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## DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause

Timothy Joseph Keefer

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# DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause

Timothy Joseph Keefer\*

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\* This Note is dedicated to the memory of Karl R. Beccue (1912-1994). The author would like to thank Professor Allan P. Ides, Professor Frederic L. Kirgis, Bonnie R. Gerhardt, Marcie E. Paduda, and the Volume 55 Editorial Board of the *Washington and Lee Law Review* for their assistance in the production and development of this Note.

The whole issue of faith and credit as applied to the law of domestic relations is difficult, and the books of the Court will not be closed on it for a long time, if ever.<sup>1</sup>

### I. Introduction

At 12:50 a.m. on September 21, 1996, President Clinton signed into law the Defense of Marriage Act (DOMA).<sup>2</sup> Congress passed DOMA with a "veto-proof" majority<sup>3</sup> in response to *Baehr v. Lewin*,<sup>4</sup> the case that is likely to legalize same-sex marriages in Hawaii and may ultimately require other states to recognize such marriages.<sup>5</sup> DOMA establishes two objectives: first,

1. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 14 (1945).

2. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (1994)); see Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21 ("[The President] did it at midnight because that's when it deserved to be signed. The reasons the bill was brought to a vote were dubious." (quoting deputy press secretary Mary Ellen Glynn)). Baker notes that the President signed the bill because he supports the traditional notion of the one-man, one-woman marriage. *Id.*

3. See 142 CONG. REC. H7505-06 (daily ed. July 12, 1996) (citing House Vote Roll No. 104-316, tally of 342-67); 142 CONG. REC. S10,129-01 (daily ed. Sept. 10, 1996) (citing Senate Vote Roll No. 104-280, tally of 85-14).

4. 852 P.2d 44 (Haw. 1993).

5. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that circuit court erroneously dismissed complaint seeking injunctive and declaratory relief against constitutionality and enforcement of Hawaiian statute limiting marriage licenses to member of opposite sex), *appeal after remand sub nom. Baehr v. Miike*, 910 P.2d 112, 116 (Haw. 1996); H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 (noting that if Hawaii permits same-sex marriages, same-sex couples will attempt to use full faith and credit to force other states to recognize such marriages). In *Lewin*, the Hawaii Supreme Court considered whether there were facts to sustain a claim, based on Hawaiian constitutional protections of privacy and sex discrimination, against the Hawaii law that excluded, *inter alia*, same-sex marriages. *Lewin*, 852 P.2d at 53-68. According to the *Lewin* court, the right to marry is a fundamental right and falls within the zone of privacy rights. *Id.* at 55-56. However, the court found the notion of same-sex marriage not to be so deeply rooted in the traditions and conscience of Hawaii to be afforded fundamental privacy protection. *Id.* at 56-57. On the matter of sex discrimination, the *Lewin* court noted that the Hawaii Constitution prohibits state-sanctioned discrimination on the basis of sex and that the Hawaii marriage statute restricts marriage based on sex. *Id.* at 59-60. First, the court ruled that the circuit court erred in concluding that homosexuals did not constitute a suspect class for purposes of the Hawaii Constitution's equal protection clause. *Id.* at 58-59. Second, the circuit court erred in using the rational relationship test rather than strict scrutiny to analyze Hawaii's marriage law. *Id.* at 58, 63-67. Consequently, the *Lewin* court held that the marriage law presumably violated the Hawaiian Constitution unless the state could justify the statute's sex-based classification with a compelling state interest and that the statute was narrowly tailored to that interest. *Id.* at 67. On remand, the Hawaii Circuit Court found that the state did not have a compelling state interest for this classification. *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996).

it permits states to ignore legal same-sex marriages of other states;<sup>6</sup> second, it provides a definition of "marriage" for federal purposes.<sup>7</sup> This Note examines Congress's exercise of a full faith and credit exception or "negative" power in DOMA that permits states to ignore the acts of other states in the case of same-sex marriages.<sup>8</sup>

Congress cites the Full-Faith-and-Credit Clause of the Constitution<sup>9</sup> (the Clause) as both the reason why DOMA is necessary and as the source of congressional authority to enact it.<sup>10</sup> The Clause states: "Full Faith and Credit

6. See Defense of Marriage Act § 2 (granting permission to states to ignore same-sex marriages of other states). Section 2 provides:

POWERS RESERVED TO THE STATES.

(a) In General. — Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

§ 1738C. Certain acts, records, and proceedings and the effect thereof.

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

*Id.* At the time of this writing, same-sex marriages are not recognized anywhere in the United States. See generally Peter G. Guthrie, Annotation, *Marriage Between Persons of the Same Sex*, 63 A.L.R.3D 1199 (1975 & Supp. 1997) (noting that, to date, persons of same sex may not enter into marriage contract).

7. See Defense of Marriage Act § 3 (defining "marriage" for federal purposes). Section 3 provides:

DEFINITION OF MARRIAGE.

(a) In General. — Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

§ 7. Definition of "marriage" and "spouse."

"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."

*Id.*

8. *The Defense Of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 42 (1996) [hereinafter *Hearings on S. 1740*] (statement of Prof. Cass R. Sunstein). According to Professor Sunstein, "negative power" is the power to create exceptions to full faith and credit. *Id.*

9. U.S. CONST. art. IV, § 1.

10. See H.R. REP. NO. 104-664, at 7-10, reprinted in 1996 U.S.C.C.A.N. 2905, 2911-14 (claiming Congress derives its authority for DOMA from Full-Faith-and-Credit Clause and that DOMA was warranted because Clause would require states to recognize same-sex marriages); 142 CONG. REC. S4870 (daily ed. May 8, 1996) (statement of Sen. Nickles) ("Many States are concerned that another State's recognition of same-sex marriages will compromise their own law prohibiting such marriages. . . . [L]egislators in 24 States have introduced bills to deny

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."<sup>11</sup> The enactment of DOMA reflects congressional concern that if Hawaii permits same-sex marriages, then the Clause will require other states to recognize those marriages.<sup>12</sup> According to DOMA's legislative history, however, Congress believed that states rightfully could raise a public-policy exception<sup>13</sup> to avoid recognizing such marriages. Nonetheless, Congress and the states were unwilling to rely on this Court-created protection.<sup>14</sup> Instead, Congress invoked the second sentence of the Clause as authority to enact DOMA.<sup>15</sup> Thus, Congress enacted legislation permitting states *not* to recognize the acts of other states for the first time in this country's history.<sup>16</sup> Critics have argued that this enactment reflects a mis-

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recognition of same-sex marriage'." (quoting unspecified *Washington Times* article). See Valerie Richardson, *States Spurn Hawaii Gay Marriages Bill Would Reject Same-Sex Unions*, WASH. TIMES, Mar. 11, 1996, at A1 ("Legislators in 24 states have introduced bills to deny recognition of same sex marriage.").

11. U.S. CONST. art. IV, § 1.

12. See H.R. REP. NO. 104-664, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 (noting proponents of same-sex marriage seek to require states to recognize such marriages via Clause).

13. See *infra* Parts II.B.2, II.C and accompanying text (discussing public policy exception to full faith and credit).

14. See H.R. REP. NO. 104-664, at 8-10, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2912-14 (stating unwillingness by Congress to rely on Court-created exception and noting concerns registered by 23 states that they would have to recognize same-sex marriages). The public policy exception is a narrow exception to full faith and credit based on the highly important internal concerns of a state. *Id.* at 9; see also *infra* Part II.C (discussing Court-created exceptions).

15. See H.R. REP. NO. 104-664, at 25-27, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929-31 (citing second sentence of Clause as authority for DOMA).

16. See *id.* at 26 n.64, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2930 n.64 (citing acts of Congress passed under Clause, all of which *require* recognition of certain acts of other states). The acts cited include: Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)); Parental Kidnaping Prevention Act of 1980, Pub. L. 96-611, 94 Stat. 3569 (codified at 28 U.S.C. § 1738A (1994)) (requiring States to grant full faith and credit to child custody determinations of other States if consistent with criteria established by Congress); Full Faith and Credit for Child Support Orders Act of 1994, Pub. L. 103-383, 108 Stat. 4064 (codified at 28 U.S.C. § 1738B (1994)) (same with respect to child support orders); Safe Homes for Women Act of 1994, Pub. L. 103-322, title IV, 40221(a), 108 Stat. 1930 (codified at 18 U.S.C. § 2265 (1994)) (full faith and credit to be given to protective orders issued against spouse with respect to domestic violence). *Id.*; see also Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 97 n.492 (1996) (noting that before DOMA Congress had never enacted statute permitting states not to recognize judgments of other states); Mike McKee, *Gay Marriages Face Serious Obstacles*, FULTON COUNTY DAILY REP., Dec. 17, 1996, at 1, available in LEXIS, News Library, Fulton File (quoting Evan Wolfson, cocounsel for

understanding of the words and intent of the Clause and that DOMA is either premature because no state currently permits same-sex marriages or unnecessary in light of the public policy exception to full faith and credit.<sup>17</sup>

The questions raised by congressional enactment of DOMA under the Clause go beyond the national policy differences over homosexual rights or same-sex marriages.<sup>18</sup> The greater issue is whether Congress has authority to permit states to protect themselves from unwanted policies of sister states or, as DOMA's critics claim, to grant more autonomy to the states in a way that may lead to isolation or "balkanization."<sup>19</sup> DOMA raises a novel question of congressional power over interstate legal relations through the exercise of a rarely used and seldom interpreted constitutional provision.<sup>20</sup>

This Note explores the power of Congress to create exceptions to the Full-Faith-and-Credit Clause using DOMA as the example. Part II of this Note examines the power of Congress under the Clause from a historical perspective in order to provide a better understanding of the Clause's scope and meaning.<sup>21</sup> In addition, Part II analyzes debates and draft changes made during the Constitutional Convention,<sup>22</sup> as well as case law, legislation, and scholarly discussions of the Clause since ratification.<sup>23</sup> Part II also analyzes the exceptions to full faith and credit as a guide for a possible model of the scope of this newly-exercised congressional authority.<sup>24</sup> Part III discusses

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victorious gay couples who brought Hawaii case). *But see Hearings on S. 1740, supra* note 8, at 23 (statement of Prof. Lynn D. Wardle) (claiming that Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A (1994), has "negative" dimensions and that Supreme Court has found Act constitutional in *Thompson v. Thompson*, 484 U.S. 174 (1988)).

17. *See* H.R. REP. NO. 104-664, at 36, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2938-39 (dissenting view) (claiming DOMA is unnecessary and premature); Letter from Professor Laurence H. Tribe to Senator Edward Kennedy (May 24, 1996), *reprinted in* 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy, "Unconstitutionality of S. 1740, The So-Called Defense of Marriage Act") (questioning constitutionality of DOMA under full faith and credit).

18. *See* Laurence H. Tribe, 'Defense of Marriage Act' Proposes to Set States' Union Asunder, L.A. DAILY J., June 4, 1996, at 6 (claiming that congressional exceptions to full faith effecting "endless list" of areas would impact union).

19. *Id.*

20. *See* H.R. REP. NO. 104-664, at 37-39 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2939-41 (dissenting view) (noting Congress has rarely invoked Clause and Supreme Court interpretation has been less than complete).

21. *See infra* Part II (analyzing potential basis for congressional exception power within Clause).

22. *See infra* Part II.A (discussing Constitutional Convention debates of Clause).

23. *See infra* Part II.B (discussing post-ratification full faith and credit acts of Congress, case law, and commentaries relating to congressional exception power).

24. *See infra* Part II.C (discussing Court-created exceptions to full faith and credit vis-a-vis Congress).

DOMA's creation of a full faith exemption for state recognition of same-sex marriages in light of the constitutional history of the Clause.<sup>25</sup> It also discusses the potential scope of Congress's power today under the Clause, assuming that Congress can exercise this power to create exceptions within a unified federal system.<sup>26</sup> Finally, this Note contends that Congress has an exception power under the Full-Faith-and-Credit Clause to enact legislation that permits states to ignore certain acts of other states<sup>27</sup> and that the Constitution does not limit this power to providing specific exceptions for state determinations of public policy similar to the constrained state public policy exceptions currently recognized by the Supreme Court.<sup>28</sup>

## II. Congress's Power to Authorize Exceptions to Full Faith and Credit

### A. The Constitutional Convention

Because the Supreme Court has never ruled on the constitutionality of a congressionally-authorized exception to the Full-Faith-and-Credit Clause, such as that contained in DOMA,<sup>29</sup> an understanding of the framers' intent is necessary to determine the limits of the Clause. In part, the Clause was a carry-over from the Articles of Confederation.<sup>30</sup> Its inclusion in the United States Constitution was not as contentious as that of some other sections,<sup>31</sup> and the grant of congressional power was somewhat of an afterthought.<sup>32</sup> Therefore, the scarcity of available information regarding the drafting and inclusion

25. See *infra* Part III (analyzing arguments for and against DOMA as exercise of congressional exception power).

26. See *infra* Part III (analyzing arguments for and against DOMA as exercise of congressional exception power).

27. See *infra* Part IV (discussing logic of congressional exception power).

28. See *infra* Part II.C (discussing Supreme Court-created exceptions to full faith and credit).

29. See *infra* notes 215-16 and accompanying text (discussing only Supreme Court pronouncement on constitutionality of congressional exception power where it did not decide issue).

30. See ARTICLES OF CONFEDERATION art. IV, ¶ 3 ("Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other State."); Jackson, *supra* note 1, at 3 (noting Constitutional Convention found basis of full faith and credit in Articles of Confederation).

31. See James D. Sumner, Jr., *The Full-Faith-and-Credit Clause – Its History and Purpose*, 34 OR. L. REV. 224, 230 (1955) (noting little controversy over adoption of Clause compared to other provisions).

32. See *id.* at 231 (noting that "there were no references to full faith and credit in the Hamilton and Randolph plans, nor in the Patterson suggestions . . . Congress, in this clause recommended by the Committee of Detail, was not given power to prescribe the effect to be given sister-state acts." (citations omitted)).

of the Clause<sup>33</sup> is especially significant in light of the current debate over DOMA and it may also provide a reason for some of the confusion over the Clause's meaning since ratification.<sup>34</sup>

The Committee of Detail first presented the Clause<sup>35</sup> to the Constitutional Convention for consideration on August 6, 1787.<sup>36</sup> The proposed wording contained a slight change from Article IV of the Articles of Confederation.<sup>37</sup> In particular, the proposed wording included a new requirement to give full faith "to the acts of the Legislatures" of each state.<sup>38</sup> When debate on the Clause began, this change was the original point of disagreement, and it was the first step in increasing the scope of the Clause.<sup>39</sup> An increase in the power of Congress followed.<sup>40</sup>

The general inclusion of state legislative acts in full faith and credit, which the Convention eventually adopted, arguably gives these acts extra-territorial effect.<sup>41</sup> Mr. Williamson of North Carolina objected to the addition of legislative acts because he did not understand what the Clause meant, and instead he moved to have the original words of the Articles of Confederation incorporated.<sup>42</sup> Mr. Wilson of Pennsylvania and Dr. Johnson of Connecticut

33. See Jackson, *supra* note 1, at 4 (noting that "[d]ebate on this subject as recorded was brief and cryptic and participated in by but a few delegates").

34. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1312 (Melville M. Bigelow ed., 5th ed. Boston, Little, Brown and Co. 1891) (1833) (describing two perspectives that had already developed in early 1800s on power of Congress under Clause); see also *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 242 (1828) (criticizing Supreme Court's interpretation of Clause in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813)); *infra* Part II.B.1 (discussing post-ratification disagreement among courts on full faith and credit). The *Hall* court stated, "Indeed, . . . no doubt could exist in the mind of any lawyer upon the subject, but for the construction supposed to be given to the constitution . . . in the case of *Mills v. Duryee*." *Hall*, 23 Mass. (6 Pick.) at 247.

35. See ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 723 (1941) (detailing Convention records indicating Clause known as "Article XVI").

36. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 563 (1937).

37. See *id.* (comparing language of Articles of Confederation with proposed language); *supra* note 30 (noting appropriate text of Articles of Confederation).

38. WARREN, *supra* note 36, at 563. The Committee of Detail proposed the following language: "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and magistrates of every other State." *Id.*

39. See *infra* notes 42-45 and accompanying text (discussing initial debate on inclusion of state legislative acts).

40. See *infra* notes 46-58 and accompanying text (discussing debate on increase in scope of congressional power and objections to inclusion of legislative acts).

