which Congress' authority to act turns on the scope of its constitutional grants of power, not what the states have done. See, e.g., *Raich v. Gonzales*, [arguing that allowing state regulation to determine the scope of Congress' power turns the Supremacy Clause on its head]; see also Robert Post, *Federalism of the Taft Era: Can It Be Revived?* (discussing death of dual federalism understandings).

limited scope the Court has given to the requirement of full faith and credit for sister state laws. Under current doctrine, a forum state is required to apply another state's law only if it is not competent to legislate regarding the subject matter at issue, which essentially demands that a state have some minimum level of contacts with the underlying dispute. This is 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.²⁰⁷ The Fourteenth Amendment thus offers little impediment to DOMA's section 2 as applied to choice of law, because it will be rare that a state cannot claim the minimal contacts demanded in regard to a case brought in its own courts.

Applied to recognition of judgments, however, the matter is different. Many judgments appear analogous to property receiving significant protection under Fourteenth Amendment due process: they grant a judicially-enforceable entitlement to benefits that, at least in the case of money damages, have an ascertainable monetary value and are not subject to discretionary termination.²⁰⁸ Indeed, 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.²⁰⁹ Nor is it difficult to envision instances when an individual might sue to enforce a judgment that involves a same-sex

²⁰⁷*Baker*, 522 U.S. at 663 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-13 (1981) (holding full faith and credit adds little to due process and requires only that a state apply another state's law only when it lacks significant contacts with the parties or the event underlying the litigation); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985) (same). Although the Court phrases its requirement as being that a state "must have a significant contact or significant aggregation of contacts," *Allstate*, 449 U.S. at 312-13, *Allstate* makes clear that the level of contacts deemed "significant" can be quite minimal.

²⁰⁸ See Thomas W. Merrill, *The Constitutional Face of Property*, 86 Va. L. Rev. 885, 960-67 (2000) (identifying these three features as core aspects of property for due process purposes). 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.

²⁰⁹ 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, making a core dimension of property for Fifth Amendment purposes, the right to exclude from specific assets, less directly applicable; moreover, DOMA is not an instance where the government is taking an individual's judgments for its own use. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality op.) Merrill, *supra* note ?, at 970-74 (discussing the importance of the right to exclude to property protected by the Takings Clause). An additional complication is that judgments are clearly subject to restriction without compensation in some circumstances, notably bankruptcy, and states are allowed to impose limits on how judgments are executed. See [Restatement 2d Judgments?]; see also *infra* note 209 (noting that judgments from other jurisdictions are not automatically effective). That said, no one disputes that financial assets can be property for Fifth Amendment purposes, a judgment represents a specific interest (as opposed to general financial liabilities), and 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. Washington Legal Found.*, 524 U.S. 156, 160 (1998). But see *Brown v. Legal Found.*, 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 is diverted to pay for indigent defense).

marriage—for example, a judgment that an insurer is liable to cover the costs of medical procedures under a health insurance policy covering spouses.²¹⁰ DOMA clearly allows states to refuse to recognize judgments of this sort, not simply in its retraction of full faith and credit for records and judicial proceedings, but further in stipulating that “[n]o state . . . shall be required to give effect to . . . a right or claim arising from [a same-sex] relationship.”²¹¹

As a result, DOMA’s application to judgments appears more problematic, although in the end even here the statute appears within Congress’ powers. DOMA does not appear to violate procedural due process insofar as it authorize states to refuse to enforce judgments respecting same-sex relationships.²¹² Whether it violates substantive due process is a more complicated question. Insofar as refusal to recognize judgments undermines legitimate reliance interests, DOMA’s section 2 has a retrospective aspect that may trigger more searching substantive due process scrutiny than would otherwise apply to laws affecting economic property.²¹³ Even so, given that DOMA was in place before any state recognized same-sex marriage and thus before any judgments respecting same-sex marriage arose, legitimate claims of reliance appear hard to assert.²¹⁴

This leaves the question of whether as applied to judgments DOMA works an unconstitutional taking of property. Given that those states taking advantage of DOMA’s authorization have not themselves issued the judgments in question, the claim that DOMA authorizes states to violate the Takings Clause (as incorporated in the Fourteenth Amendment) also appears implausible.²¹⁵ At a minimum, for this claim to have any chance

²¹⁰ See Wardle, *supra* note ?, at 378-80 (providing examples of possible judgments involving same-sex marriages).

