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Congress's Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996

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I. INTRODUCTION

As Justice Jackson described it in 1945, the Full Faith and Credit Clause[1] is "relatively a neglected one in legal literature."[2] The Defense of Marriage Act of 1996[3] (DOMA), however, has generated new interest in the Full Faith and Credit Clause; William Eskridge predicts that it "is about to become the Constitution's hottest provision."[4] Whereas the Clause requires states to give full faith and credit to the acts, records, and judicial proceedings of other states, DOMA permits states to deny full faith and credit to acts, records, and judicial proceedings that recognize same-sex marriages.[5] DOMA is a novel use of Congress' power under the Full Faith and Credit Clause:[6]

1. The Full Faith and Credit Clause provides 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 Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.
2. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 3 (1945). The nature and scope of Congress' power under the Clause is overlooked, especially by scholars who instead address Congress' power in the context of conflict of laws jurisprudence. *Id.* at 3.
3. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C & 1 U.S.C. § 7).
4. William Eskridge, *Credit is Due (Same Sex Marriage and the U.S. Constitution's "Full Faith and Credit Clause")*, NEW REPUBLIC, June 17, 1996, at 11.
5. *See infra* section II.B.
6. DOMA was passed pursuant to Congress' full faith and credit power. *See* H.R. REP. No. 104-664, at 25-26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929-30 [hereinafter HOUSE REPORT]("[T]his situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation to prescribe what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual marriage.").

for the first time in history,[7] Congress has exempted one category of state acts, records, and judicial proceedings from the constitutional imperative that full faith and credit "shall" be given.

This unprecedented use of the Full Faith and Credit Clause sparked a lively debate over the scope of Congress' power under the Clause. When queried regarding the constitutionality of the proposed bill, several scholars argued DOMA was an improper exercise of the full faith and credit power because the Clause does not authorize Congress to decrease full faith and credit.[8] According to this line of reasoning, Congress' power is subject to a "one-way ratchet," which gives Congress power to expand—but not to contract—full faith and credit.[9] Supporters of DOMA rejected the ratchet theory and instead maintained that Congress has broad and expansive power to exempt acts, records, and judicial proceedings that recognize same-sex marriages from the full faith and credit obligation.[10]

This Article explores whether Congress' full faith and credit power is indeed subject to a one-way ratchet. In the course of its analysis, this Article proposes a corollary to the ratchet theory that describes another dimension to Congress' full faith and credit power: the provision authorizing Congress to "prescribe the Manner" limits Congress to legislating only the procedures by which the full faith and credit mandate will operate. The Article terms this as the "procedures theory."[11] According to the procedures theory, Congress has no power to preempt state substantive law by legislating a particular normative

7. It was not disputed that DOMA was an unprecedented use of Congress' full faith and credit power. *See, e.g.*, *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 69 (1996)[hereinafter *Hearings* 7/11/96](statement of Sen. Feinstein)("DOMA permits sister states to give no effect to the laws of other states. This is a novel approach to legislating under Congress' full faith and credit enforcement power.").

8. *See, e.g.*, 142 CONG. REC. S5931-32 (daily ed. June 6, 1996)(letter of Prof. Tribe to Sen. Kennedy, May 24, 1996)[hereinafter *Tribe Letter*]. *See also* Laurence H. Tribe, *Toward a Less Perfect Union*, N.Y. TIMES, May 25, 1996, at 11 [hereinafter Tribe, *Less Perfect Union*].

9. Conceiving of congressional power as subject to a one-way ratchet is not new. The United States Supreme Court noted how Congress' constitutionally derived power can operate in one direction in the voting rights case, *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress may act only "affirmatively" to expand equal protection rights under the Equal Protection Clause, and Congress has no power to act "negatively" to restrict rights. *See infra* section V.A.

10. *See, e.g.*, *Hearings* 7/11/96, *supra* note 7, at 56-59 (letter of Prof. McConnell to Sen. Hatch).

11. An example of legislation under the full faith and credit power that conforms to the procedures theory is the Parental Kidnapping Protection Act (PKPA), 28 U.S.C. § 1738A (1994). PKPA enforces full faith and credit for child custody determinations so long as those determinations are consistent with certain criteria established by Congress. If a custody determination is made by a court with proper jurisdiction, that determination will be enforced. *See infra* text accompanying notes 134-37.

value; rather, Congress can regulate the means by which state substantive law shall be given faith and credit. In short, Congress can administer procedural, but not substantive, regulations when it exercises its full faith and credit power.

Operating in conjunction, the ratchet theory and the procedures theory suggest that Congress may legislate the procedures by which full faith and credit shall be given, and in so doing, Congress may legislate only to increase the availability of full faith and credit. The ratchet theory goes to the meaning of the "Effects Clause," stating that Congress can legislate to give positive effect to the mandate that "Full Faith and Credit shall be given." The "procedures theory" goes to the meaning of the "prescribe the Manner" provision, stating that Congress can legislate the procedures that give content to the imperative of full faith and credit. Whereas the ratchet theory identifies the permissible end for which Congress may legislate (to augment full faith and credit), the procedures theory identifies the permissible means by which Congress may legislate (to prescribe the procedural manner by which full faith and credit shall operate).[12]

Part II investigates the Defense of Marriage Act. The first section reviews the circumstances leading to the passage of DOMA. The second section describes the Act and briefly addresses whether same-sex marriages might have been recognized had Congress not withdrawn full faith and credit from acts, records, and judicial proceedings that recognize same-sex marriages.[13] The third section outlines the arguments proffered in the debate over whether or not Congress' authority includes any power to decrease full faith and credit.

Part III analyzes the text of the Full Faith and Credit Clause. It investigates the validity of the ratchet theory and the procedures theory as limits on Congress' power and offers the "textual defense" to both theories.

Part IV considers a "historical/interpretive defense" of the ratchet and procedures theories. The first section examines the drafting of the Full Faith and Credit Clause to determine whether the drafters

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The "procedures theory" is inspired by the Supreme Court's interpretation of how the Qualifications Clause, U.S. CONST. art. I, § 2, operates in conjunction with the "Times, Places and Manner" provision, U.S. CONST. art I, § 4, and the "Judge . . . Qualifications" provision, U.S. CONST. art. I, § 5. *See infra* section V.C.

12. Although the ratchet theory and the procedures theory are related, a flaw in the procedures theory is not fatal to the ratchet theory. Even if the procedures theory is wrong, and Congress *can* legislate substantive norms under its full faith and credit power, the ratchet theory is not invalidated.

13. This Article neither comprehensively examines, absent DOMA, whether same-sex marriages validly performed in one state would have been recognized in a second state, nor explores whether traditional conflict of laws doctrine would permit nonrecognition of such marriages based on the public policy of the second state. For sources exploring these subjects, see *infra* note 22.

conceived of Congress' power as subject to a one-way ratchet. The second section considers how DOMA's effects conflict with Madison's view of the Clause. The third section assesses the procedures theory in light of modern commentary on the Full Faith and Credit Clause. The fourth section notes that all prior congressional action pursuant to its full faith and credit power has conformed to the one-way ratchet and procedures theories.

Part V compares the text of the Full Faith and Credit Clause to other constitutional provisions authorizing Congress to act. On balance, comparing Congress' power under the Full Faith and Credit Clause with the grants of congressional authority in the Fourteenth Amendment, Article III, the Elections Clauses, and the Fugitive Slave Clause suggests the ratchet theory and the procedures theory are in fact plausible and persuasive interpretations of Congress' power.

Finally, Part VI addresses whether the constitutional principles underlying the Full Faith and Credit Clause support the ratchet theory. The Article concludes first that the ratchet theory and the procedures theory offer plausible and superior interpretations of the Clause, and second that Congress overreached its constitutional authority when it passed DOMA.

II. DEFENSE OF MARRIAGE ACT

A. The Perceived Threat of a "Tyrannical Hawaii"

In 1993, the Supreme Court of Hawaii held in *Baehr v. Lewin* that the Hawaii marriage statute,[14] which requires marriage to be between a man and a woman, discriminates on the basis of gender in possible violation of the Equal Protection Clause of the Hawaii Constitution.[15] On remand,[16] the trial court determined that the sex discrimination was not justified by a compelling state interest.[17] The case is now pending appeal.[18]

14. HAW. REV. STAT. § 572-1 (1985).
15. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
16. The Hawaii Supreme Court provided the trial court with the following instruction: "On remand, in accordance with the 'strict scrutiny' standard, the burden will rest on [the defendant] to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." *Id.* at 68.
17. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). *See also* Carey Goldberg, *Hawaii Judge Ends Gay Marriage Ban*, N.Y. TIMES, Dec. 4, 1996, at A1.
18. The *Baehr* trial court judge stayed the decision pending appeal at the state's request. For a history of Hawaii's response to *Baehr*, including legislative proposals to prevent same-sex marriages, see David Orgon Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 14-16 (1997).

The remand of *Baehr* caused many people to anticipate Hawaiian recognition of same-sex marriage[19] and thus stimulated a national conversation concerning the propriety of same-sex marriages. Amidst major debate over whether same-sex marriage is desirable in the first place, gay rights advocates celebrated.[20] Both opponents and advocates of same-sex marriage posited that gay and lesbian couples could marry in Hawaii and enjoy the incidents of marriage in their home states.[21] The debate spawned a plethora of articles examining the inevitable conflict of law question: would same-sex marriages celebrated in Hawaii be recognized outside Hawaii?[22] Opponents of same-sex marriage cited *Baehr* and the efforts of same-sex marriage advo-

19. *See, e.g.*, HOUSE REPORT, *supra* note 6, at 2, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906; Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 747 n.2 (1995).

20. There is substantial debate within the gay and lesbian community as to whether or not the ability to enter into marriage—arguably an oppressive institution—is even desirable. *Compare* Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, NAT'L GAY & LESBIAN Q., Fall 1989, *reprinted in* LESBIAN & GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 17 (Suzanne Sherman ed., 1992)(arguing that equality in marriage for gays and lesbians will provide the foundation for the end of discrimination), *and* Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 604-08 (1995)(stating that domestic partnership ordinances lack the economic benefits and emotional symbolism of state recognition of same-sex marriage), *with* Nancy D. Politkoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1536 (1993)(describing the struggle for recognition of same-sex marriage as "an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation"). *See generally* WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 51-85 (1996); Barbara J. Cox, *Same Sex Marriages and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1035 & nn.10-12 (citing sources discussing the debate within the gay and lesbian community).

21. *See, e.g.*, *Hearings* 7/11/96, *supra* note 7, at 2 (statement of Sen. Hatch); HOUSE REPORT, *supra* note 6, at 7, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911; Joan Biskupic, *Once Unthinkable, Now Under Debate: Same Sex Marriage Issue to Take Center Stage in Senate*, WASH. POST, Sept. 3, 1996, at A1. For a survey of the benefits and burdens that legally married couples currently enjoy, and thus same-sex married couples might someday enjoy, see David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

22. *See, e.g.*, Cox, *supra* note 20; Deborah Henson, *Will Same Sex Marriages Be Recognized in Sister States: Full Faith and Credit and Due Process Limitations on State Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's* Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 553-556 (1994); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 454-66 (1994); Thomas Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 516-28 (1995); Note, *In Sickness and In Health, In Hawaii and Where*

cates as a call to action; the specter of a "Tyrannical Hawaii," ready judicially to impose its sanction of same-sex marriages on unwilling states, became a popular target of political animosity.[23]

As commentators have noted, however, the threat that states opposed to same-sex marriage would be forced to recognize same-sex marriages under the Full Faith and Credit Clause was unfounded. The interstate recognition of marriages is governed by conflict of law rules, not the Full Faith and Credit Clause.[24] Although well-established conflict of law doctrine declares that marriages are recognized as valid if they were valid in the state where celebrated,[25] the "public policy exception" to the "place of celebration" rule allows a state to deny recognition to marriages that violate the state's public policy.[26] Hence, the threat posed by the Full Faith and Credit Clause to states opposed to same-sex marriage was overstated.[27]

Else?: Conflict of Laws and Recognition of Same Sex Marriages, 109 HARV. L. REV. 2038 (1996).

23. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 23 (statement of Gary L. Bauer, President Family Research Council); *id.* at 2 (statement of Sen. Hatch); HOUSE REPORT, *supra* note 6, at 6, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910.

24. *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. (forthcoming 1998)(manuscript at 9, on file with the Author).

25. *See* Uniform Marriage and Divorce Act § 210, 9A U.L.A. 176 (1987)("All marriages contracted . . . outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted . . . are valid in this State."). *See also* HOUSE REPORT, *supra* note 6, at 8, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2912; EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.5 (2d ed. 1992); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

26. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 283(2) (1971)(stating that a valid marriage will be recognized everywhere *"unless it violates the strong public policy* of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." (emphasis added)). As Professor Larry Kramer has written,

> "Public policy" functions as an escape from the usual conflicts rules: Content with its choice-of-law rules in most cases, a court may on occasion find itself asked to apply a law significantly at odds with forum notions of justice or good policy. In such cases, the court can use the public policy doctrine to make an exception, refusing to apply the undesirable law.

Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972 (1997). *See also* Nevada v. Hall, 440 U.S. 410, 421-22 (1979)("[The] Full Faith and Credit Clause does not require a State to apply another State's law in violation of its legitimate public policy."); Carroll v. Lanza, 349 U.S. 408, 412 (1955). The constitutionality of the public policy exception has been questioned. *See* Kramer, *supra* (arguing that the public policy exception conflicts with the Full Faith and Credit Clause).

27. *See, e.g.*, Kramer, *supra* note 26, at 1966 ("The brouhaha over Hawaii's anticipated legalization of same-sex marriages is a big dud from a conflict of laws perspective. There is simply no problem; other states do not have to recognize such marriages."). Federal legislators were well aware of the public policy exception

To national legislators, however, several things were clear. First, Hawaii might confer marriage licenses on same-sex couples. If so, gay couples might leave their domiciles where they could not marry, marry in Hawaii, and then return to their domiciles seeking recognition of their marriages under the "place of celebration" rule.[28] Due to the interstitial nature of the relationship between state and federal law,[29] recognition of same-sex marriage would have effects at both the state and federal levels.

Second, a flurry of state activity alerted national legislators to the popularity of opposing same-sex marriage.[30] Anticipating the inevitable conflict of laws issue, many states enacted legislation codifying their opposition to same-sex marriage as a matter of state "public policy."[31] State courts could have denied recognition to same-sex marriages as a matter of public policy absent legislative authorization.[32] Such legislation was therefore not required to prevent the recognition of same-sex marriage. These state legislatures nonetheless feared their state courts would not necessarily find same-sex marriage repugnant as a matter of public policy.[33] In fact, several law review articles advocated that the public policy exception should be construed narrowly and should not be used to deny recognition to same-sex marriages performed in Hawaii.[34] One of the ironies of the DOMA saga is how this body of literature sympathetic to same-sex marriage was used to justify the Act: DOMA's supporters insisted that federal intervention was necessary since these authors had concluded that the public policy exception should not be available.[35] Thus, the research

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that could release states from the requirement of recognizing foreign marriages. *See Hearings* 7/11/96, *supra* note 7, at 44 (statement of Prof. Sunstein).

