

Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex

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ABSTRACT

This Article examines the extent to which the U.S. Constitution's Full Faith and Credit Clause requires one state to accept another's conclusions regarding a person's sex, which has been at issue in some cases involving intersex or transgender persons. Litigants and scholars have argued that the Clause commands states to recognize another state's prior determination that a person has changed sex. These arguments, however, rest upon a naturalized, essentialist view of sex at odds with the regulatory, relational manner in which identities such as sex, adulthood, or race operate in law. Accordingly, even when one state properly adjudicates a person's sex, others are prospectively free—under the Full Faith and Credit Clause—to reach their own conclusions about that person's legal sex.

INTRODUCTION

Among the numerous challenges facing transgender and intersex¹ persons² in the contemporary United States is the prospect and, in too many

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¹ “Since about 1995, the meaning of *transgender* has begun to settle, and the term is now generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.” Paisley Currah, Richard M. Juang & Shannon Price Minter, *Introduction*, in *TRANSGENDER RIGHTS* xiii, xiv (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006). “Being intersex denotes, according to Alice Dreger, ‘a variety of congenital conditions in which a person has neither the standard male nor the standard female anatomy.’” *Id.* at xv (quoting Alice Domurat Dreger, *A History of Intersex: From the Age of Gonads to the Age of Consent*, in *INTERSEX IN THE AGE OF ETHICS* 5–6 (Alice Domurat Dreger ed., 1999)). Although there are no recorded decisions denying the lived sex of intersex persons in the United States, such disputes have arisen in other jurisdictions, *see, e.g.*, *W. v. W.*, [2001] Fam. 111 at 147 (Eng.) (intersex case from United Kingdom); *In the Marriage of C & D* (falsely called C), [1979] 35 F.L.R. 340 (intersex case from Australia), and certainly could do so in the United States.

² This Article uses phrases such as “transsexual man,” “man with a transsexual history,” “transgendered man,” or “trans man” to refer to a person who was identified by others at birth as female but who self-identifies as male, and phrases such as “transsexual woman,” “woman

recorded cases, the reality of official denial of their lived gender.³ Early decisions denied legal recognition of transgender persons' lived sex, upholding refusals to change birth certificate sex designations and denying the validity of a marriage entered into prior to surgical procedures.⁴ Following one 1970s case upholding the legal validity of a marriage between a transsexual woman and a man whose sex appears legally unquestioned,⁵ an almost unbroken string of decisions, most rendered in the past decade, have refused to give operative legal effect to transpersons' lived sex.⁶ State courts in Ohio,⁷ Texas,⁸ Kansas,⁹ Florida,¹⁰ and Illinois¹¹ have refused to adopt transpersons' self-identified sex as their legal sex for purposes of the disputes at issue. The people involved have suffered grave financial, social, and emotional consequences from these legal decisions. Elaine Ladrach was repeatedly denied the right to marry her fiancé.¹² Christie Lee Littleton was denied the right to sue a physician for the wrongful death of her husband.¹³ J'Noel Gardiner was denied all inheritance when her husband died without a will.¹⁴ Jacob Nash was barred from marrying the woman he loved.¹⁵ The marriage of Michael Kantaras was invalidated and his relationship with his children, whom he helped raise, imperiled.¹⁶ And Sterling Simmons was stripped of all parental rights with respect to his son.¹⁷

To address such injustices, litigants and scholars have turned to a potpourri of constitutional arguments to try to force governments to determine the sex of individuals in accordance with the gender identities they live

with a transsexual history," "transgendered woman," or "trans woman" to refer to a person who was identified by others at birth as male but who self-identifies as female.

³ "Lived gender" refers to the sex/gender with which a person identifies and in which the person lives one's life; it may be different from the "assigned sex or gender" with which a person is identified by others at birth.

⁴ *Hartin v. Dir. of Bureau of Records*, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973) (birth certificate); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (marriage); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1965) (birth certificate).

⁵ *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

⁶ *But cf. In re Heilig*, 816 A.2d 68 (Md. 2003) (holding that circuit courts had jurisdiction to determine and to declare that a person had changed sex and remanding for evidence of permanent and irreversible change on part of petitioner).

⁷ *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987); *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 2307095 (Ohio Ct. App. Dec. 31, 2003).

⁸ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

⁹ *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

¹⁰ *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

¹¹ *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).

¹² *In re Ladrach*, 513 N.E.2d 828, 829, 831-32 (Ohio Prob. Ct. 1987).

¹³ *Littleton v. Prange*, 9 S.W.3d 223, 225, 231 (Tex. App. 1999).

¹⁴ *In re Estate of Gardiner*, 42 P.3d 120, 123, 135, 137 (Kan. 2002).

¹⁵ *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *1, *9 (Ohio Ct. App. Dec. 31, 2003). At the time of this decision, no U.S. state allowed same-sex couples to marry civilly. *Gay Marriage Timeline*, PEW FORUM ON RELIGION & PUBLIC LIFE (Apr. 1, 2008), <http://pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Timeline.aspx>.

¹⁶ *Kantaras v. Kantaras*, 884 So. 2d 155, 155-56, 161 (Fla. Dist. Ct. App. 2004).

¹⁷ *In re Marriage of Simmons*, 825 N.E.2d 303, 306, 315 (Ill. App. Ct. 2005) (referring to Sterling's child as "he").

daily. The guarantee of equal protection of the laws has been offered as a principle precluding states from denying the lived sex of transgender persons while accepting the lived gender of non-transgender (or “cisgender”¹⁸) persons.¹⁹ Some have suggested that the constitutionally protected right to travel may be violated in some circumstances when a state refuses to recognize the legal determination by another state of someone’s gender.²⁰ And recent case law and legal scholarship address arguments that the Full Faith and Credit Clause of the Constitution²¹ compels interstate recognition of sex determinations.²²

In particular, litigants and scholars have argued that the Full Faith and Credit Clause requires states to accept other states’ prior determinations of a trans litigants’ sex (as reflected in administrative or court-ordered changes to the sex indicated on a birth certificate). In its doctrinally strongest form, where a court-ordered change to a birth certificate has been rendered, the argument holds that the earlier state’s adjudication constitutes a “judgment” determining a trans litigant’s sex and that every other state is then constitutionally compelled to accept that judgment for any legal purpose and thus cannot take a different view of the litigant’s sex.²³

¹⁸ Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 76 n.6 (2010) (“Cisgender is a word commonly used in trans and allied communities and in trans scholarship for people who are not transgender.” (citing Julia Serano, *Whipping Girl FAQ on cissexual, cisgender, and cis privilege*, <http://juliaserano.livejournal.com/14700.html> (May 14, 2009, 05:46 EST))).

¹⁹ See, e.g., Katherine A. Womack, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1371 (2010) (concluding that “transgender people may meet the criteria to belong to a suspect class” under the Equal Protection Clause); John Parsi, Note, *The (Mis)Categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497, 1521 (2010) (“The impact of not recognizing a person’s acquired sex is to inherently discriminate against them in instances when sex matters.”); Cathy Perifimos, Note, *The Changing Faces of Women’s Colleges: Striking a Balance Between Transgender Rights and Women’s Colleges’ Right to Exclude*, 15 CARDOZO J.L. & GENDER 141, 163 (2008) (asserting that treating two otherwise identical applicants differently based on whether their home states legally recognize their lived gender “denies them equal protection under the law”).

²⁰ See, e.g., Julie A. Greenberg & Marybeth Herald, *You Can’t Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 855–56 (2005) (arguing that if a trans woman is legally married to a male in State A and State B refuses to recognize her as legally female, a significant burden will be placed on her marriage that can hinder travel); Shana Brown, *Sex Changes and “Opposite-Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1154 (2001). The Greenberg and Herald title contains a slight misnomer, as the article concerns the interstate effects of gender-identity rulings rendered by a court or agency located within one state.

²¹ See *infra* note 29 and accompanying text (quoting Clause). “For a concise history of full faith and credit, see Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).” *Baker v. General Motors Corp.*, 522 U.S. 222, 231 n.3 (1998).

²² See, e.g., *In re Estate of Gardiner*, 22 P.3d 1086, 1107–09 (Kan. Ct. App. 2001), *rev’d*, 42 P.3d 120 (Kan. 2002); Greenberg & Herald, *supra* note 20, at 844–55; Shawn Gebhardt, Comment, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419, 1421, 1426 (2009).

²³ For example, counsel for J’Noel Gardiner, a woman with a transsexual history who had the validity of her marriage called into question, argued that “Kansas need[s] to give full faith

This might sound like a progressive application of constitutional federalism, saving transgender people from regressive state efforts to deny their hard-won legal gender as adjudicated in a more enlightened state. But, consider the situation of trans men and women whose first encounter between their sex and the judicial system goes against them, with a court rendering a judgment that denies their lived gender. Sterling Simmons's original birth certificate, for example, was amended through an administrative process²⁴ before an Illinois court ever ruled that he was legally female.²⁵ Regardless of the merits of that ruling, a "mandatory deference" approach to full faith and credit and sex determinations would offer no help to transpersons in Simmons's position, those who first have a court deny their lived sex. Mandatory recognition of such adverse judgments would straitjacket transpersons even if they choose to make a new residence in a trans-friendly state. Not only would they have been deprived of whatever legal right they litigated and lost (the right to marry the person they love, parental rights, inheritance rights), they would have no chance for future legal recognition of their lived sex. Their self-understanding of their sex, their gender identity, would have to be legally repudiated across the nation, even in states desiring to recognize it.

This view of full faith and credit to sexual judgments is, however, not the best way to understand the ramifications of constitutional federalism for legal gender identity or sex determinations. In this Article I critique the view, argued with insufficient analysis by some litigants and scholars, that the Constitution's Full Faith and Credit Clause requires one state simply to accept another state's legal judgments about a person's sex. I contend that legal identities, in this case sex identity, should be understood as relationships among classes of people recognized in law for practical, forward-looking purposes, rather than being shorthand for naturally occurring divisions of people into classes based on certain properties inherent in them.