²¹¹ 28 U.S.C. § 1738C

²¹² Cf. *BiMetallic v. State Bd. of Equalization*, 239 U.S. 441, ___ (1915) (holding procedural due process does not require a hearing “[w]here a rule of conduct applies to more than a few people,” distinguishing contexts where “[a] relatively small number of persons” are ‘exceptionally affected, in each case on individual grounds’).

²¹³ Cf. *Eastern Enterprises*, 524 U.S. at 528-37 (plurality op.) (holding that imposition of severe and disproportionate retroactive liability on a limited class may constitute a taking if parties could not reasonably have anticipated the liability, and finding that on this basis specific imposition at issue there constituted a taking); *id.*, at 547-50 (Kennedy, J., concurring in the judgment) holding retroactive imposition of financial liability at issue there unconstitutional on due process rather than takings grounds).

²¹⁴ See *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that President did not effect a taking in nullifying petitioner’s attachment against Iranian assets to enforce a judgment because the attachment was obtained clearly subject to the president’s power of revocation and thus “petitioner did not acquire any sort of ‘property’ interest in its attachments of the sort that would support a constitutional claim for compensation.”).

²¹⁵ Even under the Full Faith and Credit Clause, as implemented by Congress, individuals must make a sister-state judgment into a judgment of the state where they desire to seek enforcement before it must be executed. See *McElmoyle v. Cohen*, 38 U.S. (13 pet.) 312, 325 (1839); see generally David P. Currie

of success it would be necessary to show that DOMA operates to make judgments respecting same-sex marriages essentially unenforceable.²¹⁶ Yet no doubt in many instances judgments will remain enforceable notwithstanding DOMA, if for no other reasons than because of the possibility of enforcing the judgment in the state where it was issued.

Of course, DOMA might be a rational means of mediating tensions over same-sex marriage across the nation and yet nonetheless be unconstitutional because inseparable from invidious discrimination against homosexuals, or because it violates the fundamental right to marry.²¹⁷ But those possibilities aside, under the analysis proposed here, DOMA appears to fall within Congress' powers.

It is not clear that a different result emerges were Congress to mandate nonrecognition of sister-state laws and judgments respecting same-sex marriage, rather than leaving such recognition to each state's choice. To be sure, such a mandatory nonrecognition act is deeply offensive to federalism principles; for Congress to use its power under the Effects Clause to force the discrimination against other states' laws and judgments runs deeply counter to constitutional norms of both national union and state autonomy. It is, to borrow a phrase of Justice Kennedy's from a related context, "not within our constitutional tradition to enact laws of this sort."²¹⁸ This extraordinary character might mean that such a nonrecognition act would fail due process scrutiny under the Fifth Amendment, much like Colorado's Amendment 2 did in *Romer v. Evans*.²¹⁹

But the extremism of the measure does not necessarily put it outside the scope of Congress' powers over interstate relations under the analysis here. To the extent states object to one state's willingness to recognize same-sex marriage as having any effect outside that state's borders, and not simply to being themselves forced to recognize such marriages, a mandatory nonrecognition act is rationally connected to the interest in

et al, *Conflicts of Laws* 529-30 (6th ed. 2001). Moreover, in the case of international judgments, full faith and credit does not even apply and recognition is a matter of comity. See Wardle, *supra* note ?, at ___. These qualifications suggest that judgments receive stronger constitutional protection against the state that issued them than against sister states.

²¹⁶ Unless DOMA significantly precludes enforcement, a particular state's refusal to enforce a judgment is difficult to classify as a "taking" and thus as a violation of Fourteenth Amendment rights. See, e.g., *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 2080-82 (2005) (clarifying that unless a regulation allows physical occupation of property or denies all economically beneficial use, the test for whether a regulation "takes" property and requires compensation is the *Pennsylvania Central* balancing test, which focuses on the impact a regulation has on reasonable investment expectations).

²¹⁷ For arguments that the DOMA represents unconstitutional discrimination against homosexuals, see Sunstein, *supra* note ?, at 47-48; Koppelman, *supra* note ?, at 4-9, 25-32; see also *Palmore v. Sidoti*, 422 U.S. 429, 433-34 (1984). For the argument that the DOMA violates the fundamental right to marry, see *Lawrence v. Texas*, *Loving v. Virginia*. [GET CITES];.

