

FULL FAITH AND CREDIT IN THE EARLY CONGRESS

*Stephen E. Sachs**

INTRODUCTION.....	1203
I. FULL FAITH AND CREDIT IN CONTEXT.....	1209
A. <i>Authentication and Evidence</i>	1209
B. <i>Pleading and Substantive Effect</i>	1213
II. THE CLAUSE AND ITS HISTORY.....	1216
A. <i>“Full Faith and Credit” in Early Usage</i>	1217
B. <i>The Articles of Confederation</i>	1221
1. <i>Statutory Precedents</i>	1221
2. <i>Text and Amendment</i>	1223
3. <i>Judicial Interpretation</i>	1224
C. <i>The Constitutional Convention</i>	1227
1. <i>Textual Changes</i>	1227
2. <i>Implications</i>	1229
III. THE LEGISLATIVE HISTORY OF FULL FAITH AND CREDIT.....	1231
A. <i>The 1790 Act</i>	1231
1. <i>Text and Origins</i>	1231
2. <i>Interpretation</i>	1233
B. <i>The 1804 Act</i>	1240
1. <i>Intervening Developments</i>	1240
2. <i>Congressional Action</i>	1246
C. <i>The 1806–1808 Bills</i>	1251
1. <i>Intervening Developments</i>	1251
2. <i>Congressional Action</i>	1253
a. <i>Analysis</i>	1254
b. <i>History</i>	1255
D. <i>The 1812 Attempt</i>	1257
E. <i>The 1813–1814 Bill</i>	1259
1. <i>Intervening Developments</i>	1259

* Yale Law School, J.D. 2007; Oxford University, BA (Hons) 2004; Harvard University, A.B. 2002. I am grateful to Will Baude, Jessica Bulman-Pozen, Josh Chafetz, Michael Collins, Morris L. Cohen, David Engdahl, Matthew Madden, David Pozen, Alan A. Sachs, Amanda Schwoerke, Ralph U. Whitten, Judge Stephen F. Williams, and Steven C. Wu for advice and comments on earlier drafts.

2. <i>Congressional Action</i>	1262
F. <i>The 1817–1818 Bill</i>	1266
1. <i>Intervening Developments</i>	1266
2. <i>Congressional Action</i>	1267
a. <i>The Nelson Bill</i>	1267
b. <i>The Debates</i>	1270
G. <i>The 1820 Attempt</i>	1274
H. <i>The 1822 Attempt</i>	1276
I. <i>Summary</i>	1276
CONCLUSION	1278

AFTER more than 200 years, the Full Faith and Credit Clause remains poorly understood. The Clause first issues a self-executing command (that “Full Faith and Credit shall be given”), and then empowers Congress to prescribe the manner of proof and the “Effect” of state records in other states. But if states must accord each other full faith and credit—and if nothing could be more than full—then what “Effect” could Congress give state records that they wouldn’t have already? And conversely, how could Congress in any way reduce or alter the faith and credit that is due?

This Article seeks to answer these questions in light of Congress’ early efforts, from the Founding to the 1820s, to “declare the Effect” of state records—efforts which have largely escaped the notice of current scholarship on the Clause. Together with pre-Founding documents and the decisions of influential state courts, these efforts suggest that the Clause was not generally understood to mandate the effect of state records in other states, but rather to leave such determinations to the legislative branch. Indeed, early interpreters of the Clause attributed far less importance to its first self-executing sentence, which was often understood as a rule of evidence, and far more importance to the congressional power to determine substantive effect. Recovering this original meaning not only saves the Clause from obscurity, but also offers opportunities for deliberation and legislative choice over the structure of our federal system.

INTRODUCTION

*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.*¹

Justice Jackson once described the Full Faith and Credit Clause as “a neglected one in legal literature.”² Today, the Clause is a center of controversy, with debates over the Defense of Marriage Act (“DOMA”)³ generating at least as much heat as light.

The basic features of the Clause, however, are still poorly understood. Its first, self-executing sentence—“Full Faith and Credit shall be given . . .”—is thought to require the direct enforcement of other states’ laws and judgments.⁴ The Supreme Court considers this requirement “exacting,” holding that a final judgment of a competent state court thereby “gains nationwide force.”⁵ As Douglas Laycock put it, “[f]ull faith and credit is the maximum possible credit; it is conceptually impossible to give faith and credit that is more than full.”⁶ Thus, the Clause “requir[es] each state . . . to treat the law of sister states as equal in authority to its own.”⁷

But as the controversy over DOMA has shown, this broad interpretation runs quickly into contradictions. The Clause not only issues a self-executing command, but also empowers Congress to determine the manner of proof and “the Effect” of sister-state records. Using this power, for example, Congress has given na-

¹ U.S. Const. art. IV, § 1.

² Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 Colum. L. Rev. 1, 3 (1945).

³ 28 U.S.C. § 1738C (2006).

⁴ See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 261 (1998) (offering examples).

⁵ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

⁶ Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 296 (1992).

⁷ *Id.*

tionwide effect to state child support and custody orders.⁸ Yet if states must accord each other's laws and judgments "full" faith and credit—and if nothing could possibly be more than "full"—then what obligations could Congress create that states wouldn't already bear? Conversely, if the Constitution itself requires "full" faith and credit, then how could Congress reduce or alter the faith and credit that is due? Under the prevailing interpretation, in other words, the first, self-executing sentence has swallowed the rest of the Clause—leading some scholars to portray this power as nearly a dead letter,⁹ and others to invest Congress with an impressive (though unenumerated) capacity to relax any provision of Article IV.¹⁰

This theoretical puzzle has produced equal confusion in practice. Though the Clause itself treats acts, records, and judicial proceedings equally, the Supreme Court "has always differentiated 'the credit owed to laws (legislative measures and common law) and to judgments.'"¹¹ Likewise, though the text draws no distinctions among different acts, courts have never enforced so-called penal statutes across state lines.¹² Stirring declarations of broad constitutional purpose (making the states "integral parts of a single na-

⁸ See 28 U.S.C. §§ 1738A–1738B (2006); see also 18 U.S.C. § 2265 (2006) (protection orders).

⁹ See, e.g., Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965, 2003 (1997) (describing the Clause as granting a power to "[r]efine and implement, not undermine or abolish," and arguing that DOMA exceeded that power by allowing states to disregard marriages sanctioned elsewhere); Letter from Laurence H. Tribe, Ralph S. Tyler, Jr., Professor of Constitutional Law, Harvard Law Sch., to Senator Edward M. Kennedy (May 24, 1996), reprinted in 142 Cong. Rec. S5931–33 (daily ed. June 6, 1996) (arguing that the Clause only empowers Congress "to enforce [its] self-executing requirements insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient"); cf. Jeffrey L. Rensberger, Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit, 32 Creighton L. Rev. 409, 412 n.6 (1998) (listing sources).

¹⁰ See, e.g., Gillian E. Metzger, Congress, Article IV, and Interstate Relations, 120 Harv. L. Rev. 1468 (2007).

¹¹ Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 152 (1999) (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998)); accord *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003).

¹² See *Nelson v. George*, 399 U.S. 224, 229 (1970).

tion”¹³) have sat uncomfortably alongside ad hoc exceptions (“[I]t is for this Court to choose in each case between the competing public policies involved.”)¹⁴ And no matter how “exacting” the language may seem, the Court has also informed us that full faith and credit is “not an inexorable and unqualified command.”¹⁵

The Full Faith and Credit Statute,¹⁶ first enacted by Congress in 1790 (the “1790 Act”),¹⁷ made the law no clearer. Today the Statute commands that public records of sister states “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”¹⁸ In other words, the judgment of State *A* must have the same effect in State *B* as it would in *A*’s own courts.¹⁹ Yet this rule, too, is riddled with exceptions. State *B*’s statute of limitations will block the enforcement of State *A*’s judgment.²⁰ A Michigan injunction loses its effect once the enjoined party leaves for Missouri.²¹ Indeed, according to the Restatement, a judgment “need not be recognized or enforced” if it would “involve an improper interference with important interests of [a] sister State.”²²

¹³ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935) (describing the “very purpose” of the Clause as “to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation”).

¹⁴ *Hughes v. Fetter*, 341 U.S. 609, 611 (1951); see also *id.* (“[F]ull faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state . . .”).

¹⁵ *Pink v. A.A.A. Hwy. Exp.*, 314 U.S. 201, 210 (1941).

¹⁶ 28 U.S.C. § 1738 (2006).

¹⁷ An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other State, ch. 11, 1 Stat. 122 (1790).

¹⁸ 28 U.S.C. § 1738 (2006).

¹⁹ See, e.g., Sanford N. Caust-Ellenbogen, *False Conflicts and Interstate Preclusion: Moving Beyond a Wooden Reading of the Full Faith and Credit Statute*, 58 *Fordham L. Rev.* 593, 593 & n.4 (1990) (listing citations).