28. This strategy was recognized by both advocates and opponents of same-sex marriage. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 9-10 (statement of Sen. Nickles)("The timing of [DOMA] was really brought about by the [*Baehr*] decision and by several activists that want to have same sex marriages throughout the country."); *id.* at 44 (statement of Prof. Sunstein)("The impetus for this bill is the fear that people will rush to Hawaii, get married and then bind the 49 states.").
29. Federal law traditionally relies on state law definitions of family relationships. *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996). *See also infra* note 55.
30. *See, e.g.*, HOUSE REPORT, *supra* note 6, at 9-10, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913-14.
31. *See, e.g.*, Koppelman, *supra* note 24 (manuscript at 4); Henry J. Reske, *A Matter of Full Faith: Legislators Scramble to Bar Recognition of Gay Marriages*, A.B.A. J., July 1996, at 32 (stating that "legislators in more than 30 states and in Congress have introduced legislation to ensure the states will not have to recognize" same-sex marriages).
32. *See* Kramer, *supra* note 26, at 1975.
33. *See id.* at 1976.
34. *See, e.g.*, Cox, *supra* note 20, at 1099-118; Henson, *supra* note 22, at 553-56; Hovermill, *supra* note 22, at 454-66.
35. *See, e.g.*, HOUSE REPORT, *supra* note 6, at 9, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913 ("But even as the Committee believes that States currently possess the abil-

of these authors, who tried to limit the public policy exception and promote the universal recognition of same-sex marriages, has ultimately been co-opted to promote DOMA.

Third, opponents of same-sex marriage characterized the probable recognition of same-sex marriage as an attack on states' rights: the rights of those states that prohibit the performance of same-sex marriages would be infringed when gay couples who wed in Hawaii entered their states. Notably, the states' rights debate most often was characterized as how Hawaii threatened the rights of states that prohibited same-sex marriages, rather than how states that refused to recognize same-sex marriages threatened Hawaii's interests in having marriages that were performed in Hawaii recognized elsewhere. The states' rights argument, however, can cut both ways because DOMA undermines the rights of those states that recognize same-sex marriage. Justice Frankfurter articulated this dual nature of any conflict of laws question when he wrote that "[i]t is . . . no more rhetorical to say that Nevada is seeking to impose its policy upon North Carolina than it is to say that North Carolina is seeking to impose its policy on Nevada."[36] The dual nature of the same-sex marriage conflict of laws question gives rise to what will be called the "states' rights conundrum."[37]

Despite the two sides to the states' rights conundrum, only one side was emphasized during the debate over DOMA: Hawaiian recognition of same-sex marriage was seen as an assault on the policies of those states opposed to same-sex marriage. The other half of the conundrum—that Hawaii had an interest in other states' recognition of Hawaiian marriages—was comparatively ignored. The protection of "states' rights" is a political issue of enduring popularity, and it was a major factor for those who supported DOMA.[38]

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ity to avoid recognizing a same-sex 'marriage' license from another State, it recognizes that that conclusion is far from certain. For example, there is a burgeoning body of legal scholarship—some of it inspired directly by the Hawaiian lawsuit—to the effect that the Full Faith and Credit Clause does mandate extraterritorial recognition of 'marriage' licenses given to homosexual couples.").

36. 317 U.S. 287, 307 (1942)(Frankfurter, J., concurring).

37. Professor McConnell aptly describes the states' rights conundrum in his letter to Senator Hatch in support of DOMA: "When two states have inconsistent laws on the same subject, it would literally be impossible for the each to be given effect throughout the country." *Hearings* 7/11/96, *supra* note 7, at 58 (letter of Prof. McConnell to Sen. Hatch). McConnell argues that decreasing faith and credit for Hawaiian same-sex marriages necessarily protects the rights of states that decry same-sex marriage. "[N]ot all state laws can be enforced everywhere, if the laws are in conflict. If Hawaii's law recognizing same-sex marriage is enforced in other states, the laws of those states will be stripped of their efficacy." *Id. See also infra* text accompanying notes 199-207.

38. *See Hearings* 7/11/96, *supra* note 7, at 13 (statement of Sen. Nickles). *See also* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1065-66

Fourth, the United States Supreme Court had recently decided *Romer v. Evans*.[39] At issue in *Romer* was an amendment to the Colorado Constitution, which provided that neither the state nor any municipality could prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[40] The Supreme Court invalidated the amendment,[41] provoking a mixed political response. Gay rights advocates lauded the result.[42] Critics of *Romer* characterized it as part of a movement to grant "special rights"[43] to gays and lesbians and decried the decision as an abuse by activist judges.[44] In fact, the language of Justice Scalia's dissenting opinion is the same language used by those who warn of a "Tyrannical Hawaii." By stating that "[t]his Court has no business imposing on all Americans the resolution favored by the elite class from which the Members of this institution are selected,"[45] Scalia characterized

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(1995)(discussing states' rights positions in the debate over federalization of crime); Pace Jefferson McConkie, *Civil Rights and Federalism: Is There a More Perfect Union for the Heirs to the Promise of Brown?*, 1996 B.Y.U. L. REV. 389, 391; Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 288-89 (1996).

39. 116 S. Ct. 1620 (1996).

40. *Id.* at 1623.

41. *Id.* at 1628-29.

42. *See, e.g.*, Catherine Brennan, *Anti-Gay Law Unconstitutional*, DAILY RECORD, May 21, 1996; Ina Jaffe, *Supreme Court Decision Won't End Debate on Gay Rights* (National Public Radio, Morning Edition, May 24, 1996)(LEXIS, News Library, NPR File, Transcript No. 1875-4)(quoting Lambda Legal Defense and Education Fund Staff attorney that *Romer v. Evans* "dramatically improves the legal landscape for future gay rights cases").

43. Opponents of the gay rights movement argue that they are opposed to "special rights" for gays and lesbians. *See, e.g.*, William Schneider, *Too Hot to Handle? Go to the Courts*, NAT'L J., June 1, 1996, at 1234; Frank Rich, *The War in the Wings*, N.Y. TIMES, Oct. 9, 1996, at A21. For a critique of the "special rights" argument, see Samuel A. Marcosson, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137 (1995); Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 HARV. L. REV. 1905, 1906-07 (1993).

44. In a National Public Radio report concerning the public response to *Romer v. Evans*, Ina Jaffe reported that Robert Knight, the Director of Cultural Studies of the Family Research Council, predicts that "the next great crusade for conservatives will be curbing the judiciary." Jaffe, *supra* note 42. Mr. Knight stated that

> [i]t kind of makes you wonder, you know, what it takes for people of traditional values to get a Supreme Court justice to agree with them.... Because the judges are clearly out of control and are contemptuous of the moral heritage of America. So I believe people will call for things like maybe a two-term limit for federal judges, up to and including Supreme Court justices. People will demand that we return to being a democracy and not run by a few people in black robes.

Id.

45. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996)(Scalia, J., dissenting).

Romer as the inappropriate judicial imposition of the views of an elite group on others.[46]

DOMA was in part a reaction to the controversial decision in *Romer*. One commentator identified DOMA as a necessary response to *Romer*:

> In [*Romer v. Evans*], the U.S. Supreme Court showed how little regard some powerful jurists have for the right of people to govern themselves in a democratic republic. Congress needs to act now to reassert the legislative branch's constitutional role as the voice of the people and the maker of the laws. It needs to send a message to the Supreme Court and other courts . . . . We cannot afford to let judges usurp any more power and tyrannize an already besieged moral code. The Defense of Marriage Act is a powerful antidote to the destructive trend that has gripped this country at the hands of some injudicious judges.[47]

Fifth, it was an election year. The debate over same-sex marriage featured the unusual "switching of sides" by politicians who typically espoused contrary opinions. Although DOMA flouts some of the favorite causes of modern conservatism,[48] conservatives supported DOMA in droves. Conservative politicians, who usually advocate minimal federal interference with states' issues, suddenly demanded federal intervention in the institution of marriage.[49] Regulating marriage always has been the prerogative of the states and beyond the realm of federal regulation; DOMA enters this traditional domain of the states to create a federal definition of marriage.[50] As one commentator has pointed out,

> "[if] all of this moral talk is at odds with federalism [because regulating marriage is traditionally the states' role]," then the decision of the Republican leadership to sacrifice the federalism principle in favor of a moral one must

46. *Cf.* HOUSE REPORT, *supra* note 6, at 6, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910 (describing judges in Hawaii as "prepared to foist the newly-coined institution of homosexual 'marriage' upon an unwilling Hawaiian public").

47. *Hearings* 7/11/96, *supra* note 7, at 23 (statement of Gary L. Bauer, President of the Family Research Council).

48. *See* 142 Cong. Rec. S10100, S10118 (daily ed. Sept. 10, 1996)(hearings on DOMA)[hereinafter *Hearings* 9/10/96](statement of Sen. Feinstein)("For a Congress whose mantra has been returning power to the states, this legislation, it would seem, is a serious retreat from that idea, giving broad new power to the Federal government in an area historically left under State control."); *id.* (statement of Sen. Wyden)("This bill . . . seems to me a repudiation of traditional conservatism. . . . [I]t is Big Brother to the core."). *See also* Eskridge, *supra* note 4, at 11.

49. Interestingly, the Violence Against Women Act (VAWA) was opposed on the basis that the federal government and the federal judiciary should not usurp state domestic relations law. *See, e.g.*, Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1108-11 (1994); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2196-206 (1996). Comparing the debates over VAWA and DOMA raises interesting questions about which values in marriage the federal government is hoping to protect.

50. *See* Paula Ettelbrick, *Wedlock Alert: A Comment on Gay and Lesbian Family Recognition*, 5 J.L. & POL'Y 107, 109 n.2 (1996). *See also infra* note 55.

> illuminate their hierarchy of values, at least in an election year. However the Constitution is finally interpreted on the question of same-sex marriage, politicians (including the president) know that at the moment there is little public support for it and little likelihood of serious political damage in opposing it.[51]

Liberals, too, switched sides. Although often accused of reading federal powers too broadly, liberals argued that the federal government had no business defining marriage and that DOMA violated Hawaii's rights.[52] The retreat from traditionally-held positions illustrates that the debate over same-sex marriage was unusually politicized. Furthermore, the speed with which DOMA was introduced and passed indicates that the political reward was foremost in the sponsors' minds. As one commentator noted, "[t]he bill is on a fast track, probably too fast for any but an election year."[53] National legislators saw in the combination of these factors a political move with guaranteed popularity. Citing its constitutional authority under the Full Faith and Credit Clause, Congress passed DOMA.[54]

B. Defense of Marriage Act

DOMA has two provisions—the "federal definitions" provision, and the "choice of law" provision. The federal definitions provision defines marriage as "a legal union between one man and one woman" for federal purposes.[55] The choice of law provision defuses the constitutional requirement of full faith and credit and instead authorizes states to

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51. Paul Reidinger, *Politically Expedient*, A.B.A. J., Oct. 1996, at 78, 80 (quoting Ann Althouse, Professor of Law, University of Wisconsin at Madison).
52. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 3 (statement of Sen. Kennedy).
53. Eskridge, *supra* note 4, at 11.
54. DOMA passed the House by a vote of 342-67 on July 12, 1996. 142 CONG. REC. H7505-06 (July 12, 1996). It passed the Senate by a vote of 85-14 on September 10, 1996. 142 CONG. REC. S10129 (Sept. 10, 1996). President Clinton signed the bill on September 21, 1996. Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.
55. Defense of Marriage Act of 1996, § 3(a), 1 U.S.C.A. § 7 (West 1997)("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

    The federal definitions provision of DOMA raises its own set of interesting constitutional questions. It arguably assaults principles of federalism. The Federalist Papers delineated areas of federal and state interest, noting that issues of family relations were properly within the province of the states. *See, e.g.*, THE FEDERALIST No. 17, at 107 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)(stating that state governments should have priority in "regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake"). Traditionally, federal courts look to state law to supply the definitions of domestic relations; this is part of the interstitial nature of federal and state law. *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570 (1956)(applying the state definition of "children" in an action arising under federal copyright laws);

deny full faith and credit to any act, record, or judicial proceeding that recognizes the existence of a same-sex marriage.[56] This provision provides that

> 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 States, 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.[57]

At first blush, DOMA resembles the prophylactic measures taken by states to deny recognition of same-sex marriages on public policy grounds.[58] Indeed, both supporters and opponents of the Act stressed its redundancy in light of the public policy exception to the recognition of marriage.[59] The House Report accompanying DOMA argued that DOMA is constitutional because same-sex marriages do not have to be recognized by states in any case: "[T]he result is the same in both cases, and so there cannot be a constitutionally significant difference between these mechanisms."[60] As Professor Cass Sunstein testified to the Senate Judiciary Committee, DOMA was "probably either pointless or unconstitutional."[61]

Closer analysis reveals, however, that DOMA does not merely declare or describe state power to disregard same-sex marriages under the public policy exception. Rather, it authorizes a greater disregard of same-sex marriages than would be possible for states under the public policy exception.[62] Absent DOMA, state measures declaring

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FALLON ET AL., *supra* note 29. Section 3 breaks from the tradition of federal courts importing the state-defined constellation of family relationships.

For a list of the disabilities imposed on same-sex couples pursuant to Section 3, see generally Koppelman, *supra* note 24 (manuscript at 5-7). Professor Koppelman opines that the definitional provision, taken alone, may be constitutional as "Congress obviously has the power to define the terms of the U.S. Code." *Id.* (manuscript at 7). He ultimately concludes, however, that the "invidious intent that is inferable under [*Romer v. Evans*] infects both provisions of the law," and therefore the entire statute is unconstitutional. *Id.* (manuscript at 7-15).

56. *See* HOUSE REPORT, *supra* note 6, at 27, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2931.

57. Defense of Marriage Act of 1996, § 2, 28 U.S.C. § 1738C (1996).

58. *See, e.g.*, Joel R. Brandes & Carole L. Weidman, *Same-Sex Marriage*, 217 N.Y. L.J. 3 (1997); Todd D. Robichaud, *Defense of Marriage—Or Attack on Family?*, NAT'L L.J., Sept. 30, 1996, at A24. *See also supra* text accompanying notes 30-35.