²¹⁸ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

²¹⁹ *Id.* at 633-36.

preserving union. Moreover, although clearly singling out certain states for national ostracism regarding their marriage laws, a nonrecognition act's limitation to laws and judgments respecting same-sex marriage weighs against finding a violation of the principle of state equality. A mandatory nonrecognition requirement may present more forcefully the question of whether individuals' property interests in judgments are being taken, but for the reasons identified above such a claim is difficult to make. Instead, the strongest Fourteenth Amendment argument against a mandatory nonrecognition act is that requiring states that allow same-sex marriage to nonetheless deny recognition to same-sex laws and judgments from other states forces them to engage in irrational action. Though meritorious, this argument hardly imposes a significant limit on Congress' power to enact such an act.

B. Congress' Power Over Article IV Privileges and Immunities and Congressional Authorization of State Bar Residency Requirements.

Of all the interstate relations provisions of Article IV, the Privileges and Immunities Clause of Section 2 has the widest scope. It is this clause that guarantees nonresidents the right to work and “do[] business . . . on terms of substantial equality”²²⁰ with the state's residents, to own and dispose of property, to access the state's courts, and “to be treated as a welcome visitor rather than an unfriendly alien when temporarily present” in a state.²²¹ For purposes of assessing claims of congressional power, it is helpful to consider separately two types of measures that undermine Article IV privileges and immunities protections: congressional authorization of state discrimination against nonresident economic activity, and congressional authorization of state regulation of activities undertaken by the state's residents outside its borders.

Perhaps over no area of interstate relations is Congress' claim to power greater than in regard to state regulation of economic activity. The seamless integration of state and national markets has led the Court to sanction congressional regulation of all economic activity, even that occurring wholly intrastate.²²² Although the Court has been less than pellucid regarding what counts as economic activity,²²³ little doubt exists that it encompasses “the pursuit of a common calling”²²⁴ and other core endeavors protected by the Privileges and Immunities Clause. In any event, whatever economic activity means, Congress' powers over intrastate economic activity extends to such activity undertaken by residents and nonresidents alike. Moreover, as discussed earlier, it is well-established that

²²⁰*Piper*, 470 U.S. at 280; *see also Austin v. New Hampshire*, 420 U.S. 656, 662, 666-68 (1975) (holding the Clause protects nonresidents working in a state against discriminatory taxation).

²²¹*See Saenz v. Roe*, 526 U.S. 489, 500-02 (1999); *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

²²²*See Gonzales v. Raich*, 125 S. Ct. 2195, 2205-09 (2005).

²²³*But see id.*, at ___ (quoting Webster's).

²²⁴*United Building & Constr. Trades Council*, 465 U.S. at 219.

Congress can authorize discriminatory state measures that otherwise would violate the dormant Commerce Clause.

Does this mean that Congress can also authorize states to discriminate against economic activity undertaken by nonresidents within their borders, in violation of the Privileges and Immunities Clause? To make the question concrete: In *Supreme Court v. Piper*, the Court ruled that state-imposed residency requirements for membership in a state bar violate Article IV's Privileges and Immunities Clause.²²⁵ Could Congress, exercising its commerce power, authorize states to impose such residency requirements for bar membership if they so chose?²²⁶ Although traditionally an area for state regulation and often involving intrastate conduct, lawyering is a form of economic activity.²²⁷ Overwhelmingly lawyers charge their clients for the services they provide and the provision of legal services plainly has an impact on interstate commerce, as recent debates over product liability, medical malpractice, and securities fraud litigation demonstrate.²²⁸ It also merits noting that congressional authorization of state discrimination, unlike other forms of federal regulation, would serve to enhance state authority, allowing states to impose a requirement they are currently precluded from imposing but not requiring that they do so. Hence to the extent the Court's recent decisions invalidating federal legislation as outside the commerce power turn on the need to preserve certain areas for state control, that concern here would lead to upholding congressional power.²²⁹

Again, under the proposed analysis the constitutionality of such legislation resolves down to whether Article IV's privileges and immunities guarantees receive substantial protection under the Fourteenth Amendment. Nonresidents' right to engage in economic activity on the same terms as residents clearly does not. Although fundamental for Article IV purposes, the right to engage in economic activity has far more limited statute outside of the interstate context. Instead, under the Fourteenth Amendment's Due Process and Equal Protection Clauses or the Commerce Clause, economic regulations trigger the

²²⁵ 470 U.S. 274, 288 (1985).