41. See *infra* Part II.C (noting extraterritorial effect as result of Clause); *infra* note 58 and accompanying text (same).

42. See 2 1787 DRAFTING THE U.S. CONSTITUTION 1368 (Wilburn E. Benton ed., 1986) [hereinafter 1787 DRAFTING] ("Mr. Williamson moved to substitute in place of it, the words of



answered that they believed the purpose of the Clause was to cover judgments and insolvency acts.<sup>43</sup> During this period, the states were passing acts for the relief of insolvent debtors and the proponents of including state legislative acts had an apparent desire to give these efforts "nation-wide effectiveness."<sup>44</sup> In an attempt to clarify the issue, Mr. Pinckney of South Carolina suggested an addition to the Clause regarding the establishment of uniform laws on bankruptcies.<sup>45</sup> The suggestion that full faith should cover only bankruptcy laws may reflect the discomfort of some delegates with a sweeping requirement to give full faith to legislative acts of other states, *without exception*.

At this point in the debate, Mr. Madison of Virginia made the first reference to congressional power when he agreed with the Pinckney amendment, but also pointed out that Congress should regulate the execution of judgments across state lines.<sup>46</sup> Mr. Randolph of Virginia responded, perhaps mistakenly,<sup>47</sup> that nations do not execute the judgments of other nations and proposed his own version of the Clause with no grant of power to Con-

the Articles of Confederation on the same subject. He did not understand precisely the meaning of the article." (quoting from Madison's notes of Convention)). This volume provides chronological records of the debates by section of the Constitution. See also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447 (Max Farrand ed., 1937) [hereinafter RECORDS] (providing parallel citation to Madison's notes of Convention included in 1787 DRAFTING, *supra*). Commentators commonly cite to this volume. Therefore, this Note includes parallel citations for the debates.

43. See 2 1787 DRAFTING, *supra* note 42, at 1368 ("Mr. Wilson and Dr. Johnson supposed the meaning to be that Judgments in one State should be the ground of actions in other States, and that acts of the Legislatures should be included, for the sake of Acts of insolvency. . . ." (quoting Madison's notes)); 2 RECORDS, *supra* note 42, at 447 (same).

44. G.W.C. Ross, "Full Faith and Credit" in a Federal System, 20 MINN. L. REV 140, 146 (1936).

45. See 2 1787 DRAFTING, *supra* note 42, at 1368 ("Mr. Pinckney moved to commit article XVI, with the following proposition, 'To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange.'" (quoting Madison's notes)); 2 RECORDS, *supra* note 42, at 447 (same); see also U.S. CONST. art. I, § 8, cl. 4 (providing congressional power to establish uniform laws on bankruptcy); WARREN, *supra* note 36, at 564 n.1 (noting bankruptcy power was vested in Congress separately on Sept. 3, 1787).

46. See 2 1787 DRAFTING, *supra* note 42, at 1368 ("Mr. Madison was for committing both. He wished the Legislature might be authorized to provide for the *execution* of Judgments in other States, under such regulations as might be expedient. He thought this might be safely done and was justified by the nature of the Union." (quoting Madison's notes)); 2 RECORDS, *supra* note 42, at 448 (same).

47. See Ross, *supra* note 44, at 148 (noting that Mr. Randolph was "probably mistaken" because this was common practice in civil law countries). Mr. Randolph, rather than being mistaken about the practice in civil law countries, could have been concerned that this proposal would give one nation (the United States) the authority to declare the execution of judgments in the courts of other sovereigns (particular states).

gress.<sup>48</sup> Gouverneur Morris of Pennsylvania, perhaps because of the suggestion by Mr. Madison, then proposed a version of the Clause containing an authorization for Congress resembling that which eventually appears in the final version.<sup>49</sup> Under Morris's plan, Congress would establish the interstate rules for the acknowledgment of all legal acts of a state and the effect these acts would have.<sup>50</sup> The Convention submitted the Pinckney, Randolph, and Morris proposals to a committee.<sup>51</sup>

The committee version was a modification of the Morris proposal, but in the portion of the Clause that involved the determination of effects it "restricted the power of Congress to . . . State judgments."<sup>52</sup> When the Convention reconvened, Gouverneur Morris moved to amend the proposal to return it to his original plan for the broad scope of congressional authority.<sup>53</sup> Dr. Johnson noted that this would permit Congress to require the states to give a particular effect to the legislative acts of other states.<sup>54</sup> Mr. Randolph objected to the Morris amendment because it would permit Congress to usurp all of the powers of a state, and therefore he wanted congressional power limited to the effect of judgments alone.<sup>55</sup> However, the Convention adopted the

48. See 2 1787 DRAFTING, *supra* note 42, at 1368 ("Mr. Randolph said there was no instance of one nation executing judgments of the Courts of another nation." (quoting Madison's notes)); 2 RECORDS, *supra* note 42, at 448 (same).

49. See 2 1787 DRAFTING, *supra* note 42, at 1369 ("Full faith ought to be given in each State to the public acts, records, and judicial proceeding of every other State; and the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings." (quoting Madison's notes on Morris proposal)); 2 RECORDS, *supra* note 42, at 448 (same).

50. See *supra* note 49 (quoting text of Morris proposal).

51. See 2 1787 DRAFTING, *supra* note 42, at 1369 (citing Madison's notes that committee comprised Mr. Rutledge [sic] of South Carolina, Mr. Randolph, Mr. Gorham of Massachusetts, Mr. Wilson, and Mr. [sic] Johnson); 2 RECORDS, *supra* note 42, at 448 (same).

52. WARREN, *supra* note 36, at 565 (emphasis added). The committee version stated:

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

*Id.* at 564-65.

53. See *id.* at 565 (noting that Morris sought to replace "which judgments obtained in one State shall have in another" with word "thereof").

54. See 2 1787 DRAFTING, *supra* note 42, at 1370 ("Dr. Johnson thought the amendment as worded would authorise the General Legislature to declare the effect of Legislative acts of one State, in another State." (quoting Madison's notes)); 2 RECORDS, *supra* note 42, at 488 (same).

55. See 2 1787 DRAFTING, *supra* note 42, at 1370-71 ("Mr. Randolph considered it as strengthening the general objection against the plan, that its definition of the powers of the

Morris amendment on a vote of six states to three.<sup>56</sup> The impact of this vote is significant because the Convention gave Congress a power of greater scope than any previous plan anticipated.<sup>57</sup> As a result, Congress could prescribe the legal effect of all public acts and records, in addition to judgments, of one state among the other states.<sup>58</sup>

Mr. Madison, whose initial views on the scope of congressional power in the Clause the Convention rejected,<sup>59</sup> proposed the final modification to the Clause.<sup>60</sup> He suggested that the Convention should replace the precatory "ought to," with respect to full faith and credit given in each state, with the mandatory "shall," and the "shall," with regard to the power of the Legislature to regulate full faith and credit, with the permissive "may."<sup>61</sup> There was no dissent.<sup>62</sup> This change set the stage for debate in our legal history on the mandatory, "self-executing" nature of the first portion of the Clause and on Congress's limited use of its optional powers in the second portion.<sup>63</sup>

The Committee of Style made two final changes to the Clause prior to approval by the Convention.<sup>64</sup> They replaced "Legislature" with the more

Government was so loose as to give it opportunities for usurping all the State powers." (quoting Madison's notes); 2 RECORDS, *supra* note 42, at 488-89 (same).

56. See 2 1787 DRAFTING, *supra* note 42, at 1371 (indicating Georgia, Maryland, and Virginia voted against amendment); 2 RECORDS, *supra* note 42, at 489 (same).

57. See *supra* notes 30-32 and accompanying text (noting lack of congressional power in Articles of Confederation and proposals).

58. See Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 425-26 (1919) (noting that framers gave Congress power to prescribe legal consequences across state lines).

59. See *supra* text accompanying notes 46, 56 (indicating Mr. Madison envisioned more limited role for Congress, but Convention did not agree).

60. See *infra* note 61 (indicating change to Clause).

61. 2 1787 DRAFTING, *supra* note 42, at 1371; 2 RECORDS, *supra* note 42, at 489. Therefore, wording after Madison's change was:

Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Legislature may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

2 1787 DRAFTING, *supra* note 42, at 1371; 2 RECORDS, *supra* note 42, at 489.

62. See 2 1787 DRAFTING, *supra* note 42, at 1371 (noting motion was carried *nem. con.*); RECORDS, *supra* note 42, at 489 (same). *Nemine contradicente* means "[n]o one dissenting; no one voting in the negative." BLACK'S LAW DICTIONARY 1036 (6th ed. 1990).

63. See *infra* Parts II.B, II.C (discussing disagreement among courts over whether Clause was self-executing or whether it required congressional action, and impact of congressional action in early full-faith legislation).

64. See 2 1787 DRAFTING, *supra* note 42, at 1371 (quoting text from Committee of Style which appears in ratified Constitution).

specific "Congress" and divided the Clause into two sentences.<sup>65</sup> One commentator has argued that the purpose behind the use of two sentences was to reflect a clause of independently operating parts: (1) a general self-executing requirement, and (2) an option for Congress to legislate specifically.<sup>66</sup> These dual functions resulted from the Madison amendment, however, and do not rely on the stylistic change for their substantive meaning.<sup>67</sup>

Considering the mandatory nature of the Clause and its grant of congressional power over interstate relations, it seems logical that significant debate would occur over the Clause during ratification.<sup>68</sup> The records reveal no such debate.<sup>69</sup> The Federalist Papers mention the Clause only once.<sup>70</sup> Writing in the Federalist Papers, Mr. Madison noted that the Clause in the Constitution was a great improvement over the one in the Articles of Confederation, which was "indeterminate" and "of little importance,"<sup>71</sup> because justice would be more predictable and uniform under the new version.<sup>72</sup> In his view, the Clause represented one of the benefits of the Constitution.<sup>73</sup>

In drafting a constitution to forge thirteen states into one nation, the framers intended the Clause to be a unifying tool toward that end.<sup>74</sup> Justice Jackson, a Supreme Court Justice from 1941 to 1954, considered the Clause to be the basis for the creation of a nationally uniform justice system.<sup>75</sup> However, it is not apparent that the framers intended the Clause to fulfill Professor

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65. *Id.*

66. See Sumner, *supra* note 31, at 239 (noting that framers use of two sentences was not repetitious and unnecessary, but served to establish two independent parts).

67. See *supra* notes 60-63 and accompanying text (discussing effect of word change on substance of Clause).

68. See Jackson, *supra* note 1, at 5 (noting lack of post-Convention debate).

69. See *id.* at 4-5 (commenting that Constitutional Convention, contemporary discussions, and ratifying conventions failed to significantly debate enactment of Clause).

70. See THE FEDERALIST NO. 42, at 285-86 (James Madison) (The Heritage Press 1973) (discussing Full-Faith-and-Credit Clause).

71. *Id.* at 286.

72. See *id.* ("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"); see also George P. Costigan, Jr., *The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 COLUM. L. REV. 470, 474 n.3 (1904) (claiming that Madison's concern was still merely effect of court judgments on neighboring states).

73. See Costigan, *supra* note 72, at 474 n.3 (quoting Madison on Full-Faith-and-Credit Clause).

74. See Sumner, *supra* note 31, at 241-49 (discussing goals of Clause).

75. See Jackson, *supra* note 1, at 34 (claiming Clause is "the foundation of any hope we may have for a truly national system of justice").

Tribe's vision of the Constitution's "most vital unifying provision."<sup>76</sup>

Conceivably, the framers could have had a primary, general purpose of federalism in mind that did not exclude other necessary uses. While establishing an overarching purpose of enhancing the union, the Clause at the same time gave Congress the power to address details and problems that the framers could not foresee.<sup>77</sup> Justice Jackson believed that the framers and early Congresses did not fully grasp all of the problems that the Clause could address, or for that matter, could cause.<sup>78</sup> The Convention's minimal debate on the Clause supports his viewpoint.<sup>79</sup> Regardless, the debates clarify that those in support of granting broad powers to Congress in the Clause prevailed.<sup>80</sup> The framers did not know precisely how and why the country would use the Clause in the future, but they explicitly gave permission to Congress to regulate its mandatory implementation.<sup>81</sup>

### B. Post-Ratification Acts and Court Decisions

#### 1. The Early Acts and Nineteenth Century Full Faith Constitutional Development

The First Congress exercised its powers under the Full-Faith-and-Credit Clause when it passed the Act of May 26, 1790 (Act of 1790).<sup>82</sup> In the Act of

76. Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5933 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (emphasis added).

77. See Sumner, *supra* note 31, at 242 (finding general purpose and other purposes).

78. See Jackson, *supra* note 1, at 6 ("I find no satisfactory evidence that the members of the Constitutional Convention or the early Congresses had more than a hazy knowledge of the problems they sought to settle or of those which they created by the faith and credit clause."); see also Cook, *supra* note 58, at 433 (noting that "we do not know exactly what the members of the convention expected Congress to enact in the way of legislation").

79. See *supra* notes 35-63 and accompanying text (highlighting disagreements and discussing lack of clear definition of purposes of Clause).

80. See *supra* note 49-56 and accompanying text (noting victory for Clause granting greater power to Congress).

81. "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 (emphasis added); see *supra* notes 77-78 and accompanying text (claiming Convention did not know precisely how Congress would use powers under Clause).

82. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)). Titled, "An Act to Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated So As to Take Effect in Every Other State," the Act reads:

That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and seal of the court

1790, Congress primarily addressed the manner by which the states authenticated (seal, attestation, certification) the various actions of sister states and included the requirement that states give such authenticated events the same effect that they would have in the originating state.<sup>83</sup> With the Act of March 27, 1804 (Act of 1804),<sup>84</sup> the Second Congress broadened the Act of 1790 by including the Territories, and by prescribing the effect of nonjudicial acts, thus ending congressional legislation regarding full faith and credit until the later part of the 20th century.<sup>85</sup> However, these early acts did not settle the scope and manner in which full faith and credit was to operate.<sup>86</sup> The use of the words "such faith and credit" in the Act of 1790,<sup>87</sup> rather than incorporating an explicit prescription of the "Effect" of "records and . . . Proceedings" from the Clause, resulted in an ambiguity.<sup>88</sup> The Act of 1790 and the Act of

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annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, 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 whence the said records are or shall be taken.

*Id.*

83. *See id.* (detailing authentication procedures).

84. Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. § 1739 (1994)).

85. *See supra* notes 16, 84 (reflecting lack of new congressional action between 1804 and 1980). Congress slightly modified the wording of what is now 28 U.S.C. § 1738 in 1948 for clarity and harmony with what is now 28 U.S.C. § 1739. *See* 28 U.S.C. §§ 1738, 1739 (1994) (noting technical modifications made in 1948 according to Historical and Statutory Notes, and citing 62 Stat. 947 (1948)); *see also* Jackson, *supra* note 1, at 5 n.23 (indicating there was contentious debate over this change, despite unavailability of records). *But see* Costigan, *supra* note 72, at 476 n.1 (stating that Act seemed "to have been passed as a matter of course").

86. *See* Costigan, *supra* note 72, at 476 (indicating differences on construction of Clause and acts). Costigan states:

The question of the effect of the constitutional provision and of the acts . . . caused much conflict of opinion. Many state courts held . . . [the constitution and/or acts] did not mean to confer upon the judgments of courts of sister States any greater rights than were accorded foreign judgments at the common law.

*Id.*; *see also* Hilton v. Guyot, 159 U.S. 113, 185 & n.1 (1895) (citing 25 cases illustrating state refusal to give conclusive effect to foreign state judgments). The *Hilton* Court observed: "In the courts of the several States, it was long recognized and assumed, as undoubted and indisputable, that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only prima facie evidence of the matter adjudged." *Id.* at 185.

87. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)).

88. U.S. CONST. art. IV, § 1; *see infra* notes 90-121 and accompanying text (comparing New York Supreme Court's interpretation of Act of 1790 with United States Supreme Court's early interpretation).

