ABORTION, FULL FAITH AND CREDIT, AND THE "JUDICIAL POWER" UNDER ARTICLE III: DOES ARTICLE IV OF THE U.S. CONSTITUTION REQUIRE SISTER-STADTE ENFORCEMENT OF ANTI-ABORTION DAMAGES AWARDS?

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Abstract

Interstate judgments enforcement is governed by the Full Faith and Credit Clause of Article IV of the Constitution, together with its implementing statute, 28 U.S.C. 1738. Although a highly technical area of the law, interstate judgments enforcement has important social repercussions for some very modern problems of great cultural significance. One of the currently significant applications is the interstate enforcement of judgments rendered in civil suits based on state anti-abortion laws. For example, Texas statute S.B. 8 gives anyone who wishes to sue a civil cause of action against persons who facilitate abortions. Even complete strangers to the abortion can decide to become a plaintiff in such an action and can sue for money "damages" despite having suffered no injury.

Non-experts seem to have the impression that the Full Faith and Credit Clause presents an ironclad requirement that judgments of sister states must always be enforced. If that were the case, states that recognize reproductive freedom would be obliged to enforce judgments entered into in states like Texas, despite their strong public policy against such actions. This Article shows why this impression is mistaken.

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First, the full faith and credit principle has for centuries been subject to exceptions, several of which are potentially relevant in the reproductive freedom context. These include lack of subject matter jurisdiction, the public policy exception, and the penal law exception. In addition, a uniform law adopted in forty-eight states (the Uniform Enforcement of Foreign Judgments Act) permits the state enforcing the judgment to apply its own judgments law to an interstate enforcement proceeding. The enforcing state will therefore apply to foreign state judgments any exceptions to judgments enforcement law that it has as a general matter for its own domestic judgments.

Second, and more importantly, the Clause and statute both contain an important qualification: they apply only to "judicial" actions. This exception prevents a state from requiring sister-state enforcement of decisions that do not meet the usual tests for a judicial "case or controversy" (as defined in Article III of the Constitution). Article III and Article IV both use the word "judicial" to specify the standard necessary for the exercise of federal power. These two neighboring constitutional provisions are supported by a common historical origin (they were drafted at the same time and by some of the same people at the constitutional drafting convention) and fulfill comparable functions. If the two constitutional provisions are treated the same, judgments under statutes like Texas S.B. 8 would not be given mandatory force in other states because such cases would not meet the standing requirement imposed by Article III.

INTRODUCTION

The bitter battle over the constitutional right to an abortion has already plagued American politics for nearly half a century. The 1973 decision in *Roe v. Wade* was followed by decades of intensive political organizing, fundraising, lobbying state legislatures, filing court challenges, and manipulation of the process for selection of federal judges and justices.[1] Anti-abortion states repeatedly passed restrictive legislation chipping away at the protections that *Roe* had recognized.[2] In September 2021, boldly defying *Roe* in the

1 Roe v. Wade, 410 U.S. 113 (1973). *See generally* N.E.H. HULL & PETER CHARLES HUFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (3d. ed. 2021). For an in-depth account of the Supreme Court decisions dealing with state's efforts to chip away at *Roe*, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008). Two cases dealing with the push-back against *Roe* are *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) and *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020). The importance of the popular reaction to *Dobbs* for purposes of interstate enforcement doctrine is discussed *infra* at note 116.

2 *See generally* N.E.H. HULL & PETER CHARLES HUFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (3d. ed. 2021).

expectation that the newer members of the Supreme Court would back it up, the State of Texas adopted S.B. 8—the Texas Heartbeat Act, which abandoned all pretense of deference to *Roe*.[3] Less than twelve months later, *Roe* was history.[4]

Roe's overruling in 2022 was not the end of the story; it merely kicked off the next act in the drama, as *Roe*'s enemies immediately moved the goalposts. A campaign supposedly designed to protect state autonomy from federal interference morphed quickly into a campaign to stamp out abortion in all fifty states.[5] Half a century of bitter battle is already behind us, and the principal actors are just getting warmed up.

One of the aspects of this dispute that has come into focus since *Roe*'s demise is the conflict of laws implications of these rulings.[6] Not content merely to outlaw local abortions, some states have threatened to apply their laws to women leaving the state to obtain the procedure. Nonresident women's rights advocates, as well as medical professionals practicing elsewhere, worry that they could be subjected to the Texas law.[7] Contemplating the prospect of Texas courts entering awards against out-of-state defendants, constitutional theorists who would ordinarily cringe at the words "conflict of laws" are now getting around to thinking about extraterritoriality. But the issue of extraterritorial applicability of state anti-abortion law is just a taste of things to come. Even once that issue is done with,

3 The popular name of the statute reflects its prohibition of abortion once the fetal heartbeat could be detected. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 205(a) (West 2021).

4 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

5 *See, e.g.*, Glenn Kessler, *These Republicans Cheered Abortion Policy Going to States. They Are Also Sponsoring a Federal Ban.*, WASH. POST (Sept. 7, 2022), https://www.washingtonpost.com/politics/2022/09/07/these-republicans-cheered-abortion-policy-going-states-they-are-also-sponsoring-federal-ban/ [https://perma.cc/KU4E-CU8V].

6 Even prior to the point that the issue became of general interest, conflicts of laws scholars had begun to address the question of extraterritoriality. *See, e.g.*, Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993); Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

7 Out of state providers would most likely be affected if Texas law was held applicable to Texas women leaving their state to obtain an abortion elsewhere. One of the issues on which attention was focused was therefore whether the right to travel would protect the pregnant person's right to seek an abortion in another state. *See, e.g.*, CENTER FOR REPRODUCTIVE RIGHTS, *Roe v. Wade*, https://reproductiverights.org/roe-v-wade/ [https://perma.cc/DM54-B557] (discussing the reaction to overruling of *Roe* generally); Adam Liptak, *The Right to Travel in a Post-*Roe *World*, N.Y. TIMES (July 11, 2022), https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html [https://perma.cc/AR5P-U9WM].

we will still have to deal with problems about the interstate enforceability of the resulting judgments. That brings us to the question that this Article addresses.

Must sister states enforce these anti-abortion awards? It is obviously crucial to the Texas enforcement scheme that losing defendants in these Texas cases actually pay. If they do not, the threat to out-of-state providers will not be credible; possible plaintiffs will not be incentivized to bring suit, and out-of-staters will not be deterred. To maximize the nationwide impact of its statute, Texas must be able to reach out-of-state abortion clinics and women's rights organizations, especially large nonprofits that publicize their services within Texas, deliver medical care to patients from Texas, or offer support to women who need help leaving Texas to get to a clinic. These are repeat players, and the multiple applications of Texas law has potential to drive them into bankruptcy unless they can find protection for their assets in a sanctuary state. Whether you applaud Texas's ambition or find it appalling, there is no denying that the prospect of being sued in Texas is much more of a threat to outside organizations if Texas plaintiffs can reach out-of-state assets to satisfy a Texas judgment.[8] Can they?

This question is of immediate importance. Pro-choice states are considering the adoption of legislation protecting persons who assist in obtaining abortions from harassment by litigation brought under the anti-abortion laws discussed in this Article. Connecticut, for example, has already passed a "claw-back" statute for persons caught up in anti-abortion litigation in states such as Texas.[9] It provides that an individual who suffered a judgment under one of these laws "may recover damages from any party that brought the action leading to that judgment or has sought to enforce that judgment."[10] Damages include recovery of the money paid under the other state's judgment with attorney's fees. The constitutionality

8 *See, e.g.*, *Lawsuit Filed to Stop Texas' Radical New Abortion Ban*, PLANNED PARENTHOOD (July 13, 2021), https://www.plannedparenthood.org/about-us/newsroom/press-releases/lawsuit-filed-to-stop-texas-radical-new-abortion-ban [https://perma.cc/48NE-HNS5].

9 The statute states:

> When any person has had a judgment entered against such person, in any state, where liability, in whole or in part, is based on the alleged provision, receipt, assistance in receipt or provision, material support for, or any theory of vicarious, joint, several or conspiracy liability derived therefrom, for reproductive health care services that are permitted under the laws of this state, such person may recover damages from any party that brought the action leading to that judgment or has sought to enforce that judgment.

Damages include recovery of the money paid under the other state's judgment, with attorney's fees. 2022 Conn. Acts. 22–19 § 1(b) (Reg. Sess.).

10 *Id.*

of such legislation depends on the Full Faith and Credit Clause, but the case law addressing such issues is quite sparse, and only very recently have any scholars paid attention to the topic at all.[11] The strength of a state's commitment to adopting legislation protecting reproductive rights depends in substantial part on whether the legislation in question is believed capable of surviving constitutional challenge.

The magnitude and sensitivity of the competing interests on either side reveal a real-world importance that is simply not apparent to the typical teacher or student in a conflicts course. The typical law school course on conflicts lavishes time on hypotheticals about guest statutes, married women's contracting laws, and uncles eloping to Rhode Island with their nieces.[12] This is not adequate preparation for dealing with a problem of the current abortion dispute's intensity and staying power.

The key to this question lies in the relationship between Article III and Article IV of the Constitution. Both are limited to "judicial" procedures, and this fact disqualifies disputes that cannot meet Article III case or controversy standards. To illustrate: assume that the law of a particular pro-life state provides for advisory opinions, and the legislation that authorizes advisory opinions specifies that they have the force of precedent. In addition, the state's domestic law disallows attempts to re-open judgments.

The potential effect of these assumptions, taken together, is startling. Traditional understandings of interstate judgments enforcement would seem to entitle the state's advisory opinions to full faith and credit.[13] They would be enforceable anywhere in the United States. Moreover, because the opinions were advisory, the state's judges would not have to wait for an actual case to raise an issue. They could simply issue edicts at will. There would be nothing to stop such a state from flooding the airwaves with its opinions

11 Two very recent scholarly discussions of such exceptions are Diego A. Zambrano, Mariah E. Mastrodimos & Sergio F.Z. Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, N.Y.U. L. REV. ONLINE 382 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/10/98-NYU-L-Rev-Online-382.pdf [https://perma.cc/8LMY-E2PK] and Haley Amster, *Abortion, Blocking Laws, and the Full Faith and Credit Clause*, 76 STAN. L. REV. ONLINE 110 (2024), https://review.law.stanford.edu/wp-content/uploads/sites/3/2024/01/Amster-76-Stan.-L.-Rev.-Online-110.pdf [https://perma.cc/EWV5-7ZMG]. Both were published while the manuscript for the present Article was in preparation.

12 *See, e.g.*, *In re* May's Estate, 114 N.E.2d 4 (1953).

13 For the exposition of statutory and constitutional provisions relating to full faith and credit, *see infra* Part II. On the binding effect of advisory opinions, *see* Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207, 1220 n.38 (2022).

about everything from same sex marriage to the rights of transgender people. And sister states would be obliged to give these opinions "full faith and credit."

Surely the Constitution would not require other states to enforce that state's advisory judgments. But why not? Existing understandings of the Full Faith and Credit Clause lack the tools necessary to answer this question. This Article provides both the tools and an answer. They lie in the intentions of those who drafted the Constitution to limit judicial authority to what was familiar at the time of the drafting. Federal courts cannot transgress these limits, but neither can a state court, seeking to force its will upon the other states.

Part I of this Article summarizes the Texas statute. Then, Part II briefly discusses the defenses to the full faith and credit obligation to honor a sister state's judgments that are currently most widely recognized. They are not clearly dispositive of the matter. These are accompanied by one unfamiliar defense, based on the Uniform Enforcement of Foreign Judgments Act (UEFJA). Under this Act, a Texas judgment enforced in Connecticut court will be governed by Connecticut law on the question of whether it can be reopened. We will see that although this part of the UEFJA might seem inconsistent with the federal full faith and credit statute, it has never been found preempted. Part II of the Article gives the reasons why.

Part III then turns to a more forceful and important defense. It argues that—entirely independently of any of the standard defenses—the Full Faith and Credit Clause contains within it limitations that make it inapplicable to Texas anti-abortion awards. Because the Clause applies only to "judicial" proceedings, and because the Supreme Court has defined "judicial" proceedings as limited to Article III cases or controversies, the unusual procedural posture of these Texas cases disqualifies them for full faith and credit purposes. Part IV applies the arguments in Part III to questions of implementation.

I. Essentials of the Texas "Heartbeat Act"

After *Roe v. Wade* was decided in 1973, abortion opponents worked tirelessly for years to find ways to deter or penalize abortion that would survive the scrutiny of the federal courts; their success was halting and gradual, gaining ground over time mainly by the nomination of justices selected specifically for their hostility to *Roe*.[14] When the remaining shreds of reproductive freedom were officially laid to rest in 2022, the state of

14 Michael Scherer et al., *49-year Crusade: Inside the Movement to Overturn* Roe v. Wade, WASH. POST (May 7, 2022), https://www.washingtonpost.com/politics/2022/05/07/abortion-movement-roe-wade/ [https://perma.cc/UQS9-2VUA].

Texas was ready to exercise its newfound freedom from federal oversight; eager for exactly this overruling, it had in the previous year put in place a new law forbidding almost all abortions.

Texas S.B. 8 definitely pushed the envelope as a matter of substantive constitutional law; it announced standards for obtaining an abortion that were more restrictive than anything that could at that point be found in U.S. Reports.[15] But S.B. 8 is also notorious for its unprecedented strategy for avoiding federal court review. The novel procedural mechanism that Texas devised was designed to be put in motion exclusively through individually initiated private actions, rather than through enforcement by the state. The plaintiffs were to be private citizens, not necessarily possessed of any personal connection to the abortion that was the subject of the case. Despite having no personal connection or other kind of concrete interest—and thus no personal loss to compensate—these enforcers were to be generously rewarded for exposing other private citizens who did have a connection with the abortion in question.

Under S.B. 8, anyone who can prove that an abortion took place, was attempted, or possibly even was "intended," can collect damages from persons who had somehow assisted termination of the pregnancy in any way.[16] For each abortion proven, defendants would be required to pay plaintiffs $10,000 at a minimum plus attorney fees.[17]

> Sec. 171.208 (a): Any person, other than an officer or employee of a state or local government entity in this state, may bring a civil action

15 The standard at the time that the statute was adopted was based on a long line of precedents, starting with *Griswold v. Connecticut*, 381 U.S. 479 (1965), which traced the right of privacy beyond the Bill of Rights to the First, Third, Fourth, Fifth, and Fourteenth Amendments to hold that there is an implied fundamental right to privacy in the U.S. Constitution that permits the use of contraceptives by married persons. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended *Griswold* to include an individual right to contraception. *Roe v. Wade*, 410 U.S. 113 (1973), later held that the right to privacy protects a woman's right to choose to have an abortion. While *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), shifted the underlying framework of reproductive rights cases from privacy to liberty, it reaffirmed the central belief that liberty of intimate choices is central to a person's dignity under the Fourteenth Amendment. Texas S.B. 8 violated much of this jurisprudence. For example, the Act prohibited abortions after the point that a fetal heartbeat was detectable. TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 205(a) (West 2021). Some of the substantive discrepancies are listed in the dissenting opinion of Justice Sotomayor in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (Sotomayor, J., dissenting). *Cf. Casey*, 505 U.S. at 846 (describing the prior state of federal constitutional law on abortions).

