

**CONGRESS'S PRIMARY ROLE IN DETERMINING WHAT
FULL FAITH AND CREDIT REQUIRES: AN ADDITIONAL
ARGUMENT**

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I. INTRODUCTION

The Constitution's Full Faith and Credit Clause comprises two sentences. What is the relationship between the first sentence—which charges that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”—and the second sentence's grant of power to Congress—which states that “the Congress may by general Laws prescribe the Manner in

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which such Acts, Records and Proceedings shall be proved, *and the Effect thereof*”?¹

In an earlier article I showed that this is an unresolved question, and offered a solution.² I argued, based on text, precedent, and functionalist considerations, that the Full Faith and Credit Clause’s second sentence—known as the Effects Clause—grants Congress the primary responsibility to determine the effect one state’s laws and judgments are to have in other states.³ The courts are free to answer the question to the extent Congress has not acted. However, such judicial doctrine has the status of federal common law, and accordingly can be revised by Congress. Statutes enacted pursuant to the Effects Clause are judicially reviewable under a deferential standard, but one that ensures by means of a clear statement rule that Congress has specifically given attention to which foreign laws and judgments should be given effect. Finally, if there is no applicable federal statute or case law, state legislatures are free to come to coordinated solutions through either uniform laws or interstate compacts.

I earlier dubbed my theory the “Teamwork” approach⁴ insofar as it contemplates important roles for both Congress and courts in implementing the Full Faith and Credit Clause, but I think it clearer to rename this theory the “Congressional Primacy” approach.

This short Article provides an additional important argument on behalf of congressional primacy. Part I argues that Congress appropriately plays the primary role in implementing the Full Faith and Credit Clause because courts’ institutional limitations inevitably lead to either a radical under-enforcement or over-enforcement of the Clause. This argument is a variation on Larry Sager’s critical insight.⁵ But whereas Sager focused attention on Congress’s role in complementing judicial *under-enforcement* of constitutional *rights*,

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

2. See Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 957-75 (2006).

3. *Id.*

4. See *id.* at 960-61.

5. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216-20 (1978).

this Article addresses Congress's essential role in correcting the courts' tendencies to systematically under-enforce *and* over-enforce a *structural* constitutional principle.

Part II applies Part I's insights to the Defense of Marriage Act's ("DOMA") so-called choice of law provision, which provides that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . ."⁶ I argue that DOMA does not exceed Congress's Effects Clause powers, even if it provides full faith and credit rules in respect to judgments that vary from what Supreme Court case law requires.

Part II also concludes that courts should narrowly construe DOMA's choice of law provision. It should apply to declaratory judgments obtained by non-residents who marry in same-sex marriage states for the purpose of forcing their home states to recognize their same-sex marriages. But DOMA should not apply to mill-run judgments in connection with same-sex couples because Congress did not give any consideration whatsoever to whether such judgments should be given effect in sister-states when it enacted DOMA.

II. CONGRESS'S POWERS UNDER THE EFFECTS CLAUSE

A. Precedent

The Supreme Court has long understood that the Constitution grants Congress a significant role in determining what full faith and credit requires. The 1939 case of *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*,⁷ for example, presented the question of whether California could apply its workmen's compensation statute to an accident in California that involved a Massachusetts employee of a Massachusetts company, or whether the Full Faith and Credit Clause required the California court to apply the Massachusetts statute.⁸ Before the Court provided an answer, it said:

[I]n the case of [state] statutes, the extra-state effect of which

6. 28 U.S.C. § 1738C (2006).

7. 306 U.S. 493 (1939).

8. *Id.* at 497.

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Congress has not prescribed, as it may under the constitutional provision This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state.⁹

In other words, the Court explicitly understood that *it* could determine what effect full faith and credit demanded California to give to the Massachusetts statute only because Congress had *not* decided the issue pursuant to a federal statute.¹⁰

If Congress unquestionably had the power to statutorily determine the “extra-state effect” of California’s statute before the Court’s decision in *Pacific Employers*, what happened to Congress’s power *after* the Court rendered its decision? There are two possibilities: either the Court’s decision displaces such congressional power, or Congress’s power remains.

Precedent suggests—and policy considerations confirm—that congressional power under the Effects Clause remains intact even after the Court has laid down a decision. As to precedent, consider the case of *Sun Oil Co. v. Wortman*,¹¹ where the Court decided the Full Faith and Credit Clause did not preclude a forum state from applying its statute of limitations to all claims in a nationwide class action.¹² The Court’s holding turned on its determination that statutes of limitations were “procedural” for purposes of full faith and credit.¹³ But, continued Justice Scalia for the Court in dictum, “[i]f current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes . . . it can

9. *Id.* at 502 (emphasis added) (citation omitted).

10. *See also* *Alaska Packers Ass’n v. Indus. Accident Comm’n of Cal.*, 294 U.S. 532, 547 (1935). Though these cases discussed Congress’s powers under the Effects Clause in relation to state laws, the Court has never suggested that Congress’s powers are any different in respect to state judgments. The arguments provided in this Article, as well as my previous article, suggest that Congress’s Effects Clause powers vis-à-vis public acts are no different than its powers vis-à-vis judgments. *See Rosen, supra* note 2, at 960-84.

11. 486 U.S. 717 (1988).

12. *Id.* at 728-29.

13. *Id.* at 726-28.

be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause.”¹⁴

Sun Oil's dictum explicitly indicates that Congress has the power to override the Court's full faith and credit decisions. However, the dictum does not, on its own, wholly answer the scope of congressional power. After all, it only addresses a congressional effort to *augment* the credit due to a sister state's laws regarding what the Court has said is required; a federal statute providing that statutes of limitations were “substantive” rather than “procedural” would have meant that the forum state would have been required to apply the foreign state's statute of limitations.

As to precedent regarding congressional power to *reduce* the credit that a Supreme Court decision declares must be given to another state's laws or judgments, all we have are equivocal and somewhat contradictory statements by less than a majority of the Court. Justice Stone tentatively supported such a power, stating that “[t]he mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded *or contracted* by Congress.”¹⁵ But a plurality opinion in 1980 undecidedly pointed in the other direction, stating “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.”¹⁶

B. Policy

There are three strong policy arguments on behalf of the position that congressional power under the Effects Clause is not displaced by judicial decisions.