1804 were ambiguous as to whether they required states to give the same recognition to the *outcome* of the proceeding as the original state did, or to the validity of the *records* of the proceeding.<sup>89</sup>

*a. State Courts vs. The Supreme Court*

In *Hitchcock v. Aicken*,<sup>90</sup> the New York Supreme Court<sup>91</sup> of Judicature examined the meaning and scope of both the Clause and congressional action under the Clause.<sup>92</sup> In a fractured opinion, the court recognized that the Constitution created the mechanism to change the way a state treated the evidence of the proceedings of sister states.<sup>93</sup> However, Justice Kent,<sup>94</sup> writing one of the opinions in the majority, claimed that the Full-Faith-and-Credit Clause only required other states to recognize the acts of the state of origination as evidence.<sup>95</sup> He observed that it was up to Congress to declare how the states should implement full faith and credit and that, in exercising this power under the Act of 1790, Congress did not require states to give conclusive effect to the acts of sister states.<sup>96</sup> In effect, Judge Kent's

89. See *infra* notes 107-09, 144-50 and accompanying text (highlighting change between Justice Story's position on "effect" referring to "acts" or "manner" in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), and his later writings).

90. 1 Cai. R. 460 (N.Y. Sup. Ct. 1803).

91. Highest court of law in New York prior to 1848.

92. See *Hitchcock v. Aicken*, 1 Cai. R. 460, 474-84 (N.Y. Sup. Ct. 1803) (deciding that Full-Faith-and-Credit Clause and Act of 1790 only required states to admit judgments of other states as presumptive evidence out of courtesy, rather than as conclusive of issue). In *Hitchcock*, the court considered what effect a conclusive judgment from Vermont would have in a New York court. *Id.* at 461. According to the New York court, the general rule of law was to treat judgments of other states as those of foreign nations – as *prima facie* evidence open to examination as they would be in the state that rendered them. *Id.* at 483. However, the court said that the Full-Faith-and-Credit Clause gave power to Congress to legislate the manner of proving acts, records and proceedings among states, and their effect. *Id.* at 480. As a result, the Act of 1790 declared the effect to be "*such* faith and credit" as they have in their own state. *Id.* at 476, 480. According to the court, "*such* faith" logically amounted to less than "full faith." *Id.* at 480. The clause was only meant to cover evidentiary matters decided in the other state. *Id.* Therefore, under the Act of 1790, New York was only required to treat the Vermont findings as presumptive evidence and could apply its own substantive law to the case. *Id.* at 482-84.

93. See *id.* at 480 (claiming Constitution provided means to change system as it existed under Articles of Confederation by giving Congress power to act).

94. Justice Kent became Chief Justice and authored the opinion in *Taylor v. Bryden*, 8 Johns. 172 (N.Y. Sup. Ct. 1811), which reaffirmed the decision in *Hitchcock*.

95. See *Hitchcock*, 1 Cai. R. at 481 (stating that "the constitution meant nothing more by full faith and credit, than what respected the evidence of such proceedings").

96. See *id.* at 480 (claiming that Act of 1790 left full faith in same position as it was under Articles of Confederation); see also *Taylor*, 8 Johns. at 177 (reaffirming court's position that judgment from another state was not conclusive).

position denies the self-executing, mandatory nature of the first sentence of the Clause.

The opinions of the justices in *Hitchcock* closely foreshadowed today's debate over the power of Congress under the Clause and the purpose underlying DOMA.<sup>97</sup> Justice Kent argued that Congress, through the powers granted to it under the Clause, qualified the credit that states had to give the acts of originating states.<sup>98</sup> He believed that Congress was authorizing something *less* than full faith – an exception. Justice Radcliff wrote that absolute full faith would lead to instability, interfere with jurisdiction among the states, and allow states to prescribe the law to one another.<sup>99</sup> In contrast, dissenting Justices Livingston and Thompson "envisioned far greater unity among states."<sup>100</sup>

In this early period of the Union, the lack of consensus on the precise meaning of full faith and credit extended to the federal courts as well.<sup>101</sup> In

97. See Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 280-84 (1990) (discussing various opinions in *Hitchcock* and noting its majority opinion displayed view of "interstate disunity").

98. See *Hitchcock v. Aicken*, 1 Cai. R. 460, 480 (N.Y. Sup. Ct. 1803) ("[T]his act, without prescribing the effect, defines, or, rather, qualifies, the faith and credit they are to receive. Instead of *full* faith and credit, they are to receive *such* faith and credit.").

99. See *id.* at 462 ("To allow them a greater effect might be attended with much inconvenience, . . . produce an irregular interference of jurisdiction between different states, and, in some cases, . . . enable them to *prescribe the law to each other*. *The consequences cannot easily be foreseen.*" (emphasis added)). Cf. 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady) (concerning the plan to use full faith and credit to legalize Hawaiian homosexual marriages throughout the country). Rep. Canady stated:

[It] is profoundly undemocratic, and it is surely an abuse of the Full Faith and Credit Clause. Indeed, I cannot imagine a more appropriate occasion for invoking our constitutional authority to define the States' obligations under the Full Faith and Credit Clause. As Representative Terrance Tom from Hawaii testified before the Subcommittee: "If inaction by the Congress runs the risk that a single Judge in Hawaii may re-define the scope of legislation throughout the other forty-nine states, [then] failure to act is a dereliction [of our] responsibilities."

*Id.*

100. Kogan, *supra* note 97, at 283.

101. See *Hilton v. Guyot*, 159 U.S. 113, 181-82 (1895) (discussing meaning of full faith and credit). Citing circuit cases from 1794, 1811, and 1813, the *Hilton* Court observed:

The effect of these provisions of the Constitution and laws of the United States was at first a subject of diverse opinions, not only in the courts of the several States, but also in the Circuit Courts of the United States; Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Washington holding that judgments of the courts of a State had the same effect throughout the Union as within that State; but Chief Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached.

*Id.* at 182.



the 1813 case of *Mills v. Duryee*,<sup>102</sup> the Supreme Court addressed the issue.<sup>103</sup> Writing for the majority, Justice Joseph Story, Supreme Court Justice from 1811 to 1845, concluded that constitutional and statutory construction were necessary to understand the requirements of full faith and credit.<sup>104</sup> However, the scope of his constitutional construction relied on the second sentence of the Clause to affirm congressional authority to enact the Act of 1790.<sup>105</sup> In construing the Act of 1790, the Court rejected the position taken by the New York court in *Hitchcock*.<sup>106</sup> The Act of 1790, according to the Court, did not merely provide for the admission of evidentiary records; it declared an effect.<sup>107</sup> Referring to the "such faith" portion of this legislation, Justice Story wrote, "Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it."<sup>108</sup> These words also ended an early debate on whether "Effect" in the Clause referred to the "Manner" or the "Acts."<sup>109</sup> The *Mills* Court, in deciding that "Effect" referred to the "Acts" of the states, thereby elevated and clarified the scope of Congress's power as more than merely prescribing the procedural methods for interstate recogni-

102. 11 U.S. (7 Cranch) 481 (1813).

103. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483-85 (1813) (deciding that Full-Faith-and-Credit Clause grants to Congress power to provide conclusive effect to state judgments in other states and that Act of 1790 did precisely this). In *Mills*, the Supreme Court considered whether a plea of *nil debet* ("He owes nothing." BLACK'S LAW DICTIONARY 1046 (6th ed. 1990).) was good in response to an action of debt brought in the District of Columbia on a judgment rendered in New York. *Id.* at 481, 483. According to the Court, the validity of the plea depended on constitutional and statutory construction of the Full-Faith-and-Credit Clause and the Act of 1790. *Id.* at 483. The Court said that the Act of 1790 was an exercise of Congress's power to provide the mode of authenticating records and that it declared the effect of such to be the same as would be given by the issuing court— subject to faith and credit of "the highest nature." *Id.* at 484. In New York, the action was conclusive on the parties, and it therefore must also be in the District of Columbia. *Id.* Therefore, *nil debet* was not a good plea in this case because the current action was based on the authenticated record of the previous New York action which was conclusive between the parties. *Id.* at 484-85; see also Jackson, *supra* note 1, at 7 (providing historical footnote that Francis Scott Key unsuccessfully argued that previous action in New York was merely *prima facie* evidence).

104. See *Mills*, 11 U.S. (7 Cranch) at 483 (stating that "[t]he decision of this question depends altogether upon the construction of the constitution and laws of the United States").

105. See *id.* at 483-84 (noting Act of 1790 was exercise of congressional power under Clause).

106. See Kogan, *supra* note 97, at 285-91 (noting *Mills* opinion was contrary to state court opinions represented by *Bissell v. Briggs*, 9 Mass. (9 Tyng) 462 (1813), and *Hitchcock v. Aicken*, 1 Cai. R. 460 (N.Y. Sup. Ct. 1803)).

107. See *Mills*, 11 U.S. (7 Cranch) at 484 ("It is argued that this act . . . does not declare the effect of such evidence . . . . This argument cannot be supported.").

108. *Id.*

109. See *infra* notes 136-57 and accompanying text (discussing Justice Story's later views on what "effect" refers to and noting importance of distinction).

tion of acts; it included the substance of the acts as well.<sup>110</sup> The Court also had to clarify the meaning of "Effect" in the Clause.<sup>111</sup> In contrast with the position of the New York court in 1803,<sup>112</sup> the Supreme Court decided that the only "rational interpretation" of the congressional acts was that states must give the judgments of originating states conclusive effect.<sup>113</sup> In other words, Congress, in exercising its legislative power to declare the interstate effect of legal acts, declared that such acts were entitled to conclusive, *full* faith and credit, by which all other courts of the nation were bound.<sup>114</sup> According to the Court's statutory interpretation in *Mills*, Congress had declared the effect of state actions to their fullest extent.<sup>115</sup> The Court did not decide whether Congress could have declared anything less.

Dissenting in *Mills*, Justice Johnson expressed concern that if states were to pass outrageous laws, and the Court then required other states to recognize judgments under those laws, less unity would result.<sup>116</sup> His position was in accord with that of the New York Supreme Court in *Hitchcock*.<sup>117</sup> He argued that background principles of law underlie the notion of full faith that did not mandate universal recognition of state acts, and that unrestricted full faith would not remove conflict among states, but instead would exacerbate them.<sup>118</sup> As an example, he observed that true full faith would permit a state

110. See *Mills*, 11 U.S. (7 Cranch) at 484 (deciding that Act of 1790 required states to recognize judgments as conclusive highest form of evidence).

111. See *id.* (stating that "[i]t remains only then to inquire in every case what is the effect of a judgment in the State where it is rendered").

112. See *supra* notes 106-09 and accompanying text (noting difference between *Mills* and *Hitchcock*).

113. *Mills*, 11 U.S. (7 Cranch) at 485 (explaining that Court could "perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision").

114. See Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)) (providing records and judicial proceedings of any state shall be admitted "in every court within the United States"); *Mills*, 11 U.S. (7 Cranch) at 484 (interpreting Act of 1790 to require conclusive effect).

115. See *Mills*, 11 U.S. (7 Cranch) at 484-85 (noting Congress gave acts as much faith and credit as possible).

116. See *id.* at 486-87 (Johnson, J. dissenting) (stating that "if the states are at liberty to pass the most absurd laws . . . and we . . . [put] it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that article of the constitution in direct hostility with the object of it").

117. See *id.* at 486 (Johnson, J., dissenting) (noting that "faith and credit are terms strictly applicable to evidence"); *supra* notes 90-99 and accompanying text (discussing *Hitchcock* ruling).

118. See *Mills*, 11 U.S. (7 Cranch) at 485-86 (Johnson, J. dissenting) (claiming that canons of common law were relevant and that Court should not dispense with "eternal principles of justice").

to exercise jurisdiction over property outside the reach of its process and would force another state to enforce a judgment over this property.<sup>119</sup> He noted a danger in the Court's broad interpretation of what the Constitution and the Act of Congress required of the states:<sup>120</sup> Too much faith and credit may divide rather than unite.<sup>121</sup>

Interestingly, the Clause does not provide Congress with the authority for those portions of the Acts of 1790 and 1804 that cover the District of Columbia, the territories, Indian nations, or that make judgments conclusive in *all* courts within the United States, rather than just state courts.<sup>122</sup> The Court in *Embry v. Palmer*<sup>123</sup> found the authority for these aspects of faith and credit in other portions of the Constitution.<sup>124</sup> Because *Mills* addressed the effect of a state judgment in the District of Columbia, the Court should have decided the case outside of constitutional full faith and credit considerations.<sup>125</sup> *Mills* and *Embry* are, in reality, converse cases based on the power of Congress *outside*

119. See *id.* at 486 (Johnson, J., dissenting) (providing as example attachment of cask of wine in one state and judgment on it in another).

120. See *id.* (Johnson, J., dissenting) (implying conclusive full faith would promote conflict among states rather than promote harmony).

121. See *id.* at 486-87 (Johnson, J., dissenting) (discussing disharmony in union if conclusive full faith is given).

122. See *supra* note 82 (providing text of Act of 1790); *supra* notes 84-85 and accompanying text (discussing addition of non-states to full-faith-and-credit statute).

123. 107 U.S. 3 (1882).

124. See *Embry v. Palmer*, 107 U.S. 3, 9-10 (1882) (deeming congressional authority outside of Clause). The Court stated:

The power to prescribe what effect shall be given . . . is conferred by other provisions of the Constitution . . . which declare the extent of the judicial power of the United States, [and] which authorize all legislation necessary and proper. . . . As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction . . . [and] the right of exclusive legislation over the District [of Columbia] which the constitution has given to Congress.

*Id.* In *Embry*, the Court considered whether a state court could set aside a contract judgment from the District of Columbia. *Id.* at 10. According to the *Embry* Court, the power of Congress to declare the effect of judgments among states is provided by the Full-Faith-and-Credit Clause, but, where one of the jurisdictions is not a state, Congress can declare the effect under its powers concerning the judiciary, the District of Columbia, or under the Necessary and Proper Clause. *Id.* at 9-10. By the Acts of 1790 and 1804, Congress put all of the courts in the United States on the same footing for recognition of judgments. *Id.* The *Embry* Court concluded that Connecticut could only refuse to recognize the judgment if it was subject to some deficiency in the District of Columbia. *Id.* at 10. After reviewing the law governing the District of Columbia at the time, the Court concluded that Connecticut failed to properly apply these principles. *Id.* at 11-18. Therefore, the *Embry* Court found the judgment conclusive between the parties and Connecticut's refusal to recognize the judgment was in error. *Id.* at 19.

125. See *id.* at 9 (noting power of Congress outside of full faith and credit).

of the Clause.<sup>126</sup> Therefore, DOMA would still be a legitimate use of power applicable to the District of Columbia, the territories, possessions, and tribal governments,<sup>127</sup> based on *Embry* and its progeny,<sup>128</sup> even if Congress was without authority to pass it under the Clause.

Most state courts rejected the absolutism of the *Mills* version of the conclusive effect portion of full faith and credit and adopted the Johnson dissent.<sup>129</sup> Fifteen years after the Supreme Court's decision in *Mills*, the Massachusetts Supreme Judicial Court rejected the *Mills* rationale in *Hall v. Williams*.<sup>130</sup> The Massachusetts court adopted the reasoning underlying the Johnson dissent in *Mills*.<sup>131</sup> According to the Massachusetts court, Justice Johnson's reasoning constituted the most obvious construction of the Constitution and Acts of Congress.<sup>132</sup> *Hall* reflected the view of the state courts of the time,<sup>133</sup> and these decisions are arguably the genesis of the court-created exceptions to full faith.<sup>134</sup> Neither federal nor state courts universally adopted,

126. See Costigan, *supra* note 72, at 482 (claiming *Mills* and *Embry* are converse of each other and outside of full faith and credit).

127. Defense of Marriage Act § 2, 28 U.S.C.A. § 1738C (West Supp. 1997) (defining the scope of the Act using the following language: "[n]o State, territory, or possession of the United States, or Indian tribe . . .").

128. See *supra* notes 122-26 and accompanying text (describing congressional authority to require full faith and credit outside of Clause).

129. See *Hilton v. Guyot*, 159 U.S. 113, 185 n.1 (1895) (indicating 17 of 25 cases cited in *Hilton* were decided after *Mills*); Kogan, *supra* note 97, at 290-91 (noting that most state courts rejected *Mills* and followed contrary position of other state courts).

130. 23 Mass. (6 Pick.) 232 (1828).