16 HEALTH & SAFETY § 171.208.

17 HEALTH & SAFETY § 171.208 (b)(2).

> against a person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, . . . or (3) intends to engage in the conduct described by Subdivision (1) or (2).[18]

Because the party who files the civil damages action does not need to have any connection to the case, but could be simply a self-appointed or even randomly-chosen enforcer of the law, it would be impossible to know the identity of the complaining party in advance.[19] No federal court would be able to keep the law from going into effect because there were no identifiable individuals at whom an injunction could be directed. The purpose of this unprecedented approach was no secret. By specifying only private enforcement, Texas sought to make preemptive federal court action impossible.[20]

What was not obvious to most observers, however, were the potential consequences of this strategy for the extraterritorial applicability of the statute. This sort of civil damages remedy is, in several respects, much better suited than traditional criminal law prosecutions for regulating activities taking place in other states. Criminal law is implemented largely through official state activity, such as investigation, apprehension of suspects, and incarceration in jails and prisons. Texas law enforcement would encounter serious problems in carrying on investigations and in locating, pursuing, and arresting suspected violators in other states—particularly if the other state was one that recognized a woman's right to choose. Civil liability enforced exclusively by private actors avoids this problem.

This is because civil damages remedies are considered "transitory" (meaning that a dispute does not have to be litigated in the place where it arose) while venue in criminal cases may be limited (e.g., to the place where the alleged crime occurred).[21] In addition,

18 HEALTH & SAFETY § 171.208(a).

19 Suit against the state itself is not permissible because of the Eleventh Amendment and the doctrine of sovereign immunity. *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999).

20 *See* Whole Woman's Health v. Jackson, 595 U.S. 30 (2021); cited in *In re* Whole Woman's Health, 142 S. Ct. 701 (2022) (Sotomayor, J., dissenting) ("This structure was designed to make it more complicated for courts to enjoin the law's enforcement on a statewide basis.").

21 A cause of action is referred to as transitory if it can be brought in any court that can obtain personal jurisdiction over the defendant. Venue in criminal cases is more limited. In bringing prosecutions under federal law, the federal government is bound by both U.S. CONST. art. III, § 2, cl. 3 and U.S. CONST. amend. VI. The former provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." U.S. CONST. art. III, § 2, cl. 3. The latter provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. CONST. amend. VI. The state courts, in contrast, are bound by their own rules of venue as well as by the Sixth Amendment, which has been incorporated through the action of the Fourteenth Amendment Due Process Clause. U.S. CONST. amend. VIX, § 1.

with private civil actions, the state avoids assuming a responsibility of fairness to criminal defendants, such as the requirement that the state provide the defendant with legal representation at its own expense.[22] The higher burden of "proof beyond a reasonable doubt" which pertains in criminal trials is also avoided. Under the new law, enforcement costs are privatized and shifted onto the defendant in the form of an award of costs and attorney's fees. For all these reasons, civil liability is far easier than criminal liability to extend extraterritorially. To any state contemplating extraterritorial regulation of abortion, the Texas strategy must have looked like a real winner.

Of course, there are complications in interstate cases that do not arise in purely domestic cases. Chief among these are possible difficulties in getting personal jurisdiction over the absent defendant and the need to show an adequate basis for applying Texas law.[23] Both of these require that the defendants and/or the events of the dispute have some connection with the forum state; their relevance is obvious.

A third complication, however, has until this point escaped attention. It is the subject of this Article: interstate judgments enforcement. Simply because the defendant might not be a resident of Texas, and thus would likely not have any property situated in Texas, an award in a case relating to an out-of-state abortion is more likely than an award in a purely domestic case to require some kind of enforcement proceeding outside of Texas. If Texas welcomes into its courts litigation over abortions occurring in other states, prevailing plaintiffs are fairly likely to face problems with interstate enforcement. Pro-choice states are unlikely to be enthusiastic about implementing S.B. 8 judgments and may be tempted to resist. If they do resist, then prevailing plaintiffs from Texas will be dependent on the support of federal full faith and credit principles.

22 The right to a lawyer in criminal trials is provided by the Sixth Amendment. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). The presumption of innocence is generally attributed to the Due Process Clause of the Fifth and Fourteenth Amendments, although those two Amendments do not use that precise language. *See* U.S. CONST. amend. V, § 1; U.S. CONST. amend. XIV.

23 The personal jurisdiction and choice of law requirements are both attributable to the Due Process Clause. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (discussing due process limits on choice of law); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (discussing due process limits on personal jurisdiction).

Such potential problems have not dimmed the luster of Texas's imaginative approach to abortion regulation. The approach has caught on quickly in parts of the country where eliminating abortion seems to be the highest priority item on state governments' agendas.[24] But the procedural innovation that Texas adopted, while creative, came at a price. In taking the approach that it did, Texas cut some jurisdictional corners. What remained after all the procedural tinkering was finished was a statute that failed to meet the usual criteria for standing to sue.[25]

But (you are probably asking) why does this matter? The Article III requirement of standing to sue (you may point out) applies only in federal courts. That is true, but beside the point. The point here is that a judgment that is enforceable in Texas might nevertheless be unenforceable elsewhere. The reason is that a case in state court that would not qualify for Article III case-or-controversy jurisdiction does not qualify for the support of the Article IV Full Faith and Credit clause.

This Article explains the connection between Article III and the Article IV Full Faith and Credit Clause. Both Articles use the word "judicial" to limit the reach of powers newly granted by the U.S. Constitution. Article III does so by tethering the grant of power to the new federal judicial system to the traditional common law case method. This limitation was crucial to reassuring skeptics at the constitutional drafting convention who feared a

24 *See, e.g.*, Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban — And These States Might Be Next*, FORBES (Mar. 23, 2022), https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/ [https://perma.cc/4NNM-MHZW]; Alison Durkee, *South Dakota Governor Latest to Introduce Texas Abortion Copycat Bill — Here Are All the States Weighing Similar Ban*, FORBES (Jan. 21, 2022), https://www.forbes.com/sites/alisondurkee/2022/01/21/south-dakota-governor-latest-to-introduce-texas-abortion-copycat-bill---here-are-all-the-states-weighing-a-similar-ban/ [https://perma.cc/5CXA-VKD6]. State laws that nullify constitutional rights by handing off enforcement to private parties have also been adopted in other substantive areas, such as civil rights, gender equality, and freedom of speech. For example, Tennessee has authorized students and teachers to sue schools that allow transgender students to use restrooms that correspond with their gender identity. *See* Tennessee Accommodations for All Children Act, H. B. 1233, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021). A Florida law allows students to sue schools that permit transgender girls to play on athletic teams. *See* Fairness in Women's Sports Act, S. B. 1028, 2021 Leg., Reg. Sess. (Fla. 2021). Bills across several jurisdictions allow private suits against schools if teachers or visiting speakers discuss critical race theory. *See, e.g.*, Theodore R. Johnson, Emelia Gold, & Ashley Zhao, *How Anti-Critical Race Theory Bills Are Taking Aim at Teachers*, FIVETHIRTYEIGHT (May 9, 2022), https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers/ [https://perma.cc/DTL7-77FH].

25 *See infra* Part IV.

runaway expansion of judicial ambition and power.[26] Article IV's Full Faith and Credit Clause served an analogous purpose. It tethered a state court's newly created ability to create a judgment enforceable interstate to the traditional case method. Whereas Article III protected the elected branches from encroachment by the federal judiciary, Article IV protected sister states from encroachment by one another.

II. Full Faith and Credit: Basic Principles and Recognized Defenses

Few scholars and lawyers outside the cloistered academic community of choice of law experts have the background to deal with problems about interstate enforcement. Familiarity with the law of interstate judgments enforcement is not widespread, even in the fairly privileged population of persons holding law degrees. Justice Robert Jackson called Full Faith and Credit Clause "the [l]awyer's [c]lause of the Constitution"; while well intentioned, this remark probably did little to increase the Clause's popular esteem.[27]

Full Faith and Credit, on its face, is written as though it was an absolute obligation, requiring that a judgment automatically be given total obedience "though the heavens may fall." But that is true of most constitutional provisions, and it does not prevent the creation of exceptions when necessary. The First Amendment is phrased categorically; Congress should make "no law" impinging on free speech or freedom of religion. But even with the First Amendment, exceptions are permitted when there are sufficiently compelling reasons.[28] Similar countervailing considerations apply in the full faith and credit context. Domestic judgments (those where enforcement is sought in the state that issued the award) are not invariably given absolute and total effect; there is no reason that interstate judgments should be entitled to it either.

There is some agreement about which defenses purport to limit the obligation to give full faith and credit. These defenses are familiar from a standard conflict of laws course and from secondary sources dealing with problems of interstate enforcement.[29] Yet the state of the law on the question of which of these defenses are constitutional under the Full

26 *See infra* Part III.C.

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

28 The classic example is the lack of First Amendment protection for the person who falsely cries "fire" in a crowded theater. *See* Schenk v. United States, 249 U.S. 47, 52 (1919).

29 *See generally* LEA BRILMAYER ET AL., CASES AND MATERIALS ON THE CONFLICT OF LAWS, at ch.7 (8th ed. 2019).

Faith and Credit Clause is unsatisfactory. With the few, mostly superannuated, precedents that exist, it is difficult to be confident about the likely outcome if these defenses were challenged under Article IV.

This section of the Article—Part II—summarizes the current state of this body of law, listing the defenses currently generally recognized and identifying some of their major strengths and weaknesses. Part II should dispel any misconception that the Full Faith and Credit Clause is some kind of categorical "iron law" that invariably demands obedience.[30] Part II then describes a uniform act of considerable importance to the problem of interstate judgments enforcement. The Uniform Enforcement of Foreign Judgments Act is not discussed in most secondary sources in the area of conflict of laws. But due to this Act, it is possible to say with some confidence that the law of the enforcing state should apply to determine the defenses that will be applicable to the enforcement of interstate judgments.

A. Constitutional and Statutory Background

One state's obligation to respect another state's judgments is a consequence of Article IV, Section 1 of the U.S. Constitution, the Full Faith and Credit Clause. Section 1 of Article IV states:

> Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.[31]

The Clause reformulates a provision that had appeared in the Articles of Confederation a decade earlier.[32]

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30 William Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 412–13 (1994) (footnote omitted):

> Many lawyers, and some academics . . . do not seem to grasp fully the rules concerning sister-state enforcement and collateral attack. This Article explores the basic rule of sister-state enforcement and its limited exceptions. This basic rule is so clear and strong that it might be called the "Iron Law" of Full Faith and Credit . . . . Once the judgment is final according to the law of F-1, however, the Full Faith and Credit Clause prohibits collateral attack in F-2. This is the Iron Law of Full Faith and Credit.

31 U.S. CONST. art. IV, § 1.

32 Predating the Constitution by around a decade, the Articles of Confederation contained an earlier version of Article IV, which provided that "[f]ull 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." ARTICLES OF CONFEDERATION OF 1781, art. IV. The inclusion of the Clause in the draft Constitution is discussed *infra* Section III.B.2.

The Clause's objective is obvious, reasonable, and appealing. Justice Stone described its rationale in a 1935 decision, *Milwaukee County v. M.E. White*:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the State of its origin.[33]

All states gain when they can count on one another to enforce their legal decisions.

The Clause is a textbook example of the strategy of reciprocity. But the devil, unsurprisingly, is in the details. How much faith and credit must be given? Even within a single legal system, judgments enforcement involves trade-offs between the solid assurances of reliable enforceability and the flexibility needed to adjust an earlier decision when circumstances change or when it is evident that a mistake was made. The interstate context makes things even more complex because two different states may balance these competing factors in different ways.

The Clause's second sentence suggests that the drafters probably expected help from Congress. It gave Congress power to enact "general laws" about proving foreign judgments and describes what effect to give them.[34] The constitutional grant of Congressional authority is rather open-ended. It appears, in theory, to authorize Congressional enactment of virtually anything related to court decisions or legal papers, from procedures for notarizing litigation documents to a complete code of choice of law rules.[35] Congress shortly took up its invitation to "prescribe . . . the effect" of "the public acts, records, and judicial proceedings" of the states.[36] Its contribution to the interstate enforcement of laws and

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33 Milwaukee County v. M.E. White, 296 U.S. 268, 276–77 (1935).

34 U.S. CONST. art. IV, § 1.

35 The suggestion has often been made that by utilizing its powers under Article IV, Congress could solve many of the problems in contemporary choice of law. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 337 (1992).

36 U.S. CONST. art. IV, § 1.

judgments consisted largely of a single statute, which was adopted almost immediately after the Constitution's ratification.[37]

Dating to 1790, the legislation that implements the Full Faith and Credit Clause now appears as 28 U.S.C. § 1738.[38] After reiterating the basic language by which Article IV guarantees Full Faith and Credit, the text continues:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[39]

The statute's most notable feature is its reference to the "law or usage in the courts of such State, Territory or Possession from which they are taken."[40]

B. The Rendering State and the Enforcing State

This federal statute does not itself set rules or standards for the enforcement of judgments. Instead, it functions somewhat like a choice of law rule.[41] It specifies that the rules for enforcing a judgment should be taken from the domestic judgments law of the state that first issued the judgment (the "rendering state," *F(1)*).[42] It does not by its terms

37 The Full Faith and Credit Statute can be found at 28 U.S.C. § 1738.

38 The text of 28 U.S.C. § 1738 has been in place, hardly altered, for almost a quarter of a millennium. The few additions to the original version of the statute dealt largely with specialized topics such as parental kidnapping, child custody, and same-sex marriage. *See* 28 U.S.C. § 1738A (discussing parental kidnapping of children in the course of child custody disputes); Defense of Marriage Act ("DOMA") 28 U.S.C. § 1738C (originally enacted in 1996).

39 28 U.S.C. § 1738.

40 *Id.*

41 This is not to deny that a federal common law of preclusion is sometimes developed in cases of strong federal substantive interest. *See, e.g.*, Deposit Bank v. Frankfort, 191 U.S. 499 (1903). The question of the proper status of judgments of federal courts, given that the language of the statute refers only to states, has been thoroughly dissected. *See, e.g.*, Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Stephen B. Burbank, *Interjurisdictional Preclusion Full Faith and Credit and Federal Common Law*: *A General Approach*, 71 CORNELL L. REV. 733 (1986).

42 *See* 28 U.S.C. § 1738.

attach importance to the domestic judgments law of the state that is now being asked to enforce it (the "enforcing state," *F(2)*).[43]

This choice is significant. States vary in their treatment of many judgments law issues: the length of the time period allowed for enforcing a judgment, whether a judgment can be invoked by someone who would not have been bound had the earlier decision gone the other way, and other similar matters.[44] Most importantly for present purposes, states might potentially take different positions on which defenses and exceptions to the principle of judgments recognition to adopt. We sometimes talk of "preclusion law" or "judgments law" generally, as though there were rules existing independently of actual state decisional law and adopted legislation. But there is, in reality, no more a "brooding omnipresence in the sky" for the law of judgments than there is a brooding omnipresence for tort law, contract law, or anything else.[45] Law of necessity means positive law. Federal law selects the law of the rendering state; it does not, for example, authorize formulation of a general common law of judgments enforcement.

