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Toward a Constitutional Framework for the Control of State Court Jurisdiction*

Robert H. Abrams**
and Paul R. Dimond***

INTRODUCTION

The United States Supreme Court traditionally approaches issues of state court personal jurisdiction over nonresidents using a due process analysis.¹ When this analysis is based on considerations of fundamental fairness to the defendant, this limitation fits the due process clause's procedural core.² The due process rubric, however, has also been transformed into an "instrument of interstate federalism" under which conflicts between the states "as coequal sovereigns in a federal system" are adjudicated.³ This Article contends that the due process clause is wholly inapposite to these interstate federalism concerns. It proposes that state courts' extraterritorial reach instead should be constitutionally defined under the full faith

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1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1; *see, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Pennoyer v. Neff*, 93 U.S. 714 (1877); *cf.* 4 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 1065 (1969) (consent to personal jurisdiction may be given by the defendant); MICH. COMP. LAWS ANN. § 600.701 practice commentary (West 1981) (residence within the forum state is a sufficient basis for the valid exercise of personal jurisdiction).

2. *See infra* text accompanying note 48. *See generally* J. ELY, *DEMOCRACY AND DISTRUST* 14-21 (1980) (discussion of scope of due process clause). It is not the purpose of this Article to define what that core is; modern views on this question vary widely. Compare, for example, Abrams, *Power, Convenience and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 *IND. L.J.* 1, 57 (1982) (due process cannot be viewed as requiring stringent limitations on forum availability) with Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication*, 33 *MERCER L. REV.* 769, 771, 808-35, 849 (1982) (the purpose of due process in the context of personal jurisdiction is to assure parties a fair forum based on forum contacts).

3. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

and credit clause,⁴ with due process analysis limited to issues of fundamental fairness.⁵

Section I of this Article details the Supreme Court's interpretation of due process as a mechanism for protecting both fundamental fairness to the individual and the country's federal system. This section focuses on the history, purpose, and structure of the due process clause, concluding that due process's dual role is not compelled by the Constitution and is rendered unsound by the costs of merging the two functions. It further concludes that federalism issues raised by judicial assertions of extraterritorial jurisdiction are more appropriately resolved by Congress. Section II outlines a structure under which Congress has plenary power to legislate federalism dispute resolution, with the Supreme Court operating as interpreter of this legislation or as a common law mediator in the absence of legislation. It reviews the text and purposes of Article IV's full faith and credit clause and argues that the clause grants Congress the constitutional power to adopt the recommended structure. Section III describes specific and general congressional legislation that would eliminate potential interstate disputes by specifically defining the permissible reach of state court jurisdiction and addresses the proper role of the Supreme Court in resolving interstate disputes under the full faith and credit structure.

I. THE ROLE OF DUE PROCESS IN MEDIATING POTENTIAL INTERSTATE JUDICIAL FRICTION

A. THE JUDICIAL MERGER OF DUE PROCESS AND FEDERALISM CONCERNS

Due process focuses on the procedural regularity and the opportunities that must be afforded to defendants by the judicial process.⁶ It guarantees defendants "fundamentally fair" proceedings,⁷ with the right to timely notice and a meaningful opportunity to be heard before a neutral magistrate.⁸ State

4. U.S. CONST. art. IV, § 1.

5. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see also *infra* notes 54-102 and accompanying text.

6. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *In re Winship*, 397 U.S. 358 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

7. See *Fuentes v. Shevin*, 407 U.S. 67 (1972).

8. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 555-56

court assertions of extraterritorial jurisdiction violate these guarantees when the inconvenience and expense of responding to the suits prevent defendants from being heard and from participating in fundamentally fair proceedings.⁹ Modern due process analysis, however, also limits the extraterritorial reach of state courts when the jurisdictional assertions offend interstate federalism interests.¹⁰ This analysis does not turn on fairness and convenience to nonresidents, but on a state court's power to reach outside its state borders under a federal system.

The use of due process to determine interstate federalism concerns began with *Pennoyer v. Neff*,¹¹ a case involving no interstate dispute whatsoever. Rather, the Supreme Court addressed the extent to which a federal court sitting in the original forum state was required to give the state court's default judgment full faith and credit. Neff, an easterner, did not appear in an Oregon in personam action that alleged a failure to reimburse his Oregon attorney for services rendered. The Oregon court found personal jurisdiction on the basis of service of summons by publication. After entry of judgment, Neff's realty in Oregon was attached and subsequently sold to Pennoyer at a sheriff's sale. Neff, invoking diversity jurisdiction, sued in federal court to obtain possession of the land.¹² The

(2d ed. 1982); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 507-08, 532-56, 562-63 (1978).

9. See Lewis, *supra* note 2, at 808-14; Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1143 (1981).

10. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); Lewis, *supra* note 2, at 812-14.

11. 95 U.S. 714 (1877). See generally Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241; Redish, *supra* note 9, at 1115-16; Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pts. 1 & 2), 14 CREIGHTON L. REV. 499, 735 (1981).

12. The district court sustained Neff's challenge on the ground that the Oregon state court lacked jurisdiction over Neff because service of process by publication did not fully comply with Oregon's own procedure. *Neff v. Pennoyer*, 17 F. Cas. 1279, 1286-88 (D. Or. 1875) (No. 10,083). Consequently, the judgment was unenforceable in Oregon, and thus not entitled to full faith and credit elsewhere. *Id.* The Supreme Court disagreed, finding that Oregon courts would recognize and enforce the judgment and sale despite minor procedural irregularities. *Pennoyer v. Neff*, 95 U.S. at 721. Therefore, the judgment was entitled to "have such faith and credit given to [it] in every court within the United States as [it] ha[s] by law or usage" in Oregon, provided that the Oregon court had proper jurisdiction. *Id.* at 729 (quoting Act of May 26, 1790, ch. XI, 1 Stat. 122 (1790) (current version codified at 28 U.S.C. § 1738 (1976)) (legislation enforcing the full faith and credit clause of U.S. Const. art IV, § 1)). The Court, however, found the Oregon court unable to gain personal jurisdiction over Neff through service by publication alone. See *infra* notes 13-14 and accompanying text.

Supreme Court reasoned that, before the Oregon state court could obtain personal jurisdiction, Neff, a nonresident, must be served either with process within the forum state or by substituted service *after* seizure of his property.¹³ Neither was done in Neff's case, so the Oregon court's judgment was not entitled to full faith and credit in the federal court under the governing statute.¹⁴

The actual holding in *Pennoyer* is narrow: a state court's jurisdiction over the person and the dispute may be collaterally attacked, and, if the attack is successful, the court's judgment is not entitled to full faith and credit.¹⁵ The Court followed this holding, however, with dictum asserting that collateral attack is not the sole method for raising challenges to the sovereign authority of the forum state.¹⁶ Read in conjunction with the Court's discussion of state sovereignty limits based on territoriality,¹⁷ the opinion indicates that due process provides grounds for resisting assertions of personal jurisdiction on the basis of "interstate federalism." The opinion also implies, however, that these territorial limitations on state judicial power predate the fourteenth amendment's due process clause and are rooted in the law of nations and the structure of the nation announced in the United States Constitution.¹⁸

13. See *Pennoyer v. Neff*, 95 U.S. at 727.

14. *Id.* at 734. The Court also found that failure to attach the Oregon property before the original action prevented the Oregon state court from obtaining quasi in rem jurisdiction. *Id.* at 720.

15. The Court's finding that jurisdiction can be collaterally attacked is stated as a foregone conclusion:

In the earlier cases, it was supposed that the act [of May 26, 1790] gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter.

Id. at 729.

16. *Id.* at 722. The Court's discussion was unnecessary to its holding because the only issue was Neff's ability to collaterally attack the jurisdictional basis of the Oregon judgment. See *supra* text accompanying note 11.

17. See *Pennoyer v. Neff*, 95 U.S. at 720:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.

18. See *id.* at 723-25, 729-33; Redish, *supra* note 9, at 115-16. Such concerns may also be understood as judicial interpretation of the 1790 Act implementing the full faith and credit clause.

Pennoyer discusses territorial limitations inherent in a federal system at

Pennoyer v. Neff's infusion of "vague concepts of interstate sovereignty into the due process clause" has guided the Supreme Court's thinking throughout the ensuing century.¹⁹ Although the Court has abandoned the rigid territorial limits on sovereign power prescribed in *Pennoyer*,²⁰ its use of due process to restrict state sovereignty continues. For example, in *International Shoe Co. v. Washington*,²¹ the Court relied on *Pennoyer* in stating that the due process clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."²² Although the Court discussed litigant inconvenience as related to the issue of due process fairness to the defendant,²³ it still measured the "reasonableness" of the state court's exercise of jurisdiction "in

length, and does so well before any reference to the due process clause. Compare *Pennoyer v. Neff*, 95 U.S. at 720-26 (examining federalism restrictions on state court jurisdiction) with *id.* at 733 (examining due process restrictions on obtaining jurisdiction by service of process). In the first paragraph discussing the due process clause, the Court states:

[Due process means] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Id. at 733. *Pennoyer* does not indicate that due process in and of itself requires intraterritorial service of process or substituted service of process after seizure of property within the state. Due process considerations, if they are involved at all, constrain the use of process to obtain jurisdiction on procedural fairness grounds. Territorial restraints relate to due process only to the extent that they are proxies for fairness.

Although *Pennoyer's* merger of federalism concerns into due process analysis is objectionable dictum, see *infra* notes 39-63 and accompanying text, one of the authors of this Article generally supports the emphasis *Pennoyer* gave to territorial power as an indicium of when a sovereign may insist that a defendant appear in its courts. See *Abrams*, *supra* note 2. The issue of whether substantial presence within a sovereign's territory renders the sovereign's exercise of *in personam* jurisdiction fundamentally fair, however, has little bearing on the issue under discussion in this Article, i.e., the methods for resolving interstate frictions spawned by state courts' assertions of extraterritorial jurisdiction.

19. Redish, *supra* note 9, at 1113-14.

20. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945) (territorial presence not required if "minimum contacts" exist between defendant and forum).

21. 326 U.S. 310 (1945).

22. *Id.* at 319.

23. *Id.* at 316-17.

the context of our federal system."²⁴ The Court stated this reliance on interstate federalism more emphatically in *Hanson v. Denckla*,²⁵ noting that the existence of minimum contacts reflects considerations of the "territorial limitations of the power of the respective states" and does not turn on considerations of fairness and convenience to nonresident defendants.²⁶

While the Supreme Court unequivocally confirmed the role interstate federalism plays in due process determinations in its recent decision in *World-Wide Volkswagen Corp. v. Woodson*,²⁷ other decisions indicate that this role may be declining in significance. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*²⁸ signals a potential future divorce of the

24. *Id.* at 317.