²²⁶ For a discussion of why regulation of lawyers and legal activity falls within the scope of the commerce power, *see supra* note 55.

²²⁷ Interestingly, the definition of economic activity quoted in *Gonzales v. Raich*, from the ___ edition of Webster's, focuses on purchase or sale of commodities and ignores services. But it is difficult to believe that in so doing the Court meant to suggest that all regulation of intrastate service provision was outside the commerce power, not does logic support pulling service provision out in such a categorical fashion. Instead, the use of this definition likely reflects the Court's focus on a market for commodities in that case.

²²⁸[Get cites for legislation, discussions of commerce power].

²²⁹ *See United States v. Morrison* [GET CITE]; *Lopez* [get CITE]. To the extent that federalism limits are seen as protections for individual liberty, however, this argument is less persuasive. *Cf. New York v. United States*, [CITE].

mildest forms of rationality review.²³⁰ As a result, just as the Court defers to Congress' clearly expressed view that the states should be allowed to discriminate against interstate commerce in violation of the dormant Commerce Clause, so to it should defer to Congress' clear authorization of state discrimination against nonresident economic activity in violations of Article IV's Privileges and Immunities Clause.

But nonresidents' right to engage in economic activity on equal terms is not the only Article IV privilege and immunity guarantee affected by such legislation. Another is the right to travel, for vulnerability to discriminatory regulation is surely an impediment to individuals crossing state borders to pursue economic opportunities. Moreover, in general the right to travel receives far more potent constitutional protection than claims of economic liberty. Although lacking an express textual home, the Court has "long . . . recognized that the nature of our Federal Union and our constitutional concepts of personal liberty united 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."²³¹ The right to travel is perhaps unique in being intrinsically linked to both interstate relations and individual liberty. In Laurence Tribe's words, "freedom of interstate movement and migration . . . partake simultaneously of personal self-government *and* of the system of definitions and relationships that describe the form of state and federal self-government that the original Constitution as modified by the Fourteenth Amendment brought about."²³² Moreover, in its 1999 decision, *Saenz v. Roe*, the Court established that at least some protections for the right to travel limit Congress as well.²³³

Saenz, however, also made clear that the right to travel is an amalgam, consisting of different rights derived from different sources. In particular, *Saenz* listed three separate elements of the right to travel: the right to cross state borders and enter or leave a state; the right to be a welcome visitor when in a state of which one is not a resident; and the right of new state residents to be treated the same as existing residents.²³⁴ The Court identified the Fourteenth Amendment's Privileges or Immunities Clause as a textual base for protections of new state residents, but did not go so far as to extend that Clause's scope to all dimensions of the right to travel. Instead, it located the right to be a welcome visitor firmly in Article IV's Privileges and Immunities Clause, and underscored that this aspect

²³⁰ See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955); Laycock, *supra* note ?, at 265.

²³¹ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); accord, *United States v. Guest*, 383 U.S. 745, 757-58 (1966).

²³² 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)[Hereinafter, Tribe, *Saenz*].

²³³ 526 U.S. 489, 507-09 (1999).

²³⁴ 526 U.S. at 500-01.

of the right to travel is less absolute.²³⁵ Any effort to conceptualize the Article IV right to travel in Fourteenth Amendment Privileges and Immunities terms also runs into *The Slaughterhouse Cases*, where the Court laid great emphasis on the distinction between Article IV and Fourteenth Amendment privileges and immunities, treating these as mutually exclusive categories.²³⁶

Hence although intuitively the right to be a welcome visitor seems easily classifiable as one of the privileges and immunities of United States citizenship protected by the Fourteenth Amendment, in practice such a move is more difficult. This aspect of the right to travel also could be conceived of as a species of due process liberty.²³⁷ Such a move has repercussions of its own, however, given that due process is guaranteed to all persons, not just citizens, and extends to corporations. It thus presents more frontally the incongruity between holding that Congress lacks power to authorize state discrimination in violation of Article IV and that Congress has power to authorize state violations of the dormant Commerce Clause; one of these would have to give. Indeed, bringing the Commerce Clause more directly into the picture demonstrates that limiting Congress' power over the commercial and economic aspects of the right to be a welcome visitor is hard to justify. In the end, these are regulations of plainly interstate economic activity, which ordinarily trigger highly deferential review.²³⁸