By selecting the applicable law of judgments, the federal statute provides a standard for comparison. A state is obliged to give "full faith and credit" to a sister state's judgments, but how much credit does that entail? The adjective "full" does not mean that the principle of interstate enforcement is universal or inviolable. As the exceptions below illustrate, what this statute has meant in practice is simply that departures from the judgments law

43 *See id.*

44 For a discussion of the relative merits of applying the judgments statutes of limitations of *F(1)* and *F(2)*, *see* Comment, *Revival of Judgments Under the Full Faith and Credit Clause*, 17 U. CHI. L. REV. 520, 520 (1950):

> Many state's interpretation of the full faith and credit clause. Their major objection stems from that Court's insistence that a judgment of one state be given effect in all sister states irrespective of the fact that the judgment could not have been obtained in the state where enforcement is sought because inconsistent with, or repugnant to, the public policy of that state. The only concession made permits the forum to ignore foreign procedure and apply its own.

The second issue, referred to as the problem of "nonmutual collateral estoppel," is discussed in United States v. Mendoza, 464 U.S. 154 (1984) (explaining that nonmutual collateral estoppel does not apply against the United States government).

45 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). This idea is, of course, part of the holding of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

of the rendering state must be justified. And a departure that is grounded in the text of 28 U.S.C. § 1738 itself is surely adequately justified, as we shall see.[46]

C. Departures from *F(1)* Judgments Law

The Full Faith and Credit Clause and its accompanying statute are no different from the status of any other constitutional provision or piece of legislation; the literal terms of the law give way when a good enough reason exists. Despite being given a substantial head start, *F(1)* (the first court, meaning the one that issued the judgment initially) does not come out noticeably better than *F(2)* (the second court, meaning the court that enforces the judgment) in the race to have its judgments law applied.

First, there are entire subcategories of judgments law that are simply not governed by the Clause or its statute; they have their own special rules. Criminal law, for example, is a world apart, with totally different institutions such as the right of habeas corpus.[47] Judgments that are "not on the merits" are treated as falling outside of the Clause's scope.[48] Special rules address particular subject matter areas. Workers' compensation awards and awards of title to real property are examples of specialization in judgment enforcement.[49] Divorce and child custody law are other subspecialties with their own, specialized, rules of judgment recognition.[50]

The special treatment of these substantive topics is not necessarily inconsistent with the constitutional text or otherwise aberrational. These categorical exclusions can mostly

46 The second half of this Article addresses just such a reason for refusing enforcement. *See infra* Parts III–IV.

47 The right to habeas corpus is found in U.S. CONST. art. I, § 9, cl. 2; it is only one of the distinctive characteristics of judgments recognition in the criminal law. Another example is the Double Jeopardy Clause. *See* U.S. CONST. amend. V.

48 *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 (AM. L. INST. 1969) (noting that a judgment not on the merits will be recognized in other states only for issues actually decided); Reynolds, *supra* note 30, at 418 ("[J]udgments that are not 'on the merits' are generally held not to be entitled to Full Faith and Credit. Judgments not on the merits make up one large class of judgments that lack claim-preclusive effect . . . includ[ing] those based on lack of subject matter jurisdiction . . .").

49 For a discussion of the special rules relating to workers' compensation, *see* Thomas v. Wash. Gas Light, 448 U.S. 261 (1989) (plurality opinion). For a discussion of the special "land taboo," *see* Fall v. Eastin, 215 U.S. 1 (1909).

50 For the special rules relating to family law, including divorce and child custody, *see generally* LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS at ch. 7 § D (8th ed. 2019).

be explained by the distinctive policies underlying the substantive topic in question. Criminal law requires preclusion rules that reflect the ongoing nature of the remedy of incarceration. The law relating to child custody awards understandably reflects the view that the welfare of the child is almost always more important than formal considerations of the finality of judgments. It sometimes seems that there is a separate law of judgments for every substantive area of the law.

In the face of such substantive variability, the federal provisions for full faith and credit are no more automatically dispositive than any other federal (or state) law. It is to be expected that policies or rights will sometimes come into competition, and they must somehow be reconciled. The resulting balancing of interests has led to a series of defenses and exceptions that reflect these competing concerns. The existing recognized defenses include the presence of jurisdictional defects and defenses based on analogous defenses to choice of law.

1. Jurisdictional Defects

The policies underlying the Full Faith and Credit Clause and its statute are not automatically dispositive when they come in conflict with jurisdictional requirements. As is commonly known, lack of personal jurisdiction may deprive one state court of the ability to bind another, although whether it provides a basis for collateral attack in a particular case depends on whether the defendant has preserved his or her rights effectively.[51] Collateral attack is resistance to a judgment in another forum after it is entered as final; direct attack means direct appeal before entering a judgment or attack through the rendering state's own processes for vacating a judgment. Preserving the right to challenge on the basis of lack of personal jurisdiction requires refusing to appear in the first proceeding—a hard choice to put to an absent defendant. In this respect, personal jurisdiction is unlike subject matter jurisdiction, which can be raised by a judge sua sponte at any time until a final judgment is reached (and even after that, according to some authorities).[52] Subject matter jurisdiction has greater potential as a defense to enforcement of an S.B. 8 award, but problems remain.

51 *See* Baker v. Gen. Motors Corp., 522 U.S. 222 (1998). Additionally, the Supreme Court has indicated on a number of occasions that judgments cannot foreclose claims that the original rendering state would not have had the authority to consider because the matter was beyond its jurisdiction; *see id.* at 241 ("[A] Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve"). *See also Thomas*, 448 U.S. at 282–83 (plurality opinion) ("Full faith and credit must be given to [a] determination that [a State's tribunal] had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.").

52 *See* FED. R. CIV. P. 12(h).

It is often said, as a general matter, that the Clause and its statute apply only to "valid" judgments, that is, ones in which the rendering court has personal and subject matter jurisdiction.[53] Judgments that are not "valid" are for that reason not entitled to enforcement and are said to be "void."[54] Thus an early case dealing with this issue, *Thompson v. Whitman*, declared that "where the jurisdiction of the court which rendered the judgment has been assailed," the judgment will be subject to collateral attack.[55] *Thompson* quoted Justice Story as authority; in its inclusion of the Full Faith and Credit Clause, Story wrote, "[t]he Constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory."[56]

Subject matter jurisdiction has, potentially, many different facets; what counts as subject matter jurisdiction is not necessarily the same in every court.[57] In federal courts, for instance, subject matter jurisdiction includes the subject matter of the case (e.g., federal question jurisdiction), diversity of the parties, amount in controversy, and whether a dispute qualifies as a "case or controversy."[58] A state might provide a right of collateral attack for defects in every one of these, or none of these. It might provide that failure to raise a claim of lack of jurisdiction means that the claim is forfeited; jurisdictional objections might survive until final judgment or even might remain viable after judgment, indefinitely.[59]

Despite these many variations on a theme, the general position that lack of subject matter jurisdiction provides a defense to judgment enforcement is typically stated categorically.

53 *See* RESTATEMENT (FIRST) OF JUDGMENTS § 1 (AM. L. INST. 1942).

54 *Id.*

55 Thompson v. Whitman, 85 U.S. 457, 462 (1873).

56 "It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other State . . . But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story . . . adds: '. . . this does not prevent an inquiry into the jurisdiction of the court . . . The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'" *Id.*

57 In the present context, there are other consequences of the lack of standing to sue under the Article III standard. *See infra* Part IV.

58 *See* 28 U.S.C. § 1331 (defining federal question jurisdiction); 28 U.S.C. § 1332 (defining diversity jurisdiction); U.S. CONST. art. III, § 2 (defining judicial power as extending to "cases or controversies").

59 Compare, for example, the rule that personal jurisdiction is waived unless asserted almost immediately. *See* FED. R. CIV. P. 12(h).

Such categorical declarations are sprinkled liberally through the case law. For example, *Huntington v. Attrill*[60] was decided in 1892, before the turn of the twentieth century, while *Baker v. General Motors*[61] was written more than a century later in 1997. The Court reiterated this conclusion as recently as 2016, when it stated in a recent *per curiam* decision that "[a] State is not required . . . to afford full faith and credit to a judgment rendered by a court that did not have jurisdiction over the subject matter or the relevant parties."[62]

Throughout these many years, the Supreme Court's declarations of this principle have been almost identically phrased. The Court wrote in *Huntington*:

> These provisions of the constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties.[63]

Baker similarly declares: "A final judgment in one State, if rendered by a court *with adjudicatory authority over the subject matter* and persons governed by the judgment, qualifies for recognition throughout the land."[64] And *Milliken v. Meyer* (which was written roughly halfway through the interval separating *Huntington* from *Baker*) declares as follows: "Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry."[65]

60 *See* Huntington v. Attrill, 146 U.S. 657, 685 (1892).

61 *See* Baker v. Gen. Motors Corp., 522 U.S. 222 (1998).

62 V.L. v. E.L., 577 U.S. 404, 407 (2016) (citing Underwriters Nat'l Assurance Co. v. N. C. Life & Accident & Health Ins. Guar. Ass'n., 455 U.S. 691, 705 (1982)). *V.L.* also describes limited collateral attack on judgment alleged to be lacking in subject matter jurisdiction: "That jurisdictional inquiry, however, is a limited one. '[I] f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.'" *V.L.*, 577 U.S. at 407 (quoting Milliken v. Meyer, 311 U.S. 457, 462 (1940) (quoting Adam v. Saenger, 303 U.S. 59, 62 (1938))).

63 *Huntington*, 146 U.S. at 685 (emphasis added).

64 *Baker*, 522 U.S. at 223 (emphasis added).

65 *Milliken*, 311 U.S. at 462. *Accord* Milwaukee County v. M.E. White, 296 U.S. 268, 275 (1935) ("Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction.") and United States v. Munsingwear, 340 U.S. 36, 39 (1950) (describing as the "classic statement of the rule of *res judicata*" the principle that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same

"Of course," the Court has observed, subsequent challenge on the basis of lack of subject matter jurisdiction must be permitted.[66]

The Restatements of Conflict of Laws and of Judgments reveal a certain lack of consensus but largely come to the same conclusion. According to the Second Restatement of Conflicts, when a judgment of one state is attacked in another state, the judgment must be recognized if valid.[67] The Second Restatement of Judgments states that "[a] judgment is *valid* for this purpose *if the rendering court had jurisdiction of the subject matter*, if the court had territorial jurisdiction, and if adequate notice was given to the party assuredly bound by the judgment."[68] Such questions regarding the validity of the judgment are determined by the court being asked to recognize the judgment.[69] Conversely, under the Second Restatement of Judgments, an invalid judgment is not entitled to full faith and credit, and judgments from courts lacking in subject matter jurisdiction can be avoided in a subsequent action.[70] A judgment rendered in one state and relied upon in a subsequent action in another state may be collaterally challenged if the original court lacked subject matter jurisdiction.[71]

Authorities such as these seem, on their face, to put jurisdictional requirements into conflict with the finality policies of the Full Faith and Credit statute and the judgments law of the rendering state. Because of the categorical position apparently taken by the Statute, those principles of finality appear to clash with jurisdictional requirements. This is misleading; the jurisdictional requirements are not preempted by the federal Full Faith and Credit Statute. In cases like *Thompson v. Whitman* and *D'Arcy v. Ketchum*, the Supreme Court easily reconciled defenses based on lack of jurisdiction with the statutory full faith and credit requirement.[72]

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parties or their privies." (quoting S. Pac. R. Co. v. United States, 168 U.S. 1, 48–49 (1897))).

66 *Milliken*, 311 U.S. at 462 (stating that the lack of subject matter jurisdiction is "of course" open to inquiry in the enforcing state).

67 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93, 98 (AM. L. INST. 1971).

68 RESTATEMENT (SECOND) OF JUDGMENTS § 81 cmt. a (AM. L. INST. 1982) (emphasis added).

69 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 104 cmt. a, 105 cmt. b (AM. L. INST. 1971).

70 RESTATEMENT (SECOND) OF JUDGMENTS § 81 (AM. L. INST. 1982).

71 *Id.*

72 *See generally* Thompson v. Whitman, 85 U.S. 457 (1873); D'Arcy v. Ketchum, 52 U.S. 165 (1850).

In *D'Arcy*, a judgment had been issued in New York—*F(1)*—after a proceeding in which the defendant's joint debtors had not been properly made parties.[73] New York judgments law would have enforced the judgment against the absent debtors. The plaintiff claimed that the Full Faith and Credit statute required application of the law of *F(1)* (that is, New York) because New York was the state in which the judgment was made.[74] This argument was unsuccessful.[75] Prior to the adoption of the Constitution, the Court reasoned, jurisdiction would not have existed, and the Full Faith and Credit Clause was not designed to create jurisdiction in situations where it did not already exist.[76] Similarly, in *Thompson v. Whitman*, the Court noted that to construe the Clause as overriding the earlier principle that jurisdictional defects gave a right to reopen would effectively provide jurisdiction in cases where it had not previously existed.[77] "The Constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory," the Court wrote.[78]

In *D'Arcy*, the Supreme Court pointed out that neither Article IV nor the Full Faith and Credit Statute had ever been interpreted to bar otherwise valid defenses to the enforcement of a judgment.[79] "[I]n our opinion," the Court explained, "Congress did not intend to overthrow the old rule [allowing collateral attack for want of jurisdiction] by the enactment that such faith and credit should be given to records of judgments as they had in the state where made."[80]

But honesty requires recognition of the authority on the other side.[81] It can be argued

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73 *D'Arcy*, 52 U.S. at 176.

74 *See id.*

75 *See id.*

76 *See id.*

77 *Thompson*, 85 U.S. at 461.

78 *Id.* at 469 (1873).

79 *D'Arcy*, 52 U.S. at 176 (denying that the enforcing state has an obligation to apply the law of the rendering state to a question regarding the status of judicial records).

80 *Id.*

81 For a view contrary to the one discussed in the text, *see, e.g.*, James W.M. Dwyer, *Recent Decisions: Full Faith and Credit and Collateral Attack on the Determination of Jurisdiction*, 48 MARQ. L. REV. 102, 103 (1964) ("The rule against collateral attack on the jurisdiction of a court is a mandate of the United States Constitution.").

that while jurisdictional defects leave a judgment vulnerable, this vulnerability is cured if the question was litigated in the first award.[82] That is the rule for personal jurisdiction; the defendant has the opportunity to object to personal jurisdiction, but not to raise the defense repeatedly.[83] In that context, preclusion has been treated as appropriate even if the issue was not litigated, so long as the party who now raises the issue had an *adequate opportunity* to litigate the issue.[84] Subject matter jurisdiction is different; it survives a failure to raise the question, with the court at all times empowered to bring the matter up sua sponte.[85] So, it is arguable that subject matter jurisdiction should be a basis for collateral attack even though personal jurisdiction is not.[86]

In short, there is disagreement about whether supposedly void judgments provide an adequate basis for collateral attack.[87] Perhaps some other defenses to

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82 *See* Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n., 455 U.S. 691, 706 (citation omitted):

> This Court has long recognized that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." [citing cases] . . . Any doubt about this proposition was definitively laid to rest in [Durfee v. Duke, 375 U.S. 106, 111 (1963)], where this Court held that "a judgment is entitled to full faith and credit even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." . . . If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts. From our examination of the record, we have little difficulty concluding that the Rehabilitation Court fully and fairly considered whether it had subject matter jurisdiction to settle the pre-rehabilitation claims of the parties before it to the North Carolina deposit.