25. 357 U.S. 235 (1958).

26. *Id.* at 251.

27. 444 U.S. 286 (1980). The Court in *World-Wide Volkswagen* concluded that due process's demand for minimum contacts served two alternative ends. First, it protected defendants against unfair "burdens of litigating in a distant or inconvenient forum." *Id.* at 292. Second, it limited state courts' assertions of extraterritorial jurisdiction "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* The Court concluded that even if no inconvenience resulted to the defendant and the state had a strong interest in the controversy, the due process clause, "acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294.

World-Wide Volkswagen involved an action brought in Oklahoma state court for damages sustained when an allegedly defective automobile burst into flames after being involved in an accident, severely burning the plaintiffs. The plaintiffs had purchased the car in New York, from a New York retailer, while they were New York residents. They were driving through Oklahoma to Arizona when the accident occurred. In addition to naming the foreign manufacturer and the American importing company as defendants, the suit named both the New York retailer and its wholesaler, neither of whom did business in Oklahoma. The Supreme Court found that due process forbade the Oklahoma court from exercising in personam jurisdiction over the latter two defendants.

The basis for the Court's finding of a due process violation, however, is confused. Jurisdiction was apparently denied because of the total lack of contacts between the defendants and the forum. *See id.* at 295. Whether this lack of contacts violates procedural fairness or interstate sovereignty is unclear from the Court's opinion. The Court's recitation of the "parade of horrors" that would confront the sellers of chattels if jurisdiction were allowed suggests a procedural unfairness rationale. *See id.* at 296. However, interstate federalism language, such as that quoted above, dominates the decision, making it a fair conclusion that jurisdiction was denied to protect interstate federalism. Further, because Oklahoma was the state where the accident occurred and witnesses were to be found, it was a logical and relatively convenient forum with a strong interest in applying its own law to the case. Thus, it seems that un-stated federalism concerns likely influenced the refusal to permit Oklahoma jurisdiction over the objecting defendant.

28. 456 U.S. 694 (1982). *Insurance Corp. of Ireland* involved a breach of contract suit brought in a Pennsylvania federal court seeking excess insurance proceeds for business interruption losses. The foreign insurers defended by as-

interstate federalism and due process analyses. The Court's description of the due process inquiry in *Insurance Corp. of Ireland* stressed that personal jurisdiction represents a restriction on judicial power as a matter of individual liberty, and not as a matter of sovereignty.²⁹ This critical departure from previous articulations of due process requirements is discussed in a footnote:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other states. . . . The restriction on state sovereign power . . . , however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.³⁰

The Court's retreat from the strict application of the feder-

serting the court's lack of in personam jurisdiction. *Id.* at 701-02. Plaintiffs pursued discovery to establish that the insurers had sufficient contacts with Pennsylvania to support jurisdiction. *Id.* at 698. The insurers refused to comply with the discovery requests, despite the court's warning that continued refusal would result in an order finding personal jurisdiction for the purposes of the suit. *Id.* at 699. The Supreme Court upheld the eventual imposition of this sanction, finding that the insurers' actions amounted to a legal submission to the court's jurisdiction. In the process of its analysis, the Court carefully delineated the differences between subject matter jurisdiction and personal jurisdiction and the constitutional constraints each places on the federal courts. *Id.* at 701-02. The Court's discussion of the role federalism concerns play in due process arose in the context of this analysis.

29. *Id.* at 702. This action was brought in federal rather than state court. In a concurring opinion, however, Justice Powell states that, absent a specific rule or statute establishing a federal basis for personal jurisdiction, the same jurisdictional standards apply to federal courts and to the courts of the states in which they sit. These standards include the due process-based federalism concerns articulated in *World-Wide Volkswagen*. *Id.* at 711-12 (Powell, J., concurring).

30. *Id.* at 702 n.10. This part of the Court's opinion was adopted by eight Justices. Justice Powell concurred in the result but dissented strenuously from this part of the opinion. *See id.* at 713 (Powell, J., concurring).

A recent choice of laws decision, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), indicates that Justice Stevens strongly supports separating federalism concerns from due process in that context. Justice Stevens's concurrence in *Hague* urges that the due process inquiry relates only to unfair surprise to litigants in a court's choice of governing law. *Id.* at 327. The federalism concerns implicated by a state's refusal to apply another state's laws in a suit is a separate and unrelated inquiry. *See id.* at 322. Justice Stevens asserts that such questions of state sovereignty must instead be addressed under the full faith and credit clause, *see id.*, the same assertion made by this Article, *see infra* notes 65-102 and accompanying text.

alism concerns in the due process analysis is highlighted in *Keeton v. Hustler Magazine, Inc.*³¹ In *Keeton*, the plaintiff brought a diversity suit in a New Hampshire federal court alleging defamation by defendant's nationally circulated magazine. Neither party resided in New Hampshire, and only a small percentage of the magazines were sold there.³² In analyzing the personal jurisdiction issue raised by these facts, the courts apply the general federal diversity rule that treats such issues as if they had been raised in state court.³³ The First Circuit rejected the district court's assertion of jurisdiction on federalism grounds, stating that "the New Hampshire tail is too small to wag so large an out-of-state dog."³⁴ The Supreme Court, however, sustained the state's jurisdiction over the defendant, making no allowance for these federalism concerns. The Court's opinion stresses that the defendant suffered no due process unfairness in answering "for the contents of that publication wherever a substantial number of copies are regularly sold and distributed."³⁵ *Keeton's* discussion of federalism concerns does obliquely imply that due process requires less forum state contact in suits with little extraterritorial impact.³⁶ Despite this comment, however, the decision pays federalism concerns scant attention, and in fact appears to ignore its own statements on the role of interstate federalism in due process analysis. Not only were the forum state contacts in *Keeton* slight, but a prior Ohio judgment had dismissed *Keeton's* claims based on the same publication.³⁷ The case thus

31. 104 S. Ct. 1473 (1984).

32. *Id.* at 1477. Plaintiff's choice of New Hampshire as a forum state undoubtedly stemmed from the fact that New Hampshire has the nation's longest statute of limitations for defamation actions. On the date of filing, New Hampshire was the only state in which the action was not barred. *See id.*

33. *See* *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 222-23 (2d Cir. 1963). For an extended critique of the "general rule," see generally *Abrams, supra* note 2.

34. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 36 (1st Cir. 1982).

35. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. at 1482.

36. *Id.* at 1478 ("[I]t is certainly relevant to the jurisdictional inquiry that petitioner is seeking to recover damages suffered in all States in this one suit. The contacts between respondent and the forum must be judged in light of that claim, rather than a claim only for damages sustained in New Hampshire."). This discussion implies that fewer contacts would be constitutionally necessary to sustain personal jurisdiction had the plaintiff sought damages only for those injuries sustained in New Hampshire.

37. In the prior Ohio action, a judgment of dismissal was entered after a finding that the action was barred by the statute of limitations. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d at 33. The federal district court, sitting in diversity, adopted the New Hampshire choice of law rule that viewed the prior dismissal as procedural and did not give it conclusive weight. Nor was New Hampshire

presented both strong federalism concerns arising from its de facto circumvention of the Ohio judgment and substantial extraterritorial impact through its validation of a damage award representing injuries suffered in all states receiving the defamatory publication.³⁸ The Court's avoidance of federalism concerns reflects their diminishing role in due process analysis and demonstrates the need for clarification of the current status of these concerns.

B. THE COSTS OF MERGING DUE PROCESS AND FEDERALISM CONCERNS

The Court's continued reliance on *Pennoyer's* dictum raises several practical, jurisprudential, and constitutional problems, each of which takes its toll on the effective functioning of the judicial system. First, the bases for the Court's limitations of state court jurisdiction are invariably muddled. Although the Court states the concern for procedural fairness and the defendant's convenience and the concern for interstate federalism separately,³⁹ it never isolates these factors when judging whether the extraterritorial assertions of jurisdiction meet the due process requirements,⁴⁰ and no clear guidelines emerge. When this failure is coupled with the Court's own confusion,⁴¹

bound to follow Ohio's statute of limitations because New Hampshire is one of the few states that has not adopted the Uniform Reciprocal Statute of Limitations Act, an Act that borrows other states' shorter limitation periods in this situation.

38. Under the single publication rule, the entire edition of the magazine is treated as only one publication. This doctrine allows the plaintiff to prove mere general distribution of the libel and to show the extent of distribution, *including distribution in other states*, as an indication of damages. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 113 (1984).

39. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

40. See, e.g., *id.* *World-Wide Volkswagen* is distressingly unclear as to whether the Oklahoma court's assertion of jurisdiction violated due process because Oklahoma had too little interest in the case, because it was too burdensome and inconvenient for the New York retailer to defend in Oklahoma, or because Oklahoma was somehow attempting to intrude on New York's sovereign authority over its local retailers. See *supra* note 27.

41. See *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984), where the Court appears to have difficulty defining the role federalism concerns occupy in due process jurisprudence and the application of that role in the case sub *judice*. See *supra* text accompanying notes 36-37. Compare *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (both unfairness and federalism restrict extraterritorial exercises) with *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 & n.10 (1982) (federalism is not an independent restriction on the sovereignty of the court). But see *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322-32 (Stevens, J., concurring) (defining his view of the separate roles of due process and federalism).

prediction of future due process applications becomes impossible.⁴² Ultimately, this morass generates costly and wasteful threshold litigation over state court exercises of jurisdiction.

Second, the entities presumably suffering from state courts' overextensions of jurisdiction are those states whose interests in the federal system are encroached upon. The states, however, exhibit a curious lack of complaint regarding sister states' assertions of extraterritorial jurisdiction.⁴³ Instead, a private party usually seeks to defend itself by claiming, in essence, to represent the absent state's sovereignty interest. Not only does this stand the paradigm of states as *parens patriae* on its head,⁴⁴ but it conflicts with credible evidence that most affected states would not object to a sister state's use of a long-arm statute to gain personal jurisdiction.⁴⁵ Thus, federalism does not justify allowing an individual to assert the state's supposed interest as a personal due process right when the state could, if it wished, intervene in the suit or otherwise indicate that it perceives extraterritorial jurisdiction as an affront to its state sovereignty.

Third, the Court's use of the due process clause as an instrument of interstate federalism does not fit the historic structure of judicial review. In interpreting the content of due process, the Court acts as the final arbiter of the constitutional requirements.⁴⁶ Neither Congress nor the states can revise the

42. For an example of how prediction is simplified when the personal jurisdiction inquiry is reduced to issues of fairness and convenience alone, see generally *Abrams*, *supra* note 2. One result of this reduction is that it permits courts to consider means of mitigating the hardships of distant litigation rather than insisting on dismissal. *Id.* at 36; see also *infra* note 110.