131. See *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 242-44 (1828) (rejecting *Mills* opinion). In *Hall*, the court addressed the issue of whether a foreign state's judgment was conclusive when a party claims improper service. *Id.* at 239. According to the *Hall* court, a party had to have an opportunity to attack the jurisdiction of the original court. *Id.* at 240. The court observed that under the Constitution the original judgment is supposed to be as conclusive in the second state as it was in the first, but noted state disagreement with this position. *Id.* at 241-42. The *Hall* court took notice of the conclusive requirements of the United States Supreme Court's decision in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), and, in reviewing judicial criticism of *Mills*, rejected it in favor of Justice Johnson's dissenting opinion. *Id.* at 242-47. Consequently, the *Hall* court ruled that judgments of another state were not conclusive for purposes of challenging jurisdiction. *Id.* at 246-47; see also Kogan, *supra* note 97, at 291 n.140 (citing *Hall* court's rejection of Story's reasoning in *Mills* in favor of Johnson's).

132. See *Hall*, 23 Mass. (6 Pick.) at 242 ("[S]o palpable is this principle, that no doubt could exist in the mind of any lawyer upon the subject, but for the . . . construction supposed to be given to the constitution of the United States, and the act of Congress following it, in the case of *Mills v. Duryee*.").

133. See Kogan, *supra* note 97, at 290 (noting that, at that time, most state courts were adopting Johnson's dissent).

134. See *infra* Part II.C (discussing modern Court-created exceptions to full faith and credit).

on either constitutional or statutory grounds, conclusive full faith and credit, notwithstanding the Supreme Court's decision in *Mills*.<sup>135</sup>

*b. Justice Joseph Story's Commentaries*

Justice Story revisited the Full-Faith-and-Credit Clause in his *Commentaries on the Constitution*<sup>136</sup> (*Commentaries*). Published twenty years after *Mills*, Story's *Commentaries* contain an important discourse on the continuing debate over the Clause.<sup>137</sup> Justice Story provides unique perspectives on the Clause from early in the nation's history. According to Justice Story, the first portion of the Clause, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State,"<sup>138</sup> is self-executing.<sup>139</sup> He posits not only that this first sentence requires mandatory recognition of acts, records, and proceedings among the states,<sup>140</sup> but also that it leaves "nothing to future legislation,"<sup>141</sup> "nor is it susceptible of any qualification by Congress."<sup>142</sup> This would seem to make the early Acts of Congress superfluous except for the procedural portions regarding authentication.<sup>143</sup> Story's position would also signal the end of DOMA, absent some other enumerated power.

On the issue of congressional power, Justice Story's writings contradict his own opinion in *Mills*.<sup>144</sup> Sections 1312 and 1313 of his *Commentaries*

135. See *Hilton v. Guyot*, 159 U.S. 113, 182 (1895) (citing different federal decisions on full faith and credit); Kogan, *supra* note 97, at 269-94 (discussing development of full faith constitutional law and disagreements over conclusive effect).

136. See 2 STORY, *supra* note 34, §§ 1302-13 (containing Chapter XXIX, titled, "Power of Congress as to Proof of State Records and Proceedings").

137. See *id.* § 1303 (discussing Articles of Confederation); *id.* §§ 1304-07 (providing history of how laws and acts of foreign nations were treated by other nations); *id.* § 1308 (examining three distinct parts of Clause); *id.* §§ 1309-10 (covering first section of Clause); *id.* §§ 1311-13 (covering second section of Clause).

138. U.S. CONST. art. IV, § 1.

139. See 2 STORY, *supra* note 34, § 1308 (stating that "[t]he first is declared, and established by the Constitution itself, and is to receive no aid").

140. See *id.* § 1309 (stating that "[t]he language is positive, and declaratory, . . . 'Full faith and credit shall be given'").

141. *Id.*

142. *Id.* § 1308.

143. See Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1994)) ("And the said records and judicial proceedings authenticated as aforesaid, 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 whence the said records are or shall be taken."). This section must be invalid under Story's position in his *Commentaries*. See *supra* notes 136-42 and accompanying text (discussing Story's position).

144. See Kogan, *supra* note 97, at 295-96 (claiming Justice Story rejected his *Mills* opinion in *Commentaries*).

focus on the meaning of the words "and the Effect thereof" in the Clause.<sup>145</sup> In these sections, Justice Story reverses his position in *Mills* by claiming that "Effect" in the Clause refers to the "Manner" by which one proves the acts, rather than the acts themselves.<sup>146</sup> This conclusion is necessary in order for Justice Story to claim that Congress has no say over the mandatory nature of the first part of the Clause. He points out that if Congress cannot qualify the mandatory nature of the Clause, then Congress's power must lie in declaring the effect of the interstate *procedures* of proving legal acts.<sup>147</sup> Otherwise, the grant of congressional power makes no sense.<sup>148</sup> Once he claims that position that Congress cannot modify the mandatory, self-executing portion of the Clause, then "Effect" must be relegated to the "Manner" of authentication.<sup>149</sup> The Supreme Court has not adopted this position.<sup>150</sup>

In Section 1313 of his *Commentaries*, Justice Story notes that it really does not matter which interpretation of the Clause is correct because each viewpoint recognizes Congress's authority to declare the effect of state judgments, "so always that full faith and credit are given to them."<sup>151</sup> Congress exercised this authority in fully implementing full faith and credit by the Acts of 1790 and 1804. Justice Story's statement reflects a logical flaw in his argument. The difference between each position is what the word "Effect" refers to.<sup>152</sup> If "Effect" refers to "Acts" rather than "Manner," then the mandatory nature of the Full-Faith-and-Credit Clause must be subject to congressionally imposed conditions. Otherwise the Clause is nonsensical if it means that Congress can declare the effect, provided that the effect is nothing less than what the first sentence of the Clause already makes mandatory and self-executing. Such an interpretation would make the power of Congress a nullity.<sup>153</sup> Surely,

145. See 2 STORY, *supra* note 34, §§ 1312-13 (discussing second sentence of Clause).

146. See *id.* (arguing "Effect" refers to "Manner"); *supra* notes 104-15 and accompanying text (discussing Justice Story's opinion in *Mills*).

147. See 2 STORY, *supra* note 34, § 1312 (discussing two possible readings of Clause).

148. See *id.* (stating that "otherwise the power to declare the effect would be wholly senseless; or Congress could possess the power to repeal or vary the full faith and credit given by that section").

149. See *supra* notes 138-43 and accompanying text (claiming first sentence of Clause is mandatory and unmodifiable by Congress).

150. See *supra* notes 108-110 and accompanying text (deciding "Effect" refers to "Acts" in *Mills*). The Supreme Court has not contradicted this position.

151. See 2 STORY, *supra* note 34, § 1313 (stating that "each admits the competency of Congress to declare the effect of judgments, when duly authenticated; *so always, that full faith and credit are given to them*; and Congress by their legislation have already carried into operation the objects of the clause [by the Acts of 1790 and 1804]" (emphasis added)).

152. See *id.* § 1312 (discussing two possible readings of Clause).

153. See *supra* notes 146-49 and accompanying text (noting Story's indication that such interpretation would be senseless).

the debate over this wording in the Constitutional Convention was not superfluous.<sup>154</sup> If "Effect" refers to "Manner," then the validity of the Acts of 1790 and 1804 is suspect because Congress declared the "Effect" of the "Acts."<sup>155</sup> The Court has not questioned the validity of the Acts of 1790 and 1804.<sup>156</sup> Therefore, it matters which version is correct. Justice Story's position in *Mills*, that Congress has the power to declare the substantive effect of the acts of the states, and his position in the *Commentaries*, that Congress only has the power to declare the procedural effect of authentication are inconsistent.<sup>157</sup> If Justice Story is mistaken in his *Commentaries*, then Congress has the power to modify full faith and credit.

*c. The Supreme Court Acknowledges Exceptions to Full Faith and Credit*

Following Story's *Commentaries*, the Supreme Court considered the meaning of the Full-Faith-and-Credit Clause in *M'Elmoyle v. Cohen*.<sup>158</sup> The Court relied on some of the words from the *Commentaries*, but it ultimately limited the conclusive nature of other state judgments.<sup>159</sup> The Court, joined in its decision by Justice Story, stated that the Constitution requires full faith and credit, "independently of all legislation."<sup>160</sup> However, in describing the conclusive nature of the judgments of one state, the Court indicated that the

154. See *supra* Part II.A (discussing Convention's grant of power to Congress in Clause).

155. See Costigan, *supra* note 72, at 481-84 (discussing validity of Acts of 1790 and 1804 under Clause).

156. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483-84 (1813) (noting passage of Act of 1790 in accord with Clause). The Supreme Court has not contradicted this position.

157. See Kogan, *supra* note 97, at 294-96 (pointing out contradiction between Justice Story's position in *Mills* and his position in *Commentaries*).

158. 38 U.S. (13 Pet.) 312 (1839).

159. See *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 326 (1839) (quoting from Justice Story's *Commentaries*); *id.* at 327 (deciding that statute of limitations of enforcing state can be defense against judgment from rendering state in accordance with requirements of full faith and credit). The issue in *M'Elmoyle* was whether, under the constitutional and statutory requirements of full faith and credit, Georgia's statute of limitations can bar recovery from a judgment rendered in South Carolina. *Id.* at 324-25. The *M'Elmoyle* Court noted that the Constitution and Act of 1790 changed the legal relationships among the states from the then-existing law to require recognition of foreign state judgments as Congress mandates. *Id.* at 325-26. Citing Justice Story's *Commentaries* for support, the Court concluded that a judgment was only examinable upon grounds that could render it examinable in the originating state. *Id.* at 326. The *M'Elmoyle* Court decided that a judgment conclusive on the merits was separate from a judgment of execution. *Id.* at 326-27. Therefore, the state enforcing the judgment could apply its own law of remedy: Georgia could apply its own statute of limitations. *Id.* at 327. The Court reasoned that under the concept of sovereignty, states must be free to operate their judiciary based on their own policies. *Id.* Consequently, the *M'Elmoyle* Court ruled that Georgia could apply its own statute of limitations to a foreign state judgment. *Id.* at 328.

160. *Id.* at 325.

Constitution's grant of power to Congress in the second sentence of the Clause acts as a limitation on this command.<sup>161</sup> The *M'Elmoyle* Court observed that the self-executing full faith and credit mandate of the Constitution is subject to the conditions and limitations of Congress as to both manner and effect.<sup>162</sup>

The Court further noted that even though the Act of 1790 made a judgment of one state a record unexaminable on the merits, such judgments did not carry a power of execution into another state.<sup>163</sup> Rather, the plaintiff had to get a subsequent judgment in the state of execution.<sup>164</sup> The second state, while bound by the law of judgment of the first state by the Constitution and congressional legislation, could follow its own law of remedy<sup>165</sup> as a defense to recovery.<sup>166</sup> The Court justified this position by noting that a forum state's laws of remedy grow out of policy considerations for the people and property within a state, which have their basis in state sovereignty.<sup>167</sup> Therefore, as early as 1839, the Court recognized a state public policy based exception to full faith and credit.<sup>168</sup> In addition, the Court apparently determined that the Acts of 1790 and 1804 did not mandate an effect of absolute full faith and credit.<sup>169</sup>

The Court re-enforced the *M'Elmoyle* decision in *Bank of the State of Alabama v. Dalton*.<sup>170</sup> In *Dalton*, the Court again interpreted Congress's Act

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161. See *id.* at 324-25 ("[T]he judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of congress has prescribed. . . . The authenticity of a judgment and its effect, depend upon the law made in pursuance of the constitution." (emphasis added)).

162. See *id.* (claiming that Congress prescribes both manner and effect of state acts).

163. See *id.* at 325 (noting judgments are not examinable on merits, but require judgment of execution in enforcing state).

164. See *id.* (stating that "[t]o give it the force of a judgment in another State, it must be made a judgment there").

165. See *id.* at 326 (noting examples such as "release, payment, or a presumption of payment, from the lapse of time, whether . . . by the common-law prescription, or by a state of limitation").

166. See *id.* at 326-27 (noting recognition of judgments is exclusive of defenses based on "right of the State itself to exercise authority over the persons or the subject-matter").

167. See *id.* at 327 (claiming state organization of its judiciary stems from its policy, that statutes of limitations are manifestations of policy, and that state policies and issues of sovereignty cover persons and property within states).

168. See *infra* Part II.C (discussing Court-created public policy exception). But see Jackson, *supra* note 1, at 30 (criticizing *M'Elmoyle* as example of Supreme Court "transposing conflicts doctrines into the law of the Constitution").

169. See *M'Elmoyle*, 38 U.S. (13 Pet.) at 326 (claiming congressional legislation is conclusive of judgments, not execution).

170. 50 U.S. (9 How.) 522 (1849).



of 1790.<sup>171</sup> The Court ruled that the Act did not prevent one state from passing statutes of limitation to bar recovery on judgments from other states.<sup>172</sup> The Court recognized the uncertain scope of congressional power under the Constitution to further declare interstate effects, but did not decide this issue.<sup>173</sup> Instead, the Court relied on statutory construction.<sup>174</sup>

In the Term after *Dalton*, the Court expressly reinterpreted its decision in *Mills*.<sup>175</sup> In *D'Arcy v. Ketchum*,<sup>176</sup> the Court limited the broad interpretation of the mandatory conclusive effect of the Acts of 1790 and 1804 in *Mills*.<sup>177</sup>

171. See *Bank of Alabama v. Dalton*, 50 U.S. (9 How.) 522, 529 (1849) (finding no exception in Mississippi statute of limitations for plaintiff and finding that statute did not violate Clause or Act of 1790). In *Dalton*, the Court addressed the issues of whether the Act of 1790 bars a state statute of limitations from covering an act occurring in another state prior to passage of the state limitation, whether such a limitation was binding on a federal district court sitting in the state, and whether the statute of limitations contains an exemption for parties not covered by the statute until the suit is filed. *Id.* at 522, 526-29. The *Dalton* Court recognized that state statutes of limitations provide rules of decision for federal courts sitting in that state. *Id.* at 527. The Court further noted that the Act of 1790 provided conclusive effect of judgments between parties, but did not require other states to enforce the judgment. *Id.* at 527-28. The *Dalton* Court refused to read into the Mississippi statute an exemption for parties outside of Mississippi until one of them filed a suit for judgment in Mississippi. *Id.* at 528-29. Consequently, the Court upheld the Mississippi statute and found that the statute covered the suit. *Id.* at 527-29.

172. See *id.* at 528 ("That the legislation of congress, so far as it has gone, does not prevent a State from passing acts of limitation to bar suits on judgments rendered in another State, is the settled doctrine of this court." (citing *M'Elmoyle*)).

173. See *id.* (failing to decide scope of congressional power to declare effect of interstate acts). The Court noted:

As to what further "effect" congress may give to judgments rendered in one State, and sued on in another, does not belong to this inquiry: We have to deal with the law as we find it, and not with the extent of power congress may have to legislate further in this respect.

*Id.*

174. See *id.* (indicating basis for decision was Court's interpretation of Act of 1790).

175. See Kogan, *supra* note 97, at 292-93 (discussing shift away from *Mills* to state view of limitations on conclusive full faith and credit).

176. 52 U.S. (11 How.) 165 (1850).

177. *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850) (holding that Congress did not intend to include state judgments on validity of their own service of notice in Act of 1790). The *D'Arcy* Court considered whether the Constitution and Act of 1790 required recognition by a court in Louisiana of a judgment from New York, in which a party received no notice of the suit, even though such a suit was valid and enforceable in New York. *Id.* at 173-75. The *D'Arcy* Court stated that in New York, *D'Arcy* could not make the defense of lack of service since two defendants and his partner were properly served. *Id.* at 173-74. The *D'Arcy* Court noted that according to the *Mills* decision, one could only attack judgments of a state if they were subject to attack in the rendering state. *Id.* at 175. The Court distinguished *Mills* as only applying to the facts of that case and concluded that the principle of *Mills* could not be applied without exception. *Id.* The *D'Arcy* Court looked to existing principles of justice and inter-

The Court constrained *Mills* to the proposition that, in declaring the effect, Congress simply prohibited a second trial on the merits when properly heard<sup>178</sup> and that the more sweeping full faith and credit principles in that decision were open to exceptions.<sup>179</sup> In *D'Arcy*, the Court ruled that Congress did not intend to change the principle of law that existed among states at the time of the ratification of the Constitution that judgments were void in another state unless service on the defendant was proper or the defendant made a voluntary defense.<sup>180</sup> The Court reasoned that this was the proper background law and therefore the situation required no congressional remedy.<sup>181</sup>

The Supreme Court's interpretation of the Clause as mandatory, but regulable by Congress, led the Court to interpret the meaning of the Constitution and the Acts of 1790 and 1804 together without ever delimiting the scope of congressional power.<sup>182</sup> The Court did this in a period of deference to state sovereignty<sup>183</sup> by weakening the mandatory aspect of the Clause on the states

national law to determine what Congress intended to remedy with the Act of 1790. *Id.* at 175-76. Under the existing law, foreign judgments were void unless the parties received proper service. *Id.* at 176. Therefore, the *D'Arcy* Court ruled that state judgments were invalid outside of the rendering state unless service was proper and that the state courts were correct in finding exceptions to full faith and credit. *Id.*; see *supra* notes 102-15 and accompanying text (discussing mandatory conclusive effect of state acts in *Mills*).