First, to hold otherwise would mean the Constitution created a race between the courts and Congress in which the institution that acts first gets to determine what full faith and credit requires. That would be odd constitutional architecture. Although first-in-time rules to resolve potential conflicts between institutions with overlapping powers are not unheard of—consider the rules of *res judicata*, which

14. *Id.* at 729 (citation omitted).

15. *Yarborough v. Yarborough*, 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting) (emphasis added).

16. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273 n.18 (1980) (plurality opinion).

provide that the first court that comes to final judgment determines issues of law and fact¹⁷—they are unusual. In fact, first-in-time rules are found only when the two institutions with overlapping powers are functionally similar.¹⁸ For example, the courts of States *A* and *B* (or of state court *A* and federal court *C*) are functionally similar insofar as all are courts—such that neither of the competing institutions is clearly better suited to authoritatively resolve the question. There is no reason to think a first-in-time rule would make sense vis-à-vis the courts and Congress in this context.

Second, as I argued at length in my earlier article, Congress is better institutionally suited than courts to determine what effect one state's acts and judgments are to have in other states.¹⁹ The basic argument is that the Full Faith and Credit Clause aims to accomplish two goals that are in tension with one another—fusing the states into a single nation while keeping the states meaningfully empowered—and harmonizing such incommensurable goals is an inherently subjective, political task that is best undertaken by the more politically accountable branches.²⁰ If Congress does not legislate, and a full faith and credit question is presented to a court, then the court must provide some answer. But this judicial answer should not be understood as displacing the power of the more suitable institution—Congress—to provide a different answer at a later point. I shall not further elaborate this argument here.

This Part of the Article provides an additional reason why Congress is better suited than courts to determine what full faith and credit requires: past experience shows, and careful consideration of courts' institutional limitations confirms, that courts will either radically under-enforce or over-enforce full faith and credit. Fortunately, the fact that courts have inherent limitations does not mean that full faith and credit invariably must be ill-implemented (i.e., either radically under-enforced or over-enforced). Legislatures have the very institutional characteristics necessary to intelligently

17. See Mark D. Rosen, *Revisiting Youngstown: Against the View that Justice Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1720-25 (2007).

18. See *id.*

19. See Rosen, *supra* note 2, at 967-71.

20. See *id.*

implement full faith and credit that courts lack. This is yet another reason why Congress appropriately has the primary role, via the Effects Clause, in determining what full faith and credit requires.

1. Three Possible Approaches to Full Faith and Credit

To say Congress appropriately plays the primary role in determining what full faith and credit requires does not mean courts are unimportant. To the contrary, here, as elsewhere, courts' probing analysis in particular cases can tease out the foundational values that underlie constitutional provisions. Legislatures typically have neither the time nor inclination to dig so deeply. The courts' heavy lifting can determine the tradeoffs that must be made among the competing commitments underlying a constitutional provision. Courts' decisions thereby present the legislature with a menu of options, among which the legislature can make its inherently subjective, political choice when exercising its constitutional powers to legislate.²¹

21. This interplay between courts and Congress is well illustrated by the Supreme Court's development of several possible ways of conceptualizing the relationship of voting dilution to the Fifteenth Amendment, and Congress's selection of one of these when it enacted the 1982 Amendments to the Voting Rights Act. The Supreme Court held that districting can violate the Fifteenth Amendment if it "operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (citation omitted). The Justices divided over whether this was to be determined on the basis of a subjective or objective test, but ultimately opted for the former, see *City of Mobile v. Bolden*, 446 U.S. 55, 69-73 (1980), over the dissent of several Justices who thought a showing of discriminatory impact to be sufficient. *See id.* at 94 (Brennan, J., dissenting); *id.* at 103 (Marshall, J., dissenting); *id.* at 95 (White, J., dissenting) (concluding that invidious purposes can be inferred from "objective factors"). The plurality opinion also discussed, and quickly rejected, what it considered to be Justice Marshall's suggestion that the Fifteenth Amendment guaranteed minority groups proportional representation. *See id.* at 75-80. When Congress considered what it should do with its powers to enforce the Fifteenth Amendment under section two of that Amendment, it did not proffer its own independent understanding, but instead chose from among the various conceptions developed by the Court and the dissenting Justices. Congress rejected the idea that the Fifteenth Amendment guaranteed proportional representation and, most importantly, adopted a discriminatory impact standard instead of a subjective discriminatory purpose standard. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 569-91 (3rd ed. 2007) (collecting legislative history).

Much indeed can be learned from the Supreme Court's full faith and credit jurisprudence. But before seeing this, it is first necessary to provide some background. Determining the credit one state must give to a public act or judgment from another state, and deciding whether the forum must give effect to the foreign state's law or judgment or whether the forum state can instead apply its own law (or generate its own judgments), constitutes a choice of law question. Scholars usefully distinguish between two different approaches that can be taken to choice of law: the unilateralist approach and the multilateralist approach.²² The unilateralist approach resolves the question by looking to considerations that relate to only one state.²³ A multilateralist approach, by contrast, considers factors in relation to each of the states whose laws or judgments are potentially applicable.²⁴

With the distinction between unilateralism and multilateralism in mind, we can now proceed to the case law. In the 1930s, the Supreme Court recognized that determining what credit a forum state had to give to another state's law could be resolved by flatly requiring the forum state to apply the foreign state's law.²⁵ Indeed, this is arguably the most straightforward reading of the Full Faith and Credit Clause, which states "*Full Faith and Credit shall be given*" to the statutes and judgments "of every other State."²⁶ Flatly requiring application of foreign law is a unilateralist approach insofar as it decides what law is applicable by focusing analysis on only one state—the foreign state. Let's call this "foreign-state unilateralism."

The Court immediately rejected this unilateralist approach, stating that "[a] rigid and literal enforcement of the full faith and credit clause, *without regard to the statute of the forum*, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its

22. See, e.g., William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 107-10 (1998); Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 784-85 (2008).

23. See sources cited *supra* note 22.

24. See sources cited *supra* note 22.

25. See *Alaska Packers Ass'n v. Indust. Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935).

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

own.”²⁷ As the italicized language indicates, the Court believed that determining full faith and credit’s requirements necessitated taking into account not only the foreign state’s statute, but *also* the “statute of the forum.”²⁸ In other words, the Court rejected a unilateralist approach in favor of a multilateralist approach.