43. Virtually all states have enacted long-arm statutes extending jurisdictional reach to its furthest constitutional limit. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); MINN. STAT. § 543.19 (1982); N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1972 & Supp. 1983-84); N.C. GEN. STAT. § 1-75.4 (Supp. 1981); VA. CODE § 8.01-328.1 (1984). The legislative adoption of any long-arm statute by state officers sworn to uphold the federal constitution, U.S. CONST. art. VI, indicates the belief that extraterritorial assertions of jurisdiction are constitutionally permissible, at least to the extent of the statute adopted.

44. *Parens patriae* is the doctrine that a state may represent the interests of its citizens in litigation that touches on their combined individual or collective rights. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972). Litigation conducted by a state on behalf of its citizens subsumes their individual interests. Cf. *Abrams*, *Interbasin Transfer in a Riparian Jurisdiction*, 24 WM. & MARY L. REV. 591, 610-11 (1983) (the norm in apportioning water rights among competing users in different states is for a state to initiate the litigation).

45. See *supra* note 43; see also J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 203-05 (1980).

46. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1802); J. CHOPER, *supra* note 45, at 199; J. NOWAK, *supra* note 8, at 1-21.

outcome. Congress may pass legislation that "enforces" or "extends" the requirements, but it may not "dilute" them.⁴⁷ The Court's primacy in interpreting the minimum constitutional protection afforded *individuals* under the due process clause is consonant with its traditional role as a judicial counterweight against imbalances of political power and majoritarian tyranny.⁴⁸ The Court drastically departs from the normal power allocation, however, when it allows due process to limit state courts' extraterritorial jurisdiction on federalism grounds. Congress, not the Court, is invariably the final arbiter of interstate frictions, whether it be under the commerce clause,⁴⁹ the compact clause,⁵⁰ or the full faith and credit clause.⁵¹ Although the Court often serves as a forum of first instance when Congress has not spoken, it openly acknowledges the power of subsequent congressional modification of interstate legal relations.⁵²

47. See *Oregon v. Mitchell*, 400 U.S. 112, 250 n.32 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); U.S. CONST. amend. XIV, § 5. There is an alternative view that would generally defer to congressional exercises of power under § 5 by interpreting the word "enforce" as removing any limits on such power. See L. TRIBE, *supra* note 8, at 272, 272 n.61; Cohen, *Congressional Power To Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 620 (1975). Even under this view, however, otherwise plenary congressional enforcement power is still constrained, for example, by the fifth amendment's due process clause. See *id.* Under either view of the proper structural limits on congressional power, judicial interpretations of due process under the fourteenth amendment would not be subject to congressional reversal or dilution.

48. See J. CHOPER, *supra* note 45, at 64-65; J. ELY, *supra* note 2, at 50.

49. See J. CHOPER, *supra* note 45, at 205-09. Dean Choper correctly notes a distinction between the roles of individuals' challenges in due process federalism cases and in interstate commerce clause federalism cases. Nonresident individuals and national interests are not represented in state legislative decision making, so some national forum is needed to insure that the state has not trammelled the constitutional limits of the interstate commerce clause. The Supreme Court, however, does not act as the final arbiter of these interstate issues; its results are subject to congressional revision. *Id.* at 205-08. Compare *Leisy v. Hardin*, 135 U.S. 100 (1890) (state liquor regulation runs afoul of dormant commerce clause) with *In re Rahrer*, 140 U.S. 55 (1891) (congressional exercise of power authorizes state liquor regulation); compare *City of Milwaukee v. Illinois*, 406 U.S. 91 (1972) (federal common law could give rise to claim for abatement of nuisance of interstate water pollution) with *City of Milwaukee v. Illinois*, 451 U.S. 301 (1981) (congressional action has preempted federal common law in area of interstate water pollution).

50. U.S. CONST. art. I, § 10, cl. 3; *Texas v. New Mexico*, 103 S. Ct. 2558, 2561 (1983).

51. See *infra* notes 89-102 and accompanying text.

52. See, e.g., cases cited *supra* note 49; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-80 (1945); Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). The roles of the Court and Congress in resolving tensions of interstate federalism can be understood in another way that leads to the same power allocation. In the absence of congressional legislation, the Court in the first instance posits a constitutional right in interpreting the constitutional structure with respect to the particular state action. Once Congress speaks

Congress thus retains the ultimate power to establish alternative policies to control federalism concerns, and the Court's reliance on due process to limit state sovereignty by restricting state court jurisdiction is an aberrant allocation of power between the Court and Congress.⁵³

These flaws, when viewed in the aggregate, indicate that due process analysis is an inappropriate means of addressing federalism concerns raised by the extraterritorial reach of state court jurisdiction. Moreover, the due process clause makes no mention of federalism concerns, as recognized by the Supreme Court in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,⁵⁴ nor do the congressional debates on the clause refer to resolving such interstate tensions.⁵⁵ This omission cannot be dismissed as resulting from unfamiliarity with the potential for interstate strife over the issue; conflicts involv-

pursuant to enumerated and plenary power, the Court then reviews such congressional action pursuant to the rational basis/appropriate means test first articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819). See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); L. TRIBE, *supra* note 8, at 401-09.

53. Some other occasional invocations of due process limit state power in other contexts, most notably in apportionment of state taxation of multistate activity. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 8, at 282-361. Those cases, however, are decided as well under commerce clause analysis. *Id.* Moreover, the Court defers to subsequent congressional redetermination of the issues involved. Compare *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959) (due process not violated by state tax on foreign corporation when tax is fairly apportioned and where taxpayer engages in substantial income producing activity in the state) and 15 U.S.C. § 381 (1982) (no state shall have the power to tax income derived from interstate commerce if solicitation of orders is taxpayer's only business activity within the state) with *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 280 (1972) (purpose of § 381 is to define clearly a lower limit for the exercise by a state of its power to tax income of foreign corporation so long as tax is fairly apportioned to taxpayer's activity within state); compare *McCarran-Ferguson Act* § 2, 15 U.S.C. § 1012 (1982) (no act of any state shall be construed to invalidate or supersede any state law regulating or taxing the business of insurance) with *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430-31 (1946) (effect of McCarran Act is to sustain state tax imposed on foreign insurers even on assumption that failure to require similar tax on domestic insurers may constitute a discrimination against interstate commerce). Like the jurisdiction cases, these cases are unsound to the extent that they still embrace the due process rationale.

54. 456 U.S. 694, 702 n.10 (1982); see *supra* notes 28-30 and accompanying text.

55. The relatively sparse debates, however, do address the issue of national versus state power in protecting individual rights. See, e.g., CONG. GLOBE, 42nd Cong., 1st Sess. 697, App. 83-84, App. 153 (1871) (Reps. Edmunds, Garfield & Bingham, respectively, discussing 1871 Civil Rights Act); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (Rep. Bingham discussing fourteenth amendment); CONG. GLOBE, 39th Cong., 1st Sess. 2459-60 (1866) (Rep. Stevens discussing fourteenth amendment); CONG. GLOBE 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson discussing 1866 Civil Rights Act).

ing judicial jurisdiction were well known by the states in the pre-Civil War era.⁵⁶ Nevertheless, the text and legislative history relate only to the individual's constitutional rights to state enforcement of constitutional duties and not to the rights of one state against another.⁵⁷

II. A PROPOSED SOLUTION UNDER THE FULL FAITH AND CREDIT CLAUSE

A. A RECOMMENDED STRUCTURE

This Article contends that the ultimate responsibility for resolving federalism concerns over state courts' extraterritorial jurisdiction should rest not with the Supreme Court but with Congress, a body institutionally better equipped to legislate federalism outcomes that are sensitive to the needs of the states.⁵⁸ This structure not only conforms to the traditional allocation of power between the Court and Congress⁵⁹ but more faithfully adheres to the text and intent of the due process clause. The due process clause should not be burdened with the baggage of resolving speculative interstate disputes over state court assertions of extraterritorial jurisdiction;⁶⁰ it is bet-

56. Specifically, jurisdiction involving runaway slaves was a divisive issue between the states. *See, e.g., Lewis v. Fullerton*, 22 Va. Rep. (1 Rand.) 15 (1821); *see also Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611-12 (1842) (no state before Constitution's adoption had power over slaves except within state's own territorial limits); *cf. R. BERGER, GOVERNMENT BY THE JUDICIARY* 61, 222-26 (1977) (arguing that Congress had to be aware of jurisdictional issues due to the North's burning resentment of judicial enforcement of the federal fugitive slave clause).

57. *See, e.g., R. BERGER, supra note 56; Dimond, Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 494-502 (1982); Redish, *supra* note 9, at 1121.

58. *Cf. supra* notes 49-51 and accompanying text (Congress is final arbiter of most interstate conflicts).

59. *See supra* notes 46-53 and accompanying text.

60. *But see Brilmayer, How Contacts Count: Due Process Limitations On State Court Jurisdiction*, 1980 SUP. CT. REV. 77. The thesis of this Article is not wholly at odds with Professor Brilmayer's defense of the interstate sovereignty aspects of the *World-Wide Volkswagen* case. The primary ground of disagreement between Professor Brilmayer's position and this Article is nonetheless an important matter of constitutional structure—whether the issues of interstate federalism should be resolved under the full faith and credit clause rather than under the due process clause. The thesis of this Article favoring full faith and credit permits the Court to make a resolution subject to revision by the Congress. Indeed, a number of the interstate sovereignty concerns adduced by Professor Brilmayer coincide with this Article's suggestions for congressional and judicial action under the full faith and credit clause. *Compare id.* at 84-86 *with infra* notes 103-48 and accompanying text.

ter reserved for the protection of the individual right to a fair proceeding providing notice and opportunity to be heard.

Under the proposed restructuring of jurisdictional dispute resolution, the Supreme Court would interpret state jurisdiction limitations under congressionally established standards or, in the absence of legislation, under federal common law.⁶¹ Nonresident defendants could challenge the *fairness* of state court assertions of jurisdiction directly in the forum court. Unless Congress or the Court specifically provided otherwise, however, a defendant could challenge correlative limits on state sovereignty only by collateral attack in the enforcement proceedings of states other than the forum state. The Supreme Court would then referee any federalism disputes resulting from the enforcement court's ruling.

This framework eliminates most, if not all, of the difficulties created by due process enforcement of federalism limitations, while preserving the due process protection of fairness and convenience for nonresident defendants. By separating the concerns of federalism and fundamental fairness, the Court could avoid decisions such as *World-Wide Volkswagen*⁶² and *Keeton*,⁶³ in which the Court's reasoning is obvious only to itself. The Court could instead focus its energy on clearly defining the fundamental fairness right. At the same time, the proposal allows the Court to referee interstate federalism disputes arising from jurisdiction claims only after a collateral ruling raises an actual dispute, when the affected states' positions are more clearly established. Finally, Congress remains free to legislate results different from those reached in the Court's provisional decisions.