83 *See* FED. R. CIV. P. 12(h)(1).

84 *See id.*

85 *See FED. R. CIV. P.* 12(h)(3).

86 Note that under the theory advanced in this Article, the defendant can raise the lack of standing to sue at the judgments enforcement stage. But standing under Article III will not yet have been litigated at that point because the original judgment was rendered by Texas. State courts, of course, are not bound by Article III.

87 *See, e.g.*, Stoll v. Gottlieb, 305 U.S. 165, 172 (1938) (footnote omitted) (holding that where subject matter jurisdiction was litigated in the first proceeding, it could not be relitigated collaterally):

> An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction, the question is whether the former judgment is *res judicata*. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties did have jurisdiction of the subject matter of the litigation. In this case, the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

interstate judgments enforcement are more conclusive.

2. Choice of Law Defenses

Several familiar exceptions to the Article IV obligation of interstate judgments enforcement are analogous to familiar principles of choice of law. Choice of law concepts and principles, in other words, have in some instances been adapted and applied to the judgments context as well.

For example, as a matter of choice of law, the forum generally applies its own rules to procedural issues—the mechanics of the litigation—regardless of the source of a case's substantive law.[88] An analogous principle of *lex fori* is used in the context of judgments enforcement; it has long been agreed that the forum applies its own rules about the mechanical aspects of judgments enforcement.[89] If the Full Faith and Credit Statute were read literally, the enforcing state would instead apply the mechanical "procedural" rules of the rendering state.

This example of the mechanical aspects of enforcement procedures may not be of much interest in the abortion context. But there are three other areas in which interstate judgments law has followed choice of law doctrine: tax or revenue laws,[90] penal laws,[91]

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88 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (AM. L. INST. 1971).

89 *See* McElmoyle v. Cohen, 38 U.S. 312, 324 (1839) (stating that a judgment may be enforced only as "laws [of enforcing forum] may permit"); Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998) ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister-state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.") (citing McElmoyle *ex rel.* Bailey v. Cohen, 13 Pet. 312, 325 (1839) (stating that a judgment may be enforced only as "laws [of enforcing forum] may permit")); RESTATEMENT (SECOND) OF JUDGMENTS, § 99 (AM. L. INST. 1969) ("The local law of the forum determines the methods by which a judgment of another state is enforced.")).

90 *See* Milwaukee County v. M.E. White, 296 U.S. 268 (1935).

91 *See* Huntington v. Attrill, 146 U.S. 657 (1892).

and laws contrary to public policy,[92] the second and third of which are potentially quite significant for S.B. 8 awards.

a. Tax Laws and Judgments

In the case of tax laws, the explanation traditionally given for not enforcing tax judgments was more or less identical with the explanation for not applying the other state's substantive tax law. Conventional choice of laws principles held that taxation was a government function, and a state cannot impose the costs of carrying out its governmental operations on another state.[93] This principle was thought to be as relevant when the issue was enforcement of judgments as when the issue was choice of law.

Then, in 1935, the Court decided *Milwaukee County v. M.E. White*.[94] It acknowledged that the creation of exceptions to apparently categorical rules was consistent with the Clause's basic purposes:

> Such exception as there may be to this all-inclusive command is one which is implied from the nature of our dual system of government, and recognizes that, consistently with the full faith and credit clause, there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another. That there are exceptions has often been pointed out . . .[95]

But the Court nevertheless held that the tax judgments of other states must be enforced. And this continues to be the rule regarding enforcement of tax laws. The Court has not definitively indicated whether states must enforce each other's tax laws as a matter of choice of law[96] but has simply held that even if states are free to refuse to enforce one another's tax laws, this result would not carry over to tax judgments.[97]

92 *See* Reynolds, *supra* note 30, at 436.

93 *See generally* Clark J.A. Hazelwood, *Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments*, 19 MARQ. L. REV. 10 (1934).

94 Milwaukee County v. M.E. White, 296 U.S. 268 (1935).

95 *Id.* at 273.

96 *See id.* at 275 (distinguishing between enforcement of judgments and enforcement of the underlying substantive law).

97 *See id.*

b. Penal Laws and Judgments

The second choice of law-inspired defense against interstate judgments enforcement is possibly relevant in the abortion context. As Chief Justice Marshall famously wrote in *The Antelope*: "[t]he Courts of no country execute the penal laws of another."[98] The Restatement (Second) of Conflict of Laws supports this "penal law" exception[99] and it is recognized, albeit in a somewhat different context, in the Federal Rules of Civil Procedure.[100] As with the exception for non-enforcement of another state's tax law, the explanation for non-enforcement of penal laws is that a state's administration of its penal law is considered one of its government functions, and no state is entitled to shift the burden of carrying out its governmental functions onto other states.[101]

The precise contours of the exception are unsettled. Criminal laws and criminal law judgments are in this category, although the penal law exception is not limited to criminal law. In *Huntington v. Attrill*, the Supreme Court defined this historic exception to the Full Faith and Credit Clause as not requiring enforcement of a judgment when the statute is penal in the "international sense."[102] The Court explained that the determination of whether a statute is penal in the international sense depends upon "whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."[103] A law, or the judgments applying it, is "penal" if it is designed to deter or punish conduct and the remedy that is imposed is not geared to the damage done but is proportioned to provide more plausible deterrence.

This definition of "penal" laws or judgments is certainly broad enough to include cases brought under the contemporary anti-abortion laws modeled on the Texas statute. It is clear

98 *See* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

99 *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89 Reporter's Note (AM. L. INST. 1969) (listing types of cases classified as penal). For a twentieth-century application, see Loucks v. Standard Oil, 120 N.E. 198 (N.Y. 1918) (Cardozo, J.).

100 For a general discussion of the penal law exception, *see* Reynolds, *supra* note 30, at 434. The penal law exception is reflected in Rule 60 (dealing with the effect of judgments) of the Federal Rules of Civil Procedure. Rule 60 lists as a basis for release from a final judgment the fact that "[t]he judgment was procured by fraud or is penal in nature." FED. R. CIV. P. 60.

101 *See* Hazelwood, *supra* note 93.

102 *See* Huntington v. Attrill, 146 U.S. 657, 679 (1892).

103 *See* Reynolds, *supra* note 30, at 435.

that the objective of the law is punishment, not compensation; the plaintiff has suffered no harm and has no basis for demanding compensation. The measure of damages, in addition, does not seem to reflect any compensatory objective; the statute simply provides that it must be at least $10,000 plus attorney's fees, per abortion.

Enforcement of judgments based on penal law is different in one respect, however; there is no analog to *Milwaukee County*, in which the Supreme Court assessed the constitutionality of the refusal to enforce tax judgments. No definitive Supreme Court holding deals with the constitutionality of the penal law exception in the judgments context.

c. Laws and Judgments Contrary to Public Policy

The best known of the three categories of choice of law exceptions is probably the public policy exception. It states that the forum's own strongly held public policy can override application of another state's law that would otherwise be applicable.[104] Assume, for example, that the forum would ordinarily apply the contracts law of the place of contracting. But some particular case involves a contract for a sale of both of the defendant's kidneys. If the place of contracting would enforce a contract for the sale of both kidneys, but the forum would not, then the forum might use the public policy doctrine to excuse it from having to enforce a contract that it found deeply objectionable. The abortion controversy would surely be the perfect example of the public policy exception, for there could hardly be a more apt illustration of a dispute between two deeply irreconcilable positions than the debate between the right to life and the right to choose.

The public policy exception is acknowledged as valid in choice of law.[105] The applicability of the public policy argument to judgments enforcement, however, is another matter.[106] If applied to judgments, the public policy exception would excuse the forum from having to implement a *judgment* that is offensive to forum moral beliefs. Here, the authority is divided.

On the one hand are statements such as Justice Ginsburg's in *Baker v. General Motors Corp.*, declaring categorically that there is no "roving public policy exception."[107] Justice Stone apparently concluded differently in *Milwaukee County*, where he wrote that "the nature of our dual system of government" establishes that, consistent with the Full Faith and Credit Clause, "there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another."[108] Likewise, the Second Restatement of Conflict of Laws is of the view that the public policy exception still exists for judgments that reflect policies unacceptable to the forum.[109] A sister state (it is claimed) is not required to enforce judgments that "involve an improper interference with the important interests of the sister state."[110]

Judged by the usual standards, Justice Ginsburg's view in *Baker* is much more authoritative than Justice Stone's.[111] *Baker* is sixty years more recent and the decision was unanimous.[112] It is unclear, however, whether *Baker* was written with the intent to reject the public policy exception for judgments generally or only to forbid its indiscriminate use. Justice Ginsburg's opinion takes aim at the idea of a "roving public policy exception" that could apply "ubiquitous[ly],"[113] and this was quite appropriate for *Baker*. *Baker* involved technical questions about the eligibility of witnesses subject to court orders to testify in subsequent trials in other states.[114] This issue is hardly a hot button question of great moral force; if the public policy exception had been available in *Baker*, hardly any case would be beyond its reach. Any time that a state preferred to relitigate the merits of a case, public policy would have supplied a reason.

Therefore, it is appropriate to ask whether a more convincing example of a conflict of two states' public policies—an example like abortion—might perhaps result in the

104 *See, e.g.*, Reynolds, *supra* note 30, at 436 (discussing the public policy exception).

105 *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 223 (1998) (citations omitted) ("A court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy, but our decisions support no roving 'public policy exception' to the full faith and credit due *judgments*.").

106 The most forceful statement of the effect of Article IV on the public policy exception is Justice Ginsburg's opinion in *Baker*, 522 U.S. at 223.

107 *See id.*

108 *See* Milwaukee County v. M.E. White, 296 U.S. 268, 273 (1935).

109 *See* Reynolds, *supra* note 30, at 413.

110 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (AM. L. INST. 1971). *See generally* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 961 (1956).

111 *Compare Baker*, 522 U.S. at 223, *with* Milwaukee County v. M.E. White, 296 U.S. 268 (1935).

112 There were, however, two concurring opinions, one by Justice Scalia and the other signed by Justices Kennedy, O'Connor, and Thomas. *See Baker*, 522 U.S. at 241 (Scalia, J., dissenting); *id.* at 243 (Kennedy, J., dissenting).

113 *Id.* at 234.

114 *See id.*

retention of the public policy exception in at least some cases.[115] The public's reaction to the overruling of *Roe* certainly indicates the extreme importance of the issue of freedom of choice to women all around the nation.[116] It is entirely possible that *Baker* would be held not to govern an anti-abortion award; if so, the public policy exception for interstate judgments enforcement would live to see another day.

3. The Uniform Enforcement of Foreign Judgments Act

In all states other than Vermont and California,[117] enforcement of money damages awards is governed by uniform state law, according to which the applicable law is the judgments law of the state where enforcement is sought—*not* the judgments law of the state that rendered the decision.[118] The Uniform Enforcement of Foreign Judgements Act (UEFJA) states that a foreign judgment "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying" as a judgment of the state that is enforcing the judgment.[119] Texas should therefore not be surprised to learn that the enforcement of Texas judgments is governed by the law of the state where enforcement is sought. Texas should both expect other states to comply with their obligations under the Act and should itself comply with these obligations.

115 *See id.* at 234. ("In assuming the existence of a ubiquitous 'public policy exception' permitting one State to resist recognition of another State's judgment, the District Court in the Bakers' wrongful-death action . . . misread [this Court's] precedent").

116 *See, e.g.*, Danielle Kurtzleben, *What We Know (And Don't Know) About How Abortion Affected the Midterms*, NPR (Nov. 25, 2022), https://www.npr.org/2022/11/25/1139040227/abortion-midterm-elections-2022-republicans-democrats-roe-dobbs [https://perma.cc/EAU9-M3N6].

117 Vermont and California are not included in the generalized discussion below; all other states apply the Uniform Act. UNIF. L. COMM'N, *Enforcement of Foreign Judgments Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=e70884d0-db03-414d-b19a-f617bf3e25a3#LegBillTrackingAnchor [https://perma.cc/XA55-AW4P].

118 Texas has adopted the revised version of the act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35 (West 2023).

119 Uniform Enforcement of Foreign Judgments Act, 28 U.S.C. § 2467 (1964). This revised version of the Act states:

> Section 2. A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the Clerk of [any District Court of any city or county] of this state. The Clerk shall treat the foreign judgment in the same manner as a judgment of the [District Court of any city or county of] of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a [District Court of any city or county] of this state and may be enforced or satisfied in like manner.

a. Consequences of the Uniform Act

The references to "defenses" and to "reopening or vacating" judgments make the UEFJA undeniably applicable in the present context. "Defenses" would include any or all of the exceptions to full faith and credit listed above. If, for example, a survey of the enforcing state's judgments law revealed that it refused to enforce awards that were rendered without subject matter jurisdiction, that defense would be available as a justification for refusal to enforce a foreign award. It is a norm of nondiscrimination.

The defense to interstate enforcement contained in the UEFJA is different in kind from the three that have analogs in choice of law (tax law, penal law, and public policy). The Act has the status of state legislation; it has been adopted by forty-eight of this country's fifty state legislatures.[120] The Act cannot be repealed or restricted in application except by constitutional challenge, by federal statutory preemption, or by subsequent state legislation.

A good argument can be made that a defense that is suspect for full faith and credit reasons would nevertheless be constitutional if applied pursuant to UEFJA. The explanation would be that the states would have all consented to other states relying on the defense in question. The problem would be analogous to enforcement of choice of forum clauses. Choice of forum clauses are generally enforceable.[121] And they are enforceable even when they designate a forum that could not have exercised jurisdiction consistently with the Due Process Clause if no contractual provision had been agreed to. The act of giving consent can, in appropriate circumstances, change the rights that people hold.[122]

In widely adopting the UEFJA, the states have agreed to a reciprocal exchange by which each state agrees to apply its own defenses in an enforcement proceeding in its own courts. This has several implications. First, by agreeing to the application of local judgments law, the state promises, in effect, not to discriminate against foreign judgments. That is to say, the state agrees that foreign judgments should be treated like local judgments. A state that agrees to this reciprocal exchange also consents to the application of *F(2)* law if one of its own awards must be enforced out of state.

The drafters of the Uniform Act had good reason to designate the enforcing state's law for determining preclusive effect. This is a practical choice because it means that cases

120 *See* Uniform Enforcement of Foreign Judgments Act, 28 U.S.C. § 2467 (1964).