The Court implemented multilateralism by fashioning a balancing test that took account of both states’ interests. In the words of the Court, the “conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, *but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.*”²⁹ Under this balancing test, the Court frequently held that the forum state’s interest justified application of forum rather than foreign law,³⁰ but also required the forum to apply foreign law when the foreign state’s interests outweighed those of the forum.³¹

In the 1980s the Court shifted course. Over a series of cases, the Court abandoned the balancing test. In its place the Court adopted a test permitting the forum state to apply forum law so long as the forum state had a “significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”³² This new test (popularly referred to as the *Hague* test) is a unilateralist approach; full faith and credit’s requirements are ascertained by focusing on only one state. But in contrast to the foreign-state unilateralism that the Court quickly rejected in the 1930s, the *Hague* test focuses exclusively on the *forum* state. Full faith and

27. *Alaska Packers Ass’n*, 294 U.S. at 547 (emphasis added). Interestingly, the Court has adopted, and retained, a nearly automatic approach of foreign-state unilateralism in respect to *judgments* of sister-state courts. See *infra* note 34; see also Rosen, *supra* note 2, at 945-51 (discussing this case law along with a small set of exceptions). Whether full faith and credit’s application should vary so dramatically as between laws and judgments is a long-discussed question in conflicts-of-law scholarship that lies beyond the scope of this brief essay.

28. *Alaska Packers Ass’n*, 294 U.S. at 547.

29. *Id.* (emphasis added).

30. See, e.g., *id.* at 548-50; see also *Pac. Employers Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 504 (1939).

31. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 155-62 (1932), *overruled in part by Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

32. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

credit is satisfied under *Hague* so long as the forum state has some minimal contacts with the parties, transaction, or occurrence.³³ No attention need be given to the *foreign* state's interests. Let us call the *Hague* test an instance of "forum-state unilateralism."

In short, judicial experience has identified three possible approaches to determining what full faith and credit to laws requires: (1) looking exclusively to the foreign state (foreign-state unilateralism), (2) looking to the interests of all potentially interested states (multilateralism), and (3) looking exclusively to the forum state (forum-state unilateralism). The Supreme Court quickly rejected the first (foreign-state unilateralism) in favor of the second (multilateralism), and then rejected the second (multilateralism) for the third (forum-state unilateralism). A similar story is found in the context of the case law that concerns full faith and credit to judgments: an early embrace of multilateralism ultimately gave way to unilateralism, albeit the foreign-state variety rather than *Hague's* forum-state variety.³⁴

33. *Id.* In *Hague* itself, and in subsequent cases, *Hague's* minimum contacts test has amounted to an easily satisfied standard. See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058-59 (2009). For an unusual circumstance where *Hague's* minimum contacts requirement was not met, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985).

34. Contemporary jurisprudence adopts a nearly ironclad requirement that the forum state give effect to a sister-state's judgment, even if doing so is deeply contrary to the forum state's interests. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); Rosen, *supra* note 2, at 945. In contrast to this foreign-state unilateralism, the Court's early full faith and credit case law recognized many circumstances where the forum state did not have to give effect to a sister-state judgment. See *Yarborough v. Yarborough*, 290 U.S. 202, 216-24 (1933) (Stone, C.J., dissenting) (citing many cases where multilateralist analysis led to the conclusion that a foreign judgment need not be given effect). The case of *Yarborough* provided a good example of a circumstance where giving effect to a foreign state's judgment had significant in-state consequences. Georgia had issued a decree that fixed a father's support and maintenance obligations for his minor child. *Id.* at 204. After the decree's issuance the child relocated to South Carolina where South Carolina law permitted support and maintenance decrees to be reopened upon changing circumstances, but Georgia's law did not. See *id.* at 220-23 (Stone, C.J., dissenting). Applying a multilateralist approach, Chief Justice Stone cited to precedent for the proposition that "full faith and credit does not command that the obligations attached to a status, because once appropriately imposed by one state, shall be forever placed beyond the control of every other state, without regard to the

2. *Judicial Incapacity and Legislative Prowess*

What explains this trajectory of changing judicial approaches to determining what full faith and credit requires? We need not guess because the Court has told us.³⁵ The Court immediately rejected foreign-state unilateralism because it is nonsensical—why should the forum state automatically, and always, be required to apply the foreign state's statute? By contrast, multilateralism is sensible because it sought to accommodate the competing interests of each state that are invariably present when full faith and credit is at issue. In other words, foreign-state unilateralism was a problematically simplified analysis that ignored considerations that could not be overlooked if a just outcome were to be obtained.

But if multilateralism is conceptually attractive, why did the Court reject it in the 1980s? With unusual candor, the Court has acknowledged it was incapable of implementing a multilateralist methodology:

We have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. This balancing approach quickly proved unsatisfactory. As Justice Robert H. Jackson . . . aptly observed, 'it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.' In light of this experience, we abandoned the balancing-of-interests approach under the Full Faith and Credit Clause.³⁶

interest in it and the power of control which the other may later acquire." *Id.* at 219 (citation omitted). Believing that "[t]he maintenance and support of children domiciled within a state, like their education and custody, is a subject in which government itself is deemed to have a peculiar interest and concern." *Id.* at 220. The Chief Justice concluded the Georgia judgment could not displace South Carolina's power to reevaluate the father's obligations. *Id.* at 221-22. The majority, by contrast, employed a unilateralist approach that focused exclusively on the fact that Georgia had issued a final judgment. *See id.* at 212.

35. *See supra* notes 26-30 and accompanying text.

36. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495-96 (2003) (citations omitted).

Notably, the Court did not suggest multilateralism was conceptually wrongheaded. How could it? Multilateralism is the only sensible approach: foreign-state unilateralism over-enforces full faith and credit at the cost of the forum state, whereas forum-state unilateralism under-enforces full faith and credit at the cost of the foreign state. The problem was that the Court could not successfully implement multilateralism.³⁷

a. Judicial Deficiencies

The Court correctly concluded that courts are ill-suited to implement a multilateralist approach to full faith and credit. Multilateralism involves three steps: ascertaining the purposes behind each state's law, determining the intensity of each state's interest in their respective laws, and balancing the interests of one state in applying its law against the other state's interest in having its law applied.³⁸ All three steps are fraught with difficulties for courts.