178. See *D'Arcy*, 52 U.S. at 175-76 (limiting *Mills* decision). The Court stated that "congress saw proper to remedy the evil, and to provide that such inquiry and double defence should not be allowed. To this extent, it is declared in the case of *Mills v. Duryee*, congress has gone in altering the old rule. Nothing more was required." *Id.*

179. See *id.* at 175 (stating that "as was then predicted, (and as has been manifest ever since,) great embarrassment must ensue if the [*Mills*] construction, on the facts of that particular case, is applied to all others, without exception").

180. *Id.* at 176.

181. See *id.* (relying on prior laws as appropriate remedy). The Court stated:

There was no evil in this part of the existing law, and no remedy called for, and in our opinion, congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments, as they had in the State where made. The language employed is not only fairly open to construction, but the result arrived at by the court below, depends on construction; and when we look to the previous law, and the evil intended to be remedied by the framers of the constitution and by congress, we cannot bring our minds to doubt that the act of 1790 does not operate on, or give additional force to, the judgment under consideration . . . .

*Id.*

182. See Jackson, *supra* note 1, at 7 (discussing judicial development of full faith and credit, not differentiating between Constitution and Acts of 1790 and 1804); *supra* note 104 (quoting *Mills* statement that its decision was based on Constitution and laws of the United States). None of the subsequent cases differentiate between the Constitution and the Acts of 1790 and 1804.

183. See Jackson, *supra* note 1, at 7 (claiming that concern regarding "state sovereignty"

through exceptions.<sup>184</sup> In doing so, Congress was also deferring to full faith state court decisions before and after *Mills*.<sup>185</sup> Congressional inaction since 1804, combined with an unwillingness by the Court to give the Clause and Acts complete conclusive effect, provided the opportunity for the Court to develop these exceptions. As interaction among the states continued to increase, a number of Supreme Court cases discussed the theoretical scope of Congress's power to enforce or limit full faith.<sup>186</sup> The enactment of DOMA moves this issue from theory to reality.

## 2. Twentieth Century Supreme Court Commentary on Congress's Full Faith Exception Power

The Supreme Court has never ruled directly on whether Congress has the authority to grant exceptions to the Full-Faith-and-Credit Clause.<sup>187</sup> The most active period for Supreme Court full faith and credit decisions was the late 1920s to the middle 1940s,<sup>188</sup> with Justice Stone authoring important opinions in the leading cases.<sup>189</sup> *Yarborough v. Yarborough*,<sup>190</sup> a case in which the judgment of one state conflicted with the public policy and property concerns of another,<sup>191</sup> contains the first direct Supreme Court discussion of the author-

is explanation for different views of full faith and credit reflected in *Mills* and *M'Elmoyle* opinions).

184. See *supra* notes 158-81 (discussing Court's weakening of *Mills* decision).

185. See Kogan, *supra* note 97, at 293 (claiming that on eve of Civil War, Supreme Court deferred to state interpretation).

186. See *infra* notes 190-224 and accompanying text (discussing Supreme Court cases that considered Congress's power under Clause).

187. See *infra* note 215 and accompanying text (quoting Supreme Court's refusal to address issue in *Yarborough*). Since then, the Supreme Court has not readdressed the issue.

188. See *infra* notes 190-244 and accompanying text (discussing importance of leading full faith and credit cases from 1920s to 1940s).

189. *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935); *Yarborough v. Yarborough*, 290 U.S. 202 (1933) (Stone, J., dissenting).

190. 290 U.S. 202 (1933).

191. See *Yarborough v. Yarborough*, 290 U.S. 202, 212 (1933) (requiring recognition of Georgia judgment even though defendant has property in and daughter resides in South Carolina). The *Yarborough* Court addressed the issue of whether South Carolina could require additional support for a child residing in South Carolina, apart from her father, who was a resident of Georgia with property in South Carolina. *Id.* at 204-07. The father had already fulfilled his obligations to the child pursuant to a Georgia divorce decree. *Id.* The Court observed that under Georgia law support for minor children is part of a divorce proceeding and not a separate cause of action. *Id.* at 210. The *Yarborough* Court therefore decided that the father's obligations were settled in the Georgia proceeding and were entitled to full faith and

ity of Congress to create exceptions to full faith and credit.<sup>192</sup> Although the issue in *Yarborough* was not the congressional exception power, Justice Stone's dissent raised it as an issue directly related to the Court's exceptions to full faith and credit.<sup>193</sup> Basing his analysis partially on *M'Elmoyle*,<sup>194</sup> Justice Stone emphasized that the Court has never applied the Clause and the acts of Congress without exception and that the Court found it necessary to create such exceptions because the general terms of the congressional Acts of 1790 and 1804 provided none.<sup>195</sup> In a footnote, Justice Stone posited that Congress must have the authority to either expand or contract the mandatory nature of the Clause.<sup>196</sup> He reasoned that, unless Congress's power to prescribe the details of full faith was broader than the Court's, Congress's power to declare the "Effect" would have been unnecessary and meaningless because of the Court's role in interpreting and enforcing the mandatory aspects of the first sentence of the Clause.<sup>197</sup>

credit in South Carolina. *Id.* at 212-13.

192. *See id.* (deciding full faith and credit required South Carolina to recognize final Georgia child support agreement as part of divorce decree, even where child was not party to proceeding); *see also id.* at 214-15 (Stone, J., dissenting) (discussing power of Congress under Full-Faith-and-Credit Clause).

193. *See infra* notes 194-202 and accompanying text (discussing Justice Stone's dissent). Justice Cardozo joined Justice Stone's opinion. *Yarborough*, 290 U.S. at 227 (Stone, J., dissenting). The majority opinion failed to address the portion of Justice Stone's dissent articulating the congressional power to create exceptions.

194. *See Yarborough*, 290 U.S. at 214-15 (Stone, J., dissenting) (citing *M'Elmoyle*).

195. *See id.* at 215 (Stone, J., dissenting) (commenting on Court's creation of exceptions). Justice Stone stated:

[T]here is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other. That point may vary with the circumstances of the case; and in the absence of provisions more specific than the *general terms of the congressional enactment this Court must determine for itself* the extent to which one state may qualify or deny rights claimed under proceedings or records of other states.

*Id.* (emphasis added) (citations omitted). In this case Justice Stone believed that Georgia was forcing its own public policy on South Carolina. *See id.* at 223 (Stone, J., dissenting).

196. *See id.* at 215 n.2 (Stone, J., dissenting) (stating that "[t]he mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or *contracted by Congress*" (emphasis added)).

197. *See id.* (commenting on Congress's power). Justice Stone stated:

The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone.

*Id.* (Stone, J., dissenting).

Justice Stone relied on the debates of the Constitutional Convention regarding the need for congressional power to declare the "Effect"<sup>198</sup> and the Court's recognition of a public policy exception as support for his position.<sup>199</sup> Justice Stone believed that the debates led to the logical conclusion that the Clause granted Congress broad power to regulate the effects of full faith, otherwise there was no reason for the short but intense debate.<sup>200</sup> Therefore, the Court's problems in applying a public policy exception are a reflection of its own difficulty in handling full faith matters in which Congress has not yet spoken – one way or another.<sup>201</sup> Justice Stone's discussion of a congressional exception power reflected his concern that, absent congressional action, the Court was left to develop exceptions on its own, on a case-by-case basis. The majority neither accepted nor expressly rejected this portion of his opinion.<sup>202</sup>

Two years after *Yarborough*, the Court, with Justice Stone this time writing the majority opinion, again addressed exceptions to full faith in *Milwaukee County v. M.E. White Co.*<sup>203</sup> In apparent contradiction with his dissent in *Yarborough*, Justice Stone in *Milwaukee County*, when referring to limitations on full faith, wrote, "[o]f that question this Court is the final arbiter."<sup>204</sup>

198. See *supra* Part II.A (discussing debate on Clause during Constitutional Convention).

199. See *Yarborough*, 209 U.S. at 215 n.2 (Stone, J., dissenting) (relying on public policy exception for his position). Justice Stone commented:

It was remarked on the floor of the Constitutional Convention that without the extension of power in the legislature, the provision "would amount to nothing more than what now takes place among all Independent Nations." The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power.

*Id.* (citations omitted).

200. See *id.* (Stone, J., dissenting) (noting importance of constitutional convention); *supra* Part II.A (discussing debate on Clause during constitutional convention).

201. See *supra* note 195; *infra* note 224 (quoting opinions of Justices Stone and Black indicating that Congress's failure to provide interstate direction on child custody matters and divorces placed Court in position of developing solutions).

202. See *Yarborough*, 290 U.S. at 202-13 (failing to discuss congressional exception power which Justice Stone raised).

203. 296 U.S. 268 (1935).

204. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 274 (1935); see *id.* at 280 (certifying that U.S. district court in Illinois had jurisdiction over parties in suit based on valid judgment from Wisconsin state court). In *Milwaukee County*, the appellee claimed that the Illinois district court should not have jurisdiction because: (1) the suit was not within the power conferred upon federal district courts; and (2) a judgment for taxes is an exception to the Full-Faith-and-Credit Clause and the Acts of 1790 and 1804. *Id.* at 270. The Court reasoned that

The authors of the official notes and comments to Section 103 of the Restatement (Second) of Conflict of Laws, which cited the *Milwaukee County* opinion and another case<sup>205</sup> likely relied on these words when they claimed that the Supreme Court had the final word on full faith exceptions.<sup>206</sup> The authors viewed such exceptions as limited to very rare cases because of the important unifying principles of the Clause.<sup>207</sup>

If *Milwaukee County* was the source of the authors' statement regarding the conclusive power of the Court, then their reliance was misplaced. In *Milwaukee County*, Justice Stone made an assumption that the Clause and the Acts of 1790 and 1804 were not all-encompassing.<sup>208</sup> He thereby limited the question to a narrow issue for the purpose of answering the certified question in this case.<sup>209</sup> This decision reflected his concern, expressed in the *Yarborough* dissent, that congressional inaction placed the Court in the unavoidable position of deciding these conflicting policy cases, not that the Constitution placed the Court in the position as arbiter of full faith exceptions to the

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the judicial code permits a district court to hear the case because tax matters are not excluded. *Id.* at 271. The Court noted that full faith and credit is not applied without exception because of concerns regarding state sovereignty and that taxation is one of these areas of concern. *Id.* at 272-74. The *Milwaukee County* Court noted, however, that the Wisconsin action was not a ruling on the merits, but a judgment for enforcement. *Id.* at 274-75. Therefore, there was no basis for denying full faith and credit. *Id.* at 276-78. Consequently, the Court ruled that the district court in Illinois could enforce the Wisconsin judgment. *Id.* at 279-80.

205. See *Williams v. North Carolina*, 325 U.S. 226, 239 (1945) [hereinafter *Williams II*] (ruling that North Carolina could ignore ex parte divorces performed in Nevada if parties obtained Nevada residency for purpose of avoiding North Carolina divorce policy).

206. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 cmt. b, reporter's note (1971) (citing *Williams II* in comment on rationale of Section 103 and Justice Stone's dissent in *Yarborough* in notes).

207. See *id.* (stating that "[t]he Supreme Court of the United States has the final voice in determining what exceptions there are to full faith and credit, and the nature of these exceptions").

208. *Milwaukee County*, 296 U.S. at 273-74.

209. See *id.* (limiting certified question to narrow issue). Justice Stone stated:

Without attempting to say what their limits may be, we assume for present purposes that the command of the Constitution and of the statute is not all-embracing and direct our inquiry to the question whether a state to which a judgment for taxes is taken may have a policy against its enforcement meriting recognition as a permissible limitation upon the full-faith and credit clause. Of that question this court is the final arbiter.

*Id.* For support, Justice Stone relied on his majority opinion in *Alaska Packers Ass'n v. Industrial Accident Comm'n*. See *id.* at 274 (citing *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935)); *Alaska Packers Ass'n*, 294 U.S. at 547 (noting that "[u]nless by force of that clause a greater effect is thus to be given . . . it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another").

exclusion of Congress.<sup>210</sup> Only by examination of the context of Justice Stone's opinion in *Milwaukee County* can one reconcile it with his dissent in *Yarborough*. Justice Stone believed Congress should create the exceptions to full faith, but in its absence he led the Court in doing so.<sup>211</sup>

The Supreme Court continued to rely on the language from earlier cases to declare itself the "final arbiter" of full faith exceptions.<sup>212</sup> In the absence of congressional action, the Court acted to protect its role in creating exceptions to avoid "absurd result[s]."<sup>213</sup> In *Williams v. North Carolina*<sup>214</sup> (*Williams I*), an ex parte divorce case, the Court repeated its claim of the right to determine full-faith exceptions. But as in *Milwaukee County*, the Court tempered its sweeping declaration in light of congressional inaction when, referring to *Yarborough*, it stated:

Whether Congress has the power to create exceptions . . . is a question on which we express no view. It is sufficient here to note that Congress in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another has not done so.<sup>215</sup>

With that statement, the Court left undecided the issue now presented by Section 2 of DOMA.<sup>216</sup>

However, the tension between *Williams I* and the Court's later decision in *Williams v. North Carolina*<sup>217</sup> (*Williams II*) demonstrated Justice Stone's theory that the Court's difficulty in handling the public policy exception

210. See *supra* note 195 and accompanying text (discussing lack of action by Congress).

211. See *supra* note 190-210 and accompanying text (discussing Justice Stone's opinions in *Yarborough* and *Milwaukee County*).

212. *Williams v. North Carolina*, 317 U.S. 287, 302 (1942) [hereinafter *Williams I*] (stating that "[t]his Court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause").

213. *Alaska Packers Ass'n*, 294 U.S. at 547.

214. 317 U.S. 287 (1942).

215. *Id.* at 303. See *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (deciding under Full-Faith-and-Credit Clause and Act of 1790 that divorce of bona fide domiciliary is binding on courts of other states). In *Williams I*, two married persons from North Carolina moved to Nevada for 6 weeks, obtained divorces, married, returned to North Carolina, and were subsequently charged with bigamy. *Id.* at 289-91. The North Carolina trial court refused to recognize the Nevada divorces. *Id.* at 291. The North Carolina Supreme Court cited the United States Supreme Court opinion of *Haddock v. Haddock*, 201 U.S. 562 (1905), in sustaining the trial court. *Id.* The *Williams I* Court noted that *Haddock* held that the matrimonial domicile where one spouse still resided did not have to give full faith and credit to divorces obtained out of state. *Id.* at 293. Relying on previous cases requiring full faith and credit, the *Williams I* Court overruled *Haddock*. *Id.* at 295-304. Consequently, the Court required North Carolina to give the Nevada proceedings full faith and credit. *Id.* at 304.

216. See Defense of Marriage Act § 2, 28 U.S.C.A. § 1738C (West Supp. 1997) (permitting states not to recognize same-sex marriages of other states).

217. 325 U.S. 226 (1945).

stemmed from the lack of an explicit grant from Congress to create or deny one.<sup>218</sup> The Court in *Williams I* struggled with the obvious benefits and detriments of the public policy exception.<sup>219</sup> It overturned precedent to retreat from the exception in favor of a more stable rule, thus denying an exception for North Carolina.<sup>220</sup> *Williams II*, in turn, was a retreat from *Williams I* when a plurality of the Court permitted North Carolina to ignore two divorces that were legitimate in Nevada.<sup>221</sup> Justice Black, in his strong dissent<sup>222</sup> from *Williams II*, argued that only Congress, and not the Court, could authorize states to recognize lesser effect for judgments on a particular substantive issue.<sup>223</sup> His view was that the Clause placed this power squarely in the hands of Congress and that Congress had not yet declared any exceptions.<sup>224</sup>

218. See generally *Williams v. North Carolina*, 325 U.S. 226 (1945); *supra* notes 195-202 and accompanying text (discussing Justice Stone's response to lack of congressional action).