121 *See* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).

122 This assumes that valid consent was freely given and that the right in question was waivable.

underway in a single state will be treated uniformly. It reduces the burden on the enforcing court by not requiring it to apply a foreign law. And the Court has seemed to approve of this choice from time to time.[123] There is only one real objection to it: it seems at first to contradict the federal Full Faith and Credit statute. If so, then it would be preempted.

b. Preemption: The Effect of Federal Law on the Uniform Act

The UEFJA and the Full Faith and Credit Statute are similar in an important respect: both essentially operate like choice of law rules. They do not specify which defenses are valid but instead designate which state's law should apply on issues of judgments enforcement. Both are what choice of law theorists would call "jurisdiction selecting" rules because they do not tell you what result is correct, but only which state is the correct one for supplying the governing law.[124]

But the two statutes specify two different states. The Full Faith and Credit Statute requires giving judgments the effect that they would have if enforced in the state in which the award was rendered.[125] It singles out the judgments law of *F(1)*.[126] The UEFJA specifies, instead, giving the same effect as the state that is called upon to enforce the judgment: the law of *F(2)*.[127] UEFJA seems on its face to be inconsistent with a federal statute—the federal Full Faith and Credit Statute—and the consequence of such a conflict would be clear: the Uniform Act would be invalid under the Supremacy Clause.

123 *See, e.g.*, Watkins v. Conway, 385 U.S. 188 (1966) (upholding application of forum judgments law rather than the law of the rendering state because it was not discriminatory).

124 Professor Larry Kramer defined "jurisdiction selecting" rules—which he identifies as part of the "traditional approach," as follows:

> [J]urisdiction-selecting rules . . . operate according to the nature of the dispute and the locale of some critical event, without regard to the content of the law in question. Thus, tort cases are governed by the law of the place where the injury occurred, contract cases are governed by either the law of the place where the contract was made or the law of the place where it was to be performed, depending upon whether the question concerns validity or performance; succession to personalty is determined by the law of the decedent's domicile; and so on.

Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 CHI. L. REV. 1301, 1301 (1989) (footnote omitted).

125 *See* 28 U.S.C. § 1738.

126 *See id.*

127 *See* Uniform Enforcement of Foreign Judgments Act, 28 U.S.C. § 2467 (1964).

However, federal preemption is not a problem for the Act when 28 U.S.C. § 1738 is taken as a whole. The Statute requires giving the judgment the same full faith and credit as it would have by the "laws of Texas." But *the Uniform Act is part of the laws of Texas*; it was adopted in 1985 by the Texas state government.[128] Indeed, simply because it is later in time, it supersedes any contrary Texas law, as per the clear intention of the Texas Legislature. Applying *F(2)* judgments law is not inconsistent with the Full Faith and Credit Statute; it is actually *required by* the Full Faith and Credit Statute because that statute refers to the law of Texas, which in turn refers to the law of *F(2)*.

In the somewhat arcane jargon of choice of law, the reference to *F(1)* law in the federal statute should be understood as a reference to the *whole* law (including the state's choice of law rules) and not just the *internal* law (that is, substantive laws) of the rendering state.[129] Conflicts scholars will recognize this as the principle of renvoi.[130] Renvoi means simply that the court applying "the law of State *A*" will include the choice of law rules of State *A*, which may instruct the forum to actually apply the law of State *B*, if State *A* itself would apply the law of State *B*. The Supreme Court has interpreted federal statutes in exactly this way. In *Richards v. United States*, the Federal Tort Claims Act called for application of the "law" of the state where the negligent act or omission occurred.[131] The Supreme Court held that this meant the *whole law* of the place where the act or omission occurred, which is to say, the substantive law of that state, together with the state's conflict of law rules.[132]

The practice of renvoi has generally been discredited in the context of choice of law. The majority position is that a choice of law rule stating that the court should apply "the law

128 *See* TEX. CIV. PRAC. & REM. CODE ANN., § 35.

129 RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 1.03 (AM. L. INST., Tentative Draft No. 2, 2021) ("Law, Internal Law, and Whole Law Defined"):

> (1) As used in this Restatement, the "internal law" of a state is a state's law exclusive of its choice-of-law rules. It is the body of law which the courts of that state apply when they have selected their own law as the rule of decision for one or more issues.
> (2) The "whole law" of a state is that state's internal law, together with its choice-of-law rules.
> (3) "Law" without further specification refers to a state's internal law.

130 On the classic analysis of the doctrine of renvoi, *see generally*, Erwin Griswold, *Renvoi Revisited*, 5 HARV. L. REV. 1165 (1938); RESTATEMENT (THIRD) OF CONFLICT OF LAWS §5.06. (AM. L. INST., Tentative Draft No. 3, 2022).

131 Richards v. United States, 369 U.S. 1, 9 (1962) (applying the Federal Tort Claims Act). The relevant provisions of the Tort Claims Act are now found in 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671–2680.

132 *Richards*, 369 U.S. 1.

of the place of the accident," for example, should typically *not* be interpreted as requiring application of that state's choice of law rules.[133] The usual practice is to reject renvoi and apply only the state's internal (that is, domestic substantive) law.

But there is an exception, one that the Third Restatement expressly recognizes: it is for where the most important consideration is a policy of achieving uniformity. In such cases, renvoi is required.[134] Interstate enforcement of judgments is such a situation; indeed, the instructions in the Full Faith and Credit Statute are to enforce awards in such a way as to give the judgment "the same full faith and credit" as they have in the rendering state.[135] To achieve that objective, it is necessary to interpret the Full Faith and Credit statute as instructing the moving party to ask for application of the state's *whole* law—its substantive law together with its choice of law rules.

This is the only interpretation that upholds both 28 U.S.C. § 1738 and the UEFJA. Generally speaking, it is said that courts should avoid statutory constructions that result in a finding of unconstitutionality.[136] Under any interpretation other than the one offered here, there would be no application of the UEFJA that did not contradict the federal statute. It would make no sense for the drafters of the Uniform Act (who would have been selected from a nationwide pool of recognized experts on the subject) to propose a law with such a glaring defect. It would be much more likely that the drafters assumed that when the federal statute provided for giving "the same full faith and credit . . . as they have by law or usage in the courts of [the state that rendered the judgment]" that this included *all* of

133 RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.06. (AM. L. INST., Tentative Draft No. 3, 2022).

134 *See id.*:

> § 5.06. Significance of the Choice-of-Law Rules of Another State: Renvoi
> (1) When the forum's choice-of-law rules direct it to apply the law of some state, the forum applies the internal law of that state, except as stated in subsection (2)
> (2) When the objective of the particular choice-of-law rule is that the forum reach the same result on the facts as would the courts of another state, the forum applies the choice-of-law rules of the other state, subject to considerations of practicability and feasibility.

135 28 U.S.C. § 1738.

136 Michaelson et al. v. United States *ex rel.*, 266 U.S. 42, 64 (1924) (citing Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924)) articulated this presumption as follows:

> If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented; and it therefore becomes our duty, as this court has frequently said, to construe it, "if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

the rendering state's laws, including its conflict of laws rules.[137] The credit that a judgment has "by law or usage in the courts of [*F(1)*]" necessarily includes the UEFJA as one of the state's "laws."[138]

The effect of the Full Faith and Credit Clause of the Constitution, and of the statute that was adopted pursuant to it, is therefore to apply the judgments law of the state that is called upon to enforce the judgments. Although the statute on its face might at first be thought to specify the law of *F(1)*, this fails to take into account the conflict of laws principles in *F(1)* law. In adopting the Uniform Act, *F(1)* agreed that its judgments would be subject to the defenses of the enforcing state; the other adopting states did so, as well. This agreement is enforceable because Congress had the authority to determine the credit that an interstate judgment should have, and it exercised that authority by its reference to the "law or usage" of the state that awarded the judgment.[139]

III. Article III, Article IV, and the Requirement of a Judicial Proceeding

The Full Faith and Credit Clause and 28 U.S.C. § 1738 both provide that full faith and credit must be given to "public Acts, records, and judicial proceedings."[140] The problem of interstate judgments enforcement falls under the third category and not either of the first two. This third category is referred to as including judicial proceedings but does not elaborate. The adjective "judicial" has gone almost entirely unremarked for more than two hundred years. This silence should be corrected.

Well-established canons of construction provide that a word that has been included in a statute or constitutional provision is presumptively meaningful and included by design.[141] The name most prominently associated with canons of statutory construction is that of Justice Antonin Scalia. He identified two maxims that are undeniably relevant here: the

137 28 U.S.C. § 1738.

138 *Id.*

139 *Id.*

140 U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738.

141 *See* Antonin Scalia & Bryan A. Garner, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE 80, 80 (2015).

"presumption of consistent usage" and the "surplusage canon."[142] Justice Scalia stated them in the following terms:

> **Presumption of Consistent Usage.** A word or phrase is presumed to bear the same meaning throughout a text . . . .
>
> **Surplusage Canon.** If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.[143]

The word "judicial" cannot, therefore, be dismissed as trivial, superfluous, or redundant. It is "an elementary canon of construction," the Supreme Court has said, that "a statute should be interpreted so as not to render one part inoperative."[144] It elaborated: "[t]he cardinal principle of statutory construction is to save and not to destroy,"[145] and "[i]t is [our duty] to give effect, if possible, to every clause and word of a statute."[146] Although this general principle is not the property of adherents to any particular judicial philosophy, it is particularly appropriate for our current textualist Supreme Court.[147]

A. *Fidelity National Bank v. Swope*

Fidelity National Bank v. Swope[148] provides an example of what it would mean to give effect to the word "judicial" in this context. *Swope* involved Kansas City property owners and taxpayers challenging certain special taxes as unconstitutional.[149] The Kansas City

142 *Id.*

143 *Id.*

144 Colautti v. Franklin, 439 U.S. 379, 392 (1979) ("[T]he elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955))); *see* United States v. Menasche, 348 U.S. 528, 538–39 (1955) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

145 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

146 Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

147 The role of textualism in defining the word "judicial" is discussed *infra* Section III.B.1.

148 *See* Fidelity Nat. Bank & Trust Co. v. Swope, 274 U.S. 123 (1927).

149 *See id.*

charter provided a procedure by which the city could initiate an action before a nearby county circuit court to authoritatively adjudicate the validity of any challenges to the special tax.[150] At this forum, the Circuit Court rejected the owners' claims and upheld the assessments; the property owners allowed the judgment to become final without attempting to appeal.[151] The property owners later tried to challenge the constitutionality of the ordinance a second time.[152] They did so in federal district court, airing the same arguments as had been rejected in the earlier state court decision.[153] The trial and appellate courts both agreed and declared the assessments unconstitutional;[154] in a unanimous opinion authored by Justice Stone, the Supreme Court reversed.[155]

The Supreme Court declared that "the parties to [the earlier judgment] are concluded by the judgment *if the proceeding was judicial rather than legislative* or administrative in character."[156] The Court concluded that the first state court determination was entitled to *res judicata* because the original determination satisfied that test.[157] The explanation given for characterizing the first proceeding as "judicial" is revealing. The Court wrote "[t]hat the issues thus raised and judicially determined would constitute a case or controversy . . . could not fairly be questioned."[158] The Court added, for good measure, that "the judgment is not merely advisory"[159] and that the case would have qualified for removal to federal court as a case or controversy within the federal judicial power.

The reasoning in *Swope* is highly suggestive of language used by Article III of the Constitution.[160] Both *Swope* and the Article III requirement contrast "judicial" acts with

150 *See id.* at 128.

151 *See id.* at 129.

152 *See id.* at 126.

153 *See id.*

154 *See id.* at 126, 129.

155 *See id.*

156 *Id.* at 130 (emphasis added).

157 *See id.*

158 *Id.* at 131.

159 *Id.* at 134.

160 The claim that is being made here is not that the initial judgment had a defect of subject matter jurisdiction and is therefore void. For a discussion of the effects of absence of jurisdiction, *see supra* Section II.C.1. There

"legislative" acts, and both contrast "cases or controversies" with "advisory opinions."[161] The requirement that, in order to be judicial, the earlier determination should be one that "would constitute a case or controversy" is an obvious reference to the "case or controversy" requirement of Article III.[162] *Swope* therefore supports the conclusion that for a legal decision to be binding on decision makers elsewhere in the judicial system, it must have been "judicial" *in the sense intended by Article III*. The word "judicial" in Article IV, in other words, refers to the same characteristic as the word "judicial" in Article III: it is used to indicate that the dispute is a justiciable case or controversy.[163]

B. Judicial Proceedings: A Textualist and Originalist Interpretation

Within the originalist framework that dominates the thinking of a majority of the current Supreme Court, the most important types of evidence are textual and historical. Both textual and historical evidence support the interpretation of *Swope* provided here: that the word "judicial" in Article IV has the same meaning as the word "judicial" in Article III. In addition to textual and historical arguments, the Court has also taken into account the basic assumptions underlying the entire constitutional structure, such as state sovereignty

need be no defect in subject matter jurisdiction for the argument under discussion now to apply. The state court that issued the initial judgment is not bound by Article III; therefore, a lack of standing to sue that would defeat jurisdiction in a federal court might not have that effect in a state court. The point is not that there was no subject matter jurisdiction in *F(1)*, but that a judgment that (from the state law perspective) is valid might nevertheless not be entitled to full faith and credit because it fails to satisfy the federal standard for the Clause and the Statute to apply.

161 *Compare* Fidelity Nat. Bank & Trust Co. v. Swope, 274 U.S. 123 (1927) *with* U.S. CONST. art. III.

162 *See* Muskrat v. United States, 219 U.S. 346, 357 (1911) ("By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . . .")

163 The restriction to "judicial" proceedings of full faith and credit is reminiscent of the doctrine of administrative law which says that when administrative agencies make determinations, they preclude subsequent relitigation only if the facts were decided in their "judicial" capacity. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Hanover Bank v. United States, 285 F.2d 455 (Ct. Cl. 1961); Fairmont Aluminum Co. v. Comm'r, 222 F.2d 622 (4th Cir. 1955); Seatrain Lines, Inc. v. Pennsylvania R. Co., 207 F.2d 255, n.21 (3d Cir. 1953)). *See also* Goldstein v. Doft, 236 F. Supp. 730 (S.D.N.Y. 1964) (*aff'd*, 353 F.2d 484; *cert. denied*, 383 U.S. 960) (applying collateral estoppel to prevent relitigation of factual disputes resolved by an arbitrator) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.").

and separation of powers. These structural arguments also support the claim that the two uses of the word "judicial" have the same meaning.

1. Textual Arguments

The current Supreme Court is committed to textualism as a method of statutory interpretation.[164] As textualists, the majority of the justices believe that it is meaningful to treat words and phrases as having real, objective meaning. Interpretation is not a subjective process going on in the mind of the interpreter; there are "true" and "false" interpretations, just as there are true and false positions in science.

These justices are also originalists; as such, they hold that this real, objective meaning does not change over time.[165] Originalists reject the idea of a "living Constitution," instead believing that the constitutional text ought to be given the same meaning today as it had at the time that it was written. In the present context, originalism and textualism point in the same direction; they are both supportive of the claim that Article IV's use of the term "judicial" should be understood as the same as Article III's.