As a consequence of this relational view of legal identity, the only constitutionally mandatory interstate effects of sexual judgments are ones that are primarily retrospective, even if they entail future obligations as a result of a determination that a quasi-contractual relationship was created by past events. In some cases this might mean that a marriage valid as heterosexual

and credit to the Wisconsin statute and court order and the birth certificate that order created under Wisconsin law." *In re Estate of Gardiner*, 42 P.3d 120, 134 (Kan. 2002). The Kansas Supreme Court did not understand J'Noel to press the full faith and credit argument before that court. *See id.* ("On appeal, J'Noel argues that the marriage is valid under Kansas law. However, in the district court, J'Noel's sole argument was that the marriage was valid under Wisconsin law and Kansas must give full faith and credit to Wisconsin law."). The Kansas Supreme Court opinion does not address the full faith and credit argument on the merits.

Note that while this "mandatory recognition" argument seeks to apply State One's sex determination for all purposes in State Two, State Two law might itself recognize a trans or intersex person as male for some purposes and female for others.

²⁴ *See In re Marriage of Simmons*, 825 N.E.2d 303, 307 (Ill. App. Ct. 2005) (noting certificate change through Department of Public Health and State Registrar).

²⁵ *Id.* at 309.

within one state, say between a man whose sex is legally unquestioned and a woman with a transsexual history, might in a different state be deemed a legally void attempted marriage between two persons of the same sex. So long as some states deny same-sex couples legal recognition of their marriages, and so long as some such states also refuse to legally recognize the possibility of changes of legal sex, this may be an unavoidable consequence of this understanding of legal identity. A solution to the problem of states taking different views of people's legal sex based on constitutional command lies in substantive constitutional constraints on state decision-making in the areas of marriage for same-sex couples or legal recognition of gender identity, constraints likely rooted in equal protection, substantive due process, or both. The solution does not lie in the Full Faith and Credit Clause, at least as that clause is best understood in light of current Supreme Court doctrine.²⁶

Part I of this Article introduces the Full Faith and Credit Clause, looking briefly at its text, history, and place in U.S. constitutional structure before turning to the doctrine announced in Supreme Court precedents construing the clause. Those precedents draw a distinction between the respect a state must give to the laws of another state and the respect owed to court judgments rendered in another state, with the latter being much stronger than the former.²⁷ Accordingly, I focus upon the strongest case under current law for mandatory interstate recognition of a determination of someone's sex under the Full Faith and Credit Clause: where the sexual judgment rendered in an adversarial judicial proceeding in one state is called into question in a second state. Part II analyzes what a judgment determines when it decides a question of a person's legal identity. I argue that, in general, a determination of legal identity locates a person within a legal classification scheme that sorts a state's population into identity categories in order to specify how certain legal rules will be applied to that person in future disputes. Part III applies this relational view of identity to questions of legal sex. It accepts that all states may have to abide by essentially retrospective judgments rendered by one state that may depend on that state's view of a person's legal

²⁶ The Article does not primarily focus on the federal Full Faith and Credit Act. The Act cannot subtract from constitutional minima for interstate recognition were those to favor transpersons. In addition, the Act might currently offer transpersons more protection than the Clause does, and it could potentially be amended to offer transpersons greater protection were the national political will to do so achieved.

The Full Faith and Credit Act, 28 U.S.C. § 1738 (2006), in pertinent part provides:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

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

²⁷ See *infra* notes 58–62 and accompanying text.

sex. Yet each state generally remains free under the Full Faith and Credit Clause, independent of prior legal proceedings in other states, to determine for itself the legal sex it will attribute to a given person for new disputes. Thus, we ought look to substantive constitutional arguments to constrain states' ability to deny legal effect to sexual self-determination rather than essentially procedural appeals to the federalism reflected in the self-executing commands of the Full Faith and Credit Clause to ameliorate the legal plight of transgender and intersex persons.

I. A MOSTLY POSITIVE ACCOUNT OF THE FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause of the U.S. Constitution and the sometimes separately designated Effects Clause²⁸ read:

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.²⁹

Today, this provision is understood as roughly constitutionalizing *res judicata* across state boundaries,³⁰ although with greater force with respect to judicial proceedings (judgments) than with respect to public acts (laws) or records.

As noted in the Introduction to this Article, some litigants and some scholars have tried to leverage the Full Faith and Credit Clause's limited constitutionalization of *res judicata* into a forcing principle that would constitutionally compel one state, at a minimum, to adopt another state's judicially rendered sex determinations.³¹ From the uncontested (though

²⁸ Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 57 n.32 (2001) (noting that the "second sentence of Article IV, § 1, of the federal Constitution [is] sometimes called the Effects Clause").

²⁹ U.S. CONST. art. IV, § 1.

³⁰ "By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence . . ." *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942). *See also, e.g., Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998):

Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.

³¹ Shawn Gebhardt goes further, arguing that full faith and credit also requires states to accept legal sex changes when administratively documented in a birth certificate from another state. *See generally* Gebhardt, *supra* note 22 (ontologizing a status, treating it as something created once). This argument suffers fundamentally from the same flaws as the narrower, mandatory-recognition-of-judgments argument. In particular, it treats a person's legal sex as though it were a simple fact that could be conclusively resolved in a single adjudication or

underspecified) statement of current doctrine that “[t]he Full Faith and Credit Clause of the United States Constitution requires states to honor the judicial pronouncements of other states,”³² law professors Julie Greenberg and Marybeth Herald argue that “[w]hen courts refuse to recognize an amended birth certificate from a sister state, they violate principles of full faith and credit,”³³ principles that they assert are “constitutional requirements.”³⁴ Likewise, Shawn Gebhardt has argued that the Full Faith and Credit Clause means that “personal status records,” like judgments, “must be recognized by sister states so that the rights conveyed by that identity can be actualized.”³⁵ For this Article, I generally accept current case law on the meaning of full faith and credit, as do Greenberg, Herald, and Gebhardt. Considering the meaning of the Full Faith and Credit Clause and the Supreme Court’s jurisprudence construing it nevertheless leads me to a different conclusion about the interstate treatment of sex determinations under that case law.

Some scholars have argued that the original understanding of the Full Faith and Credit Clause was that the first sentence is evidentiary in nature, preventing one state from impeaching the content of the laws, records, and judgments of another state, but not of its own force specifying what substantive deference, if any, a second state must give to the first state’s laws, records, and judgments; the Effects Clause then empowers Congress to dictate the latter by statute.³⁶ Two articles arguing for such an evidentiary view

administrative interpretation. *See, e.g., id.* at 1439–40 (claiming that “‘records’ functions are more akin to that of adjudicative findings of fact than to that of public, collaborative, political expressions of legislative will” and that “[r]ecords, like adjudicative findings, establish factual issues upon which legal rights are settled”); *id.* at 1441 (distinguishing sex determinations from the judicial decree at issue in *Baker*, which held the decree not binding in another state’s courts on the grounds that that decree, enjoining testimony by a former GM employee, “did not seek just to establish a fact, or settle a question of law, between two parties”).

³² Greenberg & Herald, *supra* note 20, at 846.

³³ *Id.* at 824.

³⁴ *Id.* Later in the article the authors use language that could be interpreted as hortatory rather than mandatory. *See, e.g., id.* at 850 (“Judicial orders amending the sex indicated on the birth certificate *should be granted* the same respect as other legal status change orders, such as divorce decrees, adoption orders, and paternity determinations. When a birth certificate is amended pursuant to a properly issued court decree, every other state *should recognize* the amended legal sex status.” (emphasis added)). The statement of their conclusions in their introduction, however, is unequivocally one of constitutional command.

³⁵ Gebhardt, *supra* note 22, at 1422. But the Full Faith and Credit Clause cares about “right[s] which ha[ve] ripened into a judgment,” *Broderick v. Rosner*, 294 U.S. 629, 642 (1935), rather than treating judgments as creating prospective rights.

³⁶ *See especially* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 *YALE L.J.* 1584 (2009) (arguing for evidentiary view); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 *VA. L. REV.* 1201 (2009) (same). *See also* Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 *CREIGHTON L. REV.* 147, 159–60 (1998); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 *CREIGHTON L. REV.* 499 (1981). *But see* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *COLUM. L. REV.* 249, 290 (1992) (asserting that “the Full Faith and Credit Clause has always been understood” to mean that if a rendering state court

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of the Clause have recently been authored by David Engdahl and Stephen Sachs.³⁷ Professors Engdahl and Sachs offer cogent arguments that could perhaps be embraced in the future by some originalist majority on the Supreme Court—provided *stare decisis* could be overcome.

But this evidentiary view of the Clause would clearly be of no help to anyone seeking to use the Full Faith and Credit Clause to compel states to recognize other states' judgments about or records of a person's sex. On the evidentiary view, the Full Faith and Credit Clause itself issues no commands to the states about what substantive effect to give to another state's sex determinations.³⁸ This view comports reasonably with the textual parallelism of the Full Faith and Credit Clause,³⁹ which does not distinguish among a state's "public Acts, Records, and judicial Proceedings," all of which are owed "Full Faith and Credit" in each state. Moreover, it must be recognized that the Full Faith and Credit Clause, and Article IV in general, represented compromises between the aim of enhanced national unity and that of preserved state autonomy.⁴⁰ Allowing Congress (with equal state suffrage in the Senate) to decide how much mandatory interstate recognition there will be is a plausible means of honoring this compromise, stopping short of total nationalism and safeguarding some measure of state independence.

The evidentiary view, however, is not current law, and the Supreme Court would have to repudiate longstanding, repeatedly affirmed precedents to embrace it insofar as judgments are concerned. Current Full Faith and Credit Clause doctrine requires states to accept *judgments* from other states with proper jurisdiction over the cases producing those judgments regardless of the second state's assessment of the facts or of the first state's law. The doctrine does not require such inexorable acceptance of other states' *laws*, however, allowing states to reject applying other states' laws to disputes if the second state has a strong public policy that would oppose applying the first state's law.