This proposal is of negligible value, of course, if it cannot be implemented. This Article contends that Congress has the constitutional power to adopt the recommended structure for governing interstate jurisdictional disputes. The exercise of this power is not only demanded by the problems just ex-

61. Cf. *infra* text accompanying notes 95-99 (analogous operation of commerce clause).

62. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); see *supra* note 27.

63. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984); see *supra* notes 31-37 and accompanying text. The result in *Keeton*, affirming New Hampshire jurisdiction over a nationally distributed magazine, would remain the same. Indeed, on facts like those in *Keeton*, it is easy to conclude that the sister state forum poses no unfairness violating due process. The federalism issues, which would be delayed for subsequent independent review, pose all of the difficult questions.

amined⁶⁴ but is authorized by the text and purposes of the constitutional provision conferring the power on Congress—the full faith and credit clause.

B. THE INTENT AND STRUCTURE OF THE FULL FAITH AND CREDIT CLAUSE

In contrast to the vigorous controversy surrounding the proper bounds of due process,⁶⁵ the Article IV full faith and credit clause⁶⁶ has generated little debate regarding its meaning and application.⁶⁷ The clause's primary purpose is concededly to mediate interstate frictions through a system in which states' laws and judgments are respected and enforced by sister states.⁶⁸ Beyond this, however, the clause's precise meaning and proper operation are clouded in several respects important to its use in overseeing state court assertions of judicial power. These open issues include the extent to which the clause controls the enforcement of judgments in sister states

64. See *supra* notes 39-53 and accompanying text.

65. Compare *Palko v. Connecticut*, 302 U.S. 319, 323 (1937) (fourteenth amendment does not prohibit as state action all that would be violative of the Bill of Rights if done by federal government) and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 173 (1949) (in absence of adequate support for incorporation theory, attempt to read Bill of Rights into fourteenth amendment is simply an effort to put into the Constitution what the framers failed to put there) with *Adamson v. California*, 332 U.S. 46, 70-92 (1947) (Black, J., dissenting) (fourteenth amendment intended to make Bill of Rights applicable to the states) and *Duncan v. Louisiana*, 391 U.S. 145, 162-71 (1968) (Black, J., concurring) (both sponsors and opponents of fourteenth amendment believed it made bill of rights applicable to the states); compare *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (due process clause protects individual right to privacy against state action) with *id.* at 172-73 (Rehnquist, J., dissenting) (privacy is a liberty interest not guaranteed absolutely against deprivation, only against deprivation without due process of law).

66. The text of the full faith and credit clause reads:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

67. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Sumner, *The Full Faith and Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224 (1955).

68. See Nadleman, *Full Faith and Credit to Judgments and Political Acts*, 56 MICH. L. REV. 33, 62-71 (1957); Whitten, *supra* note 11, at 555-56. *But cf.* Redish, *supra* note 9, at 1136 (suggesting that full faith and credit be used only as a limit on choice of law, not as a federalism-mediating device more generally). Redish, however, proposes this restriction on full faith and credit's role as a matter of pragmatism; in modern times, the choice of law issue is a source of more interstate friction than is the jurisdictional issue. *Id.* at 1136-37.

and the respective roles of the Supreme Court and Congress in overseeing the clause's general command.

The full faith and credit clause literally imposes an unqualified rule that all state court judgments must be respected by sister state courts.⁶⁹ When combined with the supremacy clause of the constitution,⁷⁰ the full faith and credit clause is a self-executing definition of one aspect of state sovereignty. Refusal to respect sister state judgments violates the supreme law that all state court judges are sworn to uphold.⁷¹ Each state, however, is assured of similar respect for its own judicial processes. The clause thus advances the states' power in rendering judgments while limiting the states' power in fashioning independent rules regarding recognition of sister state judgments. Despite the facial clarity of the clause, however, its precise scope cannot be assayed from the text alone.⁷²

The full faith and credit clause first appears in the Articles of Confederation,⁷³ where it was inserted at the last moment.⁷⁴ At the time of the Articles' adoption, courts did not give conclusive weight to foreign judgments.⁷⁵ In his thorough study, Professor Ralph U. Whitten found that eighteenth century colonial and English practice accorded foreign judgments mere evidentiary weight, a shift from the earlier practice of according such judgments *res judicata* effect if the original tribunal had jurisdiction.⁷⁶ Whitten concludes that, given the general desire of the Articles' draftsmen to preserve state autonomy, the Articles

69. See *supra* note 66.

70. U.S. CONST. art. VI, cl. 2.

71. All state judges take an oath to "support the constitution of the United States." U.S. CONST. art. VI, cl. 2; see, e.g., MINN. CONST. art. V, § 6.

72. The major uncertainties include the meaning of giving "faith and credit" and the possibility that exceptions exist to the facially absolute command.

73. "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other state." ARTS. OF CONFED. art. IV.

74. Jackson, *supra* note 67, at 3-4; Sumner, *supra* note 67, at 229-30.

75. Sumner, *supra* note 67, at 226. Several articles canvass this material in detail and as a matter of original research. The text of this discussion is distilled from these works. See Jackson, *supra* note 67, at 3-7; Nadleman, *supra* note 68, at 34-59; Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 NW. U.L. REV. 1 (1944); Sumner, *supra* note 67, at 224-41; Whitten, *supra* note 11, at 523-55.

76. Whitten, *supra* note 11, at 509-10. In the preconstitutional United States, foreign judgments could include a sister state's judgment. Even within England some English courts treated the judgments of other English courts as the equivalent of foreign judgments. This practice can be explained as a result of the jealousies between the many English court systems (manorial, ecclesiastical, law, and chancery).

of Confederation provision was intended only to impose a similar rule of evidence, not to require conclusive effect on the merits for sister state judgments.⁷⁷

In contrast, the historical record and text of the full faith and credit clause as included in the Constitution indicates the intent to grant *res judicata* effect to sister state judgments. The same historical materials that show the limited respect given to foreign judgments⁷⁸ also demonstrate that eighteenth century England gave conclusive effect to judgments of "courts of record."⁷⁹ More significantly, the framers at the Constitutional Convention altered the wording and import of the full faith and credit clause through several drafts. The advisory "Full Faith and Credit ought to be given" found in an early draft was replaced by the mandatory "Full Faith and Credit shall be given."⁸⁰ Moreover, language was added granting Congress the power to prescribe the manner of proof and the effect of state acts, records, and proceedings.⁸¹ These modifications highlight the framers' intent to overcome the shortcomings of the Articles of Confederation by resort to a strong national government with a corresponding reduction in state autonomy, an intent confirmed by James Madison during the ratification process.⁸²

The unqualified power of Congress to prescribe the effect of judgments in sister states conceivably allows for federal mandates demanding that such judgments be accorded conclusive weight. Indeed, Madison noted that the clause prevented

77. *Id.* at 541:

Although the use of the modifier "full" with the evidentiary terms "faith" and "credit" might suggest a desire to establish a *res judicata* effect for state judgments in sister states, the general problem concerning the colonies before the Articles [of Confederation] seems to have been one of reception *per se* of sister-colony judgments as evidence. More importantly, it seems unlikely that the draftsmen of the Articles would have been willing to prescribe a conclusive effect on the merits for sister state judgments, given their general desire to preserve state autonomy.

78. See *supra* notes 75-77 and accompanying text.

79. Radin, *supra* note 75, at 11. Even judgments rendered by courts of other nations were given some respect and were allowed to serve as *prima facie* evidence of the matters that had been previously decided. *Id.*

80. 2 M. FARRAND, RECORDS OF FEDERAL CONVENTION OF 1787, at 489 (1911); see also Costigan, *The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of That Section and of Federal Legislation*, 4 COLUM. L. REV. 470, 473 n.1 (1904) (chronicles development of language of clause). Note, however, that the Articles of Confederation provision also contained the mandatory "shall be given." Whitten, *supra* note 11, at 543.

81. 2 M. FARRAND, *supra* note 80, at 448; see also *supra* note 66 (text of language).

82. THE FEDERALIST No. 42 (J. Madison).

persons from secreting assets liable to execution in a neighboring state as they had previously done,⁸³ an example which holds true only if the original judgment is given *res judicata* effect.⁸⁴ Moreover, this effect is consistent with the framers' intent to promote unification of the separate states.

The first Congress, which included many of the framers of the Constitution,⁸⁵ exercised the implementing power granted by the full faith and credit clause⁸⁶ and affirmed the clause's nationalizing intent. The statute adopted required that the effect of sister state judgments be the same "as they have by law or usage" in the state of rendition.⁸⁷ To the extent that the rendering state would refuse to reexamine the merits, courts throughout the nation must likewise refuse. The historical record and text of the clause thus indicates that the clause can be interpreted to give *res judicata* effect to sister state judgments, with the enforcing court able to refuse enforcement only where federal law or the law of the rendering state so permit.⁸⁸

Recognizing this nationalizing role aids in understanding the relative powers of Congress and the Supreme Court in resolving interstate frictions in the federal system. As indicated, the clause expressly grants *Congress* the power to define the manner of proof and the effect to be given to state court judgments.⁸⁹ The power granted is unqualified and encompasses the ability to establish exceptions to the general rule of

83. *Id.*

84. If *res judicata* effect is given to the original judgment, then the judgment debtor gains no legal advantage by secreting assets in the sister state. In contrast, if mere evidentiary effect is given to the original judgment, the possibility emerges that relitigation of the merits in a second forum would have a different result. In any event, both the added cost of a nonsummary procedure and the increased uncertainty of result inure to the benefit of debtors seeking to avoid payment of previously entered judgments.

85. C. ROSSITER, 1787: THE GRAND CONVENTION 301 (1966). According to Rossiter, nineteen of the framers were elected to the first Congress from the eleven participating states. Eleven were senators and eight were representatives. *See id.*

86. Act of May 26, 1790, ch. 11, 1 Stat. 122 (*codified as amended at 28 U.S.C. § 1738* (1982)).

87. *Id.* The Act provides in relevant part: "[T]he said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." *Id.*

88. *But see* Whitten, *supra* note 11, at 542-70. Professor Whitten contends that Article IV's full faith and credit clause, as well as its implementing statute, declares only that judgments are admissible as *evidence* in sister state proceedings and does not mandate *res judicata* effect for the judgments. *See id.*

89. U.S. CONST. art. IV, § 1.

unflagging respect for sister court judgments.⁹⁰ The clause, undeniably concerned with interstate judicial disputes, selects Congress as the ultimate arbiter of such disputes.