Textualism leads directly to this position. If text is what matters, and the text is the same in both cases, then in both contexts the meaning should be the same. The point is not only that the identical word is used twice, only a few paragraphs apart—although that fact, standing alone, would compel the same conclusion. In addition, the texts of Article III and Article IV share various meaningful characteristics that draw them together in function and focus.[166]

Consider once more the wording of the two provisions: Article III reads, "[t]he *judicial* power of the United States shall be vested in one supreme Court,"[167] whereas Article IV reads, "Full Faith and Credit shall be given in each State to the public Acts, Records, and *judicial*

164 *See generally* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016); Tara Leigh Grove, *Which Textualism?* 134 HARV. L. REV. 265 (2020); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053 (2017); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667 (2019).

165 *See* Megan Cairns, *Originalism: Can Theory and Supreme Court Practice be Reconciled?*, 19 GEO. J. L. PUB. POL'Y 263 (2021).

166 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

167 U.S. CONST. art. III (emphasis added).

Proceedings of every other State."[168] Both articles deal with the work of the courts—Article III with the creation and methodology of federal courts, and Article IV with the relations between the states' judicial systems.[169] As will be shown below, both involve the limits on power. Article III creates the potential for a powerful federal court system, but the word "judicial" keeps its power within bounds.[170] Article IV, similarly, increases the power of state courts by giving them—for the first time—the ability to issue judgments with assured interstate implementation, but it then limits that power to "judicial" proceedings.[171] We will see below that these similarities are not coincidental; both references help to maintain a traditional, modest judicial role. During the Constitution's drafting, tethering the potential power of courts to traditional roles was reassuring to skeptics whose main concern was the Constitution's potential encouragement of a judicial system run amok.

One manner in which the two Articles are different is the term that the word "judicial" modifies.[172] In Article III, "judicial" modifies the term "power," and in Article IV, "judicial" modifies the term "proceedings."[173] The difference does not matter. It is simply symptomatic of the fact that the former is a decision made at the outset of a case and the latter relates to the award at the conclusion of a case. This choice of words actually further confirms the strength of the links between these two articles. Judicial power is simply the potential for an actual judicial proceeding. Power exists even when it is not being exercised; it consists of an ability to carry out one's wishes. But to be a proceeding, something must actually happen. A proceeding is something that is able to take place because power exists. The ability to hold proceedings reduces, at its core, to the existence of power and the most obvious way to prove that a court has power is to examine its proceedings. Without power, there can be no proceedings; without proceedings, power would be invisible.

2. Originalist Interpretation and the Drafting Process

Textualism is therefore supportive of the claim that the word "judicial" in Article IV should be interpreted by reference to the meaning of the same word in Article III.

168 U.S. CONST. art. IV (emphasis added).

169 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

170 *See* U.S. CONST. art. III.

171 *See* U.S. CONST. art. IV.

172 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

173 *See id.*

Originalism is also supportive of that conclusion, although the reasoning is less obvious. The explanation requires a brief investigation of the historical circumstances in which the words in question appeared. What is known about the drafting process reveals that it would have been almost impossible for the Constitution's drafters to have had two different meanings in mind for the two appearances of the word "judicial."

The phrase "full faith and credit" was taken by the Framers of the Constitution from one of the Articles of Confederation. Although there is evidence that the phrase had been in use at least one hundred years before the provision in the Articles of Confederation was drafted,[174] not much is known about it.[175] The record states that on November 10, 1777, the Continental Congress named a committee to review "sundry propositions."[176] Then on November 11, the committee proposed new articles; a Full Faith and Credit Clause was included.[177] Four days later, the Articles of Confederation were adopted, and their version of the Full Faith and Credit Clause became law.[178]

The record is a bit more informative when it comes to Article IV's subsequent inclusion in the constitutional text. The Convention considered the Full Faith and Credit Clause as early as May 28, 1787, when Charles Pinckney, a South Carolina delegate, proposed its inclusion in the nascent Constitution.[179] Pinckney wrote that he had formulated the clause "exactly upon the principles of the 4th article of the present Confederation," with one small exception granting the enforcement of executive orders to return "fugitives of justice" to the states of their crimes.[180] Meetings of the Committee of Detail show that the Committee

174 *See* Stephen E. Sachs, *Full Faith and Credit in the Early Congress,* 95 VA. L. REV. 1201, 1217 (2009) ("[T]he term had been used for over a hundred years to indicate high evidentiary value. For example, a 1662 London translation of a Franco-Spanish treaty provided for both governments to issue maritime passports and bills of lading, to confirm a vessel's ownership and cargo . . . .").

175 *See, e.g.*, James D. Sumner, Jr., *The Full-Faith-and-Credit Clause — Its History and Purpose*, 34 OR. L. REV. 224, 235 (1955) (explaining that little attention was given to the full faith and credit provision before and during ratification). *See also* Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 9 (1944) ("There is almost no reference to [the Full Faith and Credit Clause] in the debates in the various states on adopting the Constitution.").

176 Charles Thomson, 9 J. CONT'L. CONG. 883, 885 (1774–1789).

177 *Id.* at 887.

178 *Id.* at 909.

179 MAX FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 112 (1911) [hereinafter 3 FARRAND'S RECORDS].

180 *Id.*

affirmed the clause's inclusion in some form in July, though the exact wording of the updated clause is unclear from the record.[181] More heated debate over the Full Faith and Credit Clause began on August 29, 1787.[182] In the draft then considered by delegates, the clause read: "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."[183] Delegates seemed to express discomfort with the clause's scope, which was broader than that of its Articles of Confederation predecessor. Different proposals were considered.

In one proposal, delegate James Madison suggested allowing Congress to provide for "the execution of Judgments in other States." [184] The Articles of Confederation version of the clause had provided only for the authentication of court judgments and not their enforcement.[185] Farrand's Records reports the objections of delegate Edmund Randolph: "Mr. Randolph said there was no instance of one nation executing judgments of the Courts of another nation."[186] Randolph then moved to commit a new version of the clause, one clarifying that the Constitution would allow only for the authentication and not enforcement of foreign records. It did not contain the requirement of a "judicial proceeding":

> Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act — and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.[187]

Randolph's version was committed with unanimous support.[188]

However, Gouverneur Morris, Pennsylvania delegate, subsequently introduced a version more nearly resembling the one in the Articles of Confederation. He suggested that the clause should read: "Full faith 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, determine the proof and effect of such acts, records, and proceedings."[189] Gouverneur Morris thereby reinserted the phrase "judicial proceedings," which Randolph's proposal had omitted. Although the language of the Full Faith and Credit Clause shifted slightly after this point, the requirement that full faith be extended to "judicial proceedings" remained with the text until it ultimately became Article IV.[190]

Consideration of the phrasing of Article III was underway virtually simultaneously with the drafting of Article IV. The phrase "judicial power" first appeared in written records of the Convention's proceedings in an outline of the speech James Wilson gave on June 16, 1787, in his discussion of Article III.[191] On August 6, 1787, the Committee of Detail presented a draft Constitution to the delegates.[192] In this draft, the Committee employed the phrase "judicial power" in what was then referred to as Article XI.[193] The subsequent draft

181 Notes on the Committee's proposed draft merely read, "Full Faith & Credit" without elaboration. MAX FARRAND, 2 THE RECORD OF THE FEDERAL CONVENTION OF 1787 174 (1911) [hereinafter 2 FARRAND'S RECORDS].

182 *Id.* at 447–48.

183 The newly proposed clause extended full faith to "the acts of the Legislatures," for example, whereas the Articles of Confederation had granted it only to acts, records, and judicial proceedings of "courts and magistrates." U.S. ARTICLES OF CONFEDERATION, art. IV. *See also* Sachs, *supra* note 174, at 1227. Given this difference, Mr. Williamson initially rejected the broad clause, proposing a return to the language of the Articles of Confederation. Mr. Pickney proposed limiting the clause's reach with a prefatory statement that seemed to restrict its import to bankruptcies and bills of exchange. It read, "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange . . . ." 2 FARRAND'S RECORDS, *supra* note 181, at 445. Nine of eleven delegates present moved to commit Pickney's motion. But, even with Pickney's caveat, the Framers were still uncomfortable with the clause's reach. Another divide became clear when James Madison suggested they might authorize Congress to provide for the "the execution of Judgments in other States." Sachs, *supra* note 174 at 1224–26 (2009). The Articles of Confederation version of the clause had provided only for the authentication of court judgments and not their enforcement. *Id.*

184 2 FARRAND'S RECORDS, *supra* note 181, at 448.

185 U.S. ARTICLES OF CONFEDERATION, *supra* note 183. *See also* Sachs, *supra* note 174, at 1227.

186 2 FARRAND'S RECORDS, *supra* note 181, at 448.

187 *Id.*

188 *Id.* ("The motion of Mr. Randolph was also committed nem: con:")

189 *Id.*

190 For example, on James Madison's motion, the Framers replaced "ought to" with "shall." 2 FARRAND'S RECORDS, *supra* note 181, at 489.

191 Outline of James Wilson's Speech (June 16, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 276, 280 (Max Farrand ed., rev. ed. 1937). ("The legislative and executive Powers are too feeble and dependent — They and the judicial Power are too confined"). Similar phrases also appeared earlier that summer. Most closely in language, Robert Yates's notes reference "judicial and legislative" power on June 6. *See id.* at 141. A June 13 account in *Farrand's Records* also makes note of a resolution about "judiciary powers." *Id.* at 231.

192 MAX FARRAND, 1 THE RECORD OF THE FEDERAL CONVENTION OF 1787 280 (1911) [hereinafter 1 FARRAND'S RECORDS].

193 Report of the Committee of Detail (Aug. 6, 1787), *in* The Gilder Lehrman Collection, https://www.gilderlehrman.org/collection/glc0081901 [https://perma.cc/Z7JK-ZFD7] ("The Judicial Power of the United

of the Committee of Detail, however, used different language; it stated "*the Jurisdiction* of the Supreme Court shall extend . . ."[194] On August 27, Gouverneur Morris and James Madison moved to strike "the jurisdiction of the Supreme Court" and replace it with the term "judicial power."[195] Their motion was committed with unanimous support.[196]

This reinsertion of the phrase "judicial power" took place only two days prior to the consideration of Article IV.[197] Gouverneur Morris, who had been responsible for adopting the phrase "judicial proceedings" into Article IV, was also responsible for including the term "judicial power" in Article III.[198] Moreover, Morris also deserves some credit for the subsequent retention of the phrase "judicial power" in the final text.[199] On September 8, 1787, a mere five days after Morris finished editing the Full Faith and Credit Clause, he joined the Committee of Style.[200] Consisting of five delegates, including Morris, the Committee was "appointed by Ballot to revise the stile [sic] and arrange the articles" of the Constitution.[201] Among the Committee's responsibilities was ensuring the consistent use of words across the Constitution.[202] Morris, by many accounts the most influential delegate on the Committee, had already demonstrated he was highly attuned to the meaning and usage of specific words in other drafting assignments.[203]

States shall be vested in one Supreme Court . . . .").

194 2 FARRAND'S RECORDS, *supra* note 181, at 186 (emphasis added).

195 James Madison, Convention Notes (Aug. 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 181, at 425–26, 431.

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 James Madison, Convention Notes (Sept. 8, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 181, at 547, 553.

201 *Id.*

202 *See id.* To give one example, the word "legislature" appeared fifty-one times in the draft the Committee received. *Id.* at 565–80. There, the word referred to both state legislatures and the national legislature. In the Committee's revised draft, however, in place of each mention of the national legislature, the Committee instead used the word "Congress." *Id.* at 590–603. The Committee eliminated the situation in which one word, "legislature," referred to two different things. *Compare id.* at 565–80 *with id.* at 590–603.

203 William Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 4, 14 (2021) ("Equally significant for Morris was words and precise word choice. A powerful example of his attention to language (as well as his capacity for deception) is

The Committee made one more significant change: it changed the placement of the two Articles in the final document.[204] Before the Committee issued its edits, what is now Article III was located at Article XI, and what is now Article IV was Article XVI.[205] The Committee rearranged the Articles so that the one requiring full faith and credit was placed immediately following the one providing for a federal judicial branch. In other cases where the Committee rearranged text, the changes reflected its desire to place closer together two similar provisions.[206] It is not a coincidence that the two uses of the word "judicial" ended up in successive articles, just a few paragraphs apart.[207] Their placement underscored the connections between the two provisions.

Given the historical context in which these terms were included and arranged in the Constitution, several conclusions about the drafting history seem unavoidable. First, the Articles in question were drafted and edited with care and attention; there is no basis for treating the word "judicial" as careless or coincidental. Second, because the phrase "judicial proceedings" was already in use in the Full Faith and Credit Clause of the Articles of Confederation, those who drafted Article III would very likely have been familiar with the word "judicial" from that usage.[208] Third, the two uses of the word are only a few paragraphs away from one another in the constitutional text.[209] This placement was deliberate, probably reflecting a perception of continuity of subject matter. Fourth, although Article IV was

the Territories Clause"). Morris developed his attention to language during his years of experience writing legal documents. *See id.* at 13. Before joining the Constitutional Convention, he was involved in drafting New York's 1777 Constitution and had written hundreds of reports and statues as a New York Legislator and representative in the Continental Congress. *Id.* Given Morris's legal experience and demonstrated focus on word choice, it is even more notable that he, out of all delegates, not only introduced "judicial" to both Article III and Article IV but also, through his role on the Committee, preserved the document's use of the word. *Id.*

204 *Compare* 2 FARRAND'S RECORDS, *supra* note 181, at 590, 600–02, *with* 2 FARRAND'S RECORDS, *supra* note 181, at 565, 575–78.

205 *Id.*

206 To give an example, the Committee combined clauses originally located in Article VII, Article VIII and Article XX into one section, the new Article VI, because all pertained to the power of the Constitution. *Compare* 2 FARRAND'S RECORDS *supra* note 181, at 603 *with* 2 FARRAND'S RECORDS, *supra* note 181, at 571–72, 579.

207 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

208 Article IV of the Articles of Confederation stated that "[f]ull 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." ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 3.

209 *See* U.S. CONST. art. III.

originally drafted for the Articles of Confederation, about a decade earlier than the drafting of Article III, final edits and the decisions to include the two Articles in the text of the Constitution were made within a few days of each other.[210] They were, moreover, promoted by the same man: Gouverneur Morris.[211] All in all, it is virtually certain that the proponents of each of the two uses of the word "judicial" were aware of the existence of the other use. Yet no effort was made to distinguish the two uses of the word.

3. Originalism and the Word "Judicial"

What is at stake in this short foray into the history of the Constitution's drafting? Why does it matter that when the Framers wrote "judicial" for purposes of Article IV, they had the same thing in mind as when they wrote "judicial" for purposes of Article III? It matters because if "judicial" in the two Articles means the same thing, then evidence about one is also relevant to our understanding about the other. It would be possible to learn about the meaning of Article IV by studying the way that similar issues are treated in regard to Article III.