37. The Court has not so forthrightly explained its embrace of unilateralism in respect to sister-state judgments. *See* sources cited *supra* note 34. The analysis that follows in the text shows that the same institutional deficiencies that make it difficult for courts to implement multilateralism vis-à-vis sister-state laws are fully operative in the context of sister-state judgments. *See infra* pp. 22-26 (contrasting judicial and legislative approaches to child support orders).

38. The reasoning process under multilateralism is similar to the "comparative impairment" analysis found in the non-constitutional choice of law context, under which courts facing a "true conflict" are to apply the law of the state whose policies would be more greatly impaired if it was not applied. *See Bernhard v. Harrah's Club*, 546 P.2d 719, 723-26 (Cal. 1976) (providing an example). Scholars have helpfully canvassed the difficulties faced by courts in implementing comparative impairment, and the discussion above in the text draws on these insights. *See* William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1027-40 (1999); Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 268 (1978); Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 576, 604-17 (1980); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 316-18 (1990). For a critical discussion of these critiques of comparative impairment see Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 818-21 (2004).

The first step, determining the purpose behind a state law, is infamously thorny.³⁹ To begin, full faith and credit concerns the choice between or among the laws of different *states*; it is trickier to ascertain the legislative purpose behind state laws than federal laws because states typically produce no formal legislative histories or published debates. Moreover (and moving to generic challenges in identifying legislative purpose), because individual legislators typically have different motivations, whose counts? Even if one were to abandon the search for the legislature's subjective intent, difficulties remain because there are typically many different objective purposes that plausibly can be ascribed to a given law.⁴⁰ Determining purpose is further complicated because full faith and credit concerns cross-border contexts involving out-of-state parties, transactions, or occurrences. States could quite plausibly choose to treat a purely domestic matter one way and an inter-state matter differently,⁴¹ yet legislators virtually never consider how their laws should apply to inter-state matters. This means that even in the relatively rare case where a state legislature has explicitly indicated the purpose behind a given law, one cannot assume the purpose regarding domestic matters applies to the cross-border context.

The second step, determining the intensity of a state's interest in a particular law, is even more difficult than the first step. Indeed, it is not clear how one would even measure the intensity of a state's interest in its policy.

The third step, balancing the states' competing interests, creates incommensurability problems because the states' different policies can almost never be translated into a common metric that permits a determinate balancing. Moreover, even if the policies *are* somehow commensurable, what is one to do if each state values each of the policies differently? For these reasons, though courts and

39. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 88-95 (1991) (providing a useful overview).

40. For a particularly trenchant demonstration of this and a discussion of concepts of depeage and bundling, which help explain some non-obvious challenges in correctly ascertaining legislative purpose, see Allen & O'Hara, *supra* note 38, at 1034-39.

41. This is one of the essential insights of Brainerd Currie's interest analysis approach. See Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 237 (1958).

commentators typically use the metaphor of “balancing,” a more apt term is “choosing.” And a choice between incommensurable policies or between commensurable policies that are valued differently by the states is invariably a deeply subjective decision.⁴²

The difficulties with each of these three steps are well illustrated by considering the facts of an old classic of the choice of law course, *Lilenthal v. Kaufman*.⁴³ An Oregon law sought to protect spendthrifts (financially irresponsible persons) and their families by stripping the capacity to contract from administratively declared spendthrifts.⁴⁴ An Oregon citizen who had been declared a spendthrift entered into a contract with a Californian merchant in California, and California had no such spendthrift law.⁴⁵ Should the contract be enforced in accordance with California law, or was it voidable per Oregon’s law?

To begin, there are difficulties in determining the purpose behind the laws of each state. Oregon’s interests in paternalistically protecting the spendthrift and guarding the third-party interests of the spendthrift’s family are clear. But did Oregon intend its law to apply only to domestic contracts with Oregon merchants, who can be presumed to be familiar with Oregon law, or also to inter-state transactions with out-of-state merchants about whom the same cannot be assumed? As to California: did the absence of a spendthrift law indicate that it valued the security of contracts more than paternalistic and third-party interests, or had California simply never considered the matter of spendthrifts?

Even if it is assumed that California had considered the issue of spendthrifts, but valued security of contracts more, how are the two states’ interests to be balanced? Security of contracts cannot be mechanically balanced against paternalism and the guarding of third-parties’ interests; comparing these competing interests is like trying to compare “apples and oranges,” which are incapable of being translated into a common measuring unit that would permit an objective balancing whose outcome all rational actors could agree

42. See generally Rosen, *supra* note 38, at 820-22.

43. 395 P.2d 543 (Or. 1964). The facts in *Lilenthal* usefully illustrate the difficulties inherent in balancing enumerated above, however, it is important to note the *Lilenthal* court did not itself utilize either a balancing of interests or comparative impairment approach.

44. *Id.* at 544.

45. *Id.*

upon. Further, how is the Oregon court supposed to balance the two states' interests when each state values the interests differently? After all, Oregon *also* values security of contracts, but simply believes that this interest is of less value than is the protection of the spendthrift and his or her family.

b. Legislatures' Comparative Advantages

Fortunately, the lack of judicial success with multilateralism need not condemn the American legal system to either under-enforcing full faith and credit with forum-state unilateralism or over-enforcing full faith and credit by means of foreign-state unilateralism. This is because there are non-judicial governmental institutions that are far better suited than courts to implement multilateralist solutions: legislatures. More specifically, Congress can legislate, or the state legislatures can act together to create uniform laws or state compacts.

As to the threshold question of whether these legislative bodies have the *power* to create such solutions, the answer is an uncomplicated yes. Congress is authorized under the Effects Clause, and in the absence of federal law the states themselves have the power to enact uniform laws or enter into compacts that determine the extraterritorial effect that one state's law has in another state.⁴⁶

Both these legislative bodies have significant institutional advantages over the courts in implementing multilateralism. First, legislatures are better situated than courts at eliciting the purpose behind state laws. Clearly a state legislature is the best institution to determine the purpose behind its own state's law, but Congress also has advantages over the courts. If Congress addressed the question of which state's law was to have extraterritorial effect, then the legislators from the affected states would have a greater incentive to determine, and take seriously, their home state's law than would a single state court judge who were hearing a single case. After all, state

46. See generally Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1149-53 (2010). Some inter-state compacts of course require congressional approval. For two excellent discussions of interstate compacts, see Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 534-37 (2008); Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 1-11 (1997).

court judges are notoriously overworked and underwhelmed about undertaking serious research into another jurisdiction's law.