Congress's role in resolving state sovereignty concerns is familiar. Article I of the Constitution gives Congress plenary power to mediate in numerous areas prone to interstate friction, including interstate commerce.⁹¹ The decision whether to enforce a sister state statute or judgment likewise presents great potential for interstate dispute. A refusal to enforce effectively negates the sister state's legislative⁹² or judicial⁹³ process. Congress's plenary power to legislate resolution of such disputes closely parallels its power under the commerce clause to compel state obedience to national policies that reconcile competing state interests.⁹⁴

The full faith and credit clause does not speak to the Supreme Court's role in resolving interstate judicial disputes. The similarity between Congress's power under this clause and the commerce clause, however, suggests extension of the parallel to define the Court's appropriate role in full faith and credit jurisprudence.

As Dean Jesse Choper's persuasive work demonstrates, "the Court does *not* exercise the momentous power of judicial review" in areas such as the dormant commerce power.⁹⁵ In the absence of clearly controlling federal legislation, the Court resolves interstate commerce disputes as a common law tribunal, creating policies to further national uniformity on a case-by-case basis.⁹⁶ Congress, however, retains the power "to

90. See Sumner, *supra* note 67, at 238-39; Whitten, *supra* note 11, at 603-05.

91. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 336 (1819); J. CHOPER, *supra* note 45, at 190-92; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543-45 (1954). Other areas of potential interstate strife in which Congress is given plenary power under Article I include interstate compacts, imports and exports, banking, money, bankruptcy, and naturalization. U.S. CONST. art. I.

92. See, e.g., *Nevada v. Hall*, 440 U.S. 410 (1979).

93. See, e.g., *Durfee v. Duke*, 375 U.S. 106 (1963); *Hanson v. Denckla*, 357 U.S. 235 (1958).

94. See, e.g., *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184, 191 (1964) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824)) (Court expressly concedes commerce is subject to plenary congressional control); *Houston, E. & W. Ry. v. United States (Shreveport Rate Case)* 234 U.S. 342, 350 (1914) (noting that where the power of Congress exists "it dominates" and is "not left to be destroyed or impeded by the rivalries of local governments").

95. J. CHOPER, *supra* note 45, at 207 (emphasis in original).

96. *Id.* at 207-08.

speak the final constitutional word" by enacting ordinary federal statutes.⁹⁷ Under this constitutional structure, the Court is merely a national forum for the provisional resolution of interstate frictions that arise from the parochial self-interests of the states.⁹⁸ The Congress, representing interests of all people and all states, retains plenary power to revise or to reverse the Supreme Court's policies.⁹⁹

Basing the Court's full faith and credit role on this model results in a secure and familiar footing for initial judicial reconciliation of interstate federalism issues under full faith and credit challenges. The Supreme Court's role in fashioning federal common law for interstate dispute resolution is well established in the commerce clause and other contexts.¹⁰⁰ More important than the familiarity of the Court's role as interstate mediator, however, is the structural commitment to Congress's residual authority to legislate different results.¹⁰¹ The full faith

97. *Id.* at 208.

98. *Id.* at 208-09.

99. *Id.* at 207. As a result of this check on the Court's power, concerns about the antimajoritarian nature of Supreme Court review of majoritarian decision making are substantially reduced, if not entirely eliminated. *Id.* at 208; J. ELY, *supra* note 2, at 187 n.13.

100. For example, although the famous *Erie Railroad* decision disclaimed federal power to fashion a general federal common law, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court, in a companion case decided the same day, accepted the need to fashion a federal common law for the resolution of disputes involving the interests of two or more sister states. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). The Court also sits as an expositor of common law solutions in interstate disputes settling state boundary issues, *Louisiana v. Mississippi*, 104 S. Ct. 1645 (1984); *Durfee v. Duke*, 375 U.S. 106 (1963); *Iowa v. Illinois*, 147 U.S. 1 (1873), and in interstate conflicts over natural resources, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Kansas v. Colorado*, 185 U.S. 125 (1902). The framers recognized the potential role of the Court in such interstate disputes by granting original jurisdiction to the Supreme Court in suits brought by one state against another. U.S. CONST. art. III, § 1.

101. The Court recently affirmed this residual authority in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*City of Milwaukee I*), 451 U.S. 304 (1981) (*City of Milwaukee II*), litigation that involved interstate water pollution nuisance. The Supreme Court initially forged a federal common law remedy for interstate water pollution, but expressly noted that subsequent federal legislation might obviate the need for such a remedy or might pursue a policy inconsistent with the continued existence of the common law remedy. *City of Milwaukee I*, 406 U.S. at 107. Eight years later, when the case returned to the Supreme Court, the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500 (codified as amended in scattered sections of 33 U.S.C.), were held to have worked exactly such an ouster of Court-fashioned federal common law. *City of Milwaukee II*, 451 U.S. at 317.

Another recent example involves regulation of the length of trucks engaged in interstate commerce. After the Court invalidated a number of such state regulations as placing too great a burden on interstate commerce, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), Congress responded by

and credit values are ideally served by this division of authority.¹⁰² Thus, the structural analysis of full faith and credit posits a very substantial role for the Supreme Court in announcing and refining a constitutional common law of interstate respect for judgments and of interstate judicial federalism.

III. IMPLEMENTING THE FULL FAITH AND CREDIT PROPOSAL IN CONGRESS AND THE SUPREME COURT

A. CONGRESSIONAL LEGISLATION

The Congress's primacy under full faith and credit enables it to define legislatively state courts' jurisdictional limits. Optimally, well-drafted legislation would obviate the need for most litigation contesting jurisdictional overreaching. In exercising its power under the full faith and credit clause, Congress could allocate jurisdiction over certain categories of disputes or more broadly limit the states' sovereign power independent of the type of litigation involved. The remainder of this section examines legislation of this type that Congress has already passed and canvasses alternatives that Congress should consider to control state court assertions of extraterritorial jurisdiction.

passing legislation that defined the permissible ambit of state regulation, Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 97-369, 96 Stat. 1765 (1983) (codified in scattered chapters of U.S.C.). In a similar vein, congressional ratification of interstate compacts allows the states to enact and enforce statutes that would otherwise violate the Constitution. See U.S. CONST. art. I, § 10, cl. 3; *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 8, 1982 Supp. 42; *cf.* R. ABRAMS, Summary of Legal Aspects of Large-Scale Interbasin Diversion of Great Lakes Water (1982) (unpublished manuscript) (advocating interstate compact to achieve result that would otherwise violate the dormant commerce clause).

102. Professor Whitten, although agreeing that Congress has plenary power under the full faith and credit clause, argues that the Court has no authority to make major modifications of territorial jurisdiction as a common law tribunal unless specifically authorized by Congress. Whitten, *supra* note 11, at 547 & n.213. Whitten, however, apparently finds congressional authorization for court review of state court decisions involving respect for foreign judgments in the statute implementing the full faith and credit clause. *Id.* at 547-48. Consequently, Whitten's analysis of the full faith and credit clause ultimately yields a power structure very similar to that expounded by this Article. It is interesting to speculate, however, on the results of Whitten's thesis if the implementing statute had never existed. Evidently, if Whitten's view is carried to its logical conclusion, the power to fashion a common law of respect for judgments would rest initially with the state courts subject only to congressional revision. See generally *id.* at 523-48.

1. Problem-Specific Legislation

Congress's most prominent effort to control potential interstate jurisdictional conflicts is section 8 of the Parental Kidnapping Prevention Act of 1980 (PKPA).¹⁰³ This enactment, codified as part of the judicial code,¹⁰⁴ requires stringent respect for sister state custody decrees: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any child custody determination made consistently with the provisions of this section by a court of another State."¹⁰⁵ To qualify for this interstate respect, the rendering court must have jurisdiction under its state laws and have a statutorily-defined degree of affiliation with the custody dispute.¹⁰⁶ Once the rendering court's jurisdiction attaches, it continues for so long as its state laws allow, provided that the child or one of the contestants for custody continues to reside in the state.¹⁰⁷ Operationally, this legislation limits original assertions of jurisdiction in child custody cases and prescribes that the jurisdiction, once attached, is continuing and exclusive.¹⁰⁸

Such congressional resolution of potential interstate jurisdictional disputes is salutary. Henceforth, interpretation of a single federal statute will govern with facility the divisive and often litigated issue of respect for child custody decrees.¹⁰⁹ Further, the legislation is consistent with the constitutional structure of full faith and credit adjudication proposed in this Article. For several decades, conflicting state court child custody determinations gave rise to full faith and credit litigation

103. Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568-73 (1980)(codified at 28 U.S.C. § 1738A (1983)).

104. 28 U.S.C. § 1738A (1983).

105. *Id.* at § 1738A(a).

106. *See id.* at § 1738A(c).

107. *Id.* at § 1738A(d).

108. This truncated description of § 1738A does not do justice to its intricacies, nor does it fully explore the potential interstate jurisdictional disputes in child custody cases after its enactment. *See, e.g.,* Coombs, *Custody Conflicts in the Courts: Judicial Resolution of the Old and New Questions Raised by Interstate Child Custody Cases*, 16 FAM. L.Q. 251 (1982) [hereinafter cited as Coombs, *Judicial Resolution*]; Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982); Bruch, *Interstate Child Custody Law and Eicke: A Reply to Professor Coombs*, 16 FAM. L.Q. 277 (1982).

109. *Cf. Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984) (allowing federal district courts jurisdiction to require that state courts give sister state judgments the respect required by the PKPA). *But see* Coombs, *Judicial Resolution*, *supra* note 108, at 268-76 (exploring and predicting problems of interpretation under 28 U.S.C. § 1738A).

requiring Supreme Court resolution.¹¹⁰ While the Court struggled mightily to establish a national policy reconciling competing state interests, finally adopting a "last-in-time" rule,¹¹¹ Congress intervened and restructured the policy into something akin to a "first-in-time" rule.¹¹² On reflection, the previ-

110. See, e.g., *Webb v. Webb*, 451 U.S. 493 (1981); *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); see also *Eicke v. Eicke*, 399 So. 2d 1231 (La. App.) (no recognition given to Texas custody decree that conflicted with a prior Louisiana decree), *cert. denied*, 406 So. 2d 607 (La. 1981), *cert. dismissed*, 459 U.S. 1139 (1983).

The well-known personal jurisdiction case, *Kulko v. Superior Court*, 436 U.S. 84 (1978), raised a different but related issue. The defendant father in *Kulko* objected not to the California court's jurisdiction to enter a child custody decree binding on him but to its jurisdiction to enter a personal judgment for increased support payments. This distinction, however, does not answer the related question of Congress's power to alter the *Kulko* result by appropriate legislation.