As a result, under the approach described here, Congress should have broad power to waive or expand application of privileges and immunities protections against state regulation of economic activity. That said, some limits may exist. Congressional authorization of a wholesale and permanent ban on nonresidents working in a state is arguably tantamount to dismantling the nation, given the close historical and practical connections between economic and political union. Such a measure seems likely to fail on rationality grounds in any event. But more targeted authorization of residency requirements for certain fields of economic endeavor, such as granting states the power to restrict membership in their state's bar to residents, would be within Congress' powers.

²³⁵ *Id.* at 500-04.

²³⁶ 16 Wall (83 U.S.) 36, ___ (1873). *The Slaughterhouse Cases* has of course come in for extensive criticism for illegitimately narrowing the scope of the Fourteenth Amendment's Privileges or Immunities Clause. John Harrison, for example, has argued that the Fourteenth Amendment was precisely intended to be an antidiscrimination measure of similar scope to Article IV, but applying Article IV's protections to state residents. See *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). More commonly, scholars (and some Justices) have argued that the Fourteenth Amendment was intended to apply the protections of the Bill of Rights against the states. [See Michael Kent Curtis, *No State Shall Abridge*, Amar, *supra* note]. These arguments, however, do not lead to the further conclusion that the Fourteenth Amendment's Privileges and Immunities Clause should be read as embodying protections for *nonresidents* akin to those found in Article IV.

²³⁷ See *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

²³⁸ See *Gonzales v. Raich*, ___/

C. *Congressional Authorization for State Regulation of Residents' Out-of-State Activities and CIANA.*

This leaves the question of Congress' power to authorize a state's regulation of activities its residents undertake outside its borders. The proposed CIANA is an example of such a measure. Section 2 of the Act makes it a federal crime 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."²³⁹ CIANA also imposes criminal penalties on physicians who perform abortions on minors from out-of-state without providing 24 hour constructive notice to one of the minor's parents.²⁴⁰ Indeed, from a federalism perspective CIANA's notification requirements are quite extraordinary, as they mandate parental notification and a minimum 24 waiting period, regardless of whether either the minor's home state or the state where the abortion is performed require parental notification, and regardless of whether the parent accompanies the minor to the abortion. The only way for a state to forestall application of these requirements is to enact a parental notification law that meets Congress' minimum standards.²⁴¹ In addition to imposing criminal liability, CIANA also authorizes civil suit by parents injured by violations of its provisions.²⁴²

Little doubt exists that CIANA falls within the scope of Congress' powers, unless it authorizes state violations of the Fourteenth Amendment (or itself violates an independent

²³⁹ §2(a) H.R. 758, 109th Cong., 1st Sess. The Act exempts the minor herself and her parents from its scope of liability, but applies to other families members, as well as adults with whom a minor may reside who is not legally recognized as a guardian or as standing *in loco parentis*. *Id.* §§ 2(b)(2), 3(c)(4). It also provides an affirmative defense for instances where the individual transporting the minor "reasonably believed, based on information the defendant obtained directly from a parent," that the minor had notified her parent (or obtained consent), or was shown documents "showing with a reasonable degree of certainty" that the minor had obtained a judicial bypass. *Id.* § 2(c).

²⁴⁰ *Id.* § (3(a)). The notification requirement does not apply if: the abortion is performed in a state requiring parental involvement in a minor's abortion decision and the physician complies with that requirement; the physician is shown documents demonstrating "with a reasonable degree of certainty" that the minor has obtained a judicial bypass in her home state; the minor signs a written statement declaring she was a victim of sexual abuse, neglect, or physical abuse by a parent and the physician notifies the authorities in the minor's home state before performing the abortion; or the abortion is necessary to save her life. *Id.* § 3(b). In addition, the physician may give constructive notice if actual notice—defined as providing written notice in person—is not possible. § 3(d).