Further, legislatures are better structured than courts to undertake the decision making process that informs intelligent multilateralist solutions. Legislatures permit all interested parties to participate in generating a solution. Congress, after all, is composed of representatives from every state. Likewise, a uniform law or state compact would be the product of a decision-making process in which all affected states could participate. By contrast, full faith and credit determinations issued in the course of litigation are made unilaterally by the court of a single state. Allowing the participation of all affected parties is preferable on basic democratic grounds and likely has epistemic benefits as well.⁴⁷

Furthermore, legislatures permit inter-state coordinated solutions that are outside courts' power and competency. There are several reasons why legislatures are better than courts at solving collective action problems. First, legislatures produce rules that bind all parties prospectively. By contrast, a court aiming to "balance interests" in a particular case has less incentive to set aside its own state's interests in the case-at-hand because there is no guarantee, or even reason to expect, that the other state will show similar solicitude sometime later if and when it hears a similar case.⁴⁸ Second, legislatures can address multiple issues simultaneously, facilitating bargaining and compromise. Third, legislatures can create new institutions to facilitate implementation of coordinated solutions.

Finally, legislatures are places where competing policy commitments are reconciled all the time by means of harmonization, compromise, deal-cutting, and log-rolling.⁴⁹ Such deal-making is *expected* to occur in legislatures, and it is facilitated by the structure of the legislative decision making process where repeat players interact on multiple issues over time. In the course of these legislative

47. See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 98-116 (2008) (providing a general discussion concerning the epistemic advantages of democratic decision making procedures).

48. The rules of *stare decisis* and precedent, which guarantee a degree of common-law prospectivity, do not apply to a sister-state's rulings.

49. See generally Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 697-704 (2010).

processes, legislators are forced to consider how intensely they value various matters.

These legislative features explain why the legislative process better tracks the decision making process at the heart of multilateralism than does the decision making process implemented by courts. To state the matter at one higher level of abstraction, selecting among incommensurable commitments, or among commensurable commitments that states value differently, is an inherently subjective process that is a paradigmatically political choice.⁵⁰ As explained above, legislatures are better structured than courts to make such political choices. And legislatures are better suited on foundational democratic grounds to make such choices.

Legislatures' institutional advantages vis-à-vis courts are well illustrated by considering the following question: does full faith and credit forbid the courts of State *B* from modifying a spousal support order that courts from State *A* issued? Justice Traynor, a highly esteemed justice of the California Supreme Court who many widely and rightly lauded as an expert in conflicts-of-law, confronted this question in *Worthley v. Worthley*.⁵¹ More specifically, at issue in *Worthley* was whether California courts had the power to modify a New Jersey spousal support decree.⁵² Though the New Jersey court unquestionably had had the power to issue the spousal support decree—the couple had been married and had resided in New Jersey until they separated, and both wife and husband had participated in the New Jersey proceeding—the husband had since moved to California.⁵³ Justice Traynor concluded that California courts could modify the New Jersey court's maintenance decree.⁵⁴

Justice Traynor's approach was subsequently rejected by the Uniform Interstate Family Support Act ("UIFSA"),⁵⁵ which has been

50. See Rosen, *supra* note 38, at 820-22.

51. 283 P.2d 19 (Cal. 1955).

52. *Id.* at 21-22.

53. *Id.* at 21. The dissenting opinion observed that "[t]here is nothing in the record to show that [the wife] is not still residing in New Jersey." *Id.* at 26 (Spence, J., dissenting).

54. *Id.* at 25.

55. UNIF. INTERSTATE FAMILY SUPPORT ACT § 211 (2008). The states were able to act via uniform law because there was no federal law, either statute or case law, that constrained them. As Justice Traynor's opinion for the *Worthley* Court

adopted in all fifty states and the District of Columbia.⁵⁶ Whereas Justice Traynor authorized the non-issuing state (California) to modify the maintenance order, UIFSA provides that a state that had jurisdiction when it entered a spousal support order has “continuing, *exclusive* jurisdiction to modify the spousal-support order throughout the existence of the support obligation.”⁵⁷

Much can be learned by contrasting *Worthley* with UIFSA. Why, one might ask, did they take such different approaches? Much is probably attributable to the fact the two approaches emerged from different institutions: courts versus legislatures.⁵⁸ Whereas Justice Traynor could only decide the question regarding California, the entity that drafted UIFSA was seeking a uniform rule that would prospectively bind *all* states. When faced with the possibility of a coordinated approach, states were willing to cede some power (by limiting the scope of their courts’ powers to modify spousal-support orders issued by other states) in order to enhance the durability and predictability of the spousal-support orders their courts would issue.

The legislative context permitted coordination in yet another crucial dimension. In the legislative context, the parties were able to simultaneously address multiple related issues: spousal-support orders issued from other states, spousal-support orders from their own states, and child custody orders.⁵⁹ This coordinated action regarding multiple

correctly indicated, the federal case law neither required nor prohibited the courts of State *A* from modifying a non-final order that had been issued by the courts of State *B*. See *Worthley*, 283 P.2d at 21-22.

56. See DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* 525 (8th ed. 2010).

57. UNIF. INTERSTATE FAMILY SUPPORT ACT § 211 (2008) (emphasis supplied).

58. To be sure, the drafters of UIFSA had the benefit of hindsight, not available to Justice Traynor, insofar as they had an opportunity to see the problems that *Worthley*’s approach generated in practice. However, this does not wholly explain the differences because the major shortcoming of *Worthley*’s solution was anticipated in Justice Spence’s dissenting opinion in *Worthley*. See *Worthley*, 283 P.2d at 26 (Spence, J., dissenting) (“This will result in confusion worse confounded, as the courts of each of several states, including New Jersey, might be called upon to modify the same decree, both retroactively as well as prospectively.”).