This difference in treatment between judgments (and records of facts) and laws (and records of relationships and legal statuses) both replicates and might be justified by the difference between retrospective and prospective acts of governance. The line between the retrospective and the prospective

"had jurisdiction, its judgment is binding on all other states" (citing *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704–05 & n.10 (1982))).

³⁷ See, e.g., Engdahl, *supra* note 36; Sachs *supra* note 36.

³⁸ One might perhaps argue for greater congressional latitude to prescribe the effects of judgments under the evidentiary view of the Full Faith and Credit Clause than under current doctrine, on the theory that there would be no particular constitutional baseline of effects that must be respected or not be disproportionately changed by Congress. But that would still leave trans advocates to press for protection under congressional enactment, not self-executing constitutional command.

³⁹ See *supra* note 29 and accompanying text.

⁴⁰ Cf. Laycock, *supra* note 36, at 259 ("Much of the Constitution addresses the task of creating one nation out of separate states, and of doing so without abolishing those states.").

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may not be conceptually pure,⁴¹ but Full Faith and Credit Clause case law embodies it to a significant extent. It rationalizes much of the precedent,⁴² and it seems a reasonable way to strike a balance in constitutional law between the nationalizing tendencies of full faith and credit and the state independence still generally presupposed in constitutional federalism doctrines.⁴³ Indeed, Stewart Sterk has concluded that the Full Faith and Credit Clause “does not require a court to enforce an order of a sister-state court that purports to control behavior occurring after the date of the judgment, whatever the res judicata rules of the state that rendered the judgment.”⁴⁴

This retrospective/prospective distinction also makes sense in light of the history of the Full Faith and Credit Clause. That Clause was a part of the original Constitution that emerged from the Constitutional Convention held in Philadelphia in 1787.⁴⁵ A predecessor clause in the Articles of Confederation provided: “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.”⁴⁶ Unfortunately, there is no extant record of the deliberations that resulted in this clause’s “inclu[sion] in the Articles of Confederation.”⁴⁷

Despite the lack of record of the delegates’ deliberation, the drafting history of this proto-Full Faith and Credit Clause suggests that a driving concern was to regularize contractual or perhaps more broadly commercial relationships across state lines. As David Engdahl has recounted, “the committee draft from which [this clause] . . . derived actually [additionally] specified that ‘an Action of Debt may lie in the Court of Law in any State for the Recovery of a Debt due on Judgment of any Court in any other

⁴¹ See, e.g., Carlos Manuel Vázquez, *Night and Day: Coeur d’Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998). Compare the difficulty in many instances of distinguishing between procedural and substantive laws. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192 (2004) (“[H]ow can procedure be distinguished from substance? . . . [A]s we all know, the substance and procedure problem is a tough nut to crack.”).

⁴² See Sterk, *supra* note 28, at 51 (noting that the Supreme Court “consistently has permitted state courts to ignore prior judgments when those judgments would interfere with the state’s ability to control post-judgment behavior within its borders”).

⁴³ My acceptance of state independence for purposes of understanding current federalism doctrines does not indicate normative acceptance of the strong states’ rights view of federalism on display in some scholarship in this area. See, e.g., Rena M. Lindevaldsen, *Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator*, 16 WM. & MARY J. WOMEN & L. 29, 54 (2009) (“[E]ach state has the sovereign right to refuse to recognize child custody orders from other states that arise from same-sex relationships.”); *id.* at 66 (asserting that “an exception to the [federal Parental Kidnapping Prevention Act should] be recognized to protect the state sovereignty of the majority of states that prohibit recognition of same-sex relationships”).

⁴⁴ Sterk, *supra* note 28, at 50.

⁴⁵ U.S. CONST. art. IV, § 1.

⁴⁶ ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 3.

⁴⁷ Engdahl, *supra* note 36, at 1607.

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State.’”⁴⁸ All of the cases brought under this Full Faith and Credit Clause forerunner attempted to give effect in second states to judgments dealing with debts or ownership of property first rendered in another state; none sought to compel a second state to apply a first state’s laws to a dispute in the second state’s courts.⁴⁹

As for the Full Faith and Credit Clause that succeeded this measure when the Articles of Confederation were superceded by the Constitution, Stewart Sterk has concluded that “[t]he principal concern of the framers was with debtors who sought to escape their debts by moving from state to state.”⁵⁰ In fashioning the Full Faith and Credit Clause, Professor Sterk argues, “[t]he Constitution’s framers built on” the clause from the Articles of Confederation, “but included language requiring the states to give full faith and credit not only to judgments, but also to the ‘public Acts’ of sister states. [This apparently] . . . was intended to assure that the states would respect each other’s ‘acts of insolvency,’ the bankruptcy determinations of the period.”⁵¹

As Professor Engdahl explains, mandatory recognition of rendering states’ judgments poses different issues from a command to give effect to another state’s laws.⁵² When one state is commanded to honor a judgment from another state, “a state’s sovereign independence” is not seriously compromised because that command dictates resolution only of “the private interests of particular parties” without resolving broader issues of public policy (other than policies about how U.S. states should treat each other).⁵³

On the other hand, Engdahl suggests, a command to one state to use another state’s law “to govern in the forum state itself” would seriously undermine states’ independent authority.⁵⁴ As he notes, “statutes were the standard means by which governments in the Anglo-American tradition established and changed public policy and undertook to control behavior [of the general population] within their geographic bounds.”⁵⁵ If full faith and credit provisions required a state to govern disputes within its boundaries, they would “displac[e] the forum [state]’s own law on point, . . . enabling the one state to govern beyond its boundaries while disabling the other state to govern within its own.”⁵⁶ Given the distinctions elucidated by Professor

⁴⁸ *Id.* at 1609–10 (citing 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 887 (1907)).

⁴⁹ *See id.* at 1614–19 (analyzing “Cases Under the Articles of Confederation’s Full Faith and Credit Provision”).

⁵⁰ Sterk, *supra* note 28, at 54.

⁵¹ *Id.*

⁵² Engdahl, *supra* note 36, at 1621–22.

⁵³ *Id.*

⁵⁴ *Id.* at 1622. *Accord* Sterk, *supra* note 28, at 49 (“[B]ecause judgments, unlike statutes, typically adjudicate past behavior rather than proscribing future behavior, a requirement that states enforce sister-state judgments imposes only weak limits on the sovereign power of a state to control behavior within its borders.”).

⁵⁵ Engdahl, *supra* note 36, at 1622.

⁵⁶ *Id.*

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Engdahl, current Full Faith and Credit Clause doctrine's differential treatment of judgments and laws is thus sensible.⁵⁷ That difference of treatment might also be extended in parallel fashion to distinguish between the retrospective effect of records or adjudications and the prospective effect that may follow from records or judgments.

Recent Supreme Court decisions confirm the Court's longstanding conviction that the Full Faith and Credit Clause itself "differentiates the credit owed to laws (legislative measures and common law) and to judgments."⁵⁸ Where one state is inclined not to apply another state's laws to resolve a dispute with multi-state connections, the Full Faith and Credit Clause allows the enforcing state to choose its own law, if it so prefers, subject to few constitutional constraints.⁵⁹ As the Court has importantly held, "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"⁶⁰ Where judgments are concerned, however, the Court adheres to the 'mandatory effect' view, insisting that its "decisions support no roving 'public policy exception' to the full faith and credit due judgments."⁶¹ As the Supreme Court explained in *Baker v. General Motors Corporation*, "[r]egarding judgments, . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."⁶²

In the modern world, therefore, the effect that the Full Faith and Credit Clause will have in one state with respect to another state's rules for sex determinations varies according to whether the rendering state has reduced a past application of its rules to an enforceable judgment (through judicial proceedings) or whether, instead, they remain more prospective rules of statutory, common, or state constitutional law (public acts) or evidentiary administrative actions (records of facts). Advocates for mandatory recognition of sexual judgments are thus likely correct to concede that, under prevailing interpretations of the Full Faith and Credit Clause, an administrative amendment of a birth certificate to reflect a different sex is "not entitled to the same deference under full faith and credit principles as an amendment or-

⁵⁷ See, e.g., Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 100 (1984).

⁵⁸ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998).

⁵⁹ *But see* Laycock, *supra* note 36, at 310–15 (arguing that preferences for forum law, even in the form of rejecting foreign state laws offensive to forum state public policies, violate the proper understanding of the Full Faith and Credit Clause).

⁶⁰ *Baker*, 522 U.S. at 232 (citing *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

⁶¹ *Id.* at 233 (emphasis in original).

⁶² *Id.*

dered by a court after a full judicial proceeding.”⁶³ Yet even where court-ordered judgments about a person’s sex identity are at issue, it would be incorrect to conclude that these are necessarily or even frequently binding upon other states. One cannot understand the constitutional effect of the Full Faith and Credit Clause, and the nature of any claim or issue preclusion it might mandate, without an appreciation of what issue or issues a judgment of legal identity properly decides, a matter regarding which I believe litigants and scholars pressing the full faith and credit argument have gone astray.⁶⁴

II. THE RELATIONAL VIEW OF LEGAL IDENTITY

My conception of legal identity emphasizes law’s consequentialist nature and the instrumental ways in which laws deploy identity. It is a mistake to think that when law decides or makes relevant someone’s sex, or someone’s race, it is simply acting upon some underlying natural “truth” about humankind. In one sense then this Article is an anti-essentialist project, understanding law to use identity categories as regulatory tools serving human purposes rather than as neutral reflections of natural human divisions.⁶⁵ My point is not simply that many claims, explicit or implicit, that purport to apply to all members of a class of people defined by identity are actually false in light of intra-group variation. Rather, my point is about the social nature of identity, at least in law, whether or not identity should also be considered social in all contexts.

Individual humans are not identical, and one can always point to some difference or another among groups of humans that distinguish them. These differences may be biological features, like the presence or absence of epicanthic folds, or matters of culture, like the wearing of turbans. Often these differences result from the interplay of nature and nurture, such as the ability to lift heavy weights. But, as Dean Martha Minow has rightly insisted, difference is itself relational.⁶⁶ I argue that legal identities are schemes of dif-

⁶³ Greenberg & Herald, *supra* note 20, at 851. *But see* Gebhardt, *supra* note 22, at 1420 (arguing that “the deference accorded to activities of our state executives, embodied in records, is in limbo”).