This is a matter of some importance. *Kulko* can be analyzed as a case that would remain wholly unaffected by decoupling due process from full faith and credit. This analysis is premised on the view that the degree of procedural unfairness, stressed by Justice Marshall's opinion, forms the exclusive motivation for the invalidation of the assertion of jurisdiction over *Kulko*. Cf. *id.* at 96-98. Interstate federalism concerns, then, would play no part in the decision. If *Kulko* rests exclusively on due process, however, its result could not constitutionally be changed by federal legislation mandating either child support jurisdiction in the state in which the affected child is present or interstate respect for such a state's judgment. See *supra* text accompanying note 47. It seems, however, as if such legislation, like the PKPA, would fit within the full faith and credit power as an implementation of an interstate federalism policy regarding correlative state sovereignty. Thus, should *Kulko* be viewed as a pure due process decision, Congress would need to reduce the unfairness of the California forum in order to protect its exercise of its full faith and credit power to make the defendant subject to a California child support decree free from due process attack. This reduction could be achieved, for example, by requiring that such a defendant be provided with a means of defending the suit without travelling to the distant, inconvenient forum. Indeed, the Uniform Child Custody Jurisdiction Act, which addresses a similar sort of litigation, allows for litigation from afar. See UNIF. CHILD CUSTODY JURISDICTION ACT § 19(a), 9 U.L.A. 162 (1968) (permitting a court in another jurisdiction to allow a party to appear there in a hearing that becomes a part of the record in the original forum); cf. *infra* text accompanying notes 118-24 (opt-out provision as means to assure due process to plaintiff class members in multistate plaintiff class actions).

111. A last-in-time rule, in essence, provides that the later of two conflicting judgments is entitled to full faith and credit. See Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 798 (1969); cf. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613-15 (1947) (sister state's court has same power to modify custody decree as original forum state's court, so such modification by sister state is not failure to give full faith and credit to original decree).

112. The PKPA is akin to a first-in-time rule because under its provisions a later judgment is not entitled to recognition if it was entered during the pendency of another state's child custody determination. See 28 U.S.C. § 1738A(g) (1983). Moreover, jurisdiction over a child custody determination is statutorily presumed to continue so long as certain conditions are met. *Id.* at

ously imposed jurisdictional limits were simply provisional federalism accommodations hammered out by the Supreme Court and subsequently replaced by an overriding federal statute.¹¹³ The jurisdictional limits in PKPA suggest that Congress can directly define the jurisdictional reach of state courts in any number of specific areas.¹¹⁴

Congress can also reduce possible friction from competing state jurisdictional assertions by specifying venue in one locale. To date, Congress has prescribed local venues only in the Fair Debt Collection Practices Act of 1977 (FDCPA).¹¹⁵ The FDCPA attempts to minimize the imbalance of power between debtors and commercial creditors by requiring venue for consumer debt enforcement actions in a locale convenient to the debtor.¹¹⁶ Courts other than those specified in the FDCPA can-

§ 1738A(d). Thus, unless the original court's jurisdiction was improper or has lapsed, later conflicting determinations of other state courts are without effect.

113. The commentators most familiar with the child custody field, however, fail to see PKPA as obviating constitutional judicial review on full faith and credit grounds. See Bruch, *supra* note 108, at 287 ("As final arbiter of the full faith and credit and due process clauses, the Supreme Court bears the ultimate burden of deciding this dispute in a way that will promote interstate harmony . . ."); see also Coombs, *Judicial Resolution*, *supra* note 108, at 258 n.39.

114. The power of Congress to intrude deeply into the state judicial system is also exhibited, for example, in the Federal Employers' Liability Act (FELA) cases. See, e.g., *Mondou v. New York, N.H. & H.R.R. Co.*, 223 U.S. 1 (1912). The *Mondou* case and others like it involve states' resistance to FELA requirements that state courts entertain FELA litigation. See 28 U.S.C. § 1445(a) (1982). Although these cases do not address which states are appropriate sites for the litigation, they illustrate the constitutionality of congressional action pursuant to an enumerated power, in this case the commerce clause, to control state court jurisdiction and procedures. For example, the Court has held that a state court may be compelled to forego its usual procedure of allowing the judge to rule on whether a release was fraudulently obtained where the FELA requires submitting that issue to the jury. *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 362-64 (1952).

This type of result has also been reached in other areas. See, e.g., *Testa v. Katt*, 330 U.S. 386, 389-94 (1947) (Emergency Price Control Act criminal enforcement provisions must be entertained by state courts); cf. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 758-71 (1982) (no tenth amendment violation inheres in ordering state administrative agencies to consider federally mandated subjects employing procedural standards set by Congress).

The tenth amendment cannot be invoked in opposition to this Article's suggested breadth of congressional power over state courts' extraterritorial jurisdiction because the area was never one entrusted solely to the states. It involves no direct conflict between national power and matters relating to exclusive state prerogatives within the confines of a single state. See *National League of Cities v. Usery*, 426 U.S. 833, 840-52 (1976). Full faith and credit issues concern effects that spill over from one state to the next, not matters relating to internal operations. Only a national forum can resolve such interstate friction.

115. 15 U.S.C. § 1692i(a)(2) (1982).

116. The permissible venues are "the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

not entertain the suit, even if possessed of valid jurisdiction and state authorized venue.¹¹⁷ The FDCPA thus limits territorial overreaching by creditors that permissive state jurisdiction and venue statutes would otherwise allow. Judgments entered by courts without FDCPA venue will not be valid.¹¹⁸

The extraterritorial powers of state courts continue to raise difficult issues that would benefit from congressional action. One of the most interesting of these issues concerns state court adjudication of multistate common question¹¹⁹ plaintiff class actions¹²⁰ in states employing an "opt-out" rule.¹²¹ To illustrate the potential for interstate conflict stemming from these cases, consider a manufacturer that allegedly breaches a nationwide promotional offer.¹²² A plaintiff initiates an action on behalf of the nationwide class in a state court that applies the opt-out rule, proceeds to judgment, and loses on the merits. An inter-

(B) in which such consumer resides"

Id. The only actions excluded from this requirement are actions to enforce an interest in real property securing the consumer's obligation, which must be brought in the judicial district or entity where the property is located. *See id.* at § 1692i(a)(1).

117. *Cf.* 15 U.S.C. § 1692i(a) (1982) (limiting available districts).

118. *Id.*

119. In common question class actions, "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" of the class. *See, e.g.,* Fed. R. Civ. P. 23(b)(3). Courts most frequently find consumer cases and securities cases to be appropriate for common question class action. *See, e.g.,* Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974). For a thorough discussion of why these issues arise in the state courts and why they are most germane in the common question area, see generally Wilton, *Nationwide Class Actions in State Courts: The Power to Bind and the Right to Adjudicate Their Claims* (unpublished draft).

120. Defendant classes may also present serious federalism problems amenable to resolution by Congress under the full faith and credit clause. Discussion of defendant classes is omitted, however, because they occur relatively infrequently and the interstate federalism issues they raise are not inherently dissimilar from those raised by non-class litigation.

121. An "opt-out" class action rule requires that class members in "common question" class actions, after receiving notification of certification of the class by the court, act affirmatively if they wish to exclude themselves from the class and thus the binding effect of the judgment in the class action. Federal Rule of Civil Procedure 23(c) is a prototype of such a rule. For an exhaustive study of the policies informing opt-out provisions, see Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3 (1983).

122. These are roughly the facts in *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914 (1981), *cert. dismissed as improvidently granted*, 459 U.S. 86 (1982). The remainder of the textual hypothetical goes beyond the *Miner* facts. In *Miner*, the case originally reached the Supreme Court based on defendant's allegation that certification of the class offended the due process rights of noninitiating nonresident class members. The dismissal of certiorari was attributable to the lack of a final judgment, a predicate for review. *See* 28 U.S.C. § 1257 (1982).

state federalism problem emerges when an out-of-state class member who failed to opt out files an independent action in another state seeking recovery for the same alleged breach by the manufacturer. When met by a *res judicata* defense, this plaintiff asserts that the prior judgment was rendered by a court that overstepped the sovereign prerogatives of its sister states. If the second state accepts this argument and allows the second lawsuit to proceed, the interstate federalism clash is patent.¹²³

One need not favor a particular result in these cases to appreciate the value of congressional action. If Congress, for example, wishes to promote efficiency and finality, a statute endorsing the nationwide binding effect of such state court class action adjudications would obviate virtually all litigation over the original judgment's effect. Congress's authoritative allocation of judicial power negates the claim that the original court intruded on a sister state's sovereign interest. This limits the second claimant to a due process argument asserting that the original judgment violated that claimant's right to be free from unfair and inconvenient litigation and thus cannot be given *res judicata* effect.¹²⁴ Alternatively, Congress has several options if it wishes to limit the state courts' power to adjudicate these cases. It could follow the PKPA approach and limit class action jurisdiction to courts in states having the greatest contacts with the common issues. Alternatively, Congress could specify that such judgments may receive nationwide binding effect only if the rendering state is affiliated with the litigation; for example, the rendering state might be the defendant's residence or the site of the defendant's performance of duties common to many or all of the plaintiffs.

123. The refusal of *res judicata* effect for the original judgment is a necessary precondition for judicial invocation of the full faith and credit clause under the methodology advocated in this Article. *See infra* text accompanying notes 156-57. Even if the second court were to honor the original judgment and uphold the *res judicata* defense, however, Congress would still have the power under the full faith and credit clause to define the precise contours of the extra-territorial power of the state court systems.

124. Recalling, however, that the hypothetical case is premised on an opt-out opportunity, this due process objection is trivial. Requiring an individual to respond to judicial notice by checking a box on a form opting out of the lawsuit and mailing the form back to the court surely cannot offend due process. Requiring recipients of legal notice to inform themselves of the notice's meaning no more offends notions of fairness than the common practice of requiring individuals to respond to summons of all varieties. To be sure, court rules control the contents of summons in a way that aids recipients in understanding the contents, *see, e.g.*, FED. R. CIV. P. 4(b) and Form 1, but most class action rules likewise insist that notice be essentially self-explanatory, *see, e.g.*, FED. R. CIV. P. 23(c)(2)(A-C).

This discussion touches only some of the possible choices for specific congressional intervention.¹²⁵ Nevertheless, it reveals the usefulness of examining federalism issues under full faith and credit rather than due process analysis. What courts and commentators have considered a serious due process claim of plaintiff class members¹²⁶ translates into a rudimentary due process issue and an independent full faith and credit issue.

2. General Legislation

Congress could also reduce dispute over jurisdictional overreaching through general legislation limiting or expanding the permissible boundaries of state court jurisdiction.¹²⁷ Again,

125. In the plaintiff class action setting, for example, Congress could also address the distribution of unclaimed damages, claims of inadequate representation, and the collateral estoppel effects of a successful class suit on those opting out.