59. *See, e.g.*, *Hearings* 7/11/96, *supra* note 7, at 61 (statement of Prof. Sunstein); Tribe, *Less Perfect Union*, *supra* note 8.

60. HOUSE REPORT, *supra* note 6, at 27, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2931.

61. *Hearings* 7/11/96, *supra* note 7, at 44 (statement of Prof. Sunstein). It is worth noting that if the ratchet theory is valid, DOMA could be simultaneously pointless (because states could already do what DOMA permits) and unconstitutional (because it overreaches the constitutional limits on Congress' authority).

62. *See generally* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. (forthcoming 1998)(manuscript at 81-84, on file with au-

same-sex marriages violative of public policy would not have completely foreclosed all interstate recognition of same-sex marriages. Rather, pre-DOMA jurisprudence of the Full Faith and Credit Clause would have required recognition of same-sex marriages in some circumstances.

Although the text of the Full Faith and Credit Clause does not distinguish between the degrees of credit afforded to acts, records, and judicial proceedings, the three categories are accorded different levels of faith and credit.[63] Acts and records are accorded a weak level of recognition,[64] whereas judgments receive the strongest faith and credit protection and cannot be disregarded on public policy grounds.[65] Absent DOMA, states might have invoked the tiered system of full faith and credit jurisprudence to adjust their recognition of same-sex marriages to the extent same-sex marriages clashed with state public policy.[66] State courts could have refused to recognize

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thor)(describing how DOMA impliedly alters preexisting law by allowing states to disregard "all judgments in which the prevailing party pleaded the existence of a same-sex marriage").

63. *See* Baker v. General Motors Corp., No. 96-653, 1998 WL 7072, at *7 (U.S. Jan. 13, 1998). *Compare* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations for Choice of Law*, 92 COLUM. L. REV. 249, 295 (1992)(arguing that the Clause and the implementing act require full faith and credit for statutes of sister states), *with* Kurt H. Nadleman, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 73 (1957).

64. *See, e.g.*, Baker v. General Motors Corp., No. 96-653, 1998 WL 7072, at *7 (U.S. Jan. 13, 1998); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981)(stating that the forum may apply its own rules of law if some reasonable relationship exists between the forum and the transaction or parties, such that the forum has a legitimate interest in doing so).

65. In *Fauntleroy v. Lum*, the Supreme Court held that a mistaken application of Mississippi law by a Missouri court was a valid judgment in Mississippi, stating that "as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached even if it went upon a misapprehension of Mississippi law." 210 U.S. 230, 237 (1908). *See also* Baker v. General Motors Corp., No. 96-653, 1998 WL 7072, at *7 (U.S. Jan. 13, 1998); Howlett v. Rose, 496 U.S. 356, 382 n.26 (1990); RESTATEMENT (SECOND) CONFLICT OF LAWS § 117 (1971); LEONARD WILLIAMS LEVY ET AL., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 823-24 (1986); Brainerd Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 89; Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1225 (1946).

66. As Professor Kramer has explained, marriage cases feature two refinements in how the public policy exception has been used. First, a state may recognize that "some differences are more matters of degree than of fundamental policy," such that "a state that permits sixteen-year-olds to marry may apply another state's law permitting fifteen-year-olds to do so, but not one extending the right to nine-year-olds." Second, "many courts distinguish between the validity of a marriage and the ability to enjoy its 'incidents.'" Kramer, *supra* note 26, at 1970-71. Thus, based on state public policy, courts might distinguish between the different incidents of marriage for purposes of same-sex marriage recognition. *See, e.g.*, *In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Ct. App. 1948)(distinguishing be-

same-sex marriages for some purposes (e.g., spousal benefits, joint tax returns, and residential zoning laws),[67] but might have enforced judgments that incorporated a reference to a same-sex marriage (e.g., a judgment in a wrongful death suit brought by the surviving spouse of a same-sex marriage).[68] In this way, the pre-DOMA Full Faith and Credit Clause probably would have compelled at least some recognition, although indirect, of same-sex marriages.

DOMA, however, dismantles the tiered system by withdrawing faith and credit from acts, records, and proceedings that recognize same-sex marriages for all purposes.[69] Congress presumed the Full

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tween recognizing bigamous marriages when a decedent was still alive and dividing the property after his death).

Absent DOMA, courts of a state that did not perform same-sex marriages might have distinguished between requiring that state to extend spousal benefits to a same-sex couple and enforcing a wrongful death judgment that recognized a same-sex marriage.

> There is a difference . . . between circumstances under which a state will create a marriage relation for its domiciliaries, or recognize the existence of that status when raised with reference to those domiciled elsewhere. . . . The courts do recognize the legal existence of and give effect to foreign matrimonial unions that do not conform to requirements for the marriage relationship among their own people.

EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 446 (1982)(citations omitted).

67. *See* Koppelman, *supra* note 24 (manuscript at 2). As a practical matter, interstate recognition of marriages is a good idea. When invalidating a North Carolina marriage evasion law that refused to give full faith and credit to an ex parte Nevada divorce, the Supreme Court held that a divorce decree had to be recognized before protecting the legitimacy of the marriage that followed such divorces. *See* Williams v. North Carolina, 317 U.S. 287, 295-96, 302-03 (1942). The Supreme Court advanced the following rationales for recognizing the divorce decree: the need to protect the legitimacy of children; the need to protect the newly married couple from criminal prosecution for bigamy; the federalist mandate of the Full Faith and Credit Clause; and Nevada's state interest in its domiciliaries. *See id.* The interests cited in *Williams* justify recognition of both out-of-state divorces and out-of-state marriages.

For a discussion of the historical development of full faith and credit doctrine with regard to divorce, see generally Neil R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119 (1990); Michael M. O'Hear, Note, *"Some of the Most Embarrassing Questions": Extraterritorial Divorces and the Problem of Jurisdiction Before* Pennoyer, 104 YALE L.J. 1507 (1995).

68. *See* Koppelman, *supra* note 24 (manuscript at 26). *See also infra* text accompanying notes 116-17.

69. Although Professor McConnell wrote a letter to the Senate Judiciary Committee supporting the constitutionality of DOMA, he suggested it was an overbroad solution to the problem raised by the threat of a "Tyrannical Hawaii."

> I question whether Congress really intends some of the results that could obtain under the proposed Act. For example, if a same-sex couple resident in Hawaii were involved in an automobile accident in Michigan, does it make any sense to treat them as "unmarried" for purposes of tort and insurance law? One way to handle this problem would be to declare

Faith and Credit Clause could play a role in marriage recognition. It therefore sought to preempt the Clause from taking effect in the first place.[70] The House Report accompanying DOMA described the Act as a "narrow, targeted relaxation of the Full Faith and Credit Clause"[71] and purported to take "the Full Faith and Credit Clause out of the legal equation surrounding the Hawaiian situation."[72]

To "relax" the full faith and credit mandate, DOMA allows states to deny effect to judgments by authorizing states to deny "effect" to any "judicial proceeding . . . respecting a relationship between persons of the same sex that is treated as a marriage . . . or a right or claim arising from such a relationship."[73] By withdrawing the protection of the Full Faith and Credit Clause from judgments, DOMA departs from existing law and therefore is not merely declaratory.[74]

As the public policy exception is well-established in conflicts of law jurisprudence, the states were operating in familiar territory. Con-

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> that the legal right of two persons to be married to one another is determined by the state of common domicile from time to time.... This would leave in place ordinary choice of law rules for cases in which domiciliaries of one state were temporarily present in another state. That would be in keeping with longstanding principles regarding the legal status of "sojourners"—principles that have been honored in the past even in the face of such divisive subjects as slavery.

Hearings 7/11/96, *supra* note 7, at 58-59 (letter of Prof. McConnell to Sen. Hatch).

70. Proponents justified DOMA as necessary to avoid the result otherwise required by the Full Faith and Credit Clause. *See, e.g.*, 142 CONG. REC. S12015 (daily ed. Sept. 30, 1996)(statement of Sen. Abraham); Biskupic, *supra* note 21, at A1 ("[Proponents] say the legislation is necessary to make absolutely clear that states need not recognize a marriage from Hawaii and to preempt any move by a liberal judge to rule otherwise, *particularly since the Constitution's "full faith and credit" clause usually requires states to recognize official acts of other states.*" (emphasis added)).

71. *See* HOUSE REPORT, *supra* note 6, at 28, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2932.

72. *Id.* at 17, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2921. It should be recognized that states probably would not have been obligated to recognize a marriage under the direct language of the Full Faith and Credit Clause as a state "act, record, or judicial proceeding." "[E]ach state as a matter of its own law recognizes that the only states whose law might potentially be applicable to determine the validity of the marriage are the states of celebration and the domicile at the time of the marriage." Mark Strasser, *Loving the* Romer *Out for* Baehr*: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 291 (1997). Because marriages do not comfortably fit within the language of the Clause does not mean that DOMA did not change existing law. Even if a marriage, taken alone, could not be characterized as a state "act, record, or proceeding," states may have been obligated to recognize same-sex marriages for at least some purposes, e.g., giving full faith and credit to judgments that recognized the existence of same-sex marriages.

73. Defense of Marriage Act of 1996, Pub. L. No. 104-19, 110 Stat. 2419.

74. *See* Koppelman, *supra* note 62 (manuscript at 81-84); Koppelman, *supra* note 24 (manuscript at 24-27).

gress' action, by contrast, was entirely unprecedented.[75] By employing a novel strategy of creating an exception to the Full Faith and Credit Clause to thwart the recognition of same-sex marriage, Congress embarked on a mission of questionable constitutional validity.

C. Debate over the Defense of Marriage Act

Congress' unorthodox manipulation of full faith and credit did not go unnoticed. The novel restriction of full faith and credit, coupled with the dearth of legislative precedent, spurred substantial debate concerning the scope of Congress' full faith and credit authority.

DOMA's critics argued that Congress could legislate only to increase or augment the full faith and credit available to state acts, records, and proceedings.[76] In other words, Congress' power under the Effects Clause is subject to a "one-way ratchet." Under this reading, the affirmative grant of congressional authority does not include a negative power to create exceptions to the constitutional mandate of full faith and credit.

Supporters of DOMA rejected the one-way ratchet theory as a limit on Congress' full faith and credit authority[77] and disputed the characterization of Congress' action as nullifying the Full Faith and Credit Clause.[78] Invoking the threat of a "Tyrannical Hawaii" eager to impose same-sex marriages on unwilling states,[79] DOMA's supporters posited that Congress had to make exceptions to the constitutional mandate to protect the rights of states that reject same-sex marriage.[80] Supporters justified the unprecedented nature of this use of Congress' full faith and credit authority by arguing that the demand for same-sex marriages was itself unprecedented and thus compelled immediate—if novel—action.[81]

Because Congress exercises its full faith and credit authority so infrequently, it is especially difficult to assess whether Congress over-

75. *See supra* note 7. *See also Hearings* 7/11/96, *supra* note 7, at 42 (statement of Prof. Sunstein).

76. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 46 (statement of Prof. Sunstein); Eskridge, *supra* note 4, at 11.

77. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 25-41 (statement of Prof. Wardle). *See also id.* at 58 (letter of Prof. McConnell to Sen. Hatch).

78. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 60 (statement of Prof. Wardle).

79. *See, e.g.*, Patricia Wen, *Measure Barring Gay Marriages Seen as Vulnerable*, BOSTON GLOBE, Sept. 12, 1996, at B1 (quoting Jay Sekulow, Chief Counsel for the American Center for Law and Justice).

80. *See* HOUSE REPORT, *supra* note 6, at 26, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2930 ("While full faith and credit is the rule—that is, while states are generally obligated to treat laws of other states as they would their own—Congress retains a discretionary power to carve out such exceptions as it deems appropriate.").

81. *See, e.g., Hearings* 7/11/96, *supra* note 7, at 52 (comments of David Zwiebel, General Counsel and Director, Government Affairs, Agudath Israel of America).

stepped any constitutional boundaries by passing DOMA.[82] Due to the dearth of legislative precedent, the arguments for and against DOMA were made in a relative vacuum. One commentator has noted that "the limits of congressional power under the Effects Clause have never been examined, in part because Congress has never tested them."[83] The balance of this Article will investigate the validity of the one-way ratchet theory of Congress' full faith and credit power.

III. TEXTUAL DEFENSE OF THE RATCHET AND PROCEDURES THEORIES OF FULL FAITH AND CREDIT

The language of the Full Faith and Credit Clause suggests that Congress' power is subject to a one-way ratchet. The Clause is constructed awkwardly insofar as it authorizes Congress to enforce a constitutional provision that already is self-executing. The first sentence, demanding that "Full Faith and Credit *shall* be given," is an affirmative and self-executing mandate.[84] The second sentence (the "Effects Clause"), stating that "Congress *may* by general Laws prescribe the Manner," grants Congress discretionary authority to legislate under this Clause. Although its self-executing nature ostensibly renders enforcement unnecessary, the Effects Clause bolsters its self-executing mandate by authorizing Congress to implement its effects.[85]

Although the combination of the self-executing mandate of full faith and credit with a grant of discretionary authority seems odd, it is not a mere accident of drafting. In an early draft of the Clause, the first sentence used the permissive term "ought," so that full faith and credit was not a constitutional requirement, and the Effects Clause used the mandatory term "shall," so that no full faith and credit was

82. *See infra* section IV.D.

83. Kramer, *supra* note 26, at 1968; Reidinger, *supra* note 51, at 80.

84. U.S. CONST. art. IV, § 1. *See also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1309 (5th ed. 1891)("The language is positive, and declaratory, leaving nothing to future legislation."). Justice Jackson observed that the self-executing nature of the Clause had been "questioned in state courts," but concluded the Clause is self-executing. "In fact, no requirement of faith and credit exists unless the clause is self-executing." Jackson, *supra* note 2, at 11 n.43 (citations omitted).

85. U.S. CONST. art. IV, § 1. In other words, "the constitutional clause is self-executing and legislation is optional." Laycock, *supra* note 63, at 293. Other constitutional provisions combine a self-executing mandate with a grant of discretionary power to Congress. For example, the Thirteenth Amendment grants Congress a power clearly limited by a one-way ratchet. The self-executing Section 1 reads as follows: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1. Section 2 grants Congress the "power to enforce this article by appropriate legislation." *Id.* § 2. Congress' enforcement power under the Thirteenth Amendment has never been understood to allow Congress to make exceptions to the prohibition against slavery.

required until Congress acted.[86] Madison suggested the provision be altered:

> Madison then moved to substitute "shall" for "ought to" and "may" for the first "shall[.]" . . . The effect of Madison's amendment was to make the clause self-executing, commanding full faith and credit in the constitutional text and making congressional action discretionary, instead of commanding congressional action and leaving the clause dependent on the implementation of the command to Congress.[87]

Combining a self-executing mandate with discretionary congressional power was therefore deliberate. The precise contours of the congressional authority, however, remain unclear. Does the Effects Clause authorize Congress to prescribe alternative rules and thus weaken the mandate of the first sentence? Or, does the Effects Clause limit Congress to enforcing the terms of the self-executing mandate of the first sentence?