²⁰ See *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *M’Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839).

²¹ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998); see also Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 *Va. L. Rev.* 747, 756 (1998) (“Courts have never been sure about the applicability of full faith and credit to equitable decrees of state courts.”).

²² Restatement (Second) of Conflict of Laws § 103 (1971); see also *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 285 (1980) (plurality opinion) (considering “the substantial interests of the second jurisdiction”). But see William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 *Md. L. Rev.* 412, 438 (1994) (doubting whether,

The prevailing interpretations of the Clause and the Statute suffer from the same flaw. A single rule of uniformity can't answer every question that the interstate conflict of laws and judgments might pose. The broader and more general the ostensible rule, the greater pressure on courts to carve out ad hoc exceptions and clean up the mess.²³

These problems were no simpler at the Founding, and the Framers did not try—in either the Full Faith and Credit Clause or its predecessor in the Articles of Confederation²⁴—to solve them once and for all. In fact, the Clause was designed *not* to solve them, but to pass them to Congress instead. As a small group of commentators have argued (prominent among them Ralph Whitten, Kurt Nadelmann, and recently David Engdahl), the only self-executing portion of the Clause was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have.²⁵ The real significance of the Clause was the power it granted to Congress to specify that effect later.

Unfortunately, in the 1790 Act, the First Congress failed to exercise its full authority. While the evidence on this point is murkier—and the scholarly literature more divided²⁶—I argue that the Act again avoided the difficult questions, addressing the authentication

“[d]espite . . . the prestige of the American Law Institute, . . . Section 103 provides an accurate statement of the law”).

²³ See, e.g., Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 *Colum. L. Rev.* 153, 178 (1949) (“[T]he language of the clause, taken together with that of the implementing statute, is so sweeping as to make inevitable the existence of some exceptions to its literal command.”); *id.* at 161 (identifying five categories of exceptions).

²⁴ See *Articles of Confederation art. IV, cl. 2* (“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.”).

²⁵ See, e.g., David E. Engdahl, *The Classic Rule of “Full Faith and Credit,”* 118 *Yale L.J.* 1584 (2009); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 *Mich. L. Rev.* 33 (1957); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 *Mem. St. U. L. Rev.* 1 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 *Creighton L. Rev.* 499 (1981); Whitten, *supra* note 4; see also Daniel A. Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 *Geo. Mason L. Rev.* 307 (1998).

²⁶ Compare, e.g., Whitten, *supra* note 4, with Engdahl, *supra* note 25.

2009]

Full Faith and Credit

1207

of state judgments while leaving their substantive effect unchanged. Over the course of the early nineteenth century, Congress repeatedly returned to the issue, never quite reaching agreement on how and when one state's judgments should bind the others. Today's Congress remains entirely free to determine the effect of state records in other states.²⁷

These interpretations may seem unusual, in part because current scholarship on the Clause is not particularly historical.²⁸ Those who do examine the Clause historically have tended to focus on the same source material: the Articles of Confederation, the debates in the Constitutional Convention, and especially the decisions of federal appellate courts.²⁹ The standard accounts also tend to portray this history as one long road to the Supreme Court's decision in *Mills v. Duryee*,³⁰ which purported to give state judgments conclu-

²⁷ This Article does not discuss in equal detail the substantive effect accorded to state laws in other states, an issue I will address in a future work.

²⁸ See, e.g., Kramer, *supra* note 9; Mark D. Rosen, Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: *Lawrence*, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires, 90 Minn. L. Rev. 915 (2006); Joseph William Singer, Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. C.R. & C.L. 1 (2005); see also sources cited *supra* note 9. See generally James R. Pielemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 S. Cal. L. Rev. 1299, 1302 (1987) (asserting that "[t]he constitutional history of the full faith and credit clause is sparse").

²⁹ See, e.g., Walter Wheeler Cook, The Powers of Congress Under the Full Faith and Credit Clause, 28 Yale L.J. 421 (1919); Edward S. Corwin, The "Full Faith and Credit" Clause, 81 U. Pa. L. Rev. 371 (1933); George P. Costigan, Jr., The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation, 4 Colum. L. Rev. 470 (1904); Crane, *supra* note 25; Jackson, *supra* note 2; Laycock, *supra* note 6; Max Radin, The Authenticated Full Faith and Credit Clause: Its History, 39 Ill. L. Rev. 1, 16 (1944); G.W.C. Ross, "Full Faith and Credit" in a Federal System, 20 Minn. L. Rev. 140, 143 (1936); James D. Sumner, Jr., The Full-Faith-and-Credit Clause—Its History and Purpose, 34 Or. L. Rev. 224 (1955); James Weinstein, The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine, 90 Va. L. Rev. 169 (2004); Rex Glensy, Note, The Extent of Congress' Power Under the Full Faith and Credit Clause, 71 S. Cal. L. Rev. 137 (1997); Julie L.B. Johnson, Comment, The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act, 145 U. Pa. L. Rev. 1611, 1617–22 (1997).