⁶⁴ Gebhardt does not argue that records are entitled to *more* deference than judgments, and his view of what it is that birth certificates record is almost identical to Greenberg and Herald’s view of what it is that judicial determinations of a person’s sex decide. Accordingly, this Article’s arguments about the relational character of legal identities in general and legal sex identity in particular are equally applicable against Gebhardt’s position.

⁶⁵ On “essentialism,” particularly as regards sex, race, and/or sexual orientation, *see, e.g.*, EDWARD STEIN, *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIVIST CONTROVERSY* (1990); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990).

⁶⁶ MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 12–13, 50–51, 53–55, 80, 377 (1990). Minow explains that “difference is not discovered but humanly invented” and that a “‘difference’ depends on a relationship, a comparison drawn between people with reference to a norm.” *Id.* at 55, 377.

ference and ultimately relational, and not simply matters of pre-political features inhering in the members of some identity group of individuals independent of human perception and cognition.

When *law* defines an identity class, it does so to make identity legally relevant for some purpose or purposes, and legal identity functions in a relational manner. Perhaps in nature one might think that there simply *are* males and females, that a person counts as either one or the other by virtue of certain inherent (non-relational) properties he or she possesses (even perhaps if these identity categories are criterially vague). This seems to be the view of Greenberg and of those who think that law's problem is its failure to locate sex in the brain.⁶⁷ Aside from possible scientific explorations, however, that is *not* how law treats or uses identity categories like race or sex. Law treats these as social categories and establishes social relationships; these relationships are marked by differential distributions or legal rights and obligations. Law probably ought to proceed with agnosticism about the underlying "truth" of the enduring partition of humankind into male and female.⁶⁸ When law uses sex, then, it does (or constitutionally must) do so as a matter of social relations.

To appreciate this point, consider adulthood and age. Age certainly seems to be a simple historical fact. Societies have disagreed over whether a person's age should be counted from conception or birth,⁶⁹ but under either approach, it is a fact, in principle knowable, about an individual. Ages in U.S. society, however, are not themselves identity categories. With few exceptions, such as a toddler in "the terrible twos," we do not think and act as if ages naturally separate people into different kinds or classes of humanity, and certainly not enduring ones. Where we do tend in that direction is with respect to the division between adulthood and childhood. But that division is not a simple fact. The child/adult dichotomy is a result of normative judgments about maturity, judgments that have historically been drawn differently by different jurisdictions and even differently within a single jurisdiction for different purposes. "Adults" and "children" thus are believed, or treated, in law as standing in a mutually opposing relationship to each other; you are one, or the other, but generally not both, not at any rate in one place at one moment for one purpose. Law uses majority and minority as a conclusion, for instrumental purposes of varying sorts. Age is social and relational.

⁶⁷ See, e.g., David B. Cruz, *Getting Sex "Right": Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 DUKE J. GENDER L. & POL'Y (forthcoming Fall 2010).

⁶⁸ Cf. David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

⁶⁹ See, e.g., Lokemun Magar, *A guide to Chinese birthday customs*, HELIUM, <http://www.helium.com/items/718358-guide-to-chinese-birthday-customs> (last visited Feb. 28, 2010).

Race is a more complicated case, but not tremendously contested today. It has almost become banal to hold that race is a social construction.⁷⁰ Even the Supreme Court seemingly accepts that humankind is not naturally biologically divided into distinct racial kinds; rather, the Court recognizes that race is one way in which we humans understand ourselves and divide ourselves into groups.⁷¹ Race is a social way of understanding the human species; it establishes relationships among different subsets of the citizenry; and law does not simply and unproblematically “reflect” some pre-political natural state of affairs when it makes judgments about people’s racial identities.

Sex, whether more commonly embraced as a basis for governmental action, is the same, and we should so understand it. When law distributes burdens and benefits on the basis of people’s sex or gender, we should not see that allocation as simply a reflection of some underlying natural reality.⁷² This is also true when the law makes an authoritative pronouncement about a person’s sex, even without immediate consequences. When a state dictates that a newborn person’s sex be recorded officially on a birth certificate, it is not, contrary to some courts’ representations, simply mirroring a historical “fact.”⁷³ Rather, the state is making a choice about how to divide its population into classes.

States (and individuals) generally act as though they believe that people can be divided into two classes, male and female, that stand in a relationship of opposition to one another (hence “the opposite sex”), that are mutually exclusive (you cannot be in a relationship of identity both with the set of males and with the set of females), and that are exhaustive (you must be in a relationship of identity with one of these sex groups). Though they should not, the seeming naturalness and utter familiarity of this common taxonomic scheme of sex identity sometimes lead one to overlook the human agency that state actors are exercising when they make determinations of sex iden-

⁷⁰ The belief has become sufficiently widespread that there is a Wikipedia entry addressing the notion. See *Social interpretations of race*, WIKIPEDIA (Nov. 5, 2010), http://en.wikipedia.org/wiki/Social_interpretations_of_race.

⁷¹ See, e.g., *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (“The understanding of ‘race’ in the 19th century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time [42 U.S.C.] § 1981 became law.”).

Not necessary to my argument is the Court’s further view that explicit racial classificatory practices (facial racial classifications) are so potentially divisive and corrosive that government must be stringently limited in its ability to deploy them, even when the point of using race is not to divide but to integrate. See, e.g., David B. Cruz, Address to the California Judges Association: Recent Decisions of the U.S. Supreme Court (Sept. 30, 2007) (criticizing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)).

⁷² Thus, as I have argued elsewhere, the Supreme Court was misguided in *Michael M. v. Superior Court of California*, 450 U.S. 464 (1981), in treating a sex-discriminatory statutory rape law as constitutionally unproblematic because it supposedly “equalized” the “natural” deterrents to engage in sex faced by the (male and female) sexes because women can get pregnant but men cannot. See Cruz, *supra* note 68, at 1001, 1050.

⁷³ See, e.g., *K. v. Health Div., Dep’t of Human Res.*, 560 P.2d 1070, 1072 (Or. 1977) (asserting that “it was the intent of the legislature of Oregon that a ‘birth certificate’ is an historical record of the facts as they existed at the time of birth”).

tity. Biology does not so neatly partition humankind. People are marked by tremendous biological, anatomical, hormonal, and even genetic variation.

Julie Greenberg was one of the first legal scholars to articulate the range of factors that go into modern medical practitioners' determinations about a person's sex. The indices of sex include genetics or chromosomes, gonads (testes or ovaries), internal morphology (such as seminal vesicles or fallopian tubes), external morphology (genitalia), hormones, phenotype (secondary sex characteristics such as breast tissue or body or facial hair), assigned sex/gender of rearing, and sexual identity (sometimes called a person's "psychological sex").⁷⁴ These "sex markers" need not all point in the same direction (toward inclusion of an individual among the set of male persons or toward inclusion of an individual among the set of female persons). In fact, a substantial portion of the population has discordant sex markers; these people are sometimes referred to as intersex persons or persons with an intersex condition, although many and perhaps most of them identify as male or female (and just contest the narrowness of common notions of maleness and femaleness). Moreover, these criteria are not individually dichotomous sex markers. Men and women generally have both androgen and estrogen. So-called "sex chromosomes" do not come merely in XX (female) or XY (male); rather, individuals may have XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO chromosome patterns.⁷⁵

Sex, then, in the common sense of dimorphism partitioning the human population in ways somehow connected to (sexual) reproduction, is an effect of human agency, not a natural object of human perception.⁷⁶ Even if there were some underlying natural reality of sex, perhaps marked by criterial vagueness, the legal system does not use such Platonic essences. When our laws exclude women from combat positions, it is not because of their chromosomal patterns; when courthouses require men but not women to remove their hats, it is not because of their genitalia. Our gendered laws serve social purposes, human aims, and are therefore not simple mirrors of nature.⁷⁷ However much biology may or may not underlie categories of male and female, human sexes are social classes, at least when used in law.⁷⁸ Legal

⁷⁴ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 n.74 (1999).

⁷⁵ *Id.* at 280 n.88.

⁷⁶ Indeed, the common medical response to ambiguous genitalia of newborn persons has been to insist upon conforming the newborn's body to the theoretical sex binary, rather than to modify the theory to accord with the observed realities of human biology. *See, e.g.*, SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED (1998).

⁷⁷ Any law that had such mirroring as its justification would properly be subject to Justice Thomas's misplaced criticism of affirmative action programs as serving merely "aesthetic" interests. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 750 n.3 (2007) (Thomas, J., concurring) ("Nothing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs.").

⁷⁸ I make no broader claims about the "truth" of sex in other domains, such as science. By and large, law seeks mastery, not understanding; to control, not to discern.

sex is a set of relationships. If you are designated female, you are grouped with other females and apart from males; if you are designated male, you are grouped with other males and apart from females. Your rights will vary depending on the group with whom you are identified.⁷⁹

III. SEX DETERMINATIONS

Most people do not experience their sex/gender being legally called into question or contested. For transgender or intersex persons, however, the kind of juridical security the majority enjoys may be unavailable. There is as yet no uniform national law governing determinations of individuals' sex. As Dean Spade has argued, that may well be a good thing for trans and intersex persons, as the rules of recognition that the federal government might adopt today may not be likely to coincide with the gender identity these people experience and live.⁸⁰ Yet this has left states free to adopt varying legal definitions of sexes. Some states legally recognize the possibility of a person achieving a sex identification different from that which she or he was assigned at birth at least for some purposes;⁸¹ others dogmatically insist that neonatal classifications are forever.⁸² If state populations lived, died, and reproduced in immaculate isolation from each other and the rest of the world, this could be a practical solution for legal systems. But we are not so static. In U.S. society, humans commonly move about, travel, relocate. This gives rise to the need for state legal systems to grapple with the existence of other states' different legal systems, and the prospect that two states may

⁷⁹ If there are actual sex-based legal needs, then those are generally going to be describable in more anatomical/physiological ways, I suspect. But gendered privacy, for example, as recognized by case law on bona fide occupational qualifications under Title VII, is a social need (if it's a need at all). Cf. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 151–52 (2004) (addressing courts' distinctions between privacy- and titillation-based defenses of single-sex hiring). Increased representation of women in certain occupations or educational institutions is a social goal, depending on social categories. I don't think we necessarily need more people who have always had ovaries as police officers (though I recognize some people attribute cognitive or other differences to sex or sex-linked traits). The fights about admission of transwomen to the Michigan Women's Music Festival, for example, even tend to be made in terms of life histories (and consequential "male" energy), though sometimes (and to my view regrettably) even more essentialist arguments are deployed. (My differential regret is not to imply that the exclusion would be unobjectionable if defended on some grounds rather than others.)