A. Interpreting "Full Faith and Credit shall be given"

One of the strongest defenses of the ratchet theory is textual: the Full Faith and Credit Clause does not expressly authorize Congress to decrease full faith and credit. Instead, the first sentence of the provision requires "*Full* Faith." The use of the word "full" connotes an affirmative understanding—all the faith and credit that *can* be given *must* be given.[88] The United States Supreme Court has emphasized the positive nature of the provision, stating that the Clause (and its implementing statute) requires "not some, but full" faith and credit.[89] This reading of the first sentence supports the one-way ratchet theory.

B. Interpreting "the Effect thereof"

Interpretation of the Effects Clause is at the heart of the debate over DOMA. Plainly stated, the second sentence of the Full Faith and Credit Clause grants power to Congress. How does this grant of congressional authority operate in conjunction with the affirmative mandate of the first sentence of the Clause? There are two ways to answer this question. First, the second sentence can be understood to modify and create an exception to the first sentence. Alternatively, the power created by the Effects Clause can be understood as bound by a one-way ratchet such that Congress may act only to implement the man-

86. The early draft stated that "[f]ull 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, & proceedings shall be proved, and the effect thereof." Laycock, *supra* note 63, at 291.

87. *Id.* at 292. *See also* 2 STORY, supra note 84, § 1303; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 489 (Max Farrand ed., rev. ed. 1966).

88. *See* Laycock, *supra* note 63, at 296.

89. Davis v. Davis, 305 U.S. 32, 40 (1938).

date of and police compliance with the first sentence. Each interpretation will be considered in turn.

DOMA's supporters argue that the Effects Clause functions as a type of "exceptions clause" that authorizes Congress to weaken full faith and credit. As Professor Michael McConnell has argued,

> [t]o "prescribe the effect" of something is to determine what effect it will have. In the absence of powerful evidence to the contrary, the natural meaning of these words is that Congress can prescribe that a particular class of acts will have no effect at all, or that their effect will be confined to their place of origin.[90]

The House Report accompanying DOMA states that "[w]hile full faith and credit is the rule . . . Congress retains a discretionary power to carve out such exceptions as it deems appropriate."[91] Under this view, empowering Congress solely to enforce what is already a self-executing imperative is pointless; the Effects Clause arguably would be surplusage unless Congress could alter the mandate of the first sentence.

DOMA's opponents argue that the second sentence does not undercut the mandate of the first. Instead, the Effects Clause is a "policing clause" that is limited to enforcing compliance with the first sentence against state infringement.[92] As Professor David Currie notes, "the power to flesh out full faith and credit may have been inserted out of an abundance of caution."[93] Given the absence of language expressly authorizing Congress to decrease full faith and credit, the Effects Clause should not be read to license Congress to interfere with the mandate of the first sentence.[94] One commentator notes "[t]hat

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90. *Hearings* 7/11/96, *supra* note 7, at 57 (letter of Prof. McConnell to Sen. Hatch).

91. *See* HOUSE REPORT, *supra* note 6, at 25, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929.

92. *Cf.* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 74-75 (1993). Professor Aynes, in describing Congress' lack of enforcement power in other Article IV provisions, states that

> [a] major tenet of antislavery constitutionalism held that . . . all the provisions of Article IV, except the Full Faith and Credit Clause, were part of a compact with the states. According to this theory, the Constitution commanded state adherence to these provisions even though Congress lacked the power to enforce these rights against state infringement.

Id. Under one reading of this theory, Congress' full faith and credit power is limited to enforcing compliance with the Full Faith and Credit Clause against state infringement. In this context, states were obliged to obey the Constitution, but Congress could not enforce this obligation. Under the Full Faith and Credit Clause, by contrast, states were obliged to obey the Constitution, and Congress *could* enforce this obligation. *See also infra* section V.D.

93. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 171 (1995).

94. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

mandatory 'shall' lose some (though obviously not all) of its meaning if Congress can simply legislate the meaning away."[95]

The text of the Effects Clause is ambiguous, as illustrated by the weight given to it by both DOMA's supporters and opponents. Therefore, other sources are needed to interpret the nature and scope of the power conferred by the Effects Clause. These sources, which include the historical understanding of the Full Faith and Credit Clause, the comparison with other grants of constitutional authority, and the role of the Full Faith and Credit Clause in the federal system, help to decipher the meaning of the Effects Clause. They will be discussed in Parts IV, V, and VI.

C. Interpreting "Congress may prescribe the Manner"

Congress is not delegated plenary power to legislate with regard to all matters involving full faith and credit under the Full Faith and Credit Clause; instead, Congress has authority only to "prescribe the Manner" in which state acts, records, and proceedings "shall be proved."[96] Under one reading, the "prescribe the Manner" provision characterizes the Full Faith and Credit Clause as a tool for Congress to regulate the procedure, but not the substantive law, of full faith and credit.[97] If the Framers wanted Congress to legislate with regard to the substantive content of the laws, presumably they could have drafted a provision stating that "Congress may prescribe which acts, records and proceedings shall be proved."

This interpretation of the "prescribe the Manner" provision gives rise to what shall be called the "procedures theory." Under the procedures theory, Congress can establish procedural requirements that must be satisfied before full faith and credit will be accorded to acts, records, and proceedings, but Congress cannot pick and choose among the substantive content of those acts, records, and proceedings once the procedural requirements have been met. In short, Congress can set the rules, but cannot choose the outcome.

If the procedures theory is correct, then DOMA falls outside the scope of Congress' power. DOMA's content-based selection of acts, records, and proceedings to be denied credit is not a regulation of procedure. Moreover, DOMA departs from prior exercise of congressional

95. Kramer, *supra* note 26, at 2003.

96. U.S. CONST. art. IV, § 1.

97. *Cf.* Keane, *supra* note 22, at 502 (noting that "[c]hampions of a weak or 'evidentiary' interpretation of the Full Faith and Credit Clause suggest that the Clause exists merely to provide a method for proving what the law of one state is when the question arises in another state's courts")(citing Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981)).

full faith and credit authority, which for the most part complied with the procedures theory and enforced the mandate of the Clause by creating authentication procedures.[98]

IV. HISTORICAL/INTERPRETIVE DEFENSE OF THE RATCHET AND PROCEDURES THEORIES

This Part assesses the ratchet theory by considering the historical understanding of Congress' power. The first section examines the drafting of the Full Faith and Credit Clause to determine whether the drafters conceived of Congress' power as subject to a one-way ratchet. The second section considers how DOMA's effects conflict with Madison's view of the Full Faith and Credit Clause. The third section assesses the procedures theory in light of modern commentary on the Clause. The fourth section appraises Congress' previous action pursuant to its full faith and credit power, noting that all previous exercise of congressional authority has conformed to the one-way ratchet and has established the procedural method by which full faith and credit shall be given.

A. Drafting and Adoption of the Full Faith and Credit Clause

Little information exists to suggest how the drafters expected the full faith and credit provision to operate. As one treatise explains, "[t]he subject of full faith and credit evoked little discussion in the Constitutional Convention, and it seems unlikely that there was any general understanding among the delegates of what the clause was designed to accomplish."[99] The decision to grant such congressional power was nonetheless the product of some deliberation and debate.

The Full Faith and Credit Clause's predecessor is found in the Articles of Confederation.[100] This version lacked any provisions for en-

98. *See infra* section IV.C. Other constitutional provisions that authorize procedural, but not substantive, regulations include Article I, Section 5 (authorizing the House to "judge the qualifications" of its members) and Article I, Section 4, Clause 1 (authorizing states to regulate the Time, Places, and Manner of Elections).

99. LEVY ET AL., *supra* note 65, at 823. There is little understanding of what "full faith and credit" actually meant to the drafters of either the Articles of Confederation or the Constitution. Professor Max Radin examined the drafting of the phrase for the Articles of Confederation to discover the original understanding of full faith and credit, but found little guidance. Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 5 (1944).

100. NOWAK & ROTUNDA, CONSTITUTIONAL LAW 319 n.2 (identifying Article IV, Clause 3 of the Articles of Confederation as the "ancestor to the modern full faith and credit clause".); Walter Wheeler Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 423 (1919).

forcing the promise of full faith and credit.[101] Thus, upon the recommendations of James Madison and Gouverneur Morris, the Constitutional Convention of 1787 added the Effects Clause, granting Congress enforcement authority.[102]

The revision was meant to elevate the interstate recognition of acts, records, and proceedings above that required under the doctrine of comity. James Wilson argued on behalf of expanding congressional authority: "if the legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations."[103] According to Wilson, the Full Faith and Credit Clause required more from the states than that which existed under the doctrine of comity.[104] Edmund Randolph[105] objected to the Effects Clause on grounds of federalism. He worried that "the definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers."[106] Despite Randolph's concerns, the proposal was adopted.[107]

The historical record of the drafting and the adoption of the Full Faith and Credit Clause, albeit sparse, supports the ratchet theory of full faith and credit. Although the Framers contemplated questions of federalism and separation of powers, nothing in the record suggests they considered whether or not Congress could decrease full faith and

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Professor Atwood has explained why the original provision was included in the Articles of Confederation:

> Prior to the Continental Congress, a few colonies, in response to the fleeing judgment debtor, enacted legislation which provided for reciprocal recognition of judgments from the courts of the other colonies. The colonists' experience led to the inclusion of a full faith and credit provision in the Articles of Confederation.

Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 66-67 n.37 (1982)(citations omitted).

101. LEVY ET AL., *supra* note 65, at 823; Radin, *supra* note 99, at 9-10.

102. *See* Cook, *supra* note 100, at 424; Jackson, *supra* note 2, at 3-7.

103. 2 FARRAND, *supra* note 87, at 488.

104. Several commentators have noted how the Framers sought to require interstate recognition of acts, records, and proceedings at a level greater than comity. *See, e.g.*, Laycock, *supra* note 63, at 259-60; Radin, *supra* note 99, at 3.

105. Edmund Randolph served as Governor and Attorney General of Virginia. He was the leader of the Virginia delegation to the Constitutional Convention, where he served on the Committee of Detail. M. CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH (1888).

106. 2 FARRAND, *supra* note 87, at 488-89. *See also* Cook, *supra* note 100, at 425; Radin, *supra* note 99, at 7-9 (describing the debate over the amendments to the Full Faith and Credit Clause).

107. *See* 2 FARRAND, *supra* note 87, at 489; Cook, *supra* note 100, at 425. *See also* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 563-66 (1928); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 897-900 (1990)(describing the colloquy over full faith and credit provision at the Philadelphia Constitutional Convention).

credit.[108] A reading of the Framers' intent to the opposite effect would conflict with the dual contentions that first, the Full Faith and Credit Clause would elevate the recognition above that required by the doctrine of comity, and second, the Clause would usurp state power. In other words, the threat to federalism would not have been anticipated if Congress had the power to punt the full faith and credit issue to the states for state-by-state determination. (This is, in large part, the effect of DOMA.) To the contrary, the record suggests the Framers understood the Full Faith and Credit Clause to give power to the national government at the cost of state power. As Professor Sunstein argued to the Senate Judiciary Committee, "[i]f you look at the history of the clause back when the Framers were writing—Madison and the others—they spoke about congressional extension and enforcement of judgments. They spoke not at all about congressional nullification of judgments."[109]

The modern understanding of the Framers' intent upon granting the new congressional authority echoes Wilson's argument that the Full Faith and Credit Clause was meant to require more than comity. The Supreme Court stated in 1948 that the Clause "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns."[110] According to one account,

> [t]he Framers felt . . . that the rules of private international law should not be left among the States altogether on a basis of comity and hence subject always to some overruling local rule of the *lex fori* but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent the section now under consideration was inserted, and Congress was empowered to enact supplementary and enforcing legislation.[111]

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108. *See Hearings* 7/11/96, *supra* note 7, at 45 (statement of Prof. Sunstein). The record is sparse and thus sheds limited light on the original meaning of full faith and credit. As Radin notes, "[t]he debate of August 29th seems to have exhausted the interest they took in it. There is almost no reference to it in the debates in the various states on adopting the Constitution." Radin, *supra* note 99, at 9.

109. *Hearings* 7/11/96, *supra* note 7, at 43. *See also id.* at 45 (statement of Prof. Sunstein).

110. Estin v. Estin, 334 U.S. 541, 546 (1948).

111. CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 836 (Washington 1987). Note how the Congressional Research Service describes Congress' power in positive terms: "to enact *supplementary* and *enforcing* legislation." This affirmative language seems to foreclose the possibility that Congress can restrict faith and credit. The same treatise, however, implies Congress might have the power to do so.

> Congress has the power under the clause to decree the effects that the statutes of one State shall have in other States. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain kind of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall.

Id. at 870.

To comport with this interpretation, Congress must exercise its full faith and credit authority to require broader interstate recognition of acts, records, and proceedings than the recognition achieved under comity. If Congress could decrease faith and credit, then interstate recognition could be reduced to that afforded under the doctrine of comity. Because DOMA allows states to return to a lower level of obligation, it conflicts with the prevailing understanding of the Framers' intent.[112]

B. Madison and the Ratchet Theory

James Madison offered one of the earliest interpretations of Congress' full faith and credit power. His understanding of Congress' power provides a useful touchstone for analyzing the limits of Congress' authority. Madison viewed the grant of congressional authority as an important improvement on the original full faith and credit provision in the Articles of Confederation.[113] As he wrote in the Federalist Papers,

> [t]he power of prescribing by general laws the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation. . . . The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.[114]

Although Madison did not expressly describe Congress' power as subject to a one-way ratchet, he never suggested that Congress could negate full faith and credit.[115]

As Madison's comments about the sudden and secret translations suggest, he believed that the Full Faith and Credit Clause would have the beneficial effect of preventing a losing litigant from fleeing with his resources to a jurisdiction where the judgment would not be en-

112. DOMA's opponents noted this tension between the Framers' intent to demand more than comity and the effects of DOMA. *See, e.g.*, *Tribe Letter*, *supra* note 8, at S5933; Eskridge, *supra* note 4, at 11.

113. *See* Radin, *supra* note 99, at 10 (asserting that Madison considered the grant of congressional authority by "far the most important part of the section").