In theory, it would also be possible to learn about the meaning of Article III by studying Article IV. In fact, however, our understanding of the meaning of Article III does not stand to profit much from what we know about Article IV. The reason is that there is a substantial jurisprudence already in existence which interprets Article III, but almost nothing in the Article IV literature that might help to understand Article III. The helpful analysis in the Article III context owes its existence to disputes raising standing, ripeness, and mootness issues. The large number of such disputes has resulted in an enormous number of judicial decisions on the subject, some of them quite thoughtful.

The lessons that Article III would tell about Article IV are familiar ground to any constitutional lawyer or academic. For many years, the Court has explained the phrase "judicial power" and the cases or controversy doctrines implementing it in terms of the conditions that the Framers would have been familiar with when drafting the constitutional provision in question. The methodology applied has been more or less originalist, although not dogmatically so.[212]

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210 *See* 2 FARRAND'S RECORDS, *supra* note 181, at 441, 447–48.

211 *Id.*

212 The originalist character of the Court's Article III opinions is well illustrated by the excerpt from Coleman v. Miller, 307 U.S. 433, 460 (1937) (Frankfurter, J., dissenting). *See infra* note 213 and accompanying text.

Justice Frankfurter provided a classic description of this method of interpretation in *Coleman v. Miller*, which interpreted the Judiciary Act of 1789:

> In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase . . . Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster, and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."[213]

One need not be a strict originalist to see the appeal of this approach. As Raoul Berger wrote, "[g]iven a document which employed familiar English terms—*e.g.* 'admiralty,' 'bankruptcy,' 'trial by jury'—it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation, and so the Supreme Court has often held."[214]

The conventional explanation for these justiciability doctrines is that they serve to commit the judiciary to a more modest role in government. The word "judicial" functions, in effect, as a code word signifying adherence to the case or controversy method of judicial decision making.

C. The Rationale for the Requirement of "Judicial" Character

The Supreme Court has a standard explanation that recurs fairly consistently in the cases interpreting the phrase "case or controversy" in Article III.[215] It explains the inclusion

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213 Coleman v. Miller, 307 U.S. 433, 460 (1937) (Frankfurter, J., dissenting).

214 Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969).

215 The Court's analysis of justiciability has received mixed reviews. Negative assessments are based on various lines of reasoning. There are scholars who doubt the historical account of the doctrine's derivation. *See generally* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142–43 (1993); Berger, *supra* note 214, at 816 (stating that the Constitution does not require the limits that the Supreme Court has placed on standing). There are also scholars who quibble with particulars of the historical account but think it is overall close enough to continue using it. *See, e.g.*, James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 2 (2001) ("[G]iven the historical context, the contemporary injury-in-fact rule is an acceptable interpretation of Article III, because it reflects not only the Framers' likely concept of what courts

of the word "judicial" as a commitment that the courts would maintain the traditional common law method, a commitment that was necessitated by fears amongst some of the delegates that the courts would abuse powers that the Constitution granted.

1. The Conventional Wisdom in Federal Courts

The word "judicial" was used to provide reassurance to skeptics fearful of the aggressive growing power of judges that the federal constitution newly empowered. Inclusion of the requirement of a "judicial" proceeding is a way of saying that a grant of judicial power is a grant of judicial power "as we currently understand judicial power to be defined, today"—that is to say, in 1787. This use of the word is part and parcel, in other words, of the Supreme Court's commitment to originalism.

The conventional explanation of the word "judicial" in Article III is as follows. The creation of an American supreme court and (eventually) federal trial and intermediate appellate courts was not taken for granted as the drafting of the U.S. Constitution got underway. To the contrary, inclusion of a system of federal courts was controversial. In supporting the proposal for federal courts, the Federalists had to allay the concerns of those skeptics who saw a federal judiciary as a potential threat to the balance of power.[216] The skeptics feared that the creation of federal courts would set in motion a long term problem of increasingly aggressive federal judicial overreaching.[217] The key to gaining acceptance

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did, but also their view of the judicial role in maintaining the separation of powers[.]"); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("We do not claim that history *compels* acceptance of the modern Supreme Court's vision of standing . . . We do, however, argue that history does not *defeat* standing doctrine; . . . its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning"). Unsurprisingly, the justices who have supported decisions to deny standing tend to be more positive about the doctrine. *See, e.g.*, John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1219 (1993) (stating that the *Lujan* decision "is a sound and straightforward decision applying the Article III injury requirement . . . .").

216 *See* 2 FARRAND'S RECORDS, *supra* note 181, at 430 ("Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.").

217 The Anti-Federalists predicted that the Constitution would empower federal judges to "enlarge the sphere of their power beyond all bounds." *See* HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 168 (1981) (expressing concern that the federal courts would exceed their jurisdiction); *id.* at 182 (arguing "that the supreme court under this constitution would be exalted above all other power in the government, and subject to no control"). An important initial opponent of the plan to establish lower federal courts with jurisdiction to hear constitutional claims was James Madison; one author reports that Madison was said to have little confidence in courts. *See* Richard Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 292 (1997).

of the proposal set out in Article III was to emphasize the restraints under which so-called "Article III" courts would operate.[218] Keeping the proposed federal courts system from becoming too powerful was therefore as much of interest to the proponents of federal courts as it was to the opponents.[219]

Proponents of a federal court system understood the value of framing their proposal in modest terms. Making a credible commitment in the Constitution to maintaining the power balance required finding some device that would hold the courts' role to approximately what it was at the time of drafting. The strategy adopted to prevent the federal courts from expanding their power at the expense of the other branches of government was the common law method. Inserting the word "judicial" into the text of Article III effectively signaled that the power that was being given to these courts was limited to resolution of the sort of disputes that were traditionally considered justiciable in British/American common law history.[220]

Under the common law method, decisions are supposed to be made only when necessitated by the circumstances, that is to say, by the presentation of a case that raises the issue. And decisions are expected to be written as narrowly as reasonably possible. For opportunities to decide legal issues, therefore, common law judges are supposed to remain dependent on the parties, who bring them legal questions wrapped up in actual and concrete disputes. Courts, in principle, have only the most limited ability to anticipate

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218 THE FEDERALIST NO. 83 (Alexander Hamilton); THE FEDERALIST NO. 48 (James Madison) (arguing for maintaining limits on the authority of the courts); THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Oxford World's Classics 2008) (arguing that the federal courts would be "the weakest of the three departments of power" because it would possess "neither force nor will, but merely judgment"); THE FEDERALIST NO. 81, at 396 (Alexander Hamilton) (Oxford World's Classics 2008) (emphasizing the "comparative weakness" of the Judicial Branch).

219 *See, e.g.*, Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1761–63 (2004) (stating that there was general agreement on both sides that there should be only "limited" "judicial intrusions into the political realm").

220 This account is essentially the holding of Marbury v. Madison, 5 U.S. 137, 177 (1803). An Article III court has the power to decide issues of constitutional law because Article III gives it the power to decide cases, and the power to decide cases assumes that the court will decide the case in accordance with the law—including any relevant constitutional provisions. The textual grounding for the requirement of a justiciable "case or controversy" lies in Article III's vesting of "judicial power" in these courts, for the Supreme Court has held that the inclusion of the qualifier "judicial" limits the power of Article III courts to acts that would have been considered justiciable by the Constitution's framers. *See* Roberts, *supra* note 215.

legal questions or to take initiative to frame the issues favorably. The Article III "case or controversy" doctrine displays a judicial commitment to remaining within the traditional "judicial" power. It is therefore not surprising that the court has consistently explained the limitation to judicial functioning as a consequence of its originalism.

2. Applying the Conventional Wisdom to State Courts

The account is less obvious when the distribution of power concerns the relative authority of different state judicial systems. There is little information about what the Framers actually had in mind when they included the Full Faith and Credit Clause in the Constitution. But given that, at the same time, they were considering the dynamics of federal judicial power (in their deliberations over Article III),[221] a similar explanation could go as follows.

At the end of the Revolutionary War, the thirteen colonies were legally free to treat each other as they would have treated foreign nations. Massachusetts owed no more respect to a legal decision made by New Jersey than it owed to legal decisions made by France. Both were matters of comity, not of legal obligation. The proposal to include in the new Constitution some provision for recognition of other states' legal decisions would therefore have been attractive. In the Article IV context, a commitment to assist in the enforcement of one another's legal rulings offered great gains in efficiency and financial stability. States would be more likely to cooperate if they had assurances that other states would responsively cooperate; the tendency to act cooperatively would therefore feed on itself and grow stronger over time.

But if the potential benefits were obvious, so were the costs. What was to prevent one state with particularly aggressive opinions from using the newly created obligation to respect earlier judgments of other states to try to decide matters that were not properly before it? Comparable language in the Articles of Confederation had presented no problems along these lines. But that provision carried with it no prospect of federal enforcement as there were no federal courts; the addition of a Supreme Court with the authority to review state court decisions and enforce the Full Faith and Credit Clause could have caused some hesitation.[222]

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221 *See supra* Part III.B.2.

222 The hesitation some of the Framers had about the addition of a red-blooded Full Faith and Credit Clause is described *supra* Section III.B.2.

The Full Faith and Credit Clause's reliance on the term "judicial proceedings" would have reassured the skeptics who feared that requiring credit to sister-state judgments might introduce major changes in the operations and functions of courts. It may have seemed likely that the individual states would have continued to follow the common law method of adjudicating legal issues only when they arose in concrete cases, but the inclusion of the word "judicial" in Article IV made this assumption official. Conditioning the assistance of the federal system upon compliance with federal norms about judicial function would be a natural remedy for the potential of state court overreaching. The U.S. Constitution in this way provided assurances that the enhanced enforcement powers of the Full Faith and Credit Clause would not be used to facilitate overreaching by states with overtly political objectives. The word "judicial," in short, conveyed the same commitment in the Article IV context as it did in the Article III context.

The wisdom of this reasoning is apparent if one thinks about the kinds of decisions that would have been eliminated by the imposition of Article III justiciability standards. The clearest example would be an advisory opinion. If advisory opinions were entitled to full faith and credit, then a state court might simply take the initiative to address the legal merits of any question that it found interesting or important. There would be a strong incentive to be the first to speak to a question in order to take advantage of the tabula rasa and commit other states to one's position through the operation of full faith and credit. The phrase "judicial proceeding" in Article IV effectively disqualifies advisory opinions from the protection of full faith and credit.

This conclusion is actually quite sensible. States cannot, and surely do not, expect that Article IV's support for interstate judgments will apply to everything that a state court has decided. Courts make decisions about all sorts of things—everything from which of several applicants to award a judicial clerkship to, to the promulgation of local rules of civil procedure—and it is taken for granted that not all of these things are entitled to full faith and credit simply because they have been announced by a judge or deal with the business of running a court. It is *cases* that qualify for interstate enforcement as a matter of federal constitutional law.

In federal courts, only disputes that qualify under the "case or controversy" standard of Article III are decided by courts, so the problem of full faith and credit applying to advisory opinions does not arise. But state courts may be empowered under state law to do many other things, including writing advisory opinions. The federal judiciary is not about to say that the states' own courts cannot grant requests for advisory opinions, but it *can* say that interstate enforcement of advisory opinions (or other disputes that would not qualify under

Article III) is not supported by Article IV. To meet the federal standard at the enforcement of judgments point, a dispute should meet the federal standard at the jurisdictional point.

As with Article III, the inclusion of the word "judicial" implicitly pledges that earlier ways of doing things will be preserved. There should be, at a minimum, a presumption that two uses of the word "judicial," dating to the same time period, are identical. The burden of proof should rest on those who would deny the commonality of the two Articles' meanings of the word.

IV. Applications

If the same meaning is given to the word "judicial" in Article IV as is given to the word "judicial" in Article III, then the end result is to condition federal support under full faith and credit upon satisfaction of the Article III "case or controversy" requirement. The most important part of that requirement, for present purposes, is the doctrine of standing to sue. The Texas Heartbeat Act is likely to generate litigation that would fail to meet that standard. Because of the peculiar procedural posture of cases brought under that statute, the individuals who bring such cases are likely to lack the sort of concrete individual interest that the Supreme Court has consistently demanded if a dispute is to be thought of as falling within the traditional "judicial power."[223]

A. The Problem with the Texas Heartbeat Act

S.B. 8's novelty lies in its unusual procedural vehicle: civil suits brought by private individuals that reward those individuals' identification and prosecution of persons with some sort of involvement in an abortion.[224] Complaints brought to court pursuant to this statute are different from traditional torts cases in several important ways.[225]

A civil damages remedy usually requires a defendant who unlawfully caused an injury to provide compensation to the individual who was injured, with the amount of compensation

223 *See* Thole v. U.S. Bank N.A, 140, S. Ct. 1615, 1618 (2020) ("To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent . . . ").

224 *See* TEX. HEALTH & SAFETY CODE § 171.207 ("Limitations on Public Enforcement") (West 2021).

225 The plaintiff's recovery is referred to, after all, as "damages." The Texas statute refers to the relief awarded that way. *See, e.g.*, TEX. HEALTH & SAFETY CODE §171.208(c) (West 2021) (referring to defendant having already paid "the full amount of statutory damages.")

reflecting the extent of the injury.[226] But there is no traditional injured party to bring suit in an anti-abortion case; the people who seek to deter abortions are not individuals who were injured by a particular abortion but persons with ideological objections to abortion as a general matter.[227] Those who argue that women are entitled to reproductive freedom, indeed, make exactly this point: control over one's reproductive functions is a private matter which does not implicate the legitimate interests of either the state or other private parties.

Through S.B. 8, the Texas legislature created a cause of action by imposing a legal obligation upon persons who have facilitated abortions to pay certain amounts to the plaintiffs who prove that such abortions have occurred.[228] It characterized the cash payments given to these self-appointed volunteers as "damages."[229] This characterization fools no one; it is evident that the plaintiff has not suffered any harm by the abortion in question and, therefore, does not need "damages." It will not work to try to paint the woman who had the abortion as the injured party because she does not receive damages. In short, the plaintiff claims a financial reward *because someone else had supposedly been injured*. This is precisely the sort of dispute that the U.S. Supreme Court has consistently dismissed as lacking standing under Article III of the Constitution.[230]

226 The civil action in question is created by TEX. HEALTH & SAFETY CODE §§ 171.207 and 171.208 (West 2021): "Sec. 171.207. ("LIMITATIONS ON PUBLIC ENFORCEMENT. (a)Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208."). Thus, no actions may be brought by the state. And no limitations are imposed on the private parties who might initiate a case. § 171.208 imposes no qualifications of traditional standing to sue on the plaintiff in the action; it merely states: "(d) Notwithstanding Chapter 16, Civil Practice and Remedies Code, or any other law, a person may bring an action under this section not later than the fourth anniversary of the date the cause of action accrues."

227 Of course, the anti-abortion view is that it is the fetus that is harmed. But even if one is willing to grant the fetus the necessary status to have a claim, there are serious issues about how to choose the fetus's representative. It would be peculiar to simply allow private parties to intervene at will, without having any connection at all to the dispute. That is, however, the result that would occur if the Texas scheme for "selecting" plaintiffs were followed.