⁸⁰ Dean Spade, Address at the UCLA School of Law Williams Institute 6th Annual Update on Sexual Orientation Law and Public Policy: Trans Sensitivity in the Legal Profession (Feb. 23, 2007).

⁸¹ See, e.g., CAL. HEALTH & SAFETY CODE § 103425 (West 2006) (authorizing new birth certificates "[w]henver a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex"); *In re Estate of Gardiner*, 42 P.3d 120, 122 (Kan. 2002) (noting that Wisconsin changed sex designation on birth certificate of transsexual woman "'after sex reassignment surgery'" (citations omitted)).

⁸² See, e.g., *In re Estate of Gardiner*, 42 P.3d at 135 (holding transsexual woman as still legal male for purposes of marriage statute); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (concluding, of transsexual woman that court deemed still legally male, that "[t]here are some things we cannot will into being[;] [t]hey just are").

choose to classify the same person differently, one opting for male, one for female. When state laws disagree about the sex/gender identity of a person, some litigants and scholars would reach for the Full Faith and Credit Clause as a federalism fix, but that approach is deeply flawed, as I now explain.⁸³

A. *Sex as Relational*

In interstate disputes, states usually choose the applicable law by reference to a body of “choice of law” rules. These rules, however, are constrained by the Constitution. The two primary constraining clauses are the Full Faith and Credit Clause⁸⁴ and the Due Process Clause of the Fourteenth Amendment.⁸⁵ The Due Process Clause has been interpreted only to impose a rule of minimal contacts on a state’s choice of law.⁸⁶ So, if a person is identified male at birth in New Jersey, has her sex legally changed there,⁸⁷ moves to Kansas, and marries a man there, where the couple lives until the man dies, that marriage and residency are a constitutionally sufficient basis (so far as due process is concerned) for Kansas to apply its law, thereby refusing to recognize New Jersey’s identification of the transgender person as female, and therefore treating the marriage as a null and void attempted same-sex marriage.

As for the Full Faith and Credit Clause, recall that it gives states great latitude to prefer their own laws, but has been interpreted to impose a demanding duty of recognition of other states’ judgments.⁸⁸ Some scholars have suggested that, at least where a court proceeding is necessary to get a judicial order to be able to change the sex designation on one’s birth certificate, this is a judgment (judicial proceeding) that must be given credit in other states.⁸⁹

⁸³ For example, Shawn Gebhardt’s full faith and credit argument for mandatory recognition of sexual judgments asserts that “the Constitution, which protects human dignity, requires that status determinations be respected, and that where possible, the individual should be the driving force behind initiating changes in his or her own status.” Gebhardt, *supra* note 22, at 1435–36. These dignity and autonomy arguments may be appropriate for substantive due process but not for the Full Faith and Credit Clause. R

⁸⁴ See U.S. CONST. art. IV, § 1.

⁸⁵ U.S. CONST. amend. XIV, § 1.

⁸⁶ See, e.g., Laycock, *supra* note 36, at 258 (“The plurality implied that the Court will invalidate a state’s choice of its own law only when the State ‘has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.’” (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981))). R

⁸⁷ Some transgendered persons prefer terms such as “sexual conformation” or “sexual confirmation” surgeries or procedures to “sex change procedures.”

⁸⁸ See *supra* notes 58–62 and accompanying text.

⁸⁹ Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 306 (2005). Although there might be some ambiguity in whether Greenberg actually goes so far as to assert a constitutionally binding duty on the second state, in so far as she says that the sex change order “*should* be fully recognized,” *id.* (emphasis added), she frames her discussion by insisting that “the analysis must focus on whether full faith and credit principles *require* a court to accept the sex as

What such arguments have yet to address, however, is just what it is that the first state (“the rendering state”) decided when it held that a person’s birth certificate sex designation must be changed. Shawn Gebhardt, for example, criticizing a Kansas decision refusing to recognize trans woman J’Noel Gardiner’s lived gender, asserts that “the Wisconsin system’s definitive definition of [her] sex should have been respected by the Kansas courts.”⁹⁰ Yet under the relational view of legal identity that I have advanced, the rendering state did not adjudicate a simple natural fact like a person’s age.⁹¹ The disagreement between Kansas and Wisconsin stemmed not from any difference in knowledge concerning J’Noel’s physiology, psychology, or medical treatments, but rather from a difference in legal definitions. What Wisconsin “definitively” resolved was J’Noel’s legal sex identity, that is, where J’Noel lies in *the state of Wisconsin’s* scheme of sex relationships (partitioning the state population into classes of legally male and legally female persons). Kansas adopted a different definition of male and female, a different partition of its population.

I believe our Constitution is best understood as placing substantive constraints on the sex definitions states may adopt.⁹² Such a substantive-rights based approach is, in my view, the proper way to solve the problems of inhospitable states’ refusal to recognize individuals’ self-identified sex, though the details of such an argument are beyond the scope of this Article. The Full Faith and Credit Clause, however, does not independently mandate that Kansas accept Wisconsin’s view of the transgender person’s sex. The Clause does not compel Kansas to apply Wisconsin law to every dispute in Kansas involving J’Noel’s sex. The Wisconsin sexual judgment could not have decided all those issues in advance, for Wisconsin has no general legislative or adjudicative jurisdiction or competence to declare authoritatively what sex relationships obtain *among the people of Kansas*.⁹³ As Douglas Laycock has explained,

indicated on the amended birth certificate,” *id.* at 305 (emphasis added). Accordingly, I believe my reading of her as asserting a constitutional command is fair.

⁹⁰ Gebhardt, *supra* note 22, at 1426.

⁹¹ Although Gebhardt recognizes that a sex determination “create[s] a relationship between an individual and the state,” he incorrectly denies that it also creates relationships among private parties and fails to appreciate that new relationships between the individual and a different state are in play once someone moves (or otherwise comes within a new state’s prescriptive jurisdiction). *Id.* at 1447.

⁹² See Greenberg & Herald, *supra* note 20, at 862–84 (proffering arguments, neither endorsed nor repudiated for purposes of this Article, that the Equal Protection Clause and substantive due process constrain permissible state definitions of individuals’ sex).

⁹³ As one court put it in a dispute arising in the Northeast of the country, “the Vermont legislature cannot legislate for the people of Connecticut.” *Rosengarten v. Downes*, 802 A.2d 170, 178 (Conn. App. Ct. 2002) (quoted in Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 360 (2005)) (rejecting Full Faith and Credit Clause argument claiming mandatory recognition of a Vermont civil union for purposes of Connecticut state court jurisdiction to dissolve the relationship).

Legislative jurisdiction, also known as prescriptive jurisdiction, is “the authority of a state ‘to make its law applicable to the activities, relations, or status of persons, or the interests of

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[t]he allocation of authority among the states is territorial. Indeed, territory is part of the very definition of the state. . . . The territorial definition of state citizenship is stated explicitly in the Citizenship Clause, which provides that all persons born or naturalized in the United States are citizens of the state “wherein they reside.”⁹⁴

Thus, in *Thompson v. Whitman*,⁹⁵ a case where the Supreme Court later stated that “[t]he implications of the Full Faith and Credit Clause . . . first received the sharp analysis of this Court,”⁹⁶ the Court referred to the Full Faith and Credit Clause as “regulat[ing] the effect of [states’] acknowledged jurisdiction over persons and things *within their territory*.”⁹⁷

Wisconsin is thus empowered as a general matter only to legislate directly for or directly regulate those within its territory.⁹⁸ At most, then, Kansas would have to credit the sex change judgment of Wisconsin and treat J’Noel as female *for purposes of Wisconsin law* including retrospective matters already decided by Wisconsin courts.⁹⁹ But if Kansas remains constitutionally free to prefer its own substantive law (say, of marriage and intestacy), then Wisconsin law—and the Wisconsin court judgment declaring J’Noel to be female—are legally irrelevant, or at least generally impose no binding strictures on Kansas.

Matters would be somewhat different had J’Noel married a man in Wisconsin, divorced there, and obtained real property in Wisconsin during the divorce pursuant to a judicial divorce decree. Then, the Wisconsin court

person in things.’” *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 177 (3d Cir. 1995) (en banc) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987)). “*Adjudicative jurisdiction* refers to a forum court’s power to consider a case, while a forum court’s power to apply forum law is termed *legislative* or *choice-of-law jurisdiction*.” Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 772 (1998). On legislative jurisdiction generally, see Willis L. M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); on adjudicative jurisdiction generally, see A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006).

⁹⁴ Laycock, *supra* note 36, at 316. *See also id.* at 318 (“The territorial allocation of state authority is a fundamental constitutional principle, even though that principle is not attributable to any particular constitutional clause.”).

⁹⁵ 85 U.S. (18 Wall.) 457 (1873).

⁹⁶ *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 227–28 (1945).

⁹⁷ *Thompson*, 85 U.S. (18 Wall.) at 462 (emphasis added).

⁹⁸ This is of course a simplification, as states regulate many transactions with which they have connections or “contacts.”