114. THE FEDERALIST No. 42, at 278-79 (James Madison)(Isaac Kramnick ed., 1987).

115. Justice Story agreed with Madison's description of Congress' new power as a significant improvement on the prior provision in the Articles of Confederation. 2 STORY, *supra* note 84, § 1303. Story's interpretation of the Clause also supports the theory of the one-way ratchet limit on Congress' power. He described Congress' power as conferring "additional certainty" on the mandate of full faith and credit; adding certainty does not imply detracting from *full* faith and credit. Furthermore, Story's use of the word "additional" supports the reading that the Effects Clause gives Congress power to implement—not to create exceptions to—the mandate of full faith and credit.

forced against him. According to Madison, the Clause would foreclose such evasion.

Yet, DOMA facilitates such tactics. In exploring DOMA's likely effects, Professor Andrew Koppelman posits hypotheticals in which losing litigants escape adverse judgments by taking their assets into different jurisdictions.[116] For example, a losing litigant can flee to a jurisdiction that will refuse to enforce the prior judgment because the prior judgment necessarily recognized the validity of a same-sex marriage relationship.

> If a drunk driver runs down and kills a pedestrian on a Honolulu street, the victim happens to have been married to a person of the same sex, and the surviving spouse wins a wrongful death suit, the driver could flee with his money to a state that does not recognize same-sex marriage. Under DOMA, courts in other states would have no obligation to enforce the judgment.[117]

Koppelman's hypothetical anticipates the very harm that Madison expected the Clause to foreclose. The losing litigant who manipulates conflicting state laws to avoid an adverse judgment flouts what Madison understood to be the principal purpose of the Clause. In Madison's terms, the drunk driver successfully "translates" his "effects liable to justice" to a foreign jurisdiction. Because DOMA permits such maneuvers, it impedes the function of the Clause as originally understood by Madison.

C. Modern Commentary and the Procedures Theory

Most modern commentary on Congress' full faith and credit authority describes no congressional power to withdraw full faith and credit.[118] In fact, many commentators call for Congress to *expand* full

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116. *See generally* Koppelman, *supra* note 24.

117. *Id.* (manuscript at 26). Professor Koppelman's hypothetical illustrates the very result that the Supreme Court (in 1942) expected the Full Faith and Credit provision to preclude.

> Were it not for [the] full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries.

Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1942)(citations omitted).

118. *See, e.g.*, 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 449 (1858)(describing the original grant of Congress' power, but not mentioning any power to withdraw full faith and credit); CYCLOPEDIA OF AMERICAN GOVERNMENT 709 (Andrew McLaughlin & Albert Hart eds., 1914); Laycock, *supra* note 64; Radin, *supra* note 99, at 7-11; Daina B. Garonzik, Comment, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723 (1996).

Some commentators have briefly noted that legislation to decrease faith and credit may be unconstitutional. *See* Freund, *supra* note 65, at 1229-30; Atwood, *supra* note 100.

faith and credit.[119] The prevailing view, then, supports the ratchet theory. Moreover, some of the commentary also has limited Congress' full faith and credit authority to the power to legislate the procedures by which the mandate of full faith and credit shall operate.

For example, Professor Michael Gottesman has argued persuasively that Congress should legislate "federal choice of law rules for categories of disputes that arise frequently in multistate contexts—rules that would determine which state's law will apply to resolve a dispute when more that one state's law might fairly be claimed applicable."[120] In proposing that Congress declare federal choice of law statutes, Gottesman never suggests that Congress legislate a particular substantive result through its full faith and credit power.[121] Rather, he conceives of the Full Faith and Credit Clause as "provid[ing] a federal means of refereeing disputes as to which state's law [is] to apply in resolving issues committed to state substantive law."[122] DOMA, by contrast, does more than simply referee a dispute; DOMA endorses a substantive norm by denying the protection of the Full Faith and Credit Clause for a subset of state proceedings on the basis of substantive content.

Although the procedures theory distinguishes between procedural and substantive rules, the dividing line between the two is hazy. Indeed, it is because choice of law has substantive ramifications that a

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Prior to DOMA, Professor Brainerd Currie had suggested that Congress could carve out exceptions to the Clause by withdrawing full faith and credit from child custody decrees, rather than requiring courts to "mak[e] an exception where Congress has made none." Currie, *supra* note 65, at 120. *See id.* at 115 n.103 ("[T]he requirement of full faith and credit" should be "removed altogether"). Congress, however, remedied the problems that troubled Currie by passing PKPA. *See infra* notes 134-37. It is notable that Congress responded by strengthening full faith and credit, rather than *weakening* it as suggested by Currie. Interestingly, even as Currie argued for increased congressional action, he stated that the issue of recognition of divorce decrees is best left to the states. *Id.* at 90.

119. *See, e.g.*, Cook, *supra* note 100, at 428-34 (discussing Congress' power to provide for (1) service in other states of state process in civil suits; (2) direct enforcement of state judgments in other states; (3) legislation compelling states to enforce judgments of other states by rendering new judgments; and (4) compulsory recognition by the states of rights created by legislative acts of other states); Garonzik, *supra* note 118 (calling for Congress to amend the Full Faith and Credit Act to extend full faith and credit to tribal court judgments); Russell J. Weintraub, *Affecting the Parent-Child Relationship Without Jurisdiction Over Both Parents*, 36 Sw. L.J. 1167-70 (1983).

120. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1 (1991).

121. Indeed, Professor Gottesman suggests that Congress, if it so desired, could displace state substantive law by enacting federal substantive rules pursuant to the Commerce Clause. "[I]t is at least arguable that Congress could enact a federal law choosing a substantive solution from among those proffered by the states implicated in a dispute." *Id.* at 23.

122. *Id.* at 24.

federal court sitting in diversity must apply the choice of law rule of the state wherein it sits under the rule of *Erie Railroad Co. v. Tompkins*.[123] Yet, a significant difference exists between (1) a federal choice of law rule that "drains the dismal swamp of 'the realm of the conflict of laws'"[124] by establishing a set of content-neutral rules by which courts can determine which state's law to apply, and (2) a federal choice of law rule that isolates a subset of acts, records, and judicial proceedings to be denied constitutional protection. As Gottesman explains,

> [i]t would be an extraordinary departure from past congressional deference to states in determining tort law for Congress to solve the problem by enacting a substantive tort law . . . . The mission of choice of law is not to devise a tort law, but to referee which state's law will apply. A federal choice of law statute would not be a torts statute, so long as the basis for choice was not a judgment about which state's substantive law is inherently more desirable. . . . The framers of the Constitution would have been aghast at the notion that Congress could enact a tort law, but they plainly envisioned that Congress could referee the application of competing state tort laws in multistate contexts.[125]

Gottesman, of course, reaches his conclusions about federal choice of law in the context of tort law, but his observations are applicable in the context of DOMA. DOMA is a similar "departure from past congressional deference to states" in the context of marriage recognition. Rather than a federal choice of law statute, DOMA is a federal marriage statute; it expresses a preference for "inherently more desirable" state substantive law in those states in which same-sex marriage is not recognized. DOMA therefore does more than just set neutral rules of the game; DOMA stacks the deck.

D. Prior Exercise of Congress' Full Faith and Credit Authority

Despite the Constitution's express grant of authority to enforce the Full Faith and Credit Clause, Congress rarely has exercised its full faith and credit power.[126] Nonetheless, two significant trends can be discerned. First, Congress has never before relaxed the constitutional obligation of full faith and credit for valid judgments, acts, or proceedings; to the contrary, all prior legislation has conformed to the one-

123. 304 U.S. 64 (1938). *See* Gottesman, *supra* note 120, at 11 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). As Professor Gottesman points out, choice of law is substantive in two ways: first, because choice of law will determine what substantive rules of law will govern a lawsuit, and second, because choice of law rules may be outcome-determinative. *Id.*

124. Gottesman, *supra* note 120, at 1 (quoting William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953)).

125. *Id.* at 30, 32.

126. *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, *supra* note 111, at 870; NOWAK & ROTUNDA, *supra* note 100, at 319 n.3; WARREN, *supra* note 107, at 565.

way ratchet.[127] Second, in those rare instances in which Congress has invoked its full faith and credit authority, it has legislated procedural norms—not substantive preferences—to be used to fulfill the requirement of full faith and credit.

The First Congress exercised its full faith and credit power to pass the Act of May 26, 1790.[128] The statute provided the procedural mechanism by which the full faith and credit obligation could be triggered, but gave no guidance as to the appropriate choice of law.[129] No legislative history from this Act indicates that Congress' power included the power to restrict full faith and credit.[130]

Although the Full Faith and Credit Clause applies by its terms only to states, § 1738 imposes the full faith and credit obligation on federal as well as state courts.[131] The United States Supreme Court

127. *See* HOUSE REPORT, *supra* note 6, at 41, *reprinted in* U.S.C.C.A.N. 2905, 2944 (noting that all prior legislation enforced the constitutional mandate). *See also Tribe Letter, supra* note 8, at S5932-33; Cass R. Sunstein, *Foreward: Leaving Things Undecided,* 110 HARV. L. REV. 6, 97 n.492 (1996). Professor Koppelman has pointed out that Congress has created statutory exceptions to the rule of full faith and credit for "judgments that Congress had the power to declare void for all purposes," i.e., because Congress properly divested the state courts of jurisdiction. He concludes these examples do not support "a general right of Congress to repeal full faith and credit for judgments issued by state courts within their proper jurisdiction." Koppelman, *supra* note 24, at 35 n.100 (citing Kalb v. Feuerstein, 308 U.S. 433 (1940); United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506 (1940)).

128. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified at 28 U.S.C. § 1738). The statute stated how acts of state legislatures could be authenticated and how state judicial records and proceedings should be proved, and provided that "records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." *Id. See also* Radin, *supra* note 99, at 10-11.

129. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress,* 61 U. CHI. L. REV. 775, 841 (1994); Keith H. Beyler, *Personal Jurisdiction Based on Advertising: The First Amendment and Federal Liberty Issues,* 61 MO. L. REV. 61, 120 (1996).

130. The implementing statute was passed without debate. Atwood, *supra* note 100, at 66 n.36 (citing Reese & Johnson, *The Scope of Full Faith and Credit to Judgments,* 49 COLUM. L. REV. 153, 153-55 (1949)).

131. *See, e.g.*, Clinton, *supra* note 107, at 900. Professor Clinton notes that

> section 1738 has been given a literal reading that creates certain anomalies. For example, federal courts asked to enforce state judgments are bound by section 1738 to accord full faith and credit to such judgments by section 1738. In contrast, section 1738, as construed by most commentators, does not directly impose on any state court asked to enforce a federal court judgment any obligation to accord such judgment full faith and credit. Rather, it is usually assumed that constitutional supremacy, rather than the statutory language, compels state courts to accord federal court judgments full faith and credit.

Id. at 901 (footnotes omitted). *See also* Atwood, *supra* note 100, at 67 n.40 (citing Davis v. Davis, 305 U.S. 32, 40 (1938)). For a survey and critique of the case law

has stated that the statute was drafted to "insure that federal courts, not included within the constitutional provision, would be bound by state judgments."[132] Thus, Congress' first exercise of its full faith and credit authority illustrates the two trends described above. First, § 1738 conforms to the one-way ratchet by increasing the faith and credit required by the Constitution. Second, § 1738 sets out the procedure by which the Clause shall be implemented without regard to substantive content of the acts, records, or proceedings at issue.

Other legislation pursuant to the Full Faith and Credit Clause has also enforced compliance with, rather than defused the mandate of, full faith and credit.[133] For example, the Parental Kidnapping Prevention Act[134] (PKPA) requires states to give full faith and credit to child custody determinations of other states, so long as those determinations are consistent with the criteria established by Congress. Because child custody determinations can be modified if necessary for the best interests of the child, courts tended, prior to the enactment of PKPA, to characterize such determinations as not final and therefore not necessarily deserving of full faith and credit.[135] The failure to enforce the custody decrees provided an incentive for a disappointed parent to kidnap her child and seek another custody determination elsewhere. PKPA foreclosed such manipulation by requiring states to enforce custody decrees from sister states, provided the determinations were made by states with proper jurisdiction.

Again, the two trends of congressional full faith and credit practice are apparent: Congress legislated to increase full faith and credit, and, by linking full faith and credit to a set of jurisdictional criteria, Congress employed a procedural mechanism to expand the mandate of full faith and credit without regard to the substantive result of the custody decrees to be enforced.[136] Indeed, when describing PKPA, the

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regarding the effect of federal court judgments in later state court proceedings, see Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 744-49 (1976).

132. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483 n.24 (1982). A notable exception to the general rule of full faith and credit as required by § 1738 rests on the validity of jurisdiction exercised by the first court. Section 1738 has long been interpreted to require states to give effect only to sister-state judgments rendered by a court with jurisdiction. This "lack of jurisdiction exception" was confirmed by the Supreme Court in 1850. *See* Beyler, *supra* note 129, at 120 (citing D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1850)).

133. *See supra* note 127.

134. 28 U.S.C. § 1738A (1994). PKPA was passed pursuant to Congress' authority to implement the Full Faith and Credit Clause. For a concise description of PKPA, see Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1062-65 (1989).

135. *See, e.g.*, Atwood, *supra* note 134, at 1063-64 (citing Ford v. Ford, 371 U.S. 187, 192 (1963); Hooks v. Hooks, 771 F.2d 935, 948 (6th Cir. 1985)).

136. One DOMA cosponsor, Senator Nickles, argued DOMA was similar to PKPA. 142 CONG. REC. S4869, S4870 (daily ed. May 8, 1996). As one commentator has pointed out, however, "Senator Nickles' analogy to prior full faith and credit legis-

Supreme Court emphasized the procedural nature of Congress' method of extending full faith and credit to child custody determinations. "Because Congress's chief aim in enacting PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations, the Act is most naturally construed to furnish a rule of decision for courts to use in adjudicating custody disputes . . . ."[137]

Congress' past exercise of its full faith and credit power has conformed to the one-way ratchet.[138] Rather than withdrawing full faith and credit from some proceedings, Congress has enforced full faith and credit for proceedings that satisfy certain criteria. DOMA completely departs from the tradition of prior full faith and credit legislation by decreasing the constitutional mandate of full faith and credit and weakening full faith and credit for a specified subset of state proceedings on the basis of substantive content. By withdrawing full faith and credit only from acts, records, and judicial proceedings that recognize same-sex marriages, Congress legislated a substantive norm. In sum, DOMA's method conflicts with every prior act of Congress under the Effects Clause.[139]

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lation reveals the flaws in his defense of DOMA's constitutionality." Cynthia M. Reed, *When Love, Comity and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 129 (1996). First, Congress sought to clarify that custody orders rendered by states with proper jurisdiction are "sufficiently final to warrant full faith and credit," whereas the "finality of marriage licenses . . . is much less ambiguous." *Id.* Second, PKPA

> "prescribes the manner" in which custody orders are entitled to full faith and credit by means of a jurisdiction standard. DOMA establishes no standard at all, but rather permits each State on an ad hoc basis to determine whether or not it wants to extend full faith and credit to a same-sex marriage.