59. UIFSA provides different rules for spousal-support orders and child-support orders. See UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 205, 211 (2008).

issues facilitated compromise because states could give a bit regarding one issue to gain in another. Trade-offs are more difficult when issues are addressed in a piecemeal fashion, as generally occurs in courts.

Moreover, legislatures, but not the courts of a single state, can create new institutions that can facilitate prospective inter-state coordination. One of Justice Traynor's strongest arguments was that allowing only the issuing state to modify spousal-support orders would result in an unworkable situation in which

[r]epeated suits for arrearages would have to be brought in New Jersey as installments accrued, to be followed by repeated actions in California to enforce the New Jersey judgments for accrued installments, with the net result that the costs of litigation and the dilatoriness of the recovery would substantially reduce the value of the support to which plaintiff is entitled.⁶⁰

The drafters of UIFSA were able to sidestep this problem by creating a registration system in which properly registered orders are promptly enforced in sister state courts.⁶¹

There is a final way in which legislatures are superior to courts for solving the type of issues that arise in relation to full faith and credit. Whether spousal support orders should be modifiable only by the issuing state, or also by a new state of residence, invariably involves trade-offs among incommensurable considerations. The former entails costs to the new resident, who is forced to re-litigate in his or her previous state. The latter imposes costs to the spouse who has not adopted a new state of residence, and also may be said to show "disrespect" to the judgment of the original issuing state. Selecting between these options involves a choice among incommensurable considerations that invariably is subjective and accordingly is more suitable to legislatures than courts.

3. Congress Versus State Legislatures

While Congress and the state legislatures share many institutional advantages over the courts in determining what full faith and credit

60. *Worthley*, 283 P.2d at 25.

61. *See* UNIF. INTERSTATE FAMILY SUPPORT ACT § 603 (2008).

requires, Congress and the state legislatures are not equivalently situated. In fact, Congress has two significant institutional advantages in respect to the state legislatures. First, Congress is better situated to guard the *national* interests that are at stake. After all, Congress is a national institution that is charged with looking out for national interests, whereas state legislatures primarily aim to secure the interests of their own states. Further, national legislation involves the participation of the President, our country's only nation-wide elected official.⁶² Because Congress *also* is expected to look out for the states' interests insofar as representatives and senators are elected by state-based constituencies,⁶³ there is reason to believe Congress is more likely than state legislatures to take account of all the interests that appropriately inform the determination of what full faith and credit requires. On the other hand, state parochialism may be mitigated by uniform laws, which are at least partially drafted by experts, including academics, who generally do not lose sight of national interests.⁶⁴ Moreover, national interests are unlikely to be wholly forgotten in respect to state compacts that require congressional approval, though national interests may be more fully protected by congressional statutes.⁶⁵

Congress's second institutional benefit over the state legislatures is that Congress can far more readily enact nation wide solutions. It takes a majority of Congress, or two-thirds should the President

62. U.S. CONST. art. I, § 7, cl. 2.

63. U.S. CONST. art. I, § 2, cl. 1. *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-53 (1985) (discussing the "procedural safeguards inherent in the structure of the federal system" by which Congress protects the interests of states).

64. *See generally* Charles W. Mooney, Jr., *Modeling the Uniform Law "Process": A Comment on Scott's Rise and Fall of Article 2*, 62 LA. L. REV. 1081 (2002) (discussing the role of various expert organizations, including the American Law Institute and the National Conference of Commissioners on Uniform State Laws, in the drafting of uniform laws).

65. While the requirement of congressional approval may encourage states to give some consideration to national interests, such interests may feature more prominently in the minds of Congress if it were to take the first crack at crafting a full faith and credit solution. Faced with a proposed compact that did not give as much consideration to national interests as it would prefer, Congress may be unwilling to withhold its approval on account of the compact's promised benefits.

exercise his veto power, to enact a statute.⁶⁶ To obtain a nation-wide solution via the state legislatures, by contrast, requires *unanimous* state support, for each state legislature must enact the uniform law or agree to an interstate compact.⁶⁷ There are well-known drawbacks to unanimity rules: they give hold-outs excessive power, and they more generally under-provide socially useful legislation.⁶⁸ Furthermore, even if all states enact a uniform law, the state legislatures frequently make changes to the model uniform law's language, thereby creating non-uniformities across states.⁶⁹ Interstate differences typically grow over time as the courts of each state interpret its state's enacted uniform law. A single federal statute, by contrast, would be applicable across every state, and all courts would interpret that single statute rather than one of fifty different state statutes. And, of course, the Supreme Court can provide uniform, nationwide interpretations of federal legislation, but not of the fifty states' different uniform laws.

For all these reasons, any solution that comes via state legislatures is far less likely to be nationwide in scope than a federal statute. The extent to which interstate differences undermine the collective benefits

66. U.S. CONST. art. I, § 7, cl. 2.

67. It would likely be more difficult to solve nationwide full faith and credit problems via interstate compacts than uniform laws. Collective action problems are reduced in the uniform laws context by the custom that has arisen; the National Commissioners on Uniform State Laws drafts a single proposed text in consultation with the states and relevant interest groups, and then proposes the text to the states to vote on. *See generally* Mooney, *supra* note 64. The interstate compact process is not so formalized because each state tends to establish a special commission, who then work together. *See generally* Hasday, *supra* note 46, at 18-22. For this reason, interstate compacts tend to involve only two or a handful of states, not all states. The main benefit to interstate compacts compared to uniform laws is their permanence. As Professor Hasday helpfully explains,

[a] state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide, and the extent to which a compact may constitutionally permit any alteration by less than unanimous consent is unclear. Indeed, the Supreme Court has held that a state may not withdraw from a compact on the ground that its highest court has found the agreement to be contrary to the state constitution.

Hasday, *supra* note 46, at 3 (footnotes omitted).

68. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 50-52 (1989); AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 24-27 (1970).

69. *See, e.g.*, UNIF. LTD. P'SHIP ACT § 404 (2001) (listing variations from official text under Maine law).

of a legislative solution depends on context-specific considerations. Common sense suggests that in some circumstances the presence of even one outlier state can potentially lead to strategic behavior by individuals that may significantly undermine the value of the coordinated solution, whereas other times the costs may be more limited.