⁹⁹ I thank Mark Strasser for emphasizing that the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 and 28 U.S.C. § 1738C (Supp. III 1997)), potentially offers Kansas an even broader argument: that because J’Noel is male for Kansas law purposes, the Wisconsin marriage was between two persons of the same sex and Section 2 of DOMA, which provides that “[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . , or a right or claim arising from such relationship[,]” therefore authorizes Kansas to deny all credit to the Wisconsin divorce judgment. Whether that is the proper interpretation of DOMA, and if so whether that congressional abnegation of full faith and credit is a permissible exercise of power under the Effects Clause, is beyond the scope of this Article.

would properly have adjudicated relationships between two of its citizens and property within its jurisdictional authority.¹⁰⁰ In that case, the content of the judgment *would* be an authoritative declaration of the ownership or non-ownership relationships among the two parties and the properties. Hence, a state such as Kansas would have to give full faith and credit to the divorce decree and its allocation of that real estate, even if Kansas would not have regarded the parties as ever married in the first place because it would not have recognized the woman's legal change of sex in Wisconsin.

B. Sex as "Status"?

Some trans advocates have anticipated and argued against the understanding I advocate. Professors Greenberg and Herald, for example, contend that "Kansas should not be able to rule that a male-to-female transsex person is entitled to the rights of a female in Wisconsin, but is granted the rights of a male in Kansas."¹⁰¹ To similar effect, Shawn Gebhardt relies upon appeals to "uniformity" and interstate consistency to argue for mandatory interstate recognition.¹⁰² There is an utter repudiation of the entailments of the relational view of legal (sex) identity. But their reasoning is flawed, relying on a reified notion of "status" and failing to examine the notions that fall within that concept or term. While some practical concerns might support their desire to transform "status" into the basis for extending the applicability of the Full Faith and Credit Clause, this would require a modification of current understandings of that Clause's scope.

Greenberg and Herald's and Gebhardt's¹⁰³ analyses may have gone astray with uncritical analogizing to conflict-of-laws treatments of divorces, adoptions, and filiations. They observe that

[a]lthough most judgments are *res judicata* against only participants in the original proceeding, determinations of a person's legal status typically are binding on nonparties. The Restatement of the Conflict of Laws defines "status" as a legal personal relationship, not temporary in its nature.¹⁰⁴

¹⁰⁰ The qualification that the real property be in the state that renders the divorce decree is intended to bring the hypothetical within the bounds of Supreme Court cases holding that the Full Faith and Credit Clause does not allow one state to dictate the disposition of real property within another state. See, e.g., *Hood v. McGehee*, 237 U.S. 611 (1915).

¹⁰¹ Greenberg & Herald, *supra* note 20, at 850.

¹⁰² Gebhardt, *supra* note 22, at 1435.

¹⁰³ Gebhardt quotes Greenberg and Herald's quotation of the *Restatement's* definition of "status." *Id.* at 1421.

¹⁰⁴ Greenberg & Herald, *supra* note 20, at 849 (footnote omitted) (citing *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* § 119 cmt. d (1934) due to Second Restatement's lack of definition of "status").

Because the “‘legal establishment of status is a socially important element of the legal order,’”¹⁰⁵ and allowing states to recognize or not to recognize sex changes accepted by the state of domicile at the time of “change” could produce “a tangled web of status issues,” “violate the purpose underlying the Full Faith and Credit Clause and profoundly affect personal rights of the deepest significance,” Greenberg and Herald conclude that, like a divorce, adoption, or paternity decree, a second state must recognize a first state’s determination that someone has legally changed his or her legal sex.¹⁰⁶ Similarly, Shawn Gebhardt argues that personal status records should be accorded mandatory interstate recognition under the Full Faith and Credit Clause because “status is a unique jurisprudential concept” and “valid concerns about third-party rights would not be implicated with respect to a status determined by an executive record.”¹⁰⁷

In the first place, these arguments fall afoul of the Supreme Court’s 1998 pronouncement in *Baker v. General Motors Corporation* that a rendering state’s judgment “cannot reach beyond the [adjudicated] controversy to control proceedings against [one of those parties] brought in other States, by other parties, asserting claims the merits of which [the rendering state] has not considered.”¹⁰⁸ It is admittedly incomplete to say without qualification that the Full Faith and Credit Clause does not bind non-parties in states other than the state that renders a judgment—for example, the Court has held priorities to be bound.¹⁰⁹ But the Court’s opinion in *Baker* did emphasize whether a litigant in a second state was a party or a non-party to the rendering state, as well as the importance to whether the judgment at issue in a Full Faith and Credit Clause dispute involves “matter[s] the [rendering] court lacks authority to resolve.”¹¹⁰ The rights a trans woman has under the gendered marriage laws of a state, for example, depend on the laws of that state, including whom the state categorizes as “male” and as “female,” and no other state has the authority in our federal system to impose a different set of laws on that state.

¹⁰⁵ *Id.* at 849 (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 119 cmt. c (1934)).

¹⁰⁶ *Id.* at 850–51.

¹⁰⁷ Gebhardt, *supra* note 22, at 1449, 1441.

¹⁰⁸ 522 U.S. 222, 238 (1998).

¹⁰⁹ *See* Sterk, *supra* note 28, at 102–03 (discussing *Yarborough v. Yarborough*, 290 U.S. 202, 210 (1933)). *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942), might seem to be another exception insofar as it held that North Carolina, a party to a bigamy prosecution the state brought in its own courts, was required by the Full Faith and Credit Clause to recognize divorces validly rendered by other states even when a North Carolina spouse was not a party to the divorce proceeding. However, dissolution of a status is not prospective in the way that creation of a status is; for reasons sketched in note 117 *infra* jurisdiction over one spouse is constitutionally sufficient to allow divorce adjudications; and, I would argue, it would violate due process for a state to unilaterally remarry (or marry) an unwilling person. Conceptually, then, *Williams I* could be understood as holding that as a matter of constitutional law there was no marriage between the Williamses that could satisfy an element of a bigamy prosecution rather than holding the Nevada divorce adjudication “binding” on non-party North Carolina.

¹¹⁰ *Baker*, 522 U.S. at 241.

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Second, the argument that status judgments should be subject to mandatory interstate recognition too casually transforms conflict of laws doctrines into Full Faith and Credit Clause rules. It would be a mistake to take common law rules and, without more, enshrine them as constitutional commands. On some views, that was one of the serious missteps of the *Lochner*-era Court.¹¹¹ As Christopher Eisgruber has argued:

There is, however, little reason to believe that the common law merits such a privileged role in constitutional interpretation. The common law's connection to American political authority has always been suspect. . . . If one is searching for the constitutive features of American liberty, one would do better to study the sweeping principles of the Declaration of Independence and the Gettysburg Address, not the technical details of Anglo-American common law. Americans had to invent the Constitution partly because their new nation lacked the foundation in custom presupposed by the ideology of English common law.¹¹²

The fact that the common law contains conflict-of-laws doctrines about status simply does not mean that the Full Faith and Credit Clause of the Constitution immutably enshrines those same rules.¹¹³

¹¹¹ See, e.g., *Alden v. Maine*, 527 U.S. 706, 762–63, n.2, 814 (1999) (Souter, J., dissenting) (criticizing the *Lochner* Court for elevating common law freedom of contract to immutable constitutional principle); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (same).

¹¹² Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 87 (1995). These arguments form part of Professor Eisgruber's criticism of an "interpretive distortion" indulged by some constitutional meaning-seekers he terms "'common law fetishism.'" *Id.* at 84. *But cf.* *Glanding v. Indus. Trust Co.*, 45 A.2d 553, 555 (Del. 1945) ("Upon the immigration of our ancestors to this country from England they adopted as a safe rule of conduct the common law of England, which they considered to be their birthright. They cherished it, and for them it represented, so to speak, a charter of liberty.").

¹¹³ The Supreme Court has sometimes said that full faith and credit requires State Two to give the same preclusive effect to a judgment that State One would. If State One follows common law rules such as those in the Restatement, this would offer a reason for mandatory recognitionists such as Greenberg, Herald, and Gebhardt to appeal to common law notions, though none is explicit that this is why they invoke the common law, and their pronouncements are more sweeping, not expressly limited to those states following the approach of the Restatement. Nonetheless, some of those Supreme Court pronouncements were about the Full Faith and Credit Act and not the Clause, even though courts have misread them as Full Faith and Credit Clause holdings. Compare, e.g., *Adar v. Smith*, 597 F.3d 697, 707 (5th Cir. 2010) (citing *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813) ("The Supreme Court first interpreted the [Full Faith and Credit] Clause in *Mills v. Duryee* to require that an out-of-state judgment be given the same effect in the several states as it would be given in the adjudicating state.")), with *Mills*, 11 U.S. (7 Cranch) at 485 (noting, at the very page cited by *Adar*, that "the act of congress [sic] . . . declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision"). And in other cases the Supreme Court addressed both the Clause and the Act without clearly distinguishing what effects could be attributed to which source of law. To the extent that there are any unambiguous constitutional holdings that states must give the same preclusive effect to judgments properly rendered in another state, they have been worded over broadly in light of various "exceptions"

Third, arguments for mandatory interstate recognition of sexual judgments have, to date, been curiously asymmetric. The “quagmire” that Greenberg and Herald insist would result if Kansas remains free to decline to adopt Wisconsin’s sex determinations is only said to come about “[i]f states fail to recognize a *change* in legal status made in another state.”¹¹⁴ But “tangled webs” could result from other states being free to change a status *created* or established in one state. Suppose Dana is designated female at birth in Wisconsin, later moves to New Jersey, undergoes medical treatment, and obtains a court order declaring that his legal identity is male and directing that he be issued a driver’s license and otherwise be legally treated accordingly. New Jersey’s repudiation of the status “made in another state” (Wisconsin) at least risks complicating Dana’s legal relationships with the people around him.¹¹⁵ Moreover, some of the mandatory recognition arguments made to date offer no evidence of recognition of the fact that the first state to adjudicate the sex of someone who has undergone medical interventions, or even someone who has not but is regarded as being intersex, could issue a ruling that decrees the person’s sex to be other than his or her self-understood gender. On that approach, such adjudication, painfully wrong from the point of view of the transgender or intersex person, should be binding upon other states. This is not a consequence dictated by current full faith and credit doctrine nor should it be advanced.¹¹⁶

Fourth and most foundationally, the status-based argument gives inadequate weight to the relational nature of the statuses it draws upon to prime its analogy pump. Adoption and filiation establish parent-child relationships (or non-relationships in the cases of unsuccessful suits to establish paternity) between a putative parent and a putative adoptee or filiatee; divorce decrees change the marital relationship of the previously married couple involved. In any of these cases, the court rendering judgment and issuing the decree

that the Court has noted (such as for property located in State Two, or, the key exception that informs the argument of this Article, bindingness on non-parties).