³⁰ 11 U.S. (7 Cranch) 481 (1813).

sive effect in other states and which is widely taken to have settled the issue forever.³¹

This Article adopts a different approach. It focuses on the history of congressional efforts, from the Founding to the 1820s, to exercise the power granted by the Effects Clause.³² During this period, influenced by dissension and disagreement in the state courts, members of Congress repeatedly proposed legislation that would have clarified the effect of sister-state judgments. This material provides a crucial window into the early understanding of the Clause and its accompanying Statute.

While the evidence is hardly one-sided, three general insights emerge from these sources.

First, early understandings of the Full Faith and Credit Clause tended to attribute far less importance to its first self-executing sentence, which was considered as part of an evidentiary framework, and far more importance to Congress' power over substantive effect.

Second, the decision in *Mills* did not immediately resolve the interpretive disputes over the Clause and Statute, which persisted for many years afterward. While *Mills*' position eventually became accepted, it was by no means the only or even the most natural possibility.

Third, even as late as the 1820s, many people believed that Congress had *not yet exercised* its power to declare the substantive effect of sister-state records. On this view, the states were still free to accord their own measure of substantive effect to sister-state records based on the preexisting common law of judgments and evidence. Rather than a mere quirk of history, this belief reflected an intellectually respectable position and may well have been right.

An evidentiary interpretation of the Clause may seem strange to us today. But this strangeness results more from the evolution of civil procedure and evidence law over the past two centuries than from any intrinsic feature of the theory. In fact, the creativity of the early congressional debates in re-envisioning interstate relations should instead be a source of legislative inspiration. A belief that

³¹ See, e.g., David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 103 (1997).

³² I have discovered no additional attempts from 1822 until at least 1850.

the Constitution's commitments are narrower than we thought is hardly constraining; it leaves the field open for deliberation and choice over the structure of our federal system.

This Article proceeds in four parts. Part I explains the historical context of the Clause from the perspective of a Founding-era creditor seeking to enforce a sister-state judgment. Part II builds on this framework to describe the immediate historical antecedents of the Clause, developing the evidentiary interpretation. Part III explores the legislative history of the Clause, explaining the activity of Congress in light of contemporaneous developments in the courts. A brief conclusion follows.

I. FULL FAITH AND CREDIT IN CONTEXT

Understanding the Full Faith and Credit Clause requires an understanding of the legal environment in which it was written. Suppose that, in the Founding period, "Creditor" obtained a judgment against "Debtor" in State *A*'s courts and under its laws—after which Debtor fled in the night to State *B*. Under the law of England and the American colonies before the Articles of Confederation—that is, before any applicable Full Faith and Credit Clause—how could Creditor have enforced his judgment and collected his debt?

A. Authentication and Evidence

Creditor's first problem was quite basic: obtaining an admissible copy of the law or judgment on which he relied. Federal statutes, for example, were not regularly published for many years after the Founding.³³ The first law on the subject required copies of new enactments to be published in at least three newspapers, and to be distributed to Congressmen and state executives. Authenticated copies could be purchased individually from the State Department,³⁴ but this did little to encourage their distribution. In 1817, the reporter of decisions in Kentucky found that the 1790 Act was

³³ See generally Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 *Minn. L. Rev.* 1008 (1938).

³⁴ See *An Act To Provide for the Safe-Keeping of the Acts, Records, and Seal of the United States, and for Other Purposes*, ch. 14, § 2, 1 Stat. 68, 68 (1789).

itself so difficult to find, “particularly in remote courts,” that he appended it to his case reports.³⁵

Even when copies of records could be found, the copies themselves were highly unreliable. Before mimeographs or Xerox machines, when legal copying was done by hand, it was easy for a copyist’s mistake to change the meaning of an authoritative legal text. In one criminal prosecution in 1826, copies of Massachusetts statutes were introduced in the form of “printed copies of the acts, with certain erasures and interlineations in writing,” and with a separate piece of paper providing an “attestation in the following words: ‘A true copy, attest, Edward D. Bangs, Secretary.’”³⁶ How was the court to know that none of the “erasures and interlineations” was a forgery? As the defense counsel complained,