126. See, e.g., *Miner v. Gillette Co.*, 87 Ill. 2d at 20-28, 428 N.E.2d at 485-89 (Ryan, J., dissenting); *Shutts v. Phillips Petroleum*, 222 Kan. 527, 542-43, 567 P.2d 1292, 1305 (1977); Vestal, *Uniform Class Actions*, 63 A.B.A.J. 837, 838 (1977); Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 731 (1979).

127. The most general exercise of the legislative power under full faith and credit occurred in 1790 and has (with relatively minor modifications) survived intact. See Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version codified at 28 U.S.C. § 1738 (1982)). That such general exercise of the power has been rare does not, a priori, demonstrate that it is unwise or unthinkable impolitic. The need to supplement or rethink the 1790 edict is of relatively modern origin and is largely traceable to the states' widespread adoption of sweeping long arm statutes and to the emergence of "interest analysis" as a viable choice of law doctrine. See Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593 (1983); cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (holding that liberal application of forum state law under interest analysis does not offend due process of law or full faith and credit). Only after a forum state asserts far-flung jurisdiction does the typical modern personal jurisdiction issue arise. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 616 S.W.2d 247 (Tex. Civ. App. 1981), *rev'd*, 638 S.W.2d 870 (Tex. 1982), *rev'd*, 104 S. Ct. 1868 (1984). The importance of choice of law considerations in forum choice cannot be overstated. Although plaintiff's desire to litigate "at home" will result in some cases of jurisdictional overreaching, the cost and risk of jurisdictional issue litigation checks the plaintiff's desire to obtain in personam jurisdiction in a constitutionally suspect forum solely for the purpose of subjecting defendant to suit in an inconvenient locale. The probable dominant motive in forum selection in cases with great potential for jurisdictional overreaching is favorable choice of governing law. See Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879-80 (1980); Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193, 1195 (1983) [hereinafter cited as Sedler, *Choice of Law in Michigan*]. A paradigm example of this motive is found in *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 33 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1473 (1984); see *supra* note 32.

no particular congressional response need be advocated to demonstrate the benefit of reducing jurisdictional wrangling. Two general legislative approaches are immediately evident, however, either of which would eliminate a vast amount of procedural litigation. First, Congress could prescribe venue standards for interstate cases.¹²⁸ Second, it could circumscribe the choice of governing law, diminishing a plaintiff's incentive to choose a forum having little connection with the litigation.¹²⁹

Numerous methods of venue restriction are available, including those discussed above in relation to problem-specific legislation.¹³⁰ In suits involving parties from different states, for example, Congress could limit venue to states with a defined affiliation with the parties or the underlying dispute. Absent proper venue, state court judgments would not receive acknowledgment outside the rendering state, or, if Congress so determined, within the state itself. Alternatively, Congress could require states to grant motions for forum non conveniens dismissals when certain convenience standards are not satisfied or are better satisfied by other available forums.¹³¹ Conceivably, Congress also could mandate that the state courts preferred on the basis of their affiliation with the litigation hear the dismissed suits,¹³² establishing a system similar to the change of venue statutes controlling lower federal courts.¹³³

128. The interstate nature of the cases is not critical to Congress's power to prescribe venue standards for state courts. Full faith and credit legislation could control the exportation of even wholly intrastate cases. The legislative proposal in the text is limited to interstate cases because pure intrastate disputes are seldom the basis for later court refusals to recognize the judgments and seldom implicate any federalism concerns.

129. See *supra* note 127.

130. See *supra* notes 103-24 and accompanying text.

131. Such legislation would be no more intrusive into the functioning of the state's judiciary than either the PKPA or the FDCPA, see *supra* notes 103-17 and accompanying text. These limitations on venue would, depending on their severity as applied in particular cases, be less severe than the exercise of either exclusive federal subject matter jurisdiction (state jurisdiction ousted, state judgments a nullity) or removal (state court forbidden to proceed further with case). The transfer of jurisdiction to sister state courts rather than to federal courts is a distinction that makes no difference to the power analysis. In both instances, Congress is acting pursuant to an express, plenary power granted by the Constitution.

132. Such legislation might require disregard of door-closing statutes of the transferee state. Cf. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 65 (4th Cir. 1965) (federal diversity court able to disregard state door-closing statute applicable in state court).

133. See 28 U.S.C. §§ 1404(a), 1406(a) (1982). The closer analogy is to the latter section, which deals with cases where the original federal venue failed to

The situation in *Keeton v. Hustler Magazine, Inc.*¹³⁴ illustrates the potential utility of such congressional action.¹³⁵ Limiting venue to the state of some party's residence or the state witnessing the greatest amount of dispute-provoking activity would eliminate New Hampshire as a possible forum. None of the parties resided in New Hampshire and only a tiny fragment of the tortious activity occurred there.¹³⁶ Depending on the legislation's expansiveness, New Hampshire might be able to enforce its judgment within its boundaries.¹³⁷ Other states, however, could not accord the judgment full faith and credit in light of New Hampshire's lack of proper venue. Consequently, Ohio could not be forced to recognize a judgment in an action it had previously dismissed.¹³⁸ The venue restriction would thus eliminate this potential federalism dispute while preserving the defendant's due process right to challenge the fairness and convenience of the chosen forum.

A congressionally-mandated application of forum non conveniens would also eliminate New Hampshire as a permissible

satisfy the affiliating criteria in assigning original venue, *see, e.g.*, 28 U.S.C. § 1391 (1982).

This proposal, with its emphasis on venue and venue-like concepts, is kindred to a number of suggestions made by prominent commentators hoping to relieve the courts of the difficulties associated with the modern personal jurisdiction inquiry. *See, e.g.*, Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981) (courts should base all nonconstitutional restrictions of geographic selection of forum on venue, looking toward eventual emergence of reasonableness as sole constitutional test of power to adjudicate); Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103 (1971) (jurisdiction must become venue, i.e., suit should be permitted where venue is proper (where defendant resides or conducts activities relevant to the action)); Hazard, *Interstate Venue*, 74 Nw. U.L. REV. 711 (1979) (state court territorial jurisdiction should attach if the state is an appropriate forum according to typical venue criteria); *cf. Abrams, supra* note 2, at 42-49 (1982) (venue and change of venue can subsume all work done by the personal jurisdiction inquiry in federal courts).

134. 104 S. Ct. 1473 (1984); *see supra* notes 31-37.

135. To the extent that the federalism concerns in *Keeton* are entwined with the substantive law of defamation, a more appropriate congressional response may be problem-specific legislation such as that discussed in the preceding subsection of the text. *See supra* notes 103-24 and accompanying text. Such legislation would be desirable if, for example, the root problem of *Keeton* were viewed as a danger to first amendment values caused by the coincidence of the "single publication rule," *see* RESTATEMENT (SECOND) OF TORTS § 577A(4) (1979), New Hampshire's unusually long statute of limitations for defamation, *see supra* note 32, and its refusal to honor the statutes of limitations of sister states, *see supra* note 37.

136. *See supra* text accompanying note 32.

137. If the legislation controlled only the exportation of the judgment, New Hampshire's ability to enforce the judgment within the state would be unimpaired.

138. *See supra* note 37 and accompanying text.

forum for hearing the dispute. Litigant and witness convenience are only two of several factors considered in deciding forum non conveniens motions;¹³⁹ also pertinent are efficient judicial administration and the problems of imposing jury duty in regions far removed from the controversy's center.¹⁴⁰ In *Keeton*, not only were the litigants and many of the witnesses inconvenienced by the forum location, but one court had already dismissed the claim¹⁴¹ and the proposed forum of New Hampshire was virtually unrelated to the dispute.¹⁴² A motion of forum non conveniens clearly should be granted by a New Hampshire court. Consequently, the federalism dispute with Ohio¹⁴³ would not arise.

Limiting the available choice of law provides a second potential means of reducing jurisdictional disputes. The benefit of another state's advantageous laws often provides one of the primary motivations for initiating an action in a court removed from the litigants or the controversy. In *Keeton*, for example, New Hampshire was selected as the forum state because it had the longest statute of limitations for defamation actions.¹⁴⁴ Congress could reduce this forum shopping by requiring all states to follow a choice of law methodology that results in uniform application of the same law to a particular dispute. Eliminating the reasons to choose an unrelated forum greatly reduces the potential for federalism disputes. This legislation is more controversial than the proposed venue restrictions, however, because it is similar to the "vested rights" choice of law theory¹⁴⁵ and to the "most significant contacts" test,¹⁴⁶ both of which are apparently declining in acceptance.¹⁴⁷

139. *Koster v. Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 524 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

140. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), cited with approval in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

141. See *supra* note 37 and accompanying text.

142. See *supra* text accompanying note 32.

143. State interests other than Ohio's may also be offended by a New Hampshire judgment in *Keeton*. A judgment rendered in New Hampshire that includes nationwide damages also ignores the policies of other states in setting short statutes of limitations for defamation actions.

144. See *supra* note 32.

145. The "vested rights" approach is usually associated with RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934). The thrust of the philosophy is that all legal controversies, from the moment of accrual of the cause of action onward, are properly governed by the law of one particular jurisdiction. In tort law, for example, the *lex loci* rule is a product of this approach. See *id.* at ch. 9 ("Wrongs").

146. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

147. See, e.g., Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules*:

Regardless of which of these diverse options Congress selects, it can effectively divide judicial power among the several states under its full faith and credit power and thus perform its traditional function of resolving interstate disputes.¹⁴⁸ Moreover, such legislation would not restructure the ultimate balance of power between the states. To the extent that a state would be prevented from rendering a binding decision, it would benefit through identical limitations on sister states' exercises of power that would otherwise impinge on its jurisdictional interests.

B. THE ROLE OF THE SUPREME COURT

Even in the absence of the posited legislation, the structure proposed in this Article allows the Supreme Court to render a full faith and credit disposition free from the distraction of concurrent due process considerations. Further, the Court can take comfort in the realization that any answer it gives is subject to congressional revision. The proposed restructuring of federalism dispute resolution redefines the Supreme Court's role both procedurally and substantively. None of these changes, however, dramatically alters the Court's operation or requires a radical renunciation of earlier decisional law. Nevertheless, the effect on the Court of separating full faith and credit concerns for interstate federalism from due process concerns for the individual merits discussion.

The procedure and context in which the Court considers the due process concerns for the individual are undisturbed by the separation. Convenience and fairness to the defendant in forum selection are still prerequisites to adjudication by the forum court.¹⁴⁹ Consequently, these considerations remain well suited to resolution in the litigation's formative stages.¹⁵⁰

Judicial Methods in Conflicts Torts Cases, 44 TENN. L. REV. 975 (1977); Sedler, *Choice of Law in Michigan*, supra note 127, at 193.