219. See *Williams I*, 317 U.S. at 295-303 (distinguishing earlier Supreme Court cases); *cf. id.* at 308-11 (Murphy, J., dissenting); *id.* at 311-24 (Jackson, J., dissenting).

220. See *id.* at 303-04 (overruling *Haddock*). The Court stated:

[T]he substantial and far-reaching effects which the allowance of an exception would have on innocent persons indicate that the purpose of the full faith and credit clause and of the supporting legislation would be thwarted to a substantial degree if the rule of *Haddock v. Haddock* were perpetuated.

*Haddock v. Haddock* is overruled.

*Id.*

221. See *Williams II*, 325 U.S. at 239 (concluding North Carolina was not required to recognize Nevada divorce decrees when parties obtained residency in Nevada to avoid public policy of North Carolina). In *Williams II*, the Court recognized that the power to grant a divorce is based on the domicile of the parties. *Id.* at 229. The Court also noted that divorce and marriage have impacts beyond the immediate parties and therefore concern the public policy of the state where such acts are to have effect. *Id.* at 230-31. North Carolina, according to the *Williams II* Court, could examine whether the parties actually abandoned their North Carolina residency, notwithstanding the Nevada judgment. *Id.* at 235-37. Because a fair trial took place on the issue, the Court decided that North Carolina could examine this issue and therefore upheld the second trial. *Id.* at 238-39.

222. See CHARLOTTE WILLIAMS, HUGO L. BLACK A STUDY IN THE JUDICIAL PROCESS 124 (1950) (noting Justice Black expressed "strong disapproval" over Court's opinion in *Williams II*).

223. See *Williams II*, 325 U.S. at 268 (Black, J., dissenting) (arguing authorization could only come from Congress). Justice Black commented: "If . . . divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the 'divorce problem' by constitutional interpretation. At least, until Congress has commanded a different 'Effect' . . . we should stay our hands." *Id.* (Black, J., dissenting).

224. See *id.* (Black, J., dissenting) (declaring Clause gave power to Congress). Justice Black stated:

Congress in 1790 declared what law should govern and what "Effect" should be given the judgments of state courts. That statute is still the law. . . . A proper



By creating exceptions, the Court was interpreting the mandatory nature of the Clause in the absence of a contrary exercise of Congress's optional powers under the Clause. In their dissents, Justices Stone and Black argued that the second sentence of the Clause grants this power to Congress, rather than to the Court.<sup>225</sup> Congress has met the concerns of both positions in its enactment of DOMA by using its optional powers to create an exception to full faith while refusing to rely on the Court-created exceptions to advance the same end.<sup>226</sup>

### C. The Court, the Public Policy Exception, and Congressional Power

If no exceptions to full faith and credit existed, whenever an interstate conflict arose, the forum state would have to recognize as conclusive the acts, records, or proceedings of the other state to the exclusion of its own.<sup>227</sup> To alleviate this situation, the Supreme Court developed limited exceptions to full faith in light of background principles of law and powers retained by the states over local matters at the time the Constitution was adopted.<sup>228</sup> The 1978 decision in *Nevada v. Hall*<sup>229</sup> is the Court's most recent reaffirmation of the public policy exception.<sup>230</sup> The Court quoted at length from *Pacific Em-*

respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did.

*Id.* (Black, J., dissenting).

225. See *supra* notes 195-97 and accompanying text (discussing Justice Stone's opinion); *supra* notes 223-24 and accompanying text (discussing Justice Black's opinion).

226. See *supra* note 5 (discussing potential requirement for other states to recognize Hawaiian same-sex marriage).

227. See *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) (commenting on literal interpretation of Clause). The Court stated:

A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.

*Id.*

228. See *supra* notes 176-81 and accompanying text (discussing Court's adoption of background principles of law in *D'Arcy*).

229. 440 U.S. 410 (1978).

230. See *Nevada v. Hall*, 440 U.S. 410, 414-27 (1978) (ruling suit against State of Nevada in California state courts did not violate sovereign immunity, Article III of Constitution, Full-Faith-and-Credit Clause, or specific provisions of Constitution limiting state sovereignty). The plaintiffs made the State of Nevada a party to a California tort action resulting from a car accident in California that involved an employee of the State of Nevada. *Id.* at 411-12. Nevada had a \$25,000 statutory limit of liability as part of its waiver of sovereign immunity. *Id.* at 412. In *Hall*, the Court for the first time addressed the issue of whether a state could claim immunity in the courts of another state. *Id.* at 414. The *Hall* Court reasoned that sovereign immunity only

*ployers Insurance Co. v. Industrial Accident Commission*,<sup>231</sup> which concluded that the Acts of 1790 and 1804 did not prescribe the interstate effect for state statutes, and therefore full faith and credit does not require the forum state to use the other state's statute to the exclusion of its own.<sup>232</sup> In fact, the Court said that Congress could prescribe the extraterritorial effect of state statutes.<sup>233</sup> Because the framers intended the Clause to cover state legislative acts,<sup>234</sup> the reasoning in *Pacific* and *Hall* suggests that Congress can create full faith exceptions by excluding them from full faith legislation, the self-executing portion of the Clause notwithstanding.<sup>235</sup>

The Court's jurisprudence on exceptions has focused on the existence of a conflicting state statute and, therefore, relies on the exclusion of statutes

extends to the courts of the state and not beyond because such a policy would implicate the rights of the other states. *Id.* at 414-18. The Court also reasoned that the constitutional restrictions on suits against states only covered the federal judiciary and did not impact state tribunals. *Id.* at 418-21. The Court noted that the Full-Faith-and-Credit Clause requires states to recognize the official acts of other states but that California did not have to recognize the Nevada statutory liability limit if it violated a legitimate public policy of California. *Id.* at 421-24. The Court considered other constitutional provisions relating to interstate relations, but found none of them sufficient for the Court to require California to apply Nevada law. *Id.* at 424-26. Consequently, the Court ruled that California could make Nevada a party in a suit in California, and it could ignore Nevada's statutory liability limits. *Id.* at 427.

231. 306 U.S. 493 (1939).

232. See *Hall*, 440 U.S. at 422-23 (quoting from *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939)); *Pacific Employers*, 306 U.S. at 504-05 (deciding full faith and credit does not permit one state to legislate for another or project its laws across state lines so that forum state is prevented from applying forum law to acts within state). The issue in *Pacific*, an opinion authored by Justice Stone, was whether full faith and credit required California to apply a Massachusetts workmen's compensation act where a Massachusetts employee of a Massachusetts employer suffered an injury in California. *Id.* at 497. The Court noted that both states had laws providing an exclusive remedy, so that the application of one law would result in exclusion of the other. *Id.* at 500-01. The Court ruled that full faith does not extend so far as to infringe on state sovereignty by substituting its own statutes for those of another state. *Id.* at 501-02. The Court noted that when the forum state has a statute expressing state policy and when the statute is to operate as the exclusive law within the state, full faith and credit does not require application of a foreign state's law. *Id.* at 502-03. Consequently, California could apply its own law rather than that of Massachusetts. *Id.* at 505.

233. See *Hall*, 440 U.S. at 422 (quoting *Pacific Employers*, 306 U.S. at 502, as stating that "in the case of statutes, . . . Congress has not prescribed [the extrastate effect], as it may under the constitutional provision").

234. See *supra* notes 41-45, 53-63 and accompanying text (discussing inclusion of state legislative acts in Clause).

235. See *Hall*, 440 U.S. at 422 (noting that Congress had not prescribed extraterritorial effect of state statutes and further stating that "we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, the conflicting statute of another state" (quoting *Pacific Employers*, 306 U.S. at 502)).

from full faith legislation.<sup>236</sup> However, a *statutory* conflict is not necessary, as the Court noted in *Pink v. A.A.A. Highway Express, Inc.*<sup>237</sup> Justice Stone, again writing for the Court, explained that the limits on full faith and credit extend to the laws and *policies* of a state.<sup>238</sup> One state could threaten the sovereignty of another state if it were able to implement the determinative policy on domestic matters.<sup>239</sup> The extent to which one state could infringe on the policies of another was therefore a matter for the Court, in the absence of congressional action.<sup>240</sup> To deny full faith and credit, the public policy

236. See 16A AM. JUR. 2D *Constitutional Law* § 867 (1979) (discussing policy exceptions to full faith and credit in terms of statutory conflicts).

237. 314 U.S. 201 (1941).

238. See *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941) (commenting on limits of Full-Faith-and-Credit Clause). In *Pink*, Justice Stone stated:

But the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another.

*Id.* (citing *Klaxon v. Stentor Elec. Mfg.*, 313 U.S. 487, 497-98 (1941); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273 (1935); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935)); see *id.* at 208-11 (deciding that full faith and credit does not require state to enforce judgment from another state where liability is based on local contract, but may decide issue based on local law and policy). In *Pink*, the Court addressed whether Georgia could deny enforcement of a New York judgment against Georgia insurance policy holders where the contract made the policyholder a member of the insurance company. *Id.* at 204-06. The Court noted that Georgia was free to make laws governing its domestic affairs and, therefore, it could interpret the contract made in Georgia covering Georgia citizens, full faith and credit notwithstanding. *Id.* at 208-10. The *Pink* Court ruled that Georgia was justified in making its determination based on "domestic law and policy which the full faith and credit clause does not override." *Id.* at 211.

239. See *Pink*, 314 U.S. at 210 (commenting on potential state sovereignty problems). The Court stated:

It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others.

*Id.*

240. See *id.* (noting Court has discretion in absence of congressional action). The Court explained:

When such conflict of interest arises, it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights

concern of the forum must be strong enough to outweigh the other state's interest.<sup>241</sup>

Recognition of foreign state marriages – a central issue in DOMA – has been one of the public policy exceptions state courts have raised.<sup>242</sup> Although the underlying principle is that a marriage is valid everywhere as long as it was valid in the state where celebrated (*lex celebrationis*), another state could refuse to recognize such a marriage if it violated a strongly held public policy.<sup>243</sup> The Supreme Court has not ruled on the marriage exception, but for all practical purposes has eliminated the exemption for divorces.<sup>244</sup>

In the earlier part of the twentieth century, during the most intense period of Court activity over full faith and credit, commentators criticized the Court's

asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another.

*Id.* (citing *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935)). *But see supra* notes 190-211 and accompanying text (discussing Justice Stone's view that Court could decide scope of full faith in case only because Congress had not).

241. *See supra* notes 227-32 and accompanying text (discussing what amounts to balancing test between full faith and public policy).

242. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) & notes (1971) (citing state cases invalidating marriages formalized in other states: *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961); *Davis v. Seller*, 108 N.E.2d 656 (Mass. 1952); *Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958)); 16A AM. JUR. 2D *Constitutional Law* § 868 n.87 (1979) (citing Maryland case, *Henderson v. Henderson*, 87 A.2d 403 (Md. 1952), as asserting right to not recognize out of state marriages on public policy grounds but refusing to do so in case); Annotation, *Recognition By Forum State of Marriage Which, Although Invalid Where Contracted, Would Have Been Valid if Contracted Within Forum State*, 82 A.L.R.3d 1240, 1242 n.14 (1978) (citing *DeFur v. DeFur*, 4 S.W.2d 341 (Tenn. 1928); *Portwood v. Portwood*, 109 S.W.2d 515 (Tex. Civ. App. 1937, no writ); *Kitzman v. Kitman*, 166 N.W. 789 (Wis. 1918) as cases raising issue of forum state public policy); Annotation, *Recognition of Foreign Marriage as Affected by Local Miscegenation Law*, 3 A.L.R.2d 240 (1949 & Supp. 1985) (discussing state case law invoking public policy principles for not recognizing marriage, and miscegenation as grounds made moot by *Loving v. Virginia*, 388 U.S. 1 (1967)); *see also* *Singh v. Singh*, 569 A.2d 1112 (Conn. 1990) (reaffirming Connecticut's right to declare marriage invalid based on public policy).

243. *See* UNIF. MARRIAGE AND DIVORCE ACT § 210, 9A U.L.A. 176 (1987) (indicating that "[a]ll marriages contracted . . . outside this State, that were valid at the time contracted or subsequently by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) & notes (1971) (noting that marriages that satisfy requirements of state where contracted will be recognized everywhere, "unless it violates the strong public policy of another State" having most significant relationship to spouses and marriage); *see also supra* note 240 (discussing state cases on nonrecognition of marriages). *But see* H.R. REP. NO. 104-664, at 38 (1996), *reprinted in* 1996 U.S.C.A.N. 2905, 2941 (dissenting view) (noting Supreme Court has never made definitive ruling on interstate recognition of marriages).

244. *See supra* notes 220, 242 (discussing state case law and weakening of protection for state policies on divorce after *Williams I* and *Williams II*).

enforcement of a public policy exception.<sup>245</sup> Commentators argued against the Court's creation of public policy exceptions based on the premise that the exception power was given to Congress under the Clause.<sup>246</sup> In 1935, Professor Ross criticized the Court for restricting the sweeping language of the Acts of 1790 and 1804.<sup>247</sup> He posited that by so doing the Court was infusing its own discomfort with the mandatory conclusiveness of the congressional legislation and the Clause into the Constitution, thereby restricting the power of Congress in the future.<sup>248</sup> According to Professor Ross, though, because the language of the Clause expressly grants Congress the power to legislate in full faith and credit, the Court's decisions may have to give way once Congress exercises its power.<sup>249</sup>

In 1955, Professor Sumner more fully developed the distinction between the power of the Court and the power of Congress.<sup>250</sup> Professor Sumner relied

245. See *infra* notes 246-75 and accompanying text (discussing commentators' criticism of Supreme Court's public policy exception).

246. See Ross, *supra* note 44, at 157-58 (arguing that Congress is appropriate branch to create exceptions).

247. See *id.* at 152 (stating that "[t]he Act of Congress sounds very sweeping . . . [b]ut such a broad construction has not proved tolerable [to the Court]").

248. See *id.* at 157-58 (commenting that Court's decisions limit Congress's discretion concerning Clause). Professor Ross states:

The constitution authorizes *Congress* to prescribe the inter-state effect of judicial proceedings. Since Congress has laid out no lines of discrimination, the Supreme Court might have held that there are none and that the obligation of "full faith and credit" extends to every sort of judicial proceeding that its original state holds effective; or, that until Congress sets up standards of discrimination each state remains free to make its own. Instead, the court has treated the constitutional section in connection with the fourteenth amendment as self-executing and has worked out its rules as assumed logical (?) corollaries of the constitutional obligation. If that is what they are, how much play of legislative discretion is left to Congress? . . . [A]ny congressional discretion must be exercised within the limits of what the Court will recognize as "reasonable," the undefinable standard of which rests in the bosom of the Court itself. But, no doubt, too, to be "reasonable" any such legislation will have to follow the general distinctions already established by the Court.

*Id.* (citations omitted).

249. See *id.* at 183 (noting possible result should Congress exercise its power). Professor Ross states:

The fact that . . . the "full faith and credit" section . . . expressly authorize[s] Congress to legislate for [its] implementing and completion will perhaps save the judicially developed rules from being deemed entirely sacrosanct . . . . Assuming the authority of Congress, it may be suggested that it would better legislate only piecemeal for a time (as the Supreme Court has been doing) . . . .

*Id.*

250. See Sumner, *supra* note 31, at 236-41 (discussing nature of Full-Faith-and-Credit Clause).

heavily on the history of the Full-Faith-and-Credit Clause to develop a view of the framers' intent.<sup>251</sup> He noted that the framers' wrote the Clause with a mandatory self-executing portion and a section that granted a broad power to Congress to modify this requirement.<sup>252</sup> According to Professor Sumner, until Congress acts, the Court is left to implement the self-executing nature of the Clause,<sup>253</sup> with the rare exception for truly conflicting state public policies.<sup>254</sup> Professor Sumner posited that, as a practical matter, Congress left the issue to the Court in the absence of congressional "exceptions, qualifications, and clarifications"<sup>255</sup> to full faith and credit, even though this was not the framers' intent.<sup>256</sup> Professor Sumner's analysis highlights the difference between the Court's role in interpreting a constitutional provision (the first part), and Congress's role in exercising an enumerated power (the second part). They are distinct roles and powers.