Id. Third, PKPA was based on sound public policy by discouraging "child snatching" and protecting the welfare of children, and "[t]here is no comparable crisis with same-sex marriage." *Id.* at 129-30 (footnote omitted).

If PKPA had created a subset of custody decrees that did not require full faith and credit based on the substantive content of the custody decrees, then it would have been an apt analogy. For example, if PKPA provided that states need not give effect to custody decrees awarding custody to lesbians, then PKPA would be precedent for DOMA.

137. Thompson v. Thompson, 484 U.S. 174, 183 (1988).

138. Full faith and credit for the Child Support Orders Act of 1994 requires the same with respect to child support orders. 28 U.S.C. § 1738B (1994). The Safe Homes for Women Act of 1994 requires full faith and credit be given to protective orders issued against a spouse or intimate partner with respect to domestic violence. 18 U.S.C. § 2265 (1994).

139. *See also Hearings* 7/11/96, *supra* note 7, at 44 (statement of Prof. Sunstein)("In the nation's history, Congress has never declared that marriages in one state may not be recognized in another; it has never done this for polygamous marriage, marriages among minors, incestuous marriages, or bigamous marriages."); Kramer, *supra* note 26, at 2001 ("Note how extraordinary the proposed Defense of Marriage Act is in this light: Congress was content to let states slug it out on

That Congress has never legislated either to decrease full faith and credit or to establish a substantive rather than procedural norm is not necessarily persuasive evidence that it has no power to do so. If Congress has power to make exceptions to the substantive provisions of the full faith and credit mandate, that power is not extinguished by Congress' disuse. It therefore is necessary to consider other arguments in support of the one-way ratchet and the procedures theories.

V. REASONING BY ANALOGY—COMPARING CONGRESS' FULL FAITH AND CREDIT POWER TO OTHER CONSTITUTIONAL PROVISIONS

Given the ambiguity of the Effects Clause, the precise nature and scope of Congress' full faith and credit power cannot be definitively discerned from its language. As DOMA percolated in Congress, several commentators studied how other constitutional powers had been granted to and exercised by Congress, and construed by the courts.[140] These analyses suggest the drafters knew how to regulate the scope of Congress' authority when they so desired. On balance, comparing the text of the Effects Clause with grants of congressional authority (or lack thereof) in the Fourteenth Amendment, Article III, the Elections Clauses, and the Fugitive Slave Clause suggests that the ratchet theory and the procedures theory are plausible and persuasive interpretations of the nature and scope of Congress' power.

A. Fourteenth Amendment Comparison: Unambiguous One-Way Ratchet Defining Congress' Power to Enforce the Fourteenth Amendment

The scope of Congress' authority under the Fourteenth Amendment is bound by an unambiguous one-way ratchet created by the unambiguous language of "enforcement." In contrast, Congress' full faith and credit power under the Effects Clause lacks such definitional clarity. Nevertheless, the ratchet theory as understood in the context of the Fourteenth Amendment is a useful analytic tool to understand how Congress' power can operate in one direction only.

The ratchet theory of congressional authority first appeared in footnote ten of *Katzenbach v. Morgan*,[141] which upheld the constitutionality of § 4(e) of the Voting Rights Act. Section 4(e) suspended English-language literacy tests for persons who had completed the

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issues like slavery, miscegenation, divorce and abortion, but this, it seems, goes too far.").

140. *See, e.g.*, *Hearings* 7/11/96, *supra* note 7, at 58 (letter of Prof. McConnell to Sen. Hatch); *Tribe Letter*, *supra* note 8. *See also* Koppelman, *supra* note 24 (manuscript at 30-36); Kramer, *supra* note 26, at 2001-02.

141. 384 U.S. 641 (1966)(upholding § 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e) (1970)).

sixth grade in Puerto Rican schools in which the language of instruction was other than English.[142] The Attorney General for New York[143] argued that § 4(e) exceeded Congress' power under Section 5 of the Fourteenth Amendment unless the Supreme Court determined that the English literacy requirement violated equal protection.[144] The Supreme Court disagreed and sustained § 4(e) without reaching the question of whether the literacy requirement violated equal protection. Instead, the Court held that Section 5 was "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[145]

Allowing Congress to perform this judicial function of constitutional interpretation seemed to threaten the separation of powers. The two dissenters, Justices Harlan and Stewart, seized the separation of powers issue inherent in this rationale.[146] They argued that if Congress had power to interpret the Constitution, then Congress could "dilute as well as expand the substantive scope of due process and equal protection."[147] Justice Brennan, writing for the majority, addressed this concern in a footnote; in so doing, he introduced the ratchet theory.

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to "enact statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress's power

142. *Id.* at 643.

143. *Id.* at 644-45 nn.2-3. At the time, New York required English literacy to be established by passing a literacy test or by proof of completing sixth grade in a school where English was the language of instruction. *Id.*

144. *Id.* at 648. *See also* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 604-05 (1975).

145. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). *See also id.* at 650 ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.").

The majority opinion in *Morgan* offered two theories for its decision to uphold § 4(e) of the Voting Rights Act of 1965. First, Congress could pass § 4(e) if Congress felt that extending the right to vote was a remedial measure to cure state discrimination against Puerto Ricans. *Id.* at 653. Second, Congress could pass § 4(e) if Congress itself determined that New York's English-literacy requirements violated equal protection. *Id.* at 654-56. To uphold § 4(e) under the second theory, the Court needed only to "perceive a basis" for Congress' determination that the literacy requirements violated equal protection. *Id.* at 654-66. This second rationale was controversial as it "rested on the crediting of a supposed congressional judgment that the denial of voting rights was itself a denial of equal protection," whereas courts traditionally made such determinations. Cohen, *supra* note 144, at 605. Arguably, the second *Morgan* rationale "stood Marbury v. Madison on its head by judicial deference to congressional interpretation of the Constitution." *Id.* at 606.

146. Katzenbach v. Morgan, 384 U.S. 641, at 669-70 (1966)(Harlan, J., dissenting).

147. Cohen, *supra* note 144, at 606 (citing Katzenbach v. Morgan, 384 U.S. 641, 668 (1966)(Harlan, J., dissenting)).

> under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate or dilute these guarantees.[148]

Justice Brennan's characterization of the limits of Congress' Section 5 power came to be known as the ratchet theory—the principle that Congress may legislate in only one direction as if constrained by a one-way ratchet.[149] According to *Morgan*, Congress can legislate only to increase equal protection of the laws.[150] The description of Congress' power to enforce the Fourteenth Amendment leaves no room for Congress to decrease equal protection. Because the provision recognizes no exceptions to the equal protection obligation, Congress' power under Section 5 is subject to a one-way ratchet.

The interpretive theory employed by Brennan—that Congress could never interpret the Fourteenth Amendment in such a way as to provide less protection than the Supreme Court had decided was minimally necessary—is not wholly applicable to Congress' full faith and credit authority for two reasons. First, *Morgan*'s ratchet theory presumes that prior judicial determinations of the minimum requirements of equal protection restrict the precise scope of Congress' power: Congress cannot "restrict, abrogate, or dilute the particular guarantees set forth by those 'equal protection . . . decisions.'"[151] Such decisions act as the "floor" under which Congress may not operate.

No analogous judicial precedent determines the minimum requirements of full faith and credit to cabin the exercise of Congress' power. Nevertheless, this distinction between the *Morgan* ratchet theory and

148. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

149. *See, e.g.*, Douglas A. Axel, Note, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 HASTINGS L.J. 641, 657 n.101 (1993)("Under the 'ratchet theory' of Congress' Section 5 power, Congress may only enlarge the individual liberties of the Fourteenth Amendment, and may not limit them."). For a general discussion of the ratchet theory in the context of equal protection, see generally *id.* at 658-60; Cohen, *supra* note 144.

150. *Morgan* is a controversial case, and Brennan's ratchet theory has been criticized. *See, e.g.*, LAURENCE H. TRIBE, CONSTITUTIONAL LAW § 5-14, at 343 (2d ed. 1988)("[Brennan] did not fully explain . . . why congressional power was so limited." (emphasis omitted)); Douglas Laycock, *RFRA, Congress and the Ratchet*, 56 MONT. L. REV. 145, 161 (1995)("[T]he notoriously vague legislative history of the Fourteenth Amendment contains no clear statement either affirming or rejecting the ratchet theory."). *See also* EEOC v. Wyoming, 460 U.S. 226, 262 (1983)(Burger, C.J., dissenting)(quoting Oregon v. Mitchell, 400 U.S. 112, 205 (1970)(Harlan, J., concurring in part and dissenting in part)). Criticizing the second *Morgan* rationale (that Congress can make equal protection determinations) does not condemn the footnote 10 ratchet theory (that Congress may act only to enforce the Equal Protection Clause). The footnote merely defines the scope of congressional authority under the Equal Protection Clause, stating that there is an abstract limit on Congress' power to act to increase, and not decrease constitutional guarantees. Thus, even if the second *Morgan* rationale is wrong, the ratchet theory may still be right.

151. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

the full faith and credit ratchet theory is not fatal to the comparison. The constitutional imperative that "full faith and credit shall be given" is fairly straightforward. Prior judicial determination of what is required by that phrase hardly seems necessary given that the Clause already requires "full" faith.[152] Anything less than "full" faith and credit necessarily would violate the Constitution. Even in the absence of prior judicial determination of what the Full Faith and Credit Clause requires, there is no risk that Congress will impermissibly legislate an excess of faith and credit because the Constitution already requires the maximum.

The second distinction between Congress' power under the Fourteenth Amendment and the Full Faith and Credit Clause is much more critical. Whereas the Fourteenth Amendment has an "enforcement" provision, the Full Faith and Credit Clause has only an "Effect" provision.[153] In other words, the Fourteenth Amendment states that Congress has power to "enforce" the provision, but the Full Faith and Credit Clause merely authorizes Congress to "prescribe the Manner" by which state "acts, records, and legislation shall be proved, and the Effect thereof."

The text of the Effects Clause does not expressly limit Congress to "enforcing" the substantive provisions of the Full Faith and Credit Clause. Professor Michael McConnell has argued that the absence of an express limit leaves Congress with a broad power to create exceptions to the first sentence of the Full Faith and Credit Clause, stating that "[i]n the absence of powerful evidence to the contrary, the natural meaning of these words is that Congress can prescribe that a particular class of acts will have no effect at all, or that their effect will be confined to their place of origin."[154]

This reading, which locates a broad congressional power in the absence of an express "enforcement" clause, proves too much. Although the Fourteenth Amendment teaches by example what the unambiguous power to "enforce" looks like in express terms, it does not prove that the absence of such express terms authorizes Congress to make exceptions to a constitutional rule.[155] Professor Laurence Tribe has

152. *Cf.* Kramer, *supra* note 26, at 2003 ("It is more credible to read the Full Faith and Credit Clause as imposing a mandatory requirement of faith and credit (defined by the Supreme Court), with the Effects Clause authorizing Congress to enact whatever national legislation is needed to define and implement it.").

153. *See Hearings* 7/11/96, *supra* note 7, at 58 (letter of Prof. McConnell to Sen. Hatch).

154. *Id.*

155. Furthermore, McConnell's logic may be employed to reach a contrary conclusion: because nothing in the Effects Clause states that Congress may legislate exceptions to the Full Faith and Credit Clause, the natural meaning of the absence of an exceptions clause arguably means Congress may not make exceptions to the rule of full faith and credit. *See supra* text accompanying notes 91-94.

argued that it is impossible to characterize a law "licensing States to give no effect at all to a specific category of 'Acts, Records, and Proceedings'" as "a general law prescribing 'the effect' of such acts, records, and proceedings. That is a play on words, not a legal argument."[156]

Notwithstanding the difference between an "enforcement" provision and an "effects" provision, the model of a one-way ratchet as conceived in *Morgan* may be applied to the very different text of the Full Faith and Credit Clause. Even though the language of the Effects Clause certainly is less clear than a hypothetical clause stating that "Congress may by general laws enforce this provision," the language delegates no power to weaken the imperative of full faith and credit. For this reason, Congress should not provide less protection than what the Supreme Court decides is minimally necessary. With DOMA, Congress authorizes less full faith and credit protection than the Supreme Court has held to be required.[157]

B. Article III Comparison: Unambiguous Power to Make Exceptions to Constitutionally Authorized Federal Jurisdiction

In contrast to the enforcement power of the Fourteenth Amendment, which unambiguously requires a one-way ratchet, Article III expressly provides for Congress to make "Exceptions" to the mandate of federal jurisdiction for the enumerated categories of cases and controversies.[158] It is a contested issue whether Congress may add to or subtract from these categories precisely because Congress was given the power to make exceptions.[159] It nonetheless is uncontroverted

156. *Tribe Letter*, *supra* note 8, at S5932 (stating that power to "'prescribe . . . the effect' . . . includes no congressional power to prescribe that *some* acts, records and proceedings that would otherwise be entitled to *full* faith and credit . . . shall instead to be entitled to *no* faith or credit at all!" (emphasis added)).

157. For example, the Supreme Court has held that the Full Faith and Credit Clause requires judgments be given full faith and credit. DOMA, by contrast, allows states to refuse to give full faith and credit to judgments. *See supra* text accompanying notes 65-74.

158. Article III provides that

> [i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2.

159. *See generally* FALLON ET AL., *supra* note 29, at 348-87. Congress' power can be said to operate in only one direction depending on whether Article III is interpreted as the "floor" or "ceiling" of federal jurisdiction. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.1, at 167 (2d ed. 1994).

that Article III gives Congress power to make exceptions to the Constitution's mandate.

The presence of the Exceptions Clause in Article III proves that when the drafters intended for Congress to have the power to alter an affirmative constitutional mandate, they authorized Congress to make exceptions to the rule.[160] Had the drafters wanted to allow Congress to detract from the mandate of full faith and credit, they could have drafted a similar exceptions provision to the Full Faith and Credit Clause.[161] Because the drafters did not do so, we can infer that they did not intend to confer power on Congress to create exceptions.[162]

C. Qualifications Clauses Comparison: Limited Power to Administer Procedural, not Substantive, Regulations

Two United States Supreme Court cases—*Powell v. McCormack* and *U.S. Term Limits, Inc. v. Thornton*—address whether Congress or the states can alter the qualifications for congressional membership set forth in Article I, Section 2. Both addressed similar interpretive questions regarding the scope of authority conferred by the Constitution. And in both cases, the Supreme Court interpreted the constitutional provision authorizing congressional action and state action narrowly: the constitutional power permitted the House or the states to administer procedural, not substantive, regulations.