148. Indeed, if any doubts persist about congressional power under the full faith and credit clause to resolve friction arising from state court assertions of extraterritorial jurisdiction, the Court has surely conceded Congress plenary power under the commerce clause so long as the legislation does not violate external limits imposed, for example, by the Bill of Rights. *E.g.*, *National League of Cities v. Usery*, 426 U.S. 833, 841 (1975) (citing *United States v. Jackson*, 390 U.S. 570 (1968) (sixth amendment) and *Leary v. United States*, 395 U.S. 6 (1969) (fifth amendment)). Given, however, the full faith and credit clause's clear textual authorization giving Congress plenary power over the extraterritorial effect of state court judgments, see supra notes 69-88 and accompanying text, there is no reason to rely on the commerce clause in this area.

149. See *INTERNATIONAL SHOE CO. v. WASHINGTON*, 326 U.S. 310 (1945).

150. See, *e.g.*, *FED. R. CIV. P. 12(b), (g), (h)*. This initial determination pre-

Moreover, the due process concerns are personal rights of the defendant, so the adjudicating court's rejection of a due process claim is best reviewed directly to avoid perpetuating the violation of these rights through enforcement of the judgment in the forum state or elsewhere.¹⁵¹ Therefore, only the scope of the Court's substantive inquiry under due process is affected by the separation.

In contrast, the Court's full faith and credit examination of interstate federalism disputes under the proposal will arise under a markedly different procedure. The proposal's greatest potential impact on the Court is restriction of this examination until the collateral attack stage.¹⁵² Unlike due process claims, the full faith and credit interest is not clearly implicated by the original judgment. The typical record in challenges to a state's exercise of personal jurisdiction contains no objections by other states to the assertions of extraterritorial jurisdiction.¹⁵³ Further, the full faith and credit interest is a sovereign right of the state and not a personal right of the adversely affected litigant.¹⁵⁴ The Court should manifest its reluctance to decide hypothetical federalism disputes by avoiding considerations of federalism in the due process calculus and awaiting a concrete full faith and credit case, a case that would arise only on collateral attack.¹⁵⁵

Absent direct review of the full faith and credit claim, that issue may never emerge from the litigation at all. If sufficient assets are available to satisfy the judgment in the rendering state, no interstate recognition of the judgment is required. Even if sufficient assets are not present in the rendering state, the state subsequently requested to enforce the judgment could reject a collateral attack that asserts a full faith and credit jurisdictional challenge. Indeed, such a decision to up-

vents waste of judicial resources that would accompany deferring resolution of these threshold issues.

151. See 28 U.S.C. § 1257(2)-(3) (1982). Appeal would lie only if the attack is one that claims that the statute asserting jurisdiction, rather than its application in the case at bar, violates the federal constitutional guarantee of due process. In other cases, Supreme Court judicial review would be obtained by a writ of certiorari.

152. See *infra* notes 153-57.

153. The atypical case is one in which a state or its agents are party defendants. See, e.g., *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) (state official as defendant raised objections to personal jurisdiction and venue); cf. *Nevada v. Hall*, 440 U.S. 410 (1979) (refusal of forum court to surrender jurisdiction or give full faith and credit to sister state's claim of partial sovereign immunity).

154. See *supra* text accompanying notes 43-45.

155. See *supra* text accompanying notes 42-45.

hold a sister state judgment based on extraterritorial jurisdiction would be unsurprising if the current reach of most states' long-arm statutes is a fair indication of the states' beliefs about the nature of correlative state sovereignty.¹⁵⁶ More importantly, the enforcement state's rejection of the collateral attack manifests its view that its federalism interests are not impinged upon. Thus, the rejection will in many cases extinguish the full faith and credit issue, removing the need for Supreme Court federalism review. Finally, many defendants may resist only to the point of exhausting direct review of the due process issue, further reducing the need for Supreme Court review of federalism issues.

Withholding direct review of full faith and credit claims would not only reduce the number of such claims requiring Supreme Court review but would also offer the Court better data in those cases that do reach it. When a sister state court upholds a collateral attack on full faith and credit grounds, it asserts that the rendering state court's exercise of jurisdiction impinged on its interests. Thereafter, the court's opinion serves as a brief both delineating the sovereignty claims of its state and illuminating the issues giving rise to a true interstate conflict.¹⁵⁷ The Supreme Court will consequently receive on review substantive information about the affected state's attitude toward the jurisdictional assertion and not a generalized hypothetical claim raised by an individual.

Only a modest substantive impact on Supreme Court review of interstate federalism disputes results from the proposed separation of due process from full faith and credit. First, the Court must clarify that previous decisions limiting jurisdiction due to federalism concerns were based not on due process but on interpretation of extant full faith and credit statutes¹⁵⁸ or on common law developed by the Court in the absence of federal full faith and credit legislation.¹⁵⁹ The Court need not repudiate the decisions' results or doctrines, but must simply shift the decisions' theoretical underpinnings from constitutional to nonconstitutional grounds. It will find ample sup-

156. See *supra* notes 43-45 and accompanying text.

157. See, e.g., *Lewis v. Hanson*, 36 Del. Ch. 235, 255-61, 128 A.2d 819, 831-35 (1957) (laying out basis for the Delaware refusal to recognize the Florida judgment that ultimately gave rise to the decision in *Hanson v. Denckla*), *aff'd sub nom. Hanson v. Denckla*, 357 U.S. 235 (1958).

158. *Pennoyer v. Neff*, 93 U.S. 714 (1877), is the pristine example of a case that should fall into this category.

159. See *supra* text accompanying notes 93-101.

port for this reinterpretation in the history and text of both the due process clause¹⁶⁰ and the full faith and credit clause,¹⁶¹ as well as in its own decisions.¹⁶²

Second, the Court's review of future federalism disputes resulting from state court assertions of extraterritorial jurisdiction will be limited to interpreting legislation such as PKPA,¹⁶³ FDCPA,¹⁶⁴ and that proposed here.¹⁶⁵ If Congress is silent on a specific issue facing the Court, the Court will resolve any interstate conflict as a common law tribunal, creating policies to further national uniformity.¹⁶⁶ In this redefined role, the Court's basic issue analysis is likely to change little,¹⁶⁷ but it will enjoy greater freedom in decision making because those decisions are subject to congressional revision.¹⁶⁸ Moreover, the Court

160. See *supra* notes 52-57 and accompanying text.

161. See *supra* notes 65-102 and accompanying text.

162. See *supra* notes 28-37 and accompanying text. The Court's burden of reinterpretation is considerably lessened with recognition that *Pennoyer v. Neff*, the seminal case merging federalism and due process, is in fact a holding resting on nonconstitutional grounds. See *supra* text accompanying note 18.

163. See *supra* notes 103-08 and accompanying text.

164. See *supra* notes 115-17 and accompanying text.

165. See *supra* notes 118-25, 127-47 and accompanying text.

166. See *supra* text accompanying notes 93-101.

167. It is unlikely, for example, that the decision in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), would have changed even had the Court not been acting as a constitutional arbiter. The Court undoubtedly was hesitant to create a constitutional barrier to a state's employment of the interest analysis method for choice of law problems. See, e.g., Lowenfeld, *Three Might-Have-Beens: A Reaction to the Symposium on Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1045, 1047-49 (1982). Such a barrier would create the possibility that appeal could be taken every time a litigant was dissatisfied by an interest analysis choice of law decision. Such a barrier would also disrupt the pattern of state autonomy on experimentation in changing choice of law doctrines that has prevailed for two centuries.

The results in some cases, however, could change. For example, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court found that Oklahoma's assertion of jurisdiction violated defendant's due process rights. See *supra* note 27. Under the proposed restructuring of federalism dispute resolution, the Court could conclude on identical facts that little personal unfairness arises from requiring a New York automobile retailer and regional distributor belonging to an interstate marketing system from defending in the courts of Oklahoma, the state in which the injury in issue occurred.

If the Court should hold that the due process convenience and fairness interests are satisfied, the case could proceed to trial in Oklahoma. The defendants' claim that Oklahoma overstepped the bounds of interstate federalism would be preserved until the judgment is exported to sister states. The collateral attack on federalism grounds, however, appears unlikely to succeed. Oklahoma's assertion of jurisdiction is well within the accepted norms of state practice under long-arm statutes. See *supra* note 45. Moreover, Oklahoma has a patent interest in adjudicating the original action as the situs of the accident giving rise to the suit.

168. See *supra* notes 95-99 and accompanying text.

will gain the opportunity to predicate its decisions on a clearer conception of the precise nature of the alleged interstate federalism offense.¹⁶⁹

IV. CONCLUSION

A proposal for a new constitutional structure for evaluating state court assertions of extraterritorial jurisdiction presents only an intriguing intellectual exercise if it offers no promise of adoption and advances no improvements on the present due process analysis. The proposal discussed in this Article, however, stands a reasonable chance of congressional or judicial adoption and offers several meaningful benefits to the federal system.

The potential judicial adoption of the proposed severance of due process and full faith and credit analysis is well within the realm of possibility. *Keeton v. Hustler Magazine, Inc.*,¹⁷⁰ as well as other Court decisions,¹⁷¹ clearly exhibits the Supreme Court's movement toward separating interstate sovereignty concerns from the individual's right to due process. To repeat the Court's words in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*¹⁷² for the purpose of emphasis:

The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns.¹⁷³

Moreover, jurisprudential and pragmatic considerations support the proposal's adoption. Jurisprudentially, the proposal allows separate analysis of federalism concerns and litigant convenience. Both issues will benefit by escaping from the obscure dual-issue, single-resolution determination of present due process adjudication.¹⁷⁴ Further, the separation permits federalism issues to be raised in a context where the interstate dispute is crystallized.¹⁷⁵ Pragmatically, the proposal will decrease the number of federalism disputes presented to the overburdened Court and simplify due process claims by eliminating their amorphous federalism facets. Finally, separating full faith and credit concerns for federalism from due process

169. See *supra* notes 153-57 and accompanying text.

170. 104 S. Ct. 1473 (1984); see *supra* notes 31-37 and accompanying text.

171. See *supra* notes 28-30 and accompanying text.

172. 456 U.S. 694 (1982).

173. *Id.* at 702 n.10.

174. See *supra* notes 39-53 and accompanying text.

175. See *supra* notes 152-57 and accompanying text.

concerns for the individual offers both Congress¹⁷⁶ and the Court¹⁷⁷ vast potential for reducing interstate judicial overreaching. The means of unlocking this potential are consonant with the constitutional structure.¹⁷⁸ Congress and the Court need only consider and act accordingly.

176. *See supra* notes 103-48 and accompanying text.

177. *See supra* notes 149-67 and accompanying text. The Court, operating as a common law tribunal, also could attempt to initiate some of the proposals discussed in the text accompanying *supra* notes 149-69 in conjunction with congressional legislation.

178. *See supra* notes 90-102 and accompanying text.