C. A Brief Summary

The Court has identified three different approaches that can be taken to full faith and credit: foreign-state unilateralism, forum-state unilateralism, and multilateralism. The two forms of unilateralism oversimplify full faith and credit, leading to severe over-enforcement (with foreign-state unilateralism) or under-enforcement (with forum-state unilateralism). Multilateralism is the most sensible approach, but successfully implementing it stretches courts beyond their institutional capabilities. This is why the Court has retreated from multilateralism to unilateralism.

Fortunately, legislatures are well suited to implement multilateralism. Congress has the power to enact multilateral solutions pursuant to the Effects Clause, and is free to act even if the Court already decided what full faith and credit requires. For this reason, judicial opinions have the status of federal common law that are subject to congressional revision. In the absence of federal solutions, state legislatures are free to fashion coordinated solutions in the form of uniform laws or interstate compacts, as they have in fact done.

II. THE DEFENSE OF MARRIAGE ACT

Part I's analysis has important implications for the Defense of Marriage Act. If Congress's Effects Clause powers are undiminished by the Court's full faith and credit case law, which is appropriately treated as federal common law rather than as a final determination of what the Full Faith and Credit Clause constitutionally requires, then DOMA's choice of law provision is a legitimate exercise of Congress' effects clause powers. This conclusion holds even if DOMA changes the Court's previously developed full faith and credit rules.

But it is necessary to be clear about precisely what are and are not Part I's implications regarding DOMA. First, Part I does not have any implications in respect to DOMA's rules regarding law because

DOMA does not alter the Court's rules as to what full faith and credit requires of laws. As discussed above, the *Hague* rule imposes virtually no obligation on the courts of one state to apply the laws of another state.⁷⁰ DOMA essentially restates this non-requirement, providing that "[n]o State . . . shall be required to give effect to any public act . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."⁷¹ Hence, Part I's argument has no application to this part of DOMA.

Second, DOMA's choice of law provision *does* have real bite in respect to *judgments* from sister state courts. Longstanding case law has established a nearly ironclad requirement that State *B* give automatic effect to the judgment from State *A*, even if doing so is deeply contrary to State *B*'s public policy.⁷² In light of this case law, it plausibly can be claimed that DOMA seeks to change the Supreme Court's full faith and credit requirements⁷³ in providing that "[n]o State . . . shall be required to give effect to any . . . *judicial proceeding* of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."⁷⁴ Many respected scholars have argued DOMA is unconstitutional on the ground it alters what the Court said full faith and credit requires as to judgments.⁷⁵ These scholars' arguments are mistaken if Part I's analysis is correct.⁷⁶

But this is not the end of the story regarding DOMA's constitutionality because two crucial caveats remain. First, to say DOMA does not exceed Congress's powers under the Effects Clause

70. See *supra* notes 32-33 and accompanying text.

71. 28 U.S.C. § 1738C (2006).

72. For a discussion of this case law, see Rosen, *supra* note 2, at 945-51.

73. Elsewhere I have disputed the proposition that DOMA's rule regarding the types of judgments that its drafters sought to address altered applicable full faith and credit case law. See Rosen, *supra* note 2, at 945-51. The argument in the above text is fully independent of my previous argument—an argument that, I should be clear, I still believe to be valid.

74. 28 U.S.C. § 1738C (emphasis added).

75. See Rosen, *supra* note 2, at 932-57, 984-85 (reviewing arguments to this effect by Dean Larry Kramer and Professors Lawrence Tribe, Andrew Koppelman, Emily Sack, and Stanley Cox).

76. Elsewhere I have provided an explanation and critique of each of these scholars' arguments that is different from, but consistent with, the argument provided here. See Rosen, *supra* note 2, at 932-57.

is not the same thing as saying DOMA is constitutional. DOMA conceivably could run afoul of *other* constitutional provisions. It may, for example, violate the liberty protected under the Due Process Clause or it may violate the Equal Protection Clause.⁷⁷

The second critical stipulation concerns statutory interpretation: how broadly should DOMA's language—"[n]o State . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State"⁷⁸—be construed? Though I fully acknowledge that DOMA's language is unqualified, I shall argue here that it nevertheless should be narrowly interpreted to apply to only a narrow category of judgments.⁷⁹

Some background is necessary to understand precisely what judgments DOMA addresses. Congress enacted DOMA when it appeared Hawaii was to become the first state to allow gay couples to marry.⁸⁰ It was widely understood that the Court's full faith and credit jurisprudence would not have required other states to recognize Hawaii's gay marriages,⁸¹ and for that reason some gay rights advocates came up with an ingenuous stratagem to maximize the scope of Hawaii's anticipated ruling. The activists suggested that gay couples who did not live in Hawaii could travel to Hawaii, marry, and then obtain a declaratory judgment from a Hawaii court that made reference to their married status.⁸² Gay activists hoped this would require the couple's home state to recognize the Hawaii marriage on account of the strictness of the full faith and credit jurisprudence regarding judgments.⁸³

77. See Rosen, *supra* note 2, at 928-31, 1001.

78. 28 U.S.C. § 1738C (emphasis added).

79. Several courts have in fact done so. See, e.g., Giancaspro v. Congleton, No. 283267, 2009 WL 416301, at * 2 (Mich. Ct. App. Feb. 19, 2009) (per curiam); Prashad v. Copeland, 685 S.E.2d 199, 206 (Va. Ct. App. 2009). For a helpful discussion of these cases, see Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 CAL. W. INT'L L.J. 275, 299-302 (2010).

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

81. See Rosen, *supra* note 2, at 948-50.

82. *Id.*

83. See *id.* at 948.

This “travel marriage” stratagem was designed to circumvent the ordinary American rule, under which the state of residence has virtually exclusive regulatory power over family law matters.⁸⁴ The legislative history, as seen in both the House Report on DOMA as well as the congressional debates, unquestionably reveals that the *only* types of judgments Congress considered when it enacted DOMA were declaratory judgments intended to fortify such travel marriages.⁸⁵

DOMA’s choice of law provision should be construed as applying only to judgments obtained to secure these travel marriages, for two reasons. First, DOMA should be narrowly construed pursuant to the interpretive canon of constitutional avoidance.⁸⁶ Professor Andrew Koppelman has demonstrated that applying DOMA’s unqualified language to cover all judgments that affect married gays would result in flatly absurd outcomes.⁸⁷ Koppelman relies on such absurdities to conclude that DOMA is irrational and accordingly unconstitutional under the lowest level of scrutiny demanded by the equal protection doctrine.⁸⁸ But there is a sensible alternative: courts could narrowly construe DOMA’s judgments provision in accordance with the canon of statutory interpretation that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”⁸⁹

However, the canon of constitutional avoidance, on its own, would not be sufficient to support the narrow interpretation of DOMA advocated here. Though it is true that the narrow interpretation does not run afoul of Congress’s intent (because, as discussed above, Congress did not consider DOMA’s application to garden-variety judgments, but was instead exclusively concerned with declaratory

84. *See id.* at 949.