In *Powell v. McCormack*,[163] the Supreme Court interpreted the contours of Congress' authority granted in Article I, Section 5, which provides in relevant part that "Each House shall be the Judge of the

160. *See* Koppelman, *supra* note 24 (manuscript at 34). Professor Currie comes to an analogous conclusion when comparing the oath provision of Article VI with the full faith and credit provision: "Article IV's explicit provision authorizing Congress to effectuate the Full Faith and Credit Clause arguably strengthens the inference that when the Framers wanted Congress to implement constitutional provisions, they said so." Currie, *supra* note 93, at 171 (footnote omitted). Nevertheless, Currie warns against reading too deeply into the comparison of provisions with and without express grants of congressional enforcement authority. "On the other hand, as Chief Justice Marshall would later tell us, the last thing the Necessary and Proper Clause was meant to do was to limit the authority implicit in other constitutional provisions." *Id.*

161. Other examples in the Constitution prove the drafters knew how to write an exceptions clause to allow Congress to alter the mandate of the particular provision. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 ("*Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing Senators." (emphasis added)); U.S. CONST. art. I, § 4, cl. 2. ("*Congress shall assemble* at least once in every Year . . . on the first Monday in December, *unless they shall by Law appoint a different Day*" (emphasis added)).

162. This argument may be vulnerable to the attack that the absence of an exceptions clause does not necessarily mean Congress is limited to enforcing the substantive provisions of the Full Faith and Credit Clause. *See supra* text accompanying notes 154-55.

163. 395 U.S. 486 (1969).

. . . Qualifications of its own Members . . . ."[164] The Court had to determine whether the power conferred by Section 5 included the power to add to the qualifications for House membership set forth in Article I, Section 2.[165]

At issue in *Powell* was a House resolution to exclude member-elect Adam Clayton Powell, Jr. from his seat in the House of Representatives.[166] Powell was excluded not because he failed to meet any Section 2 qualifications, but because of his alleged misconduct during the 89th Congress.[167] Powell argued for a narrow reading of Section 5, maintaining that the authority conferred by Section 5 allowing the House to "Judge the . . . Qualifications" was strictly limited in scope: the House could judge only whether elected members possessed the qualifications set forth in Article I, Section 2 (the "standing qualifications").[168] He argued that Section 2 enumerated the exclusive qualifications for membership, and that the House could not control the eligibility of members-elect except to administer the requirements of Section 2. Thus, the House resolution, by denying Powell his seat on the basis of alleged general misconduct, imposed additional qualifications in violation of the Constitution. The defenders of the House resolution stated that the "Judge the . . . Qualifications" provision of Section 5 should be interpreted broadly to allow the House to impose qualifications other than those enumerated in Section 2.[169]

The *Powell* Court read the Section 5 power narrowly, refusing to allow the House to deny membership to a member-elect who met the qualifications set forth by Section 2.[170] The Court interpreted the House's Section 5 power as authority to enforce compliance with the Section 2 standing qualifications. The House's Section 5 power to "judge" therefore is a policing authority to ensure that Section 2 is followed; it includes no power to impose additional substantive qualifications on members-elect.

The reasoning employed in *Powell* is applicable to the debate over DOMA. The scope of Congress' Section 5 authority is at least arguably ambiguous. Likewise, the scope of Congress' Effects Clause authority is arguably ambiguous. The *Powell* Court chose to resolve the ambiguity in favor of a narrow construction and relied on the legislative history of the provision to determine the substantive content of the

164. U.S. CONST. art. I, § 5.
165. "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2.
166. Powell v. McCormack, 395 U.S. 486, 493 (1969).
167. *Id.* at 490.
168. *Id.* at 520.
169. *Id.* at 519-20.
170. *Id.* at 519-22, 550.

grant of authority. The Court found the constitutional text and the Framers' intent, coupled with the principles of representative democracy, required the Court to deny the House's ability to impose qualifications other than the standing qualifications of Section 2.[171] The Court interpreted an ambiguous constitutional provision narrowly because a broad interpretation would subvert the constitutional purpose of Section 2. Section 2 clearly states the qualifications required for a representative. Such a clear directive defines the limits of the House's authority to police compliance with the qualifications as conferred by Article I, Section 5. Similarly, the first half of the Full Faith and Credit Clause serves the analogous purpose of defining the limits on Congress' authority conferred by the Effects Clause. The first provision clearly states that "Full faith and credit shall be given." Such a clear directive defines the limits of Congress' authority to police compliance with the directive as conferred by the Effects Clause. Just as the House resolution at issue in *Powell* sought to use its Section 5 power to subvert the Section 2 standing qualifications, DOMA uses the Effects Clause power to subvert the full faith and credit requirement.[172]

More recently, the Supreme Court addressed whether the states could impose qualifications for the offices of United States Representatives or United States Senators in addition to those set forth in Article I, Section 2.[173] At issue in *U.S. Term Limits, Inc. v. Thornton* was an amendment to the Arkansas Constitution that precluded persons who served a certain number of terms in the United States Congress from having their names placed on the ballot for election to Congress.[174] Relying on *Powell*, the Court held that the state-imposed restriction violated the Section 2 Qualifications Clause, which set forth the exclusive standing qualifications.[175] The state argued that *Powell* did not

171. At the Constitutional Convention, James Madison urged the rejection of a proposal to authorize the legislature to establish property qualifications for members, arguing that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." *Id.* at 533-34 (citing 2 MAX FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 249-50 (1911)). *See* THE FEDERALIST No. 60, at 409 (Alexander Hamilton)(Jacob E. Cooke ed., 1961). *See also* Powell v. McCormack, 395 U.S. 486, 552 n.2 (1969)(Douglas, J., concurring)(citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 462 (5th ed. 1891)).

172. DOMA supporters, however, could argue that the interpretative approach employed in *Powell* is inapplicable. *Powell* relied on the strong historical evidence that the qualifications set forth in Section 2 were to be exclusive. There is simply less historical discussion of the function of the full faith and credit provision. As noted earlier, the provision was carried over from the Articles of Confederation with little debate. *See supra* text accompanying note 100.

173. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

174. *Id.* at 783.

175. *Id.* at 827.

apply because the term limits provision was a regulation of the manner of the election, and states must regulate the "Times, Places and Manner" of election pursuant to the "Elections Clause" set forth in Article I, Section 4.[176] The Court rejected this reasoning, stating that "[t]he Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office."[177]

The states' power to regulate the "manner" of elections was interpreted to mean states could regulate only the procedure of elections. Similarly, the Full Faith and Credit Clause authorizes Congress to regulate the "manner" by which full faith and credit is achieved. A consistent interpretation of the word "manner" suggests that constitutional authority to regulate "manner" is limited to procedural regulation.[178]

Powell and *U.S. Term Limits* suggest two principles. First, a principle set forth in one section of the Constitution may implicitly restrict power conferred by another section. Second, a constitutionally authorized power may be limited to the administration of procedural, not substantive, regulations.

The first principle is fairly obvious. In *Powell*, the Supreme Court read the Qualifications Clause in Section 2 to be an implicit restriction on the House's Section 5 power to judge the qualifications for office. In *Term Limits*, the Court read the Qualifications Clause in Section 2 to be an implicit restriction on the states' powers under the Elections Clause to regulate congressional elections.

DOMA violates this first principle. The Full Faith and Credit Clause implicitly restricts the scope of Congress' authority under the Effects Clause. Thus, Congress may "prescribe the Manner" in which the full faith and credit mandate shall be carried out, but Congress may not weaken that mandate in so doing. Of course, both *Powell* and *Term Limits* relied heavily on historical and textual evidence, reading

176. The Elections Clause provides "The Times, Places and Manner or holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

177. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-33 (1995). Interestingly, the *Term Limits* Court reasoned that the lack of express prohibition against state-added qualifications did not permit state-added qualifications, especially when the Framers intended the Constitution to be the exclusive source of qualifications. This reasoning can be applied to the debate concerning Congress' restriction of full faith and credit pursuant to DOMA: the lack of express prohibition of restricting faith and credit does not mean that the states, or Congress, may restrict it, especially when the Constitution contains a clear and affirmative requirement that "[f]ull faith and credit shall be given."

178. The past exercise of Congress' full faith and credit authority has been purely procedural. *See supra* section IV.D.

such evidence in light of the underlying constitutional principles of representative democracy. Any court determining whether Congress can restrict full faith and credit will not have equally rich historical evidence.[179] A court, however, will be able to draw upon the simple but compelling argument that constitutional authority of Congress or the states must not be exercised in a manner that restricts the scope of power conferred by another constitutional guarantee.

The second principle is less intuitive. The contested actions in *Powell* and *Term Limits* both involved governmental bodies using a procedure-regulating provision of the Constitution to import a new substantive requirement that conflicted with the Qualifications Clause. In the context of federal elections, the Supreme Court has distinguished between the power to regulate a procedure and the power to add substantive qualifications.

DOMA violates this second principle by using a procedure-regulating provision to import a substantive requirement that conflicts with the general mandate of the Full Faith and Credit Clause. If Congress' authority to "prescribe the Manner" in which full faith and credit shall operate is solely a power to regulate procedure,[180] then by analogy, DOMA is suspect.

D. Fugitive Slave Clause Comparison: (Mis)Reading Congressional Power into Constitutional Silence

The Constitution does not expressly authorize Congress to decrease faith and credit. Congress therefore acted in the face of constitutional silence when it exempted one category of acts, records, and judicial proceedings from full faith and credit. Congressional action in the name of the Constitution, but in the absence of express constitutional approval, is not unprecedented.

Congress also acted in the face of constitutional silence when it passed the Fugitive Slave Act to enforce the Fugitive Slave Clause.[181] Unlike the Full Faith and Credit Clause, the Fugitive Slave Clause stood alone as a self-executing constitutional imperative and did not authorize Congress to act to enforce that Clause. The lack of explicitly authorized enforcement power in the Fugitive Slave Clause, as compared to the enforcement powers expressly granted by other Article IV

179. *See supra* section IV.A.

180. *See supra* section III.C.

181. The Fugitive Slave Clause provides that

> No Person held to Service or Labour in one State, under the Laws of 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.

U.S. CONST. art. IV, § 2, cl. 3.

provisions, suggests that Congress could not enforce the Fugitive Slave Clause.[182] This is known as the "compact theory" of antislavery constitutionalism: "the absence of an express clause granting Congress enforcement authority meant that while a compact existed that bound the states to comply . . . , no remedy was available when the states breached this obligation."[183]

Despite this absence of express constitutional authority, Congress passed the Fugitive Slave Act in 1793. The Act facilitated the ability of masters or their agents to capture and return runaway slaves.[184] The Supreme Court upheld the Act in *Prigg v. Pennsylvania*.[185] *Prigg* is an example of finding authority in the face of constitutional silence. After emphasizing the self-executing nature of the constitutional provision,[186] the Court read Congress' power to enforce the Clause into the constitutional silence on the matter. "If, indeed, the Constitution

182. *See, e.g.*, KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY, CASES AND MATERIALS 201 (2d ed. 1996); David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 702; Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 263 n.65. Congress could, however, legislate to enforce the Constitution under the Necessary and Proper Clause.

183. Aynes, *supra* note 94, at 71. *See also* James Boyd White, *Constructing a Constitution: Original Intention in the Slave Cases*, 47 MD. L. REV. 239, 245 n.13 (1987)(stating that the absence of express enforcement provisions in Sections 2 and 4 of Article IV "might reasonably be read as significant omissions").

184. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850)(repealed 1864). *See, e.g.*, Currie, *supra* note 93, at 171 (stating how the Fugitive Slave Act implemented the Article IV Clause, which was "silent with respect to congressional authority"). The Act, with its "lax evidentiary standards, gravely threatened the growing northern free black population." HALL, *supra* note 182, at 201. The Act "allowed masters or their agents who captured runaways to bring them to any magistrate, state or federal, to obtain a 'certificate of removal,' authorizing the claimants to take the runaway slaves out of the states where they were found, and back to the state where the slaves owed service." *Id.* In response, free states passed personal liberty laws with higher evidentiary standards to impede the kidnapping of fugitive slaves from free states. *Id.*

185. 41 U.S. (16 Pet.) 539 (1842). Prigg was a professional slave catcher who had seized a runaway slave who was living in Pennsylvania and who had applied for a certificate of removal under the Fugitive Slave Act of 1793 and Pennsylvania's personal liberty law. Denied the certificates of removal, Prigg kidnapped Margaret Morgan and her children and was convicted under the Pennsylvania personal liberty law. For a detailed discussion of the facts and arguments that could have influenced, but were not addressed in, the Supreme Court opinion, see Finkelman, *supra* note 182, at 273-76.

The Supreme Court also found unconstitutional the Pennsylvania personal liberty law at issue in *Prigg*. Prigg v. Pennsylvania, 41 U.S. 539, 612 (1842)("The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain."). *See* Finkelman, *supra* note 182, at 252-53.

186. The Court stated that

guarantees the right, . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to *enforce* it."[187]

Although *Prigg* may be considered more for its historical perspective on the question of when Congress legislates without express constitutional authority than for its precedential value,[188] its discussion of implied authority supports the ratchet theory of the Full Faith and Credit Clause. The Supreme Court stated that "the national government, in the absence of all positive provisions to the contrary, is bound . . . to carry into effect all the rights and duties imposed upon it by the Constitution . . . ."[189] Notably, the Court insisted that the "absence of positive provisions to the contrary" authorized Congress to "carry into effect" the Fugitive Slave Clause. If no positive provision stated otherwise, Congress could *enforce* the constitutional imperative. Thus, Congress' power under the Fugitive Slave Clause was subject to a one-way ratchet because the Constitution provided no "positive provision" authorizing Congress to do anything but enforce that Clause.

In *Prigg*, the Court merely read into the constitutional silence of the Fugitive Slave Clause a power for Congress to *enforce* the express and affirmative language of the Fugitive Slave Clause.[190] With DOMA, Congress has read into the constitutional silence (or at least ambiguity) of the Effects Clause a power to *restrict* the express and affirmative mandate of the Full Faith and Credit Clause. It is one thing to imply congressional power to enforce the Constitution; it is quite another to imply a congressional authority to subtract from a constitutional guarantee. The DOMA reading of constitutional silence is a more radical break with the Constitution's purposes. If the *Prigg*

> the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave. . . . In this sense, and to this extent, this clause of the Constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842).

187. *Id.* at 615 (emphasis added).

188. *Prigg*, of course, is a notorious slave-era decision and has been made irrelevant by the Thirteenth Amendment. While it lacks precedential value, *Prigg* can be analogized to DOMA. Congress enacted legislation (the Fugitive Slave Act) to enforce the Fugitive Slave Clause even though the Clause lacked any express provision authorizing Congress to legislate in such a manner. With DOMA, Congress has enacted legislation to weaken the Full Faith and Credit Clause even though the Clause lacks any express provision authorizing Congress to legislate in such a manner.

189. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616 (1842).

190. The *Prigg* Court's reading of the implied grant of congressional authority has been criticized by those who believe that the absence of congressional power under the Fugitive Slave Clause—especially in light of the explicit grants of congressional power in the other provisions in Article IV—should have invalidated the Fugitive Slave Act. *See* Aynes, *supra* note 92, at 74-78. *See also supra* notes 182-83.

reading of silence that authorized Congress to enforce the Fugitive Slave Clause bordered on the unconstitutional, then the DOMA reading of silence that authorizes Congress to dilute full faith and credit is an even more egregious misreading of the silences in the Constitution.

VI. CONSTITUTIONAL PRINCIPLES BEHIND THE FULL FAITH AND CREDIT CLAUSE

The central principle underlying the Full Faith and Credit Clause is national unification through preserving individual states' rights.[191] Requiring full faith and credit for each state's acts, records, and judicial proceedings preserves the individual integrity of state sovereignty for all proceedings over which the state has jurisdiction.[192] In turn, the nation—through the states' mutual sacrifices entailed by the reciprocal agreement for full faith and credit—grows more powerful as a unified and operable entity.[193] The Full Faith and Credit Clause strengthens the Union as it confirms the power of the individual states.[194]

The unifying purpose of the Clause has been well-recognized.[195] The Supreme Court stated that it "fuse[s] into one Nation a collection of independent, sovereign states."[196] Justice Jackson emphasized that it was adopted to "guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence."[197] Unifying the nation serves an enormous practical purpose. Stated simply, "[t]his guarantee makes our lives in a mobile polity easier."[198] Any exercise of Congress' full faith and credit authority should harmonize with this constitutional principle.

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191. *See, e.g.*, Jackson, *supra* note 2, at 34 ; Laycock, *supra* note 63, at 259.
192. *See, e.g.*, *Hearings* 7/11/96, *supra* note 7, at 29 (statement of Prof. Wardle)("As the federalism principle protects the integrity of the states from possible overreaching by the national government, the Full Faith and Credit Clause protects the states from possible overreaching by each other . . . to protect and preserve the position of each individual state and the national government . . . .").
193. *See* Williams v. North Carolina, 317 U.S. 287, 295 (1942)("[T]he 'very purpose' of Art. IV, § 1 was 'to alter the status of the several states as independent foreign sovereignties . . . to make them integral parts of a single nation.'" (quoting Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935))); Garonzik, *supra* note 118, at 739.
194. *See* Jackson, *supra* note 2, at 17 (stating that the Full Faith and Credit Clause was used to "federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition").
195. *See* LEVY ET AL., *supra* note 65, at 824; Laycock, *supra* note 63, at 259-60.
196. Toomer v. Witsell, 334 U.S. 385, 395 (1948). *See also* Williams v. North Carolina, 317 U.S. 287, 303 (1942)(stating that the Full Faith and Credit Clause "brings separate sovereign states into an integrated whole").
197. Jackson, *supra* note 2, at 17. *See also id.* at 2 (stating that the Clause "coordinate[s] the administration of justice among the several independent legal systems which exist in our Federation").
198. Eskridge, *supra* note 4, at 11.

A second principle underlying the Full Faith and Credit Clause is the preservation of equality of the states.[199] The mutual obligation imposed on the states by the Clause fosters equality: when state *A* accords full faith and credit to judgments of state *B*, state *A* affirms the sovereignty and equality of state *B*. Thus, even as the full faith and credit requirement exacts a cost on the states, it polices their equality. As a result, any loss to one state is precisely the measure of the gain afforded by the full faith and credit principle. As Justice Jackson noted, "[a]nything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own."[200] Any act passed by Congress pursuant to its full faith and credit authority should conform to this second principle by fostering equality between states.

A preliminary assessment of DOMA suggests that it contravenes the constitutional principles underlying the Full Faith and Credit Clause. This is a conclusion of logic alone, without reference to the practical realities facing the country: if requiring full faith and credit unifies a nation of sovereign states, then relaxing full faith and credit likely divides.[201] A rule that all marriages are recognized everywhere is, on its face, more unifying than a rule that allows states to opt out of the constitutional mandate.[202]

Before concluding that DOMA violates the constitutional principles underlying the Clause, however, the reality of the states' rights

199. *See, e.g.*, Laycock, *supra* note 63, at 289.

200. Jackson, *supra* note 2, at 33. *See also* Clinton, *supra* note 107, at 899-900 ("The obligation to accord full faith and credit to judgments and laws of other states became a binding federal legal obligation that limited the sovereignty of the states as a result of their membership in the federal union."); Kramer, *supra* note 26, at 2006 ("States are required to recognize and respect each other's laws because that is what members of a federation do.").

201. As Evan Wolfson and Michael Melcher have written,

> DOMA has assured a logistical mess arising from conflicting state and federal acts, records, and judicial proceedings. At least some Americans will soon be simultaneously married and unmarried in different reaches of the country. In effect, they will have to get a "marriage visa" stamped when they cross a state border. Married couples will worry if their right to inherit from each other will remain valid, or if their right to make medical decisions for each other or their children will be respected, or if their family health plan will be in force—merely because they choose to move to or visit another state. The problems will also affect all parties having legal relationships with the married couple, including their banks, employers, creditors, schools, local governments and administrative agencies, and children. The "house divided" produced by DOMA is exactly what the Full Faith and Credit Clause was intended to prevent.

Evan Wolfson & Michael Melcher, *DOMA's House Divided: An Argument Against the Defense of Marriage Act*, 44 FED. LAW. 30, 33 (1997).

202. The Supreme Court has emphasized how ensuring recognition of domestic relationships is an "essential function" of the full faith and credit principle. *See* Williams v. North Carolina, 317 U.S. 287, 301-02 (1942).

conundrum must be addressed. Should Hawaii opt to allow same-sex marriages, Hawaii's interests in having all of its validly performed marriages recognized everywhere will be pitted against the interests of other states to disregard same-sex marriages performed in Hawaii.[203] The states' rights conundrum requires deciding which state's rights should be trumped. The example of same-sex marriage tests the mettle of the constitutional principles underlying the Full Faith and Credit Clause: if the principle underlying the Clause is to unify the nation through preserving states' rights, does mandating recognition of same-sex marriage unify or divide the nation? Does reciprocity preserve or assault states' rights? How can the Full Faith and Credit Clause police the equality of states that disagree?

Absent DOMA, the states' rights conundrum would have been resolved by conflict of laws jurisprudence.[204] But Congress altered the stakes of the conflict of laws question when it passed DOMA. By tipping the balance in favor of those states that oppose same-sex marriage, DOMA violates the constitutional principles underlying the Full Faith and Credit Clause. First, DOMA conflicts with the principle of unification by allowing states to ignore validly performed same-sex marriages. Second, DOMA clashes with the equality principle by creating two classes of states—one class of states in which validly performed marriages are recognized everywhere, and one class of states in which validly performed marriages are sometimes ignored.[205] DOMA creates a lopsided effect: the integrity of those states that recognize same-sex marriage is diminished, while the integrity of states that refuse to recognize same-sex marriage is preserved.[206] This assaults the constitutional principles underlying the Full Faith and Credit Clause. Instead, full faith and credit principles are better

203. *See, e.g.*, *Hearings* 7/11/96, *supra* note 7, at 7 (statement of Sen. Nickles); Tom Campbell, *Each State Should Be Able to Make Its Own Decision; California Public Policy Should Be Decided by California Voters and Legislators, Not By a Judge in Hawaii*, L.A. TIMES, July 12, 1996, at B9.

204. A state court, if confronted with a same-sex couple who demands recognition of their marriage, may have to perform a balancing test to determine which state interests are more violently disrupted by recognition or nonrecognition of validly performed same-sex marriages; the public policy exception may be invoked, and perhaps applied, by those states which deeply object to same-sex marriage. *See generally* Cox, *supra* note 20.

205. *See* Koppelman, *supra* note 24 (manuscript at 10-11). *Cf.* Wolfson & Melcher, *supra* note 201, at 33 ("The effect of DOMA is that marriage will have one meaning for a favored class of Americans, and a second, inferior meaning for another class of Americans.").

206. *See* Koppelman, *supra* note 24 (manuscript at 26)("[F]ederal law, as amended by DOMA, only withdraws full faith and credit from judgments in which the rendering court *recognizes* a same-sex marriage, while continuing to require full faith and credit for judgments in which the rendering courts *denies* recognition.").

served when Congress enforces compliance with the Full Faith and Credit Clause.[207]

VII. CONCLUSION: ANTICIPATING DOMA'S DAY IN COURT

If the ratchet theory is correct, then Congress violated the limit on its power under the Effects Clause by withdrawing full faith and credit from one category of marriages. It is of course true that the ratchet theory as a limit on Congress' power was never promulgated until Congress sought to limit full faith and credit under DOMA.[208] The Supreme Court, however, has addressed in dicta whether Congress could decrease full faith and credit. In a 1933 dissenting opinion, Justice Stone hinted that Congress might restrict the force of full faith and credit.[209] In 1980, the Supreme Court stated that

> while Congress clearly has the power to increase the measure of full faith and credit that a State may 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.[210]

The Court did not speak to the merits of this question as the issue was not before it. But the passage of DOMA has placed this question squarely in the public and political realm. Although it will be some time before DOMA is actually invoked, the ratchet theory surely will have its day in court.[211]

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207. *See, e.g.*, Kramer, *supra* note 26, at 2006 ("Congress should not be permitted to redefine its terms at will or legislate away the minimum requirements of mutual respect and recognition it entails—any more than Congress can suppress speech or legislate inequality."); Tribe, *Less Perfect Union*, *supra* note 8.

208. *Compare* Eskridge, *supra* note 4 (defending the ratchet theory), *and Tribe Letter*, *supra* note 8 (same), *and Hearings* 7/11/96, *supra* note 7, at 42-48 (statement of Prof. Sunstein)(same), *with Hearings* 7/11/96, *supra* note 7, at 58 (letter of Prof. McConnell to Sen. Hatch)(attacking the ratchet theory), *and Hearing* 7/11/96, *supra* note 7, at 24-42 (statement of Prof. Wardle)(same). There are very few pre-DOMA articles that address Congress' power under the Effects Clause. *See supra* note 120. With the exception of Currie, these authors conceive of Congress' full faith and credit power in positive terms; that is, there is no mention of Congress' power to restrict full faith and credit.

209. Yarborough v. Yarborough, 290 U.S. 202, 215 n.2 (1933)(Stone, J., dissenting)("The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress."). In 1942, the Court reiterated the question when reversing a state's exception to full faith and credit on grounds of public policy. "Whether Congress has the power to create exceptions [to full faith and credit] is a question on which we express no view. It is sufficient to note that Congress . . . has not done so." Williams v. North Carolina, 317 U.S. 287, 303 (1942)(citing Yarborough v. Yarborough, 290 U.S. 202 (1933)).

210. Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980).

211. Williams v. North Carolina, 317 U.S. 287, 306 (1942)(Frankfurter, J., concurring)("Congress has not exercised its powers under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. There will be time

In fact, the Supreme Court recently was invited to consider arguments pertaining to DOMA's validity in *Baker v. General Motors Corp.*[212] *Baker* revisited the relationship between the Full Faith and Credit Clause and the public policy exception. At issue was a Michigan state court injunction prohibiting Ronald Elwell, a former General Motors employee, from testifying in any litigation involving General Motors as an owner, seller, manufacturer, or designer.[213] The Bakers, who were not involved in the Michigan case, filed a product liability action in federal court and subpoenaed Elwell's testimony.[214] The Supreme Court was required to resolve whether the Full Faith and Credit Clause barred Elwell's testimony in the federal action.[215]

Ohio, Colorado, Utah, and Virginia submitted an amicus brief that, according to one commentator, "appears to [have been] written with the Defense of Marriage Act in mind."[216] The amicus brief argued that only Congress, not the states, may create exceptions to the full faith and credit mandate on grounds of public policy.[217] The Supreme Court did not reach the issue of congressional full faith and credit authority in its opinion.[218] In the context of its conclusion that the Full Faith and Credit Clause did not bar Elwell from testifying in the federal action, however, the Court reaffirmed that there is "no roving public policy exception to the full faith and credit due judgments."[219] This statement notwithstanding, it remains to be seen whether Congress has authority to legislate exceptions to the Full Faith and Credit Clause.

The constitutional guarantee of full faith and credit should not be abrogated by statute. DOMA exposes the grave problems posed by the

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enough to consider the scope of its power in this regard when Congress chooses to exercise it.").

212. Baker v. General Motors Corp., No. 96-653, 1998 WL 7072 (U.S. Jan 13, 1998).

213. *Id.* at *4.

214. *Id.*

215. In an unreported decision, the district court refused to enforce the Michigan injunction on the grounds that the full faith and credit obligation was overcome by Missouri's public policy favoring full disclosure of relevant and nonprivileged information. The Eighth Circuit reversed, holding in part that Missouri's public policy favors honoring the judgments of other states as much as it favors the disclosure of information, and to disregard the Michigan injunction violates the Full Faith and Credit Clause. Baker v. General Motors Corp., 86 F.3d 811, 818-20 (8th Cir. 1996), *rev'd*, No. 96-653, 1998 WL 7072 (U.S. Jan. 13, 1998).

216. Edward Hartnett, *Can a State Court Injunction Prevent a Witness From Testifying in Federal Court?*, PREVIEW OF U.S. SUP. CT. CASES, Sept. 18, 1997, at 32, 35.

217. *See* Amicus Curiae Brief for States of Ohio, Colorado, Utah, and Commonwealth of Virginia, Baker v. General Motors Corp., 1998 WL 7072 (No. 96-653), *available in* 1997 WL 414365, at *4-7.

218. *See* Baker v. General Motors Corp., No. 96-653, 1998 WL 7072, at *9-11 (U.S. Jan 13, 1998).

219. *Id.* at *7.

"targeted relaxation"[220] of full faith and credit. DOMA's clash with the plain language and the basic constitutional principles underlying the Full Faith and Credit Clause illustrates why Congress' power is indeed subject to a one-way ratchet. As DOMA legislates a substantive result rather than a procedural mechanism, it conflicts with prior acts under the Full Faith and Credit Clause. The ratchet theory and the procedures theory offer plausible interpretations of the nature and scope of Congress' full faith and credit power. Because Congress overreached the limits on its power when it passed DOMA, DOMA is unconstitutional.

220. HOUSE REPORT, *supra* note 6, at 28, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2932.