228 *See* TEX. HEALTH & SAFETY CODE § 171.208(b)(2) (West 2021) ("Civil Liability for Violation or Aiding or Abetting Violation").

229 *Id.*

230 *See* Hollingsworth v. Perry, 570 U.S. 693, 708 (2013) ("But even when we have allowed litigants to assert the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.") (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)) (internal quotation marks omitted).

B. Article III Standing to Sue: A Brief Refresher

The basic principles of Article III jurisdiction need no introduction.[231] Article III of the Constitution grants "the judicial power" to the Supreme Court and such lower federal courts as Congress might later create.[232] In exercising this power, so-called Article III courts are limited to justiciable "[c]ases or [c]ontroversies."[233]

The Court explained the meaning of "cases and controversies" in *Muskrat v. United States* in terms of "regular proceedings" established in order to protect rights: "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . . ." [234] "Cases or controversies" included "suit[s] instituted according to the regular course of judicial procedure."[235] Moreover, "judicial power" referred to the right to determine actual controversies "duly instituted" in courts of proper jurisdiction.[236] In other words, "cases or controversies" essentially refers to ordinary cases that happened to raise legal issues; the parties received a chance to argue about their rights because it was necessary to resolve the case.

Citing the long-standing commitment to this distinctive image of judicial power, the Court has refused to take jurisdiction in cases that do not reflect the traditional mode.[237] This refusal reflects the underlying rationale for the requirement of an "injury" (also sometimes

231 This article is only intended to present a very truncated view of the standing doctrine. For a more developed account of the author's positions and arguments on the subject, *see* Lea Brilmayer & Callie McQuilkin, *Standing and Substance: Legitimacy, Tradition, and Injury in the Doctrine of Standing to Sue*, U. PA. J. CONST. L. (forthcoming).

232 U.S. CONST. art. III, § 2, cl. 1.

233 *Id.*

234 Muskrat v. United States, 219 U.S. 250, 357 (1911) ("By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.").

235 *Id.* at 356 ("What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies.' A 'case' was defined . . . to be a suit instituted according to the regular course of judicial procedure.").

236 *Id.* at 361 ("That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.").

237 *See id.*

referred to as an "injury in fact," or a "concrete" injury). As previously mentioned, the inclusion of the term "judicial" was intended precisely to allay the concerns of skeptics who feared the uncontrolled growth of judicial power.[238] Tethered to the traditional judicial function, the judiciary was unlikely to excessively expand over time and upset the balance of power that the Framers were planning.[239]

The last century has seen enormous amounts of both scholarly writing and litigation over what this means and whether the Court's position is sound, historically or otherwise. The details of the development of this doctrine are too lengthy and complex to fully cover in the space available in this Article. Nonetheless, it is possible to introduce enough material from the case law to get a sense of what the requirement would mean in the full faith and credit context. Recent case authority indicates strongly that the typical S.B. 8 case would not satisfy the standing requirement.

C. Justice Kavanaugh's Hypothetical Hawaiian Plaintiff

The Court's message about the nature of the proper judicial function has been basically unchanged over many years, and the issues of judicial function that most commonly appear in reproductive freedom cases have been familiar for decades.[240] On no point has the Supreme Court been more adamant than the requirement that, before they can bring a case to court, plaintiffs must have suffered a "harm" or an "injury."[241] This is part of the doctrine of "standing." Standing cases have long been a mainstay of the Supreme Court's docket;[242]

238 *See supra* Part III.C.1.

239 *Id.* at 355 ("These cardinal principles of free government had . . . guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power.").

240 It is not unusual to find abortion-related cases with justiciability problems. There are several reasons for this. First, if a pregnant woman wishes to challenge a restriction, she is likely to run into the problem that the issue is "capable of repetition yet evading review." Singleton v. Wolff, 428 U.S. 106, 117 (1976) (quoting Roe v. Wade, 410 U.S. 113, 125 (1973)). Additionally, cases that challenge the constitutionality of abortion restrictions often rely on third-party standing. This is because of the sensitivity of the issue (which makes women unwilling to face the publicity of having their names attached). In *Singleton v. Wolff*, the Supreme Court established that physicians can bring lawsuits on behalf of their abortion-seeking patients to ensure they have access to care. *See* Singleton v. Wolff, 428 U.S. 106 (1976).

241 The case of TransUnion L.L.C. v. Ramirez, 594 U.S. 413, 417 (2021), discussed *infra* has an extensive discussion of "harm" sufficient to create standing to sue.

242 It is not possible to list even a representative sample of the cases on justiciability; the cases are numerous, from almost every period in the Court's history, and extremely varied. *See generally* Flast v. Cohen, 392 U.S.

other doctrines related to the "same case or controversy" limitations are mootness, ripeness, and political question.

To determine what impact the standing doctrine would have on cases brought under the Texas Heartbeat Act, one need only consult Justice Kavanaugh's recent opinion in *TransUnion v. Ramirez*.[243] It provides a useful illustration of what is meant by "concrete" harm.[244] Justice Kavanaugh introduces a hypothetical involving two plaintiffs to explain the distinction between concrete and abstract harm, both of whom object to a factory that is polluting an area in Maine.[245] The first plaintiff is from Maine while the second is from Hawaii:

> To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.[246]

The majority opinion in *TransUnion* clearly rejects the argument that the Hawaiian plaintiff in the second lawsuit has standing.[247] The Hawaiian complainant lacks standing because the harm to property took place in Maine; neither he nor any of his property suffered from the complained-of activity.[248] The Maine plaintiff could sue, however, because she

83 (1968) (adjudicating standing to sue); Baker v. Carr, 369 U.S. 186 (1962) (exploring the political question doctrine); Liverpool S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) (stating that the constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies"); Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892); United States v. Ferreira, 54 U.S. 40, 48 (1852).

243 TransUnion L.L.C. v. Ramirez, 594 U.S. 413 (2021).

244 *See id.* at 426.

245 *Id.*

246 *Id.*

247 *Id.* at 413.

248 *Id.*

had property in Maine that was damaged by the pollution.[249]

Justice Kavanaugh's Hawaiian plaintiff is uncannily analogous to the Heartbeat Act plaintiff. In Heartbeat Act cases, just as in the hypothetical, the plaintiff alleges that the defendant unlawfully injured someone who is not a party to the case before the court. In both Heartbeat Act-type disputes and in Justice Kavanaugh's hypothetical, the defendant is now being sued by a self-appointed plaintiff, rather than by the person who the defendant supposedly harmed.

In neither case is there a personal concrete injury (as the Court would have it), and this cannot be changed simply by the legislature announcing that the plaintiff has been harmed. If the only harm is the one that it announces, the harm exists only because the lawmakers say that it does. It is presumed, not proven. It is true by definition, that is to say, it is treated as an unassailable premise and is not a factual assumption at all. This defect is not one that can be cured by legislative action.[250]

The Texas Heartbeat Act, by design, makes the actual empirical state of the world irrelevant. It creates, in effect, an irrebuttable presumption that all members of the community, whoever and wherever they may be, experience suffering when an abortion happens. It is as much a legal fiction as the "fertile octogenarian," familiar from the Rule against Perpetuities.[251] The very fact of its purported universality and inevitability confirms that this is not an empirical statement but an article of faith. This is not an injury-in-fact but rather an injury regardless of the facts. Texas's approach to standing tries to meet the requirement of an injury-in-fact with an injury-in-fiction.[252]

In the alternative, it might be thought that the difference between S.B. 8 cases and the

249 *Id.*

250 While prudential elements contribute to the standing doctrine, the Article III element is of constitutional stature. *See* U.S CONST. art. III.

251 According to Merriam-Webster, "the fertile octogenarian" refers to "a presumption at common law that a woman of any age is capable of having children for purposes of determining the applicability of the rule against perpetuities."; *Fertile Octogenarian Rule*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, https://www.merriam-webster.com/legal/fertile%20octogenarian%20rule [https://perma.cc/8TUV-4U47].

252 A legal fiction is defined as "something assumed in law to be fact irrespective of the truth or accuracy of that assumption." *Legal Fiction*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, https://www.merriam-webster.com/legal/legal%20fiction [https://perma.cc/A7QA-JQ4C]. Another definition of legal fiction is "[a]n assumption that something is true even though it may be untrue." *Legal Fiction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Hawaiian hypothetical lies in the $10,000 minimum reward that successful S.B. 8 plaintiffs receive. The existence of the reward might appear to make the dispute seem more like a traditional case because the plaintiff and defendant are fighting over something concrete. But Justice Kavanaugh does not appear to think so. The plaintiff is still "uninjured"; he does not meet the requirement of having been "harmed."[253] Justice Kavanaugh concludes that "even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available)" the second version of the hypothetical (with the Hawaiian plaintiff) would not meet the constitutional requirement:[254]

> . . . the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. *An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages)*.[255]

The opinion is clear that the outcome should not be any different simply because the legislature names a statutory remedy.[256]

At first, this position seems rather curious. Why does it not make a difference that the plaintiff expects a statutory remedy if they win the case? It does not answer this question to say (as Justice Kavanaugh does) that the plaintiff is merely trying to ensure the defendant's compliance with regulatory law—the typical tort plaintiff could be described the same way. The Court likewise treats the desire "to obtain some money via the statutory damages" dismissively; it is treated as inconsequential and tangential, although the opinion provides no explanation.[257] The difference between the typical tort plaintiff and the Hawaiian plaintiff is never explained. Precisely, such a desire to obtain money through legislatively

253 *TransUnion*, 594 U.S. at 413.

254 *Id.* at 585.

255 *Id.* at 427–28 (emphasis added).

256 *See id.* ("[T]he public interest that private entities comply with the law cannot 'be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.'") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992)).

257 *TransUnion*, 594 U.S. at 585.

prescribed damages is an important motivation in the typical private law case, where no standing objection can be made.

The result is more defensible if framed in terms of the reasons for requiring a "case or controversy" and for insisting that advisory opinions do not meet that requirement. From that perspective, there are good reasons why it does not make a difference that a statutorily created reward is offered. If all that was required to turn something into a case or controversy was a reward in the form of a sum of money, this could easily be provided in situations where someone wanted an advisory opinion about the constitutionality of a statute. The legislature would merely have to offer an award for the person who successfully mounts a challenge to a piece of legislation.

Justice Kavanaugh's opinion in *TransUnion* has its critics, of course.[258] But whatever the demerits of the principles underlying it, the Court's position is coherent, consistent, and unlikely to change. As a result, few Heartbeat Act plaintiffs are likely to satisfy the concrete harm requirement. Since the existence of a "concrete harm" is constitutionally necessary, cases brought under S.B. 8-type statutes will likely not qualify under the "case and controversy" standard of Article III.[259]

CONCLUSION

This Article begins by asking what would happen if one state sought to impose its views on sister states by dressing them up as requests for advisory opinions and then arguing that the resulting decisions were entitled to full faith and credit. It seems likely that this strategy would be widely, if not indeed universally, rejected. But we currently lack the tools to say why. Doctrinally, this argument is untenable because the earlier proceedings were inconsistent with the Article III case or controversy requirement. Yet, the commonsense reason is that we should not reward states that set out to dominate public discourse.

This Article has formulated its arguments mainly with "conservative" approaches to constitutional interpretation in mind. An argument that depends only on the exact wording of constitutional provisions and on documented historical facts has earned the support of

258 Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62 (2021); Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez?, 98 N.Y.U. L. REV. 269 (2021); Richard Pierce, *Standing Law Is Inconsistent and Incoherent*, YALE J. REGUL. ONLINE (2021).

259 *See TransUnion*, 594 U.S. at 427.

the key originalists and textualists in contemporary American legal culture.[260] Working with the most restrictive positions on constitutional interpretation results in a stronger argument, one able to withstand attacks from all sides of the political spectrum.

It is now more than two hundred years since the Full Faith and Credit Clause and its implementing Statute were adopted.[261] Yet, interstate judgments enforcement is still surprisingly uncharted territory. However, the relative lack of scholarly attention to the subject is not an indication of lack of practical importance, much less lack of theoretical significance. The bulk of the discussion above deals with issues that have never been studied (or even noticed), but their practical and theoretical importance cannot be doubted. When it comes to the Full Faith and Credit Clause, it is surprising what has been overlooked.

This Article addresses two of the less widely known reasons that a judgment from another state need not be enforced. The first of these is the Uniform Enforcement of Foreign Judgments Act, which radically alters the available defenses in the interstate judgments setting. As almost all states have adopted the Uniform Act, we should expect widespread application of the judgments law of the enforcing state. This may surprise people unfamiliar with conflict of laws doctrines but is clearly the correct result under the doctrine of renvoi.

The second half of this Article continues to surprise. The Full Faith and Credit Clause itself contains a good reason for denying enforcement to sister-state judgments. By its own wording, the Clause applies only to "judicial" proceedings, and under existing Supreme Court authority, these Texas judgments are not "judicial." In order to escape the threat of federal court injunction, the Texas legislature designed them so unlike "ordinary" cases that they do not qualify for federal guarantees of interstate enforcement. That is to say, by making them an inappropriate target for federal oversight at the jurisdictional stage, the Texas legislature unwittingly made them inappropriate candidates for federal support at the judgments phase. Poetic justice.

Some may say that the word "judicial" in Article IV does not deserve so much weight—its use was simply random or coincidental. A good textualist, it goes without saying, would not. It is difficult to maintain the claim that the adjective "judicial" in Article IV is insignificant when in Article III the word "judicial"—inserted into the text at the same time and by the same people—is celebrated as a code word for judicial restraint, moderation,

260 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

261 *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738.

and respect for the proper separation of power.[262] The U.S. Supreme Court has made clear the importance it attaches to the Article III reference to "[c]ases or [c]ontroversies" and to the traditional model of common law adjudication:

> These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted [sic] to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.[263]

There may be another explanation for what the word "judicial" was intended to mean when it was employed in the text of Article IV. There may be an explanation of why "judicial" is "a cardinal principle of free government" in one constitutional article but too insignificant to merit attention in the next one.[264] If so, the world is waiting.

Legal resolution of contentious issues such as the right to an abortion is almost guaranteed to provoke the bitterness of at least one party. When a state is required to enforce a judgment that runs counter to the deeply held beliefs of its people, the bitter taste may last a long time. The Full Faith and Credit Clause—along with its better-known sibling, Article III—has worked out an accommodation of the competing moral, legal, and political judgments. It embodies the virtues of the common law method of adjudication, aiming to keep the distribution of power roughly as it stood at the time that the Constitution was drafted. Of course, no accommodation imposed by the Full Faith and Credit Clause is likely to achieve anything deeper than simple tolerance of other states' profound differences—and even tolerance is probably too ambitious an objective. No legal solution will ensure an amicable resolution of the controversy over the right to reproductive freedom. That would be too much to expect of a mere constitutional provision, even the Full Faith and Credit Clause.

262 *See* U.S. CONST. art. III, § 1; U.S. CONST. art. IV, § 1.

263 Muskrat v. United States, 219 U.S. 346, 355 (1911).

264 *Id.*