[t]hese papers are, evidently, from the face of them, torn from some printed book These printed papers are not connected directly with the seal. The seal is on a distinct piece of white paper, and by a single thread these pretended acts of the legislature are connected with that. Some essential parts are again connected with those through which the thread passes by wafers. Does the seal prove these? If a thread or wafer were now to be used to connect either, or any of these sheets, with a newspaper, it would be equally well authenticated.³⁷

Justice Story described it as a “matter of most serious regret, [that] an exemplification so loose and irregular, should have been permitted to have found its way into any Court of justice.”³⁸ In today’s courts, such questions of authentication are almost inconceivable;³⁹ yet at the time of the Founding, the legal distinction between a foreign record and a document *purporting* to be a foreign record could not be ignored.

³⁵ See *Tarlton v. Briscoe*, 8 Ky. (1 A.K. Marsh.) 67, 69 (1817).

³⁶ *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 393–94 (1826) (reporter’s headnote).

³⁷ *Id.* at 405 (argument of counsel).

³⁸ *Id.* at 406 (majority opinion).

³⁹ But see Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 *Green Bag* 2d 283, 295–98 (2007) (noting that modern courts have relied on unenacted titles of the U.S. Code despite contrary inferences from the text of actual session laws).

2009]

Full Faith and Credit

1211

Creditor's task was complicated further by the rule of evidence known as the "best evidence" rule. The eighteenth-century treatise of Geoffrey Gilbert, frequently cited by American courts in the Founding period, explained the rule as requiring "the highest Evidence that the Nature of the Thing is capable of."⁴⁰ In other words, when better evidence might be in the party's "own Possession and Power," any second-best evidence would be held to be "insufficient and prove[] nothing . . . For if the other greater Evidence did not [tend] against the Party, why did he not produce it to the Court?"⁴¹

The best evidence rule created a hierarchy of public records. At the top of the pyramid were the original archival records of the courts themselves, for "there can be no greater Demonstration in a Court of Justice, than to appeal to its own Transactions."⁴² Next came exemplifications, or copies bearing an official seal. When given under the Great Seal or Broad Seal, such exemplifications were "of themselves Records of the greatest Validity, and to which the Jury ought to give Credit, under the Penalty of an Attaint; for there is more Faith due to the most solemn Attestations of Public Authority than any other Transactions whatever."⁴³ Then came exemplifications under the seal of a particular court, which were themselves of "more Credit"—that is, higher evidentiary force—than "sworn copies," mere transcriptions of the official documents by persons who would testify to their accuracy in open court.⁴⁴ When a document bore the seal of a public body, it was known in a technical sense as a "record." The seal itself served as "full Evidence" of the document's authenticity as a matter of law, for "the Seals thereby created [by the legislature], are supposed universally known to every Body"; but the seals of private persons or corpora-

⁴⁰ Geoffrey Gilbert, *The Law of Evidence* 15 (London, J.F. & C. Rivington et al. 4th ed. 1777). For more on Gilbert's influence, see John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 *Colum. L. Rev.* 1168 (1996) or 2 James Wilson, *The Works of the Honourable James Wilson, L.L.D.* 88 (Phila., Lorenzo Press 1804) (quoting Gilbert with regard to the "faith and credit to be given to the honesty and integrity of credible and disinterested witnesses").

⁴¹ Gilbert, *supra* note 40, at 16.

⁴² *Id.* at 7.

⁴³ *Id.* at 14.

⁴⁴ *Id.*; see also *Owings v. Nicholson*, 4 H. & J. 66, 105–06 (Md. 1815) (Buchanan, J., dissenting) (discussing "the established rule of evidence, that authenticated copies of records are required, in the absence of the originals, as the next best evidence, and cannot be supplied by parol").

tions were “not full Evidence by themselves without an Oath concurring to their Credibility.”⁴⁵

This hierarchy of evidence was sensible enough. But it had difficulty addressing records brought from other jurisdictions. Return to the example of our Creditor and Debtor; the original records of the State *A* court would obviously have to remain in State *A*'s archives and could not be taken into State *B*. Nor would sealed exemplifications always be accepted, as State *B* courts might not recognize the seals and devices of State *A*, and the question of their authenticity would typically go to a jury.⁴⁶ Even if the seals themselves were recognized, each state had its own rules on which officers were qualified to affix the seal, and judges might not accept a document certified by unfamiliar methods.⁴⁷ Sworn copies might also be difficult to obtain, since they required a witness to testify; the parties themselves could be disqualified from testifying in common law proceedings, and the clerks and recordkeepers of State *A* would be beyond the reach of State *B*'s process.⁴⁸

⁴⁵ Gilbert, *supra* note 40, at 19–20; see also *infra* note 103 (discussing Engdahl's interpretation of this phrase).