²⁴¹ *Id.* §§ 2 (b) (providing that the Act's notification requirement will not apply if the "the abortion is performed or induced in a State that has a law in force requiring parental involvement in a minor's abortion decision," but not exempting instances when neither the minor's home state nor the state where the abortion is performed do not require notification); 3(d) (defining such a parental involvement law as one that requires notification or consent from a parent or adult legally recognized as responsible for the child; laws requiring notification of another adult, such as a adult sibling, grandparent, or family friend, do not suffice).

²⁴² *Id.* § 2(a) (setting out provision to be codified at 18 U.S.C. § 2431(d)).

constitutional prohibition). Although CIANA, like other measures authorizing state regulation of residents' out-of-state activities, is facially focused on a state's relationship to its own residents, it is at its core an interstate relations measure. Its underlying impetus is to protect states from having their regulatory schemes undermined by residents' ability to engage in interstate travel. Congress has power to prohibit particular uses of the channels and instrumentalities of interstate commerce and frequently the activities residents undertake in other states, such as the purchase of abortion services, come under the rubric of economic activity.²⁴³ Thus, other than its reference to state parental notification laws, CIANA is a standard instance of congressional commerce regulation.²⁴⁴ State regulation of residents' out-of-state activities also represents a choice of law issue—the question being which state's law should apply to govern a resident's activity in another state—and thus Congress has power to legislate in this area under the Effects Clause. In addition, as discussed above, Congress' power over interstate relations should logically extend to authorizing state extraterritorial legislation despite the intrusion on other states' regulatory choices that such legislation represents. Put differently, to the extent the prohibition on state extraterritorial legislation rests on considerations of horizontal federalism and needs of union, it should be subject to congressional override.

Moreover, it is not clear that efforts by states to regulate their residents' out-of-state activities would be unconstitutional even absent congressional authorization. As noted earlier, the Court has vacillated somewhat on the constitutionality of extraterritorial state legislation. But it has expressed greatest concerns about the constitutionality of such legislation when a state is seeking to penalize activities that were lawful in the states where committed.²⁴⁵ That would seem to prohibit states from punishing failure to provide parental notification when a minor obtains an abortion in a state that has no notification requirement. On the other hand, a state's ongoing relationship with its residents is in some contexts deemed sufficient to grant it regulatory power over them wherever they are located; thus,

²⁴³ See Kreimer, *supra* note ?, at 489. That said, in mandating parental notification, even where neither the minor's home state nor the state where the abortion is performed requires it, CIANA marks a significant intrusion into areas—abortion regulation and familial relationships—traditionally left for state control.

²⁴⁴ Nor are such references to state law uncommon. See, e.g., *United States v. Edge Broadcasting Corp.*, 509 U.S. 418, 428-29 (1993) (upholding statute that prohibited radio stations in states without lotteries from airing lottery ads as a constitutionally acceptable congressional balancing of interests of lottery and nonlottery states).

²⁴⁵ See *infra* notes ___ - ___; *BMW v. Gore*, 517 U.S. 559, 572-73 (1996); ; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); 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.”) CIANA is akin to extraterritorial legislation of this type; although the criminal penalties imposed are federal and the minor herself (or her parents) are immune from liability, the effect of the Act is to allow a state to prohibit its minors from obtaining abortions in other states without notifying their parents, even if minors resident in those states can do so.

for example, the law of the resident or domiciliary state is generally assumed to govern family law matters.²⁴⁶ Perhaps most importantly, state regulation of residents' out-of-state activities does not technically fall within the scope of Article IV's Privileges and Immunities Clause.²⁴⁷ The Court has held that the Clause "has no application to a citizen of the State whose laws are complained of."²⁴⁸

That said, a state's regulation of its residents' extraterritorial activities is certainly a practical intrusion on their Article IV right to travel to other states and be treated the same as that states' residents. As Seth Kreimer has argued, "[a] system of personal law that empowered the home state to permit travel but to deny its object would undercut this liberty of movement just as surely as would a refusal on the part of the host state to allow newcomers to take advantage of local laws."²⁴⁹ Regulation of residents' out-of-state activities is also in tension with other aspects of the right to travel. Such regulation does not physically erect a barrier to their ability to enter and leave the physical territory of their home states, but it does prevent them from leaving their states viewed incorporally as legal jurisdictions. Instead, residents must carry their states' laws with them wherever they go.²⁵⁰ In addition, such regulation may selectively burden the right to travel of certain classes of residents. CIANA is an example here: pregnant minors are denied the same freedom to travel and take advantage of other states' services that a state's other residents enjoy.²⁵¹

²⁴⁶ Lea Brillmayer, *Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die*, 91 Mich. L. Rev. 873, 887 (1993).