¹¹⁴ Greenberg & Herald, *supra* note 20, at 851, 850.

¹¹⁵ Perhaps Greenberg and Herald might argue that, because in the overwhelming majority of cases people only attempt to change a legal sex designation once, there is little conflict engendered (no pun intended) by a rule preferring the second sex determination to the first (natal) one.

¹¹⁶ Gebhardt, however, recognizes the problem but embraces it, apparently on the basis of a utilitarian calculation that more states will permit changes of legal sex than will deny them coupled with a belief that giving first-moving states’ status determinations nationwide effect better protects state sovereignty than not. *See* Gebhardt, *supra* note 22, at 1456. While such utilitarian concerns seem proper for Congress to consider in deciding what implementing legislation to enact under the Effects Clause, the text of the Full Faith and Credit Clause does not readily call for such balancing. *Cf.* Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 495–96 (2003) (recounting that Court’s former “balancing-[of-state-interests] approach quickly proved unsatisfactory”). It would also often conflict with the values revealed in Gebhardt’s earlier assertion that “[w]hen liberty is at stake, it is all the more important that status determinations are unified and binding.” *See* Gebhardt, *supra* note 22, at 1449. Moreover, by ontologizing status throughout the article, Gebhardt’s arguments obscure the regulatory character of legal statuses and thereby wrongly diminish the extent of the intrusions on every state’s territorial sovereignty commanded by his approach. *Id.*

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has personal jurisdiction over a constitutionally sufficient number of those involved in the status determination—the putative parent and child or the member of the couple who wishes to be divorced—and the state involved has legislative jurisdiction over them.¹¹⁷ A decree that the people involved (putative parent and child, or soon to be sundered spouses) are or are not in a specified relation to each other is fully within the rendering state’s territorially allocated authority.¹¹⁸

But in a sex determination, the state of Wisconsin (to continue with the Wisconsin-Kansas example discussed by Professors Greenberg and Herald) has legislative jurisdiction over the petitioner (the trans or intersex person who wants to set the record straight, so to speak), as well as over the classes of male and female citizens of (and, generally, persons present in) Wisconsin. But it does not have legislative jurisdiction over the classes of male and female citizens of Kansas. A Wisconsin judgment, then, necessarily cannot be one that generally binds the people of Kansas into a set of sexed relationships with the petitioner.

In addition to the jurisdiction-over-persons issue, an individual’s legal sex is somewhat like a civil marriage. Both are, at their core, prospectively regulatory. Being civilly married is a condition that is an input to hundreds of state and federal laws.¹¹⁹ When a state marries a couple, the “act of sover-

¹¹⁷ In the *Williams* cases, the Supreme Court has held that a state must have jurisdiction over one of the members of a couple—that the person must be a domiciliary—for the state to grant a divorce. In effect, the Court allows states to change both married parties’ legal status in the state exercising jurisdiction over one party; that is, if that party has established domicile in that state. The Court does not defer to the state where a status (such as marriage) was established; rather, it is where the effects of the legal relationship are felt that allows a state to regulate that relationship. *See, e.g., Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229–30 (1945) (“Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted.”). The divorcing state thus need not technically have jurisdiction over an absent spouse; but if two people are in a relationship, and either may choose to exit that relationship, then the divorcing state has jurisdiction over all those necessary to change the relationship, i.e., over the domiciliary spouse seeking exit. Were someone to wish to insist on their affiliation with one group of the populace of State B rather than another group, State A would need jurisdiction over both—unless we were to take such a relationship as unilaterally determinable at the insistence of individuals. But that then would be tantamount to a substantive argument that every person can individually decide his or her sex himself, at least if certain conditions obtain (e.g., genital surgery), not the purely procedural argument that Greenberg and Herald’s full faith and credit argument purports to be.

¹¹⁸ *See supra* note 94 and accompanying and succeeding text (discussing territorial allocation of state authority).

¹¹⁹ At last count, the GAO identified 1,138 statutes that made marital status (vel non) relevant. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (“identif[y]ing] a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges”).

eign authority” in which it engaged, as Tobias Barrington Wolff has put it,¹²⁰ is to establish how its marriage-dependent laws will treat that couple in the future. When a state determines one of its resident’s sex (or the sex of a person present in the state), the state is establishing how its sex-dependent laws will treat that person in the future. Neither of these (marriage or sex) is subject to mandatory enforcement as a judgment due full faith and credit in another state.

Analogously, a judicial determination that someone has successfully adopted a person under the laws of Wisconsin also establishes how Wisconsin’s filial-dependent laws will treat those two persons in the future. As for other states, the majority rule among courts is that if the father and his adopted daughter move to Kansas, Kansas would be required by full faith and credit to recognize him as her father.¹²¹ Even on this majority view, the daughter will only enjoy those rights as against her father that a daughter in Kansas enjoys against her father, not the rights that Wisconsin resident daughters would enjoy in Wisconsin against their resident fathers.¹²² By and large, though, the cases espousing this view simplistically invoke “final judgments” without addressing just what it is a judicially rendered adoption decree actually decides or how adoption operates in law.¹²³ The majority

¹²⁰ Tobias Barrington Wolff, Remarks at American Association of Law Schools Annual Meeting: Panel on Recognition of Same-Sex Marriage: Conflicts Law and Public Policy in a Globalizing Society (Jan. 5, 2007) (notes of oral presentation on file with author).

¹²¹ See, e.g., *Adar v. Smith*, 597 F.3d 697, 708 (5th Cir. 2010) (“[T]here is virtually universal acknowledgment that Louisiana owes full faith and credit to the New York adoption decree and must recognize that the Adoptive Parents are Infant J’s legal parents.”); *Delaney v. First Nat’l Bank in Albuquerque*, 386 P.2d 711, 714–15 (N.M. 1963) (relying on Full Faith and Credit Clause to conclude that “we are constrained to give credence to the Colorado adoption” challenged there for inconsistency with New Mexico law).

I do not here consider issues that may arise if a state, such as Virginia, refuses to recognize a second-parent adoption because the two parents are of the same sex. Although this has happened and resulted in extensive litigation, it raises issues about DOMA and equal protection that are beyond the scope of this Article. See, e.g., Lindevaldsen, *supra* note 43, at 29 (addressing “the legal and policy implications that arise when a state that expressly prohibits recognition or enforcement of any rights arising from a same-sex relationship is confronted with a request to register and enforce a child custody order issued by another state that gives custody or visitation rights to a biological mother’s former same-sex partner”).

¹²² See, e.g., *Finstuen v. Crutcher*, 496 F.3d 1139, 1154 (10th Cir. 2007) (maintaining, in case involving California adoption decree, that “Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship”).

¹²³ *Id.* *Finstuen* comes closer than most to engaging with what an adoption decree actually resolves, but even *Finstuen* fails to appreciate the prospective, regulatory nature of a legal parent-child relationship. See *id.* at 1152 n.12 (treating adoption decree as a “judgment” for Full Faith and Credit Clause purposes “under the common definition of the term as a ‘court’s final determination of the rights and obligations of the parties in a case’” without distinguishing rights that may operate in the future as a result of regulatory laws). Rather, the court there simply treats people’s “status as adoptive parents,” *id.* at 1155, as something ontologized or reified that can float free from the legal context of the state that renders an adoption decree.

Likewise, although another Full Faith and Credit Clause adoption case, *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010), promisingly starts its analysis by noting that the rendering state (New York) had “merely adjudicated a parent-child relationship between the Adoptive Parents and Infant J,” *id.* at 711, the court subsequently insisted that the adoptive parents were “only

rule seems explicable, in part, as a consequence of practical uniformity concerns where minor children are at issue and in part as a consequence of Wisconsin's having had legislative jurisdiction and adjudicative jurisdiction over the adoptive father and daughter.¹²⁴

The latter distinguishes this case from one in which one state's adjudication of a transgender person's sex is sought to be applied in another state where the people with whom the transgender person would establish a legal relationship were not within the first state's jurisdiction. Wisconsin has legislative and adjudicative jurisdiction over a resident changing her or his legal sex designation and over the classes of people with whom the person is shifting affiliation (from affiliation with the males of Wisconsin to affiliation with the females of Wisconsin or vice versa). Accordingly, for purposes of Wisconsin law and disputes governed by it, the person would have to be treated as of the sex Wisconsin determined. Thus, a money judgment owed an ex-wife (who had been identified as male at birth in Wisconsin but had changed her legal sex designation before marrying in that state) by her ex-husband would be fully enforceable against him in Kansas.¹²⁵ Yet if she did move to Kansas and wished to be eligible for consideration as a woman for purposes of an affirmative action plan concerning a promotion at a county

seeking to be afforded the rights under Louisiana law to which the judgment entitles them," *id.* at 711 n.43. But this very formulation should have alerted the court that it was not the judgment or "the parent-child status," *id.* at 712, that was at issue. Rights are created by laws, and a right to change a Louisiana birth certificate must stem from Louisiana law, as the court's later statutory interpretation section suggests. *See id.* at 713–19 (carefully parsing Louisiana law). The court in effect ontologized the adoptive parent-child relationship, treating it as an unimpeachable fact that merely constitutes an input to Louisiana's laws that Louisiana could not ignore because of the Full Faith and Credit Clause. While the extreme vulnerability of minors might warrant such a holding by the Supreme Court restricting states' abilities to define legal parenthood, no one should obscure the stakes and necessary analysis by mere incantation of the term "judgment."