85. *See* H.R. REP. NO. 104-664, at 2-10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-14; *see also* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 17 (1997).

86. For a critical discussion of constitutional avoidance and related doctrines, *see* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1948-49 (1997).

87. *See* Koppelman, *supra* note 85, at 17. For a critical discussion of some of Professor Koppelman’s examples, *see* Rosen, *supra* note 2, at 979-81.

88. *See* Koppelman, *supra* note 85, at 17.

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

judgments connected to travel marriages) the interpretation of DOMA I propose would constitute an aggressive use of the avoidance canon on account of DOMA's unqualified language. Though the Supreme Court has occasionally relied on similarly aggressive uses of this canon,⁹⁰ courts may be understandably reluctant to rely on it alone.

Further, even if courts did invoke the canon, it would not support the (very) narrow interpretation I advocate. After all, the canon of constitutional avoidance only counsels against potentially unconstitutional interpretations of a statute, and it is unlikely that DOMA's application to *all* judgments (apart from declaratory judgments in connection with travel marriages) would be flatly absurd and hence potentially unconstitutional. Accordingly, while the constitutional avoidance canon suggests that DOMA should not be understood as applying to all judgments notwithstanding its unqualified language, the canon does not support the narrow interpretation of DOMA that I am proposing.

Fortunately, there is a second reason for narrowly construing DOMA's choice of law provision that is wholly independent of the canon of constitutional avoidance. This second reason is tied to the argument made in Part I of this article. Part I explained that Congress's full faith and credit determinations, pursuant to the Effects Clause, properly have priority over the Court's jurisprudence due to the numerous institutional advantages Congress enjoys over courts in determining what full faith and credit requires. But Congress's institutional advantages are activated and operative only if and when Congress has actually considered a full faith and credit issue previously decided by the Court. If Congress has not, then there is no reason for the Court's careful judgment to be displaced. Indeed, displacing the Court's considered judgment with a congressional non-judgment would be perverse. To put it another way, although the Court's full faith and credit pronouncements are not the last word on the subject, the proper respect owed to the Court requires that the Court's full faith and credit determinations not be displaced unless Congress has specifically reconsidered the Court's determination, as shown either by explicit statutory language or legislative history.

90. See, e.g., *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513-17 (2009).

The interpretive principle that gives rise to this second reason for construing DOMA narrowly is not unprecedented. Clear statement rules likewise aim to ensure Congress has given specific consideration to a matter.⁹¹ To be clear, I do not advocate an interpretive principle that purports to gauge whether Congress gave *adequate* consideration because, among other reasons, courts likely could not develop principled tests to determine how much legislative consideration is sufficient. Instead, the judicially implemented interpretive principle that I advocate would operate in a binary fashion, making the statute applicable only in respect to judgments that were given *some* consideration by the legislature. Several doctrines operate in a similar binary manner, eschewing judgments of degree and calling for judicial action only where there is a complete absence of some factor.⁹² At the same time, the solution I propose would have to be applied with some judgment to prevent gaming of the system by late-night congressional soliloquies and aggressive legislative histories that aim to unilaterally and dishonestly expand the scope of what Congress considered.

There is incontrovertible evidence that Congress only gave thought to declaratory judgments to fortify travel marriages, not to the mill run of judgments considered by Professor Koppelman. Accordingly, DOMA should not be interpreted as applying generally to judgments, notwithstanding DOMA's admittedly broad language.

91. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 338 (2000) (“[Clear statement rules] ensure that Congress decides certain contested questions on its own.”). The interpretive approach I advise is not a clear statement rule, of course, for it does not look only to text of the statute, but also considers legislative history. It is worth noting that the justification I provide does not run afoul of the very interesting critique of clear statement rules recently put forward by Professor John Manning. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM L. REV. 399, 404 (2010).

92. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973) (limiting strict scrutiny for wealth-based discrimination to situations where people “because of their impecuniosity . . . were *completely* unable to pay for some desired benefit, and as a consequence, they sustained an *absolute* deprivation of a meaningful opportunity to enjoy that benefit”) (emphasis added); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (distinguishing the case of *Colegrove v. Green*, where the Court had found the claim to be nonjusticiable, on the ground that the “appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes . . .”).

III. CONCLUSION

Though there are many plausible reasons why DOMA may be unconstitutional, the Effects Clause is not one of them. The Court has long understood that Congress has the power to determine the “extra-state effect” of state statutes,⁹³ and there is no good reason to believe this power disappears if the Court is asked to make a determination before Congress has prescribed a rule. The Court can play a valuable role by ruling before Congress has acted, such as providing interim rules and sustained analysis that can clarify the underlying conflicting principles that properly inform a full faith and credit outcome. However, Congress is better suited than the Court to ultimately determine how the conflicting values underlying the principle of full faith and credit should be reconciled.

Congress has many other institutional advantages over the courts. It can better elicit information, including the policies behind various state laws. Most importantly, Congress is structured so that it can achieve coordinated solutions that bring about collective benefits: Congress is composed of all affected states; provides prospective rules that bind all states; can address multiple related issues simultaneously thereby allowing negotiated compromises across related topics; and can create new institutions that facilitate ongoing interstate cooperation in the future.

In the absence of applicable federal statutory or case law, state legislatures can address full faith and credit by means of uniform laws and interstate compacts. State legislatures share the above mentioned advantages that Congress has over the federal courts. However, state legislatures are less suited than Congress to determine what full faith and credit requires because they are less apt to look out for national interests and are less capable of fashioning nation wide solutions.

93. See *Pac. Employers Ins. Co. v. Indust. Accident Comm'n of Cal.*, 306 U.S. 493, 502 (1939).