²⁴⁷ See Mark Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 897-13 (2002).

²⁴⁸ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138 (1872); see also *United Building & Constr. Trades Council v. Camden*, 465 U.S. 208, 217 (1984); *Zobel v. Williams*, 457 U.S. 55, 59-60 n. 2 (1982). This result is not required by the Clause's text, however. See Seth Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. Pa. L. Rev. 973, 1003 (2002).

²⁴⁹ "But Whoever Treasures Freedom. . .": *The Right to Travel and Extraterritorial Aborigines*, 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, 323-24 (1987) ("Nonresidents who are known to carry their domicile's law with them cannot participate as equals in the life of the state.");

²⁵⁰ See Kreimer, *Law of Choice*, *supra* note ?, at 504-08; Tribe, *Saenz*, *supra* note ?, at 152.

²⁵¹ *Saenz* could be as suggesting that classifications of residents regarding the right to travel are particularly suspect. This is a very broad reading, however, as the classification at issue in that case, as well as the line of precedent addressing durational residency requirements on which it drew, was between new and existing state residents. *Saenz* may well not extend beyond this particular classification—thus protecting individuals right to relocate to other jurisdictions, but not their right to be free from their home states' regulatory purview when temporarily present elsewhere. Moreover, a state's special concern for its minor might justify its efforts to enforce its parental notification laws outside its borders, even under searching scrutiny.

Even if not part of the recognized right to travel, the freedom to escape a state's jurisdiction, at least to the extent of undertaking activities that are lawful in the state where performed, seems intuitively part of individual liberty protected by due process.²⁵² The obvious response is that individuals are free to leave a state and establish residency elsewhere, and thus any restrictions on their liberty imposed by out-of-state regulation are arguably of their own choosing.²⁵³ But this presupposes that states have the right to put their residents to this choice. Perhaps the strongest argument to the contrary is that making extraterritorial regulation a necessary condition of residency entails a robust view of the meaning of state citizenship, one that sits oddly with the Fourteenth Amendment's Citizenship Clause. That Clause, which applies to Congress as well as the states, preempts states' power to choose their citizens and gives primacy to United States citizenship. 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.²⁵⁴ Moreover, the Fourteenth Amendment's effort to make state citizenship automatic, and to turn entirely on the criterion of residency, suggests limits on states' power to expand the obligations of residency.

The source of the constitutional prohibition on extraterritorial legislation, and the strength of this prohibition's application to residents, makes a significant difference under the approach to congressional power articulated here. If based only on Article IV or structural postulates of interstate relations,²⁵⁵ then even if the prohibition extends to a state's regulation of its residents, than it would not limit Congress. On the other hand, if the prohibition is also strongly rooted in the Fourteenth Amendment, representing either a dimension of liberty for due process purposes or a privilege and immunity of national citizenship, Congress would lack power to waive its application to the states. The question is a close one; while denying individuals any protection against extraterritorial

²⁵² The Court often has articulated the prohibition on extraterritorial state legislation or assertions of jurisdiction in due process terms, *see, e.g., BMW v. Gore*, [CITE] (identifying extraterritoriality of a punitive damages award as a factor leading to the award violating due process); *Pennoy v. Neff*, 95 U.S. 714, 722-26 (1877) (rooting territorial limit on state court jurisdiction in due process); *Allgeyer v. Louisiana*, 165 U.S. 578, 587-88 (1897) (invalidating state insurance requirement as applied to contracts made out-of-state on due process grounds) (CHECK); *see also Asahi Metal Industry, Inc. v. Superior Court of Cal.*, 480 U.S. 102, 113-14 (1987) (articulating modern minimum contacts rule for personal jurisdiction and identifying it as based in due process). On occasion, however, the Court has also identified federalism as a basis. *See Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 294 (1980).