¹²⁴ *Cf. In re Hampton's Estate*, 131 P.2d 565, 573 (Cal. App. 1942) (stating that an adoption decree cannot bind people who were not given notice of and an opportunity to be heard in the adoption proceedings and that a child may not be adopted unless the court has jurisdiction over the child's parents).

Insofar as an adjudicated adoption might be conceptualized like judicial validation of a contract between the parent and child, with the state representing the child's interests, the child would be free to enter an adoption with no one else until that contract was dissolved (since a second state would be denied the power to reject that judgment by the Full Faith and Credit Clause because the first state had jurisdiction over the necessary parties). A second state's refusal to recognize such adoptions would thus leave the child parentless, which would arguably violate the Due Process Clause. Contrary to Gebhart's contention that legal sex is a relationship solely between the state and the individual, Gebhardt, *supra* note 22, at 1447, however, legal sex is actually a relationship among multiple individuals: the men and women of the state whose law is at issue. Therefore, unlike in the case of adoption, where the first state to render a judgment has jurisdiction over the constitutionally relevant parties (the adoptive parents and child) whose relationship may be called into question in a second state, in the case of a legal sex determination, the first state to adjudicate a person's sex does not have jurisdiction over the sex relationship in a second state (the sexed members of the second state's population). Thus, the full faith and credit argument available for compelled interstate acceptance of adoption decrees is not applicable to the case of legal sex determinations.

¹²⁵ *But see supra* note 99 (discussing Mark Strasser's having raised the DOMA issue but not resolving it).

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transportation agency,¹²⁶ whatever due process or equal protection might demand in this situation, Kansas should not be required by the Full Faith and Credit Clause to treat her as part of the same class as natively identified women of Kansas just because Wisconsin grouped her with natively identified women of Wisconsin.

Some treatments of the mandatory recognition argument come close to recognizing the relational view of legal identity. Greenberg and Herald note that “[t]he *Restatement of the Conflict of Laws* defines ‘status’ as a legal personal relationship, not temporary in its nature” and concede that “status usually refers to a legal relationship to another person, such as husband-wife and parent-child.”¹²⁷ Gebhardt argues that “by issuing status records, the executive branch of government is responsible for a great variety of rights—obligations *between* private parties, between private parties and the state, and between public entities.”¹²⁸ Yet these authors fail to examine what it is about these statuses that bring them within the scope of the Full Faith and Credit Clause. This failure is especially glaring since the “status” of being married is not one courts have ever held one state constitutionally obliged to recognize under that clause as a consequence of a couple’s having been married in another state.

The primary doctrinal justification for Greenberg and Herald’s conclusion, upon which Gebhardt builds, appears to be the claim that “status” may “include an individual permanent condition created by law.”¹²⁹ This assertion is in turn slenderly supported by citation to one comment in the First Restatement of Conflicts.¹³⁰ Again, this confuses common law with the Constitution. It fails to explain why, then, a “gender fundamentalist”¹³¹ state that believes sex is permanent and sex changes impossible could not so adjudicate and legally trap a hapless transsexual person not in the wrong body¹³² but in the “wrong” legal sex identity. And it contributes to a naturalization of sex that deflects attention from the lived circumstances of human beings and social judgments about how people should be allowed to live. Without arguments to counter all of these concerns, their position merits respectful rejection, at least as an interpretation of extant Full Faith and Credit Clause law.

The preceding qualification may be important. The practical concerns emphasized by mandatory recognition authors appear greater in the modern

¹²⁶ Cf. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (Title VII challenge by male to application of such a plan).

¹²⁷ Greenberg & Herald, *supra* note 20, at 849 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 119 cmt. d (1934)).

¹²⁸ Gebhardt, *supra* note 22, at 1435 (emphasis added).

¹²⁹ Greenberg & Herald, *supra* note 20, at 849.

¹³⁰ See *id.* (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 119 cmt. a (1934)).

¹³¹ See Cruz, *supra* note 68, at 1054.

¹³² For transsexual narratives of being trapped in the wrong body, see generally JAY PROSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSEXUALITY* (1998); Ronald Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121 (1991).

era of easy, rapid travel than the framers of the Full Faith and Credit Clause might have envisioned. This increases the appeal of turning to that Clause to secure the stability of a legal status. That appeal might motivate courts to promulgate doctrine under the Full Faith and Credit Clause requiring interstate recognition of judgments of status. That protection would be partial at best unless it also extended to administratively recognized statuses, for those can profoundly affect interpersonal relationships even without any encounter with litigation.¹³³ If not limited to filial status as effectuated by adoptions, for example, such a move would have to be recognized as working a dramatic change in the degree to which the law of one state could operate prospectively to constrain the conduct of other states in a wide range of future events. Moreover, any such “fix” would have the deeply regrettable symmetric downside of making “bad” adjudications, ones repudiating trans or intersex persons’ lived sex, as binding in every state as “good” adjudications. So long as states remain understood as viable independent “sovereigns” within our national system,¹³⁴ it is not clear to me that we should interpret our Constitution in the fashion required by the “status” fix to the perceived limitations of the Full Faith and Credit Clause, particularly when it may be within Congress’s power under the Effects Clause¹³⁵ to enact asymmetric, pro-recognition statutes to make sex determinations more portable across state lines.

CONCLUSION

On the relational view of identity, the Full Faith and Credit Clause imposes few constraints on how one state may treat another state’s sex determinations in future circumstances. Where past circumstances are at issue, and the first state’s sex determinations played a legally operative role in an adjudication as to specific rights or liabilities, our nation’s constitutional guarantees of interstate unity suffice to protect people when they travel in or move to other states. But, under current law, the full faith and credit obligation cannot be leveraged into a requirement that all other states be bound by the judgment of a state that sex ought to be defined in particular ways.

This understanding of full faith and credit necessarily means that when a transgender person moves from a “good” state, one which recognizes his or her lived sex identity, to a “bad” state (such as Kansas or Florida) that insists that one cannot change one’s legal sex, he or she will not be able to use the Full Faith and Credit Clause to force his or her new state to recognize

¹³³ See generally Gebhardt, *supra* note 22 (developing argument for full faith and credit to status records).

¹³⁴ For a trenchant criticism of states-as-sovereigns discourse as failing to grapple with the transformations in federal-state relationships since the Civil War, see Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 203 COLUM. L. REV. 1992 (2003).

¹³⁵ U.S. CONST. art. IV § 1. See *supra* text accompanying notes 28–29.

his or her gender. Conversely, however, those people unfortunate enough to live in a state that does not allow for legal sex changes and who become subjected to a judicial decree denying their lived sex will not be bound by that determination for all future purposes if they move to a state that is less hostile toward or dismissive of transpersons.

This is not a fanciful scenario, as the cases discussed in this Article demonstrate. Recall the case of Sterling Simmons, mentioned in the Introduction:¹³⁶ a state appellate court ruled that his medical treatments were legally ineffective to change his sex from female, the sex he was identified as at birth.¹³⁷ This litigation was more hotly contested than a typical judicial proceeding to change a sex designation on a birth certificate. Simmons's litigation ordeal thus presents, if anything, a stronger case for the mandatory recognition approach to sexual judgments under the Full Faith and Credit Clause. Hence, although critics might condemn the result in *Simmons* as wrong,¹³⁸ the mandatory recognition rule some advocate would saddle Simmons with that judgment regardless of the state where he might make a new residence. Not only would he have been deprived of his relationship with his child, Simmons would also have no chance to establish a legal relationship of identity with those he believed to be of his own sex regardless of how trans-friendly a state to which he might move.

Moreover, accepting the relational view of identity propounded here would help move legal decision makers away from a naive view that they are merely "tracking" nature. That approach has allowed courts to disclaim responsibility for their interpretive choices, and even to shield legislatures from accountability for their statutory schemes, on the ground that all they are doing is "recognizing" an underlying reality. Although it has been claimed time and again, they have obviously done nothing of the sort. Much as it is abortion-restricting laws that have coerced some women to become

¹³⁶ See *supra* notes 11, 17 and accompanying text. The actual Sterling Simmons was described by the court as not having had "complete" gender surgeries. It is possible, therefore, that he might escape the burdens of the mandatory recognition approach by having additional surgeries. Some trans persons, however, might have all the surgeries they intend to have before their sex is ever adjudicated, and that adjudication could go against them. Perhaps some advocates of the mandatory recognition approach believe that such cases would be less common than cases where a trans person gets a court-ordered birth certificate recognizing their lived gender, which they could then require other states to honor for all purposes. I have great doubts that such a utilitarian calculus is an appropriate way to determine how to interpret the Constitution's Full Faith and Credit Clause and the constraints on state authority it imposes. But in any event, Professors Greenberg and Herald have not yet openly defended their arguments about sexual judgments in such terms, although Shawn Gebhardt has defended his argument about sexual records in this manner. Gebhardt, *supra* note 22, at 1456–57 (discussing what he terms "the 'anti-Gardiner' scenario"). We disagree about the likely costs of his approach, in part because he sees an individual's sex as a (perhaps medical) fact rather than a legal classification, but I also am yet unpersuaded that state authority under our Constitution and its Full Faith and Credit Clause should be interpreted by reference to such contingencies.

¹³⁷ See *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).

¹³⁸ Julie Greenberg and Marybeth Herald rather neutrally describe the court's judgment in *Simmons* without normative evaluation. See Greenberg & Herald, *supra* note 22, at 851, n.182.

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mothers against their will, not the “natural” fact of their pregnancies, laws denying the possibility of legal sex changes are what deny people sex-specific rights and obligations to which they would otherwise be subject. In doing so they also facilitate general societal pressures on some people to live as a sex other than the one they know themselves to be. The approach enabled, indeed demanded, by the relational view of legal identity would instead lead toward a fuller appreciation of the ways in which we collectively exercise agency to make decisions about human identity and the legal (hence social) consequences of those decisions. This could facilitate a more candid, and I hope therefore ultimately more humane, approach to the costs and benefits of those choices, particularly for the intersex and transgender persons so marginalized by much current law of sex identity in the United States.