Justice Jackson observed that state public policy exceptions would destroy the entire purpose behind the Clause, which was to place the interests of the union ahead of those of the states.<sup>257</sup> If a state could deny faith and credit to the laws of others, it was thereby adding to the power of its own

251. See *id.* at 225-36 (discussing history of full faith and credit).

252. See *id.* at 239 (noting framers intended first part of Clause to be self-executing and second part to give Congress power to modify first); see also *id.* at 236 (noting continuing congressional failure "to make further use of the broad powers given it under the constitutional clause").

253. See *id.* at 241 (commenting on Court's role in interpreting Clause). Professor Sumner states:

Hence, the Federal statute has not thus far established the foundation. As a practical matter the full faith and credit demanded by the Constitution is that which the Supreme Court specifies. There is nothing whatsoever in the history of the clause showing that this was the design of the framers. But, since the clause is self-executing . . . and since Congress has failed to carry out its task, there is little more that can be done.

*Id.*

254. See *id.* at 246-49 (discussing exceptions to full faith and credit's purpose of uniformity based on state public policies).

255. *Id.* at 239.

256. See *id.* at 241 (providing Professor Sumner's explanation of framers' intent).

257. See Jackson, *supra* note 1, at 27 (addressing public policy concerns). Justice Jackson states:

Always to be kept in mind in dealing with these problems is that the policy ultimately to be served in application of the clause is the federal policy of "a more perfect union" of our legal systems. No local interest and no balance of local interests can rise above this consideration. It is hard to see how the faith and credit clause has any practical meaning as to statutes if the Court should adhere to the statement that ". . . a state is not required to enforce a law obnoxious to its public policy."

*Id.* (citing *Griffin v. McCoach*, 313 U.S. 498, 507 (1941)).

laws.<sup>258</sup> Justice Jackson listed some of the areas in which states may have irreconcilable differences<sup>259</sup> and noted that resolving such conflicts should not be left to the personal preferences of Supreme Court Justices.<sup>260</sup> He noted that the relationships of the states to one another and to the federal system should form the basis of the solution,<sup>261</sup> but provided no exact answer on the resolution of these conflicts.<sup>262</sup> Justice Jackson argued for a "truly national system of justice"<sup>263</sup> and called upon the legal community to come up with an answer to the problems posed by the conflict between the Clause and state policies.<sup>264</sup> Justice Jackson, citing the *Yarborough* dissent, dismissed Congress as the solution to these problems because of congressional inaction,<sup>265</sup> not because of a lack of power.<sup>266</sup> It appears, however, that Congress is the logical body

258. See *id.* at 33 (stating that "[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").

259. See *id.* at 27-28 (listing industrialization, resource protection, workmen's compensation, divorce, alienation of affection, breach of promise, domicile, estates, assessments, and property as areas of state differences).

260. See *id.* at 28 (noting personal preferences are inappropriate to reconcile conflicting state policies). Justice Jackson explains:

Certainly the personal preferences of the Justices among the conflicting state policies is not a permissible basis of determining which shall prevail in a case. But only a singularly balanced mind could weigh relative state interests in such subject matter except by resort to what are likely to be strong preferences in sociology, economics, governmental theory, and politics. There are no judicial standards of valuation of such imponderables.

*Id.*

261. See *id.* at 28-29 (noting necessity that legal scholarship explore these relationships).

262. See *id.* at 28 (stating that "[t]he ultimate answer . . . will have to be based on considerations of state relations to each other and to the federal system").

263. *Id.* at 34.

264. See *id.* at 29 ("I could suggest no more engaging intellectual enterprise to which the scholarship of our profession might turn than to try to find the wise answers on constitutional grounds to these questions.").

265. See *id.* at 21-23 (commenting on congressional inaction). Justice Jackson notes that the Court left areas open for congressional action, especially those relating to marriage:

Mr. Justice Stone, joined by Mr. Justice Cardozo, pointed out in a dissenting opinion that "Much of the confusion and procedural deficiencies" in the matrimonial field might be remedied by legislation. It is also suggested that Congress has power to prescribe the type of divorce judgment that is entitled to extraterritorial recognition. The Court has had no occasion to decide such questions, but I should say it has been fairly ostentatious in leaving the way open to sustain such enactments without embarrassment.

*Id.* at 21 (citations omitted).

266. See *id.* at 21 (stating that "Congress is invested with a range of power greatly exceeding that which it has seen fit to exercise").

to answer Justice Jackson's call to balance "state relations to each other and to the federal system,"<sup>267</sup> because Congress represents the interests of the states at the federal level.

Professor Radin, writing in the interim between the *Williams I* and *Williams II* decisions, was squarely against the public policy exception which would "whittle away" the Full-Faith-and-Credit Clause.<sup>268</sup> Using *Williams I* as the example, Professor Radin argued that North Carolina's refusal to recognize a Nevada divorce on public policy grounds, because of its short residency requirement for people seeking a divorce, is equally offensive to Nevada.<sup>269</sup> According to Professor Radin, North Carolina is powerless to prohibit such evasions of its public policy in a federal system.<sup>270</sup> He posited that while states may have their own policies, people have the right to travel and live among the states.<sup>271</sup> Therefore, states could not shield themselves from one another.<sup>272</sup> Importantly, Professor Radin did not discuss the role Congress could play under the second portion of the Clause. In this, the strongest opposition to the notion of public policy exceptions among commentators, Professor Radin did recognize one deviation from full faith, and it is quite relevant to DOMA.<sup>273</sup> He believed that, theoretically, there could be a situa-

267. *Id.* at 28.

268. Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 35 (1944).

269. *See id.* at 30 (providing Nevada-North Carolina divorce example). Professor Radin explains:

If a small number succeed, for purposes that one state dislikes, in taking advantage of our Federal system by moving to and from within the Union, as they have a constitutional right to do, it is hard to see how anything can be done about it which will not be just as offensive to another state.

*Id.* It should be noted that the next year *Williams II* rejected this perspective on the problem. *See supra* note 221 (indicating North Carolina could ignore Nevada divorce decrees based on domicile).

270. *See Radin, supra* note 268, at 32 ("What protesting states fail to realize is that so long as we have a federal system like ours, a state is quite powerless to prevent this evasion.").

271. *See id.* at 29 (stating that "since the right of ingress and regress from one state to another is a fundamental one, a state must endure the impairment of its policy which the action of another state brings with it").

272. *See id.* (noting interplay between differing state policies). Professor Radin explains:

[I]t is impossible to see how under our Federal system of equal subsovereignities, a state can be protected against the action of another state. . . . Our states are not water-tight compartments. . . . That a state policy on moral as well as economic issues is subject to this qualified frustration is . . . one of the prices we pay for the maintenance of our Federal system.

*Id.*

273. *See id.* at 35 (identifying situations that may require full faith and credit to give way, especially in areas of marriage).



tion in which a practice of one state was so "abhorrent" to the majority of the others, such as non-traditional marriages, that another state could deny recognition of judgments based on that practice.<sup>274</sup> To Professor Radin, the notion of such a situation was fanciful.<sup>275</sup>

### III. DOMA as an Exercise of a Congressional Exception

An important criticism of DOMA is that it is outside the constitutional congressional grant of power under the Full-Faith-and-Credit-Clause.<sup>276</sup> Commentators and those who opposed DOMA in Congress have raised two main arguments on this point. First, a "negative" or exception power means that Congress can negate the Clause through legislation, even to permit no faith at all, and thus defeat the purpose of the Clause as "the strong unifying principle" for maximum enforcement in each state "of the obligations or rights created or recognized by . . . sister states."<sup>277</sup> Second, "congressional license"<sup>278</sup> for states to do what the Court supposedly already authorizes them to do on public policy grounds<sup>279</sup> undercuts state protection under the Tenth Amendment.<sup>280</sup>

Professor Tribe has argued that one cannot possibly read the power granted to Congress under the Clause to "prescribe the Manner . . . and the

274. See *id.* (hypothesizing state practices that could prove offensive to other states). Radin asks:

Is the full faith and credit clause subject to any exception whatever? In theory, we may well imagine situations in which it might be forced to give way. Suppose a particular state created situations which the great majority of the other states found abhorrent. To recur to such matters as personal relations, could a state make the extremer forms of incest lawful and would another state be compelled to recognize a declaratory judgment, let us say, that such an incestuous marriage was valid? In theory, I think, a state might do these things and in theory another state would be constitutionally justified in denying judgments based on such situations either full faith or any faith.

*Id.*

275. See *id.* (stating that "we are dealing with unrealities in these hypotheses").

276. See *infra* notes 277-95 and accompanying text (discussing criticism of DOMA).

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

278. Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5933 (daily ed. June 6, 1996) (statement of Sen. Kennedy).

279. See *supra* Part II.C and accompanying text (discussing Court-created policy exceptions).

280. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); H.R. REP. NO. 104-664, at 41 (1996), reprinted in 1996 U.S.C.A.N. 2905, 2943-44 (dissenting view) (arguing DOMA impinges on 10th Amendment).

Effect thereof<sup>281</sup> to authorize "no faith and credit at all."<sup>282</sup> Professor Tribe contends that to read the enabling power in such a way is a "play on words" rather than a legal argument.<sup>283</sup> He reasons that such an interpretation is to grant Congress the power to delegate a nullification authority to the states which leads to unfettered latitude to ignore the acts of sister states and thereby "gut" the self-executing portion of the Clause.<sup>284</sup> His position reflects the view that Congress may only exercise its full faith and credit power in furtherance of enforcing state acts nationwide.<sup>285</sup> The dissenting view in the House debate over DOMA did not strongly adopt this position, but rather focused on other constitutional arguments<sup>286</sup> and the states' rights and public policy concerns raised in Parts III.A and B.<sup>287</sup>

Another major criticism posits that DOMA's grant of power to the states to ignore a particular act of another state is itself a violation of both the right of states to ignore acts of other states and the right to have other states recognize their own acts.<sup>288</sup> The dissenting congressional view argues that the

281. U.S. CONST. art. IV, § 1.

282. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (questioning constitutionality of DOMA under Full-Faith-and-Credit Clause) (exclamation excluded).

283. *Id.*

284. *Id.* Professor Tribe states:

To read the enabling sentence of the Full Faith and Credit Clause to confer upon Congress a power to delegate this sort of nullification authority – to read it . . . as the proponents of this . . . law must read it if they are to treat it as the source of power for the legislation they advocate – would entail the conclusion that Congress may constitutionally decree that no Hawaii marriage, no California divorce, no Kansas default judgment, no punitive damages award by any state court against a civil rights lawyer – to suggest a few of infinitely many possible examples – need to be given any legal effect at all by any State that chooses to avail itself of a congressional license to ignore the Full Faith and Credit Clause. The enabling sentence simply will not bear so tortured a reading. . . . [T]he Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once.

*Id.*

285. See *Hearings on S. 1740, supra* note 8, at 46 (Statement of Prof. Cass R. Sunstein) (noting that this power is a "power of Congress, under the 'effect' clause of Article IV, section 1, of the Constitution, to increase the requirements of full faith and credit to sister state decrees beyond what the Constitution alone would require" (quoting RUSSELL S. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 278 (2d ed. 1986))).

286. See H.R. REP. NO. 104-664, at 40-43 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2942-46 (dissenting view) (arguing substantive due process and equal protection challenges to DOMA).

287. See *infra* Parts III.A-B (discussing criticisms of DOMA).

288. See H.R. REP. NO. 104-664, at 38-39, reprinted in 1996 U.S.C.C.A.N. 2905, 2940-42

power of states to ignore the actions of other states is a constitutional principle and does not rely on congressional authority.<sup>289</sup> This dissenting view relies on the statement of Professor Tribe for its reasoning that constitutional authority to ignore other states' actions stems from judicially created full-faith-and-credit exceptions, and that Congress lacks equivalent power to create such exceptions.<sup>290</sup> The argument suggests that the *Court* may provide exceptions to full faith and credit, but that Congress, through the grant of power in the Clause itself to declare the effect, may not. The theory apparently contends that legislation like DOMA places Congress in the position of exercising constitutional interpretive powers or attempting to place itself in an authoritative position vis-a-vis the states and the Constitution. As a result, Congress exercises powers that it does not have in violation of the Tenth Amendment.<sup>291</sup>

Additionally, Professor Tribe argues that Congress's exercise of this negative power places the acts of the "ignored" states into a "second-class status."<sup>292</sup> This exercise of power, according to Professor Tribe, destroys the core principle of a "union of equal sovereigns" which the Constitution establishes.<sup>293</sup> The dissenting view in the report concludes with the proposition that Congress's use of an exception power undercuts the constitutional protections

(dissenting view) (discussing recognition among states).

289. *See id.* at 37 (arguing states' power of recognition derives from Constitution, not Congress). The dissenting view explains:

[T]he power that states have to reject marriages of which they disapprove on policy grounds derives directly from the Constitution and has never previously been held to need any Congressional authorization, the fact that Congress . . . presumes to give the states permission to do what virtually all states think they already now have the power to do undercuts states rights.

*Id.*

290. *See id.* (citing Professor Tribe's commentary). Professor Tribe states:

The essential point is that States need no congressional license to deny enforcement of whatever sister-state decisions might fall within any *judicially* recognized full faith and credit exception. The only authority the proposed statute could possibly add to whatever discretion States already possess would be authority to treat a sister State's binding acts as though they were the acts of a foreign nation — authority that Congress has no constitutional power to confer.

Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, *reprinted in* 142 CONG. REC. S5933 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (emphasis added).

291. *See* Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, *reprinted in* 142 CONG. REC. S5932-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (questioning constitutionality of DOMA under Tenth Amendment).

292. *Id.*, *reprinted in* 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy).

293. *See id.* (stating that it "would destroy one of the Constitution's core guarantees that the United States . . . will remain a union of equal sovereigns").

for the state public policy exception.<sup>294</sup> Critics argue that this negative use of congressional power simultaneously brings into question the efficacy of the state public policy exception and creates a sub-caste of states whose policies are not in line with those of Congress.<sup>295</sup>

### A. Does DOMA Turn Full Faith and Credit on Its Head?

If Congress can create exceptions to full faith and credit without limitation, then theoretically Congress can permit the states to grant no faith or credit whatsoever.<sup>296</sup> If Congress were to do so, it would defeat a purpose of the Clause: to enhance the federal union through interstate recognition of legal acts. Whether Congress would meet constitutional scrutiny in creating such an exception is an interesting question, but beyond the scope of this Note. However, for full faith and credit purposes, DOMA addresses one narrow issue: interstate recognition of same-sex marriages.<sup>297</sup> DOMA does not prohibit recognition of this particular legal act by a state; instead, it is optional.<sup>298</sup> Because the focus of DOMA is so narrow, the real issue is whether Congress can create *any* exceptions to the mandatory nature of full faith and credit.

If Congress does not have the power to create exceptions to full faith and credit in declaring the "Effect," then only two interpretations of the Clause are possible: (1) the Clause is mandatory and therefore the "Effect" must refer to "Manner" not "Acts"; or (2) the first portion of the Clause is not mandatory

294. See H.R. REP. NO. 104-664, at 41 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2944 (dissenting view) (arguing that constitutional provisions restrict Federal Government in full faith and credit). The dissent explains:

This legislation enumerates a Federal power . . . and therefore dangerously pronounces, *expressio unius est exclusio alterius*, ["A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).] that the Federal government in fact retains the power to limit full faith and credit. And it only need express that power substantive issue by substantive issue. This is an arrogation of power to the federal government . . . Under the guise of protecting states' interests, [DOMA] would infringe upon state sovereignty and effectively transfer broad power to the federal government.

*Id.*

295. See *id.* (noting problems for interstate relations with DOMA).

296. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, *reprinted in* 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (noting that Congress could require "no faith . . . at all").

297. See Defense of Marriage Act § 2, 28 U.S.C.A. § 1738C (West Supp. 1997) (providing exemption from full faith and credit of same-sex marriages).