²⁵³ This claim may initially appear particularly tenuous regarding minors, as they lack the ability to choose where they live. *Cf. Plyler v. Doe*, 458 U.S. 202, 219-220 (1982). However, their age also justifies greater intrusion on their liberty rights. *See Hodgson v. Minnesota*, 497 U.S. 417, 444-45 (1990) (holding the state's interest in "the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely" justifies parental notification and consent requirements, but striking two parent notification requirement as unconstitutionally burdensome).

²⁵⁴ *Cf. Kreimer, Whoever Treasures Freedom, supra note ?, at 915-17.*

²⁵⁵ *Cf. Crandall v. Nevada*,

regulation short of relocating to another state seems at odds with Fourteenth Amendment concerns, individual liberty in this context has an inextricable interstate dimension: it is the freedom to travel to other states and take advantage of another state's legal regime.

In the case of CIANA, a state's special relationships to and responsibilities for its minors justifies viewing the Act as falling within the scope of Congress' powers over interstate relations. Given this factor, a state's efforts to enforce its parental notification laws may well be constitutional even independent of congressional authorization,²⁵⁶ and Congress' role in interstate relations supports giving it additional room to mediate conflicts between state regulatory regimes. Moreover, CIANA represents a national mandate of parental notification for a particular category of abortions—those involving minors who reside in other states. Although the Act contains provisions enforcing states' parental notification requirements, it is also an instance of straightforward federal preemption of state decisions to not require parental notification. In that sense, it is simply “ordinary” federal legislation. As is true regarding DOMA, however, that CIANA may fall within Congress' power over interstate relations does not mean the Act is constitutional. The restrictions it imposes on abortion access are significant, and may well rise to the unconstitutional level of creating undue burden.²⁵⁷

CONCLUSION

Federalism jurisprudence and scholarship focuses at great length on the scope of congressional powers. But the question addressed is overwhelming Congress' power over federal-state relations, whether in the form of direct imposition of duties on the states or regulation of private conduct that narrows the areas left for state control. Far less attention is paid to congressional authority over interstate relations, the horizontal dimension of federalism. This Article has attempted to remedy that gap, taking as its focus Congress' powers under Article IV, the constitutional article most devoted to interstate relations and horizontal federalism. Article IV's text, history, and precedent fail to provide clear

²⁵⁶ Tribe, *Saenz*, *supra* note ?, at 151-52 & nn. 199-200.

²⁵⁷ See *Planned Parenthood v. Casey*. For example, the Act contains no exception allowing physicians to perform abortions when necessary to preserve the health of the minor. See *id.* at ___. The Court will decide whether parental notification statutes must contain a health exception this Term in *Ayotte*. In addition, the Act appears to impose lengthy delays. Unless a parent is present with the child, CIANA appears to mandate a minimum 72 hour delay (and often longer) before an abortion can be performed, given its provisions for constructive notice. See §§ (3)(a), 3(d)(3) (requiring 24 hour constructive notice and providing that for constructive notice, “delivery is deemed to have occurred 48 hours following noon on the next day subsequent to mailing,” excluding days when mail is not delivered). While the constructive notice provision does not apply if the state where the abortion is being performed has a sufficiently restrictive notification statute with which the physician has complied, *Id.* § 3(b)(1), in most cases such compliance will result in delay as well. Finally, the requirement that a physician wait 24 hours before performing the abortion, notwithstanding having given written notice to a parent in person, comes close to failing rationality review, at least in those cases where the parent has accompanied the minor to the physician's office and plainly is aware of and supports the minor's choice to abort.

guidance. Instead, limning the contours of congressional authority in this context requires a structural analysis that focuses on the principles lying implicit in our federalist system. The conclusion from such an analysis is that Congress enjoys broad power over interstate relations, including power to contract or expand the requirements of Article IV. The one caveat, that Congress lacks power to authorize states to violate the Fourteenth Amendment, on investigation seems not as substantial a constraint as might initially appear; few of the congressional measures considered here fall outside of Congress' powers on this ground.

That Congress has broad power to authorize interstate discrimination does not mean, of course, that Congress should do so. Indeed, the relative infrequency with which Congress has expressly authorized state discrimination is important. 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 dissipates quickly in heat of disputes over social values, that is not a reason for denying Congress its constitutional powers. It is instead a reason to insist that Congress use them wisely and fairly, and to condemn congressional efforts to sacrifice national union and federalism principles for political gain.