298. See *id.* (granting permission to not recognize same-sex marriages, but not mandating that outcome).

and therefore Congress can require full faith where the Court has not.<sup>299</sup> Unless one of these interpretations is correct, the power the Constitution grants to Congress is a nullity.<sup>300</sup> The only support for the first proposition is found in Justice Story's *Commentaries* as discussed in Part II.B.<sup>301</sup> While "Effect" referring to "Manner" is a plausible reading of the words of the Clause, it is unlikely that granting power to Congress to set up procedural rules for proving state legal acts was the concern underlying the framers opposed to the final version of the Clause when they claimed it would usurp the powers of states.<sup>302</sup> Yet, this is one of Professor Tribe's arguments.<sup>303</sup>

The second position comports with the Supreme Court practice of creating limited exceptions to full faith while noting the lack of congressional action<sup>304</sup> and Congress's recent pre-DOMA full-faith legislation.<sup>305</sup> The Court, in this view, interprets what the mandatory nature of the Clause requires of the states, and Congress may fill in any Court-created exceptions through the exercise of its power to declare the effect of state acts.<sup>306</sup> The problem with this position is history. The framers intended to give to Congress broad powers over full faith and credit.<sup>307</sup> The concept of Congress playing the role of plugging the Court-created gaps in the Clause is novel, and the records of the Constitutional Convention do not support it.<sup>308</sup> This posi-

299. See *supra* Part II.B.1.b (discussing two views in Story's *Commentaries*).

300. See *supra* note 151-53 and accompanying text (noting that if declaring effect still requires mandatory full faith then Congress's power is meaningless).

301. See *supra* Part II.B.1.b (discussing Story's view that "Effect" referred to "Manner").

302. See *supra* notes 153-57 and accompanying text (positing that Story is incorrect in his view).

303. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (arguing that Congress is limited to procedural effects among states). Professor Tribe states:

Power to specify how a sister-state's official acts are to be "proved" and to prescribe "the effect thereof" includes no power to decree that, if those official acts offend a congressional majority, the need to be given no effect whatsoever by any State that happens to share Congress's substantive views.

*Id.*

304. See *supra* Part II.B.2 (discussing limited exceptions in light of congressional inaction).

305. See *supra* note 16 (citing recent congressional legislation covering child custody, child support, and protective orders).

306. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5932-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (claiming Court creates exceptions and Congress furthers full faith).

307. See *supra* Part II.A (discussing grant of broad power to Congress during Constitutional Convention).

308. See *supra* Part II.A (indicating nothing in debates supporting this position).

tion also raises a practical problem. If the Court re-interprets the first section of the Clause based upon its plain language of mandatory absolutism, then no exceptions will exist for Congress to handle and "absurd" results will occur.<sup>309</sup> The second sentence of the Clause would be meaningless.

In enacting DOMA, Congress adopted the view that the Clause mandates full faith as a general rule, with Congress making such exceptions as it deems necessary.<sup>310</sup> This position tracks Madison's final change to the mandatory and precatory language of the Clause.<sup>311</sup> This position is also consistent with the concerns of the Court and commentators when the Court was creating exceptions in the face of congressional inaction. However, Congress did not go as far as Justice Black in declaring that exceptions were within Congress's sole province.<sup>312</sup> *Mills*, the Court's now limited first pronouncement on the Clause, supports Justice Black's position that is based on the plain language of the Clause.<sup>313</sup> In *Mills*, the Court interpreted the Clause as absolutely mandatory with only such modifications as Congress prescribed.<sup>314</sup> The Court read the Clause as displacing background principles of law to establish new relationships among the states and between the states and the federal government.<sup>315</sup> Absurd results could occur with such an interpretation, but Congress could address those absurdities if they arise. This is the system Justice Black and the Justice Story of *Mills* envisioned.<sup>316</sup>

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

310. See *Hearings on S. 1740, supra* note 8, at 23 (1996) (Statement of Prof. Lynn D. Wardle) (arguing for Congressional exception power). Professor Wardle states:

Congress is empowered to specify by statute how States are to treat laws from other States. Read together, the two sentences of Article IV, section 1 logically suggest this interpretation: 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.

*Id.*

311. See *supra* notes 59-63 and accompanying text (discussing switch in permissive and mandatory language).

312. See *supra* notes 222-24 and accompanying text (noting Justice Black's dissent in *Williams II*); see also H.R. REP. NO. 104-664, at 25 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2929 (illustrating that both Congress and Supreme Court have role in full faith and credit).

313. See *supra* notes 102-15, 223-24 and accompanying text (noting both views required conclusive full faith and credit because of both congressional legislation and Full-Faith-and-Credit Clause).

314. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484-85 (1813) (noting Clause was mandatory and Congress prescribed effect).

315. *Id.* But see Kogan, *supra* note 97, at 280-83 (discussing opposing state court view that Clause did not displace background common law).

316. See *supra* notes 312-13 and accompanying text (summarizing views of Justice Black and Justice Story writing for Court in *Mills*).

Under the interpretation of either the 104th Congress or Justice Black, the Full-Faith-and-Credit Clause empowers Congress to protect and administer the unifying principles of the Clause.<sup>317</sup> If necessary, Congress can exercise its power through the creation of exceptions. Any other position is inconsistent with the history of the Clause or logic, because the framers foresaw a broad role, and created a broad power, for Congress.<sup>318</sup> Congress's role is meaningless if full faith is already mandatory and Congress is powerless to create exceptions.

### B. Does DOMA Violate States' Rights?

The argument that DOMA violates the Tenth Amendment emanates from the view that Congress has no enumerated power to enact DOMA.<sup>319</sup> As the dissenting report indicates, however, DOMA implicates the congressional power enumerated in the Full-Faith-and-Credit Clause.<sup>320</sup> The real concern is that Congress exercised this power in an unconstitutional manner by claiming for itself the authority to grant exemptions from full faith to the states.<sup>321</sup> The states do not have the power to limit full faith and credit on their own.<sup>322</sup> The only exceptions to full faith to date have been those the Court has recognized.<sup>323</sup> If Congress is exercising a power it does not have, it does so at the expense of the Court, not the states. This is because one state's marriages, which sister states refuse to recognize as a result of DOMA, never had an absolute expectation of full faith recognition in light of the Court's power over exceptions.<sup>324</sup> The position that DOMA infringes on states' rights is hard

317. See *supra* notes 310-16 and accompanying text (comparing similar views of Justice Black, that only Congress can create exceptions, and of 104th Congress, that both Congress and Court have role).

318. See *supra* Parts II.A-B (discussing framers' intent and difficult logic of Story's *Commentaries*).

319. See H.R. REP. NO. 104-664, at 41 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2943-44 (dissenting view) (arguing DOMA violates states' rights). The dissenting view explains:

The clear expression in this legislation that the Congress has a role in determining when a state may not offer full faith and credit creates a standard of Federal control antithetical to conservative philosophy and the Tenth Amendment: that powers not enumerated for the Federal Government are reserved to the States.

*Id.*

320. See *id.* (noting that Congress, by enacting DOMA, does utilize the implementing authority which the Clause grants to it).

321. See *id.* (claiming power exercised by Congress is seizure of power).

322. However, this should be a logical result if one accepts a Tenth Amendment argument against DOMA.

323. See *supra* Part II.C (discussing Court-created exception to full faith and credit).

324. See *supra* notes 242-44 and accompanying text (discussing Court's policy exception

to reconcile with the claim that the Court is the sole arbiter, or even an arbiter at all, of what the Clause requires.<sup>325</sup> In fact, DOMA, by permitting states to choose whether to recognize same-sex marriages of other states, elevates the rights of all states to decide this question within their own borders.<sup>326</sup> Those states expecting recognition of their own same-sex marriages do not face a complete bar with DOMA.<sup>327</sup> Congress did not *forbid* states from giving full faith to such marriages, and whether Congress could is an unexplored question.

Even if Congress can grant exceptions, a further issue is whether Congress can do so "substantive issue by substantive issue."<sup>328</sup> Justice Black thought so.<sup>329</sup> Selecting one policy as the "approved" policy by denying full faith to opposite perspectives presents a problem for a nation of equal sovereignties. Those states that are on the "wrong" side become a sub-caste – outsiders from the national viewpoint.<sup>330</sup> As a result, full faith would not require sister states to recognize legal acts in opposition to this viewpoint, although all states must recognize acts which Congress has not disapproved or which the Court has not exempted.<sup>331</sup> If no state recognizes a Hawaiian same-sex marriage, full faith will still require Hawaii to recognize the marriages of all of its sister-states, unless it can articulate a strong public policy against doing so and convince the Court to agree.<sup>332</sup> Any state with a minority policy on some issue could find its legal acts stripped of significance beyond its borders if a congressional majority disapproves of its policy. Congress clearly opposed the notion of same-sex marriages.<sup>333</sup> Not only does DOMA

concerning marriage).

325. See *supra* notes 203-07 and accompanying text (discussing Court as final arbiter of full faith and credit).

326. See H.R. REP. NO. 104-664, at 9-10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913-14 (claiming DOMA advances rights of states to decide marriage issue internally).

327. See *id.* at 25, 29-30, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929, 2933-34 (noting states are still permitted to recognize same-sex marriages under DOMA).

328. 142 CONG. REC. S10,077 (daily ed. Sept. 9, 1996) (testimony of Rabbi David Superstein).

329. See *supra* note 223 (arguing Congress should handle interstate divorce issues).

330. See *supra* note 295 and accompanying text (raising issue that DOMA might create sub-caste of states).

331. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, *reprinted in* 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (noting potential disparity among state positions).

332. See *supra* Part II.C (discussing policy exceptions to full faith, including marriage).

333. See H.R. REP. NO. 104-664, at 12-16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916-2920 (noting disapproval over notion of same-sex marriage and support for government role of nurturing heterosexual marriage).



permit states to deny full faith to same-sex marriages, it also creates a definition of marriage for federal purposes that excludes same-sex marriages and thereby expresses federal disapproval of a potential state policy.<sup>334</sup> Nonetheless, by allowing states to choose whether to recognize such marriages, Congress left the matter for each state to decide on its own.<sup>335</sup>

DOMA targets the effect such marriages could have on other states and the federal government.<sup>336</sup> Congress feared that a state would use the Clause to impose its policy upon all the states.<sup>337</sup> The majority believed that the Constitution designated Congress as the appropriate branch to resolve difficult interstate situations such as this impending conflict of state policies.<sup>338</sup> Congress's authority to deny full faith on particular substantive issues would give it influential power over the states holding minority views.<sup>339</sup> At the Constitu-

334. See Defense of Marriage Act § 3, 1 U.S.C.A. § 7 (West Supp. 1997) (defining marriage for federal purposes as one man and one woman).

335. See H.R. REP. NO. 104-664, at 25, 29-30, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929, 2933-34 (claiming DOMA permits each state to decide whether to recognize same-sex marriages).

336. See *id.* at 29, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2933 (discussing DOMA's impact on states). The House Report states:

The Committee believes that Section 2 of the Defense of Marriage Act strongly supports a proper understanding of federalism and state sovereignty. Section 2 is an effort to protect the right of the various States to retain democratic control over the issue of how to define marriage. It does so in a moderate fashion, intruding only to the extent necessary to forestall the impending legal assault on traditional state marriage laws. It does so in reliance on an express constitutional grant of congressional authority.

*Id.* The Report also states: "Recognition of same-sex 'marriage' in Hawaii could also have profound implications for federal law as well." *Id.* at 10, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914.

337. See *id.* at 7, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 ("[T]he . . . lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex 'marriage.' And the primary mechanism for nationalizing their break-through . . . will be the Full Faith and Credit Clause . . .").

338. See *id.* at 26, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2930 (quoting Prof. Maurice Holland). Professor Holland explains:

(The Framers) understood that there would be occasions when the legislative power of two or more states would overlap, thus engendering actual or potential conflict. The delicate, and largely political, task of resolving such conflicts was therefore (assigned) to Congress, with the expectation that it would function as a kind of referee for their settlement when required.

*Id.*

339. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, *reprinted in* 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (noting power Congress will have over states on substantive issues).

tional Convention, Mr. Randolph expressed precisely this fear in his objection to the addition of the words "and the Effect thereof."<sup>340</sup> The Convention's adoption of the proposed language, despite Mr. Randolph's concern, strongly supports Congress's position that it has the enumerated power to enact DOMA.<sup>341</sup> The discomfort that opponents of DOMA may feel at this exercise of congressional power in choosing a favorite among state policies may not rest on true constitutional concerns, but rather on unfamiliarity – Congress may have finally exercised a power granted to it after a 209-year wait.

#### IV. Conclusion

History reveals that the framers gave Congress broad power over interstate relations, which was followed by a lack of congressional desire to regulate the details of full faith and credit.<sup>342</sup> To deny broad powers to Congress today would embody the principle of atrophy into the Constitution – use it or lose it. To deny Congress the power to create exceptions to full faith and credit would relegate this broad power to procedural details or gap filling for Court-created holes.<sup>343</sup> Such an interpretation cannot withstand historical scrutiny and would require a re-evaluation of all of the congressional full-faith legislation and the entire full-faith jurisprudence.<sup>344</sup>

Of the different perspectives on full faith and credit, Congress's view of its power to enact DOMA is a middle position. Congress's view is that the Court interprets the requirements that the mandatory first section of the Clause places on the states, while Congress modifies the requirements as necessary through its optional powers under the second section.<sup>345</sup> Professor Tribe's interpretation, on the other hand, places most of the power with the Court and

340. See *supra* note 55 and accompanying text (discussing Mr. Randolph's objection to proposed Clause).

341. See *supra* notes 53-58 and accompanying text (discussing Convention's desire for broad congressional power over full faith).

342. See *supra* Parts II.A-II.B (discussing action of Constitutional Convention and subsequent lack of congressional action).

343. See *supra* notes 304-09 and accompanying text (discussing role of Congress as gap filling for Court).

344. See, e.g., Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1994)) (prescribing effect of various interstate acts); Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. § 1739 (1994)) (same); Parental Kidnaping Prevention Act of 1980, Pub. L. 96-611, 94 Stat. 3569 (codified at 28 U.S.C. § 1738A (1994)) (same); Full Faith and Credit for Child Support Orders Act of 1994, Pub. L. 103-383, 108 Stat. 4064 (codified at 28 U.S.C. § 1738B (1994)) (same); Safe Homes for Women Act of 1994, Pub. L. 103-322, 108 Stat. 1930 (codified at 18 U.S.C. § 2265 (1994)) (same).

345. See H.R. REP. NO. 104-664, at 8-9 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2912-13 (noting role for both Congress and Supreme Court); see also *supra* note 308 (quoting statement of Prof. Wardle).

leaves Congress the minor details of filling in the holes.<sup>346</sup> Justice Black, at the other end of the spectrum, believed the Court had no role except to enforce full faith without exception, and he left determining any variations to Congress.<sup>347</sup> Justice Black's position is closest to the plain language of the Clause given Madison's modification of its mandatory and permissive nature.<sup>348</sup> However, Congress's interpretation reflects practicality in light of nearly 200 years of congressional inaction and Court interpretation and modification of full faith and credit. Under either of these two interpretations, DOMA survives.

More important than the issue of same-sex marriage is Congress's decision to exercise its power to create an exception to full faith and credit for the first time in the nation's history. Never before has it been necessary for Congress to take such a step, and it does so now over a controversial social issue. After DOMA, Congress may create exceptions to full faith and credit on a variety of topics for any number of reasons.<sup>349</sup> This may have been the purpose of the Clause, but the extraordinary delay in implementation may set the stage for unexpected changes in the fabric of the federal union. DOMA reflects the diversity of social perspectives in the country and the challenges our system faces when these perspectives come into conflict. On the horizon await more conflicts of varying divisiveness. The framers intended Congress, as the federal embodiment of the states and the people, to play the role of "referee" under the Full-Faith-and-Credit Clause to prevent the view of one state from overriding that of others.<sup>350</sup>

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346. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5932-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (discussing limited role for Congress in full faith and credit while Court interprets Clause).

347. See *supra* notes 222-24 and accompanying text (discussing Justice Black's view of primary congressional role in full faith).

348. See *supra* notes 59-63 (discussing Madison's amendment to Clause during debates).

349. See Letter from Professor Laurence H. Tribe to Senator Edward Kennedy, *supra* note 17, reprinted in 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (listing contracts, divorces, and any other issues).

350. See H.R. REP. NO. 104-664, at 26, reprinted in 1996 U.S.C.C.A.N. 2905, 2930 (noting role of Congress under Full-Faith-and-Credit Clause).