⁴⁶ See, e.g., *Frey v. Wells*, 4 Yeates 497, 500 (Pa. 1808) (“The record of a foreign court was not evidence to the court, and must go to the jury proveable by testimony. In the nature of the case, it could not be otherwise; because the judge could not be supposed to know the seal or attestation of the foreign court, so as to try upon inspection. For this, or for other reasons, it was a principle that a foreign judgment could not be declared upon as a record . . .”); see also *Delafield v. Hand*, 3 Johns. 310, 314 (N.Y. 1808) (refusing to recognize a foreign court's seal, and requiring the validity of the foreign record to be proved as fact); *Henry v. Adey*, (1803) 102 Eng. Rep. 582 (K.B.) (same for Grenada); *Moises v. Thornton*, (1799) 101 Eng. Rep. 1402 (K.B.) (same for the corporate seal of the University of St. Andrews in Scotland); *Olive v. Gwin*, (1650) 145 Eng. Rep. 409, 410 (Exch.) (same for Wales); cf. Engdahl, *supra* note 25, at 1602–03 (discussing *Olive*).

⁴⁷ See *Craig v. Brown*, 6 F. Cas. 721, 722 (C.C.D. Pa. 1816) (No. 3328) (Washington, Circuit Justice) (noting that “[e]ach state has a form of its own for authenticating records,” and that “it is not to be supposed that [a] judge . . . should be acquainted with any other form than that of his own state or court”); *United States v. Johns*, 4 U.S. (4 Dall.) 414, 416 (C.C.D. Pa. 1806) (*per curiam*) (“[T]he officer entitled to affix the seal . . . is a regulation very different in the different states.”).

⁴⁸ If these types of evidence were “all beyond the reach of the party,” Chief Justice Marshall once suggested, “other testimony inferior in its nature might be received”; but he considered such evidence to be the “most proper, if not the only modes of verifying foreign judgments.” *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 238 (1804) (Marshall, C.J.).

2009]

Full Faith and Credit

1213

B. Pleading and Substantive Effect

Assuming that suitable evidence of the judgment could be found, how would Creditor obtain relief in a State *B* court? A successful plaintiff in a domestic court would simply sue out a writ of execution and take possession of the money owed. Alternatively, if the time limit for execution (or for revival of the judgment through a writ of *scire facias*) had expired, he could sue again, bringing a new action of debt founded on the judgment.⁴⁹ Debt on a sealed instrument (a “specialty”) was an ancient form of action, and the record of a domestic judgment was certainly a specialty: the entire species of “contracts of record,” or *cognovit* contracts, took the form of confessed judgments.⁵⁰

A foreign judgment, however, was not a “record,” since the foreign seal it bore (like the seal of a private person or corporation) did not make it legal evidence of a duty to pay. Such judgments would be recognized for defensive purposes: a plaintiff who had chosen his forum and lost would not be heard a second time.⁵¹ But English law did not allow the direct enforcement of foreign judgments. Instead, plaintiffs relied on a separate theory of contract: a foreign money judgment was consideration for an implied promise to pay, which could be enforced through an action of debt or *assumpsit* in the same manner as a simple contract.⁵² Like other judgments not of record (such as those of a private manor court), foreign judgments could be reexamined in a subsequent proceeding, where not only “their existence” but also “the truth of the matters therein contained [would], if disputed, be tried and determined by a jury.”⁵³

⁴⁹ See Ross, *supra* note 29, at 143; see also 3 William Blackstone, *Commentaries* *421–22.

⁵⁰ On the modern treatment of contracts of record, see generally D.H. Overmyer *Co. v. Frick Co.*, 405 U.S. 174 (1972).

⁵¹ See, e.g., *Phillips v. Hunter*, (1795) 126 Eng. Rep. 618, 621 (Exch. Ch.) (finding such a judgment conclusive “between the parties”); *Burrows v. Jemino*, (1726) 93 Eng. Rep. 815 (K.B.); see also *Rapalje v. Emory*, 2 U.S. (2 Dall.) 51, 52 (Phila. Ct. C. Pl. 1790) (Shippen, President) (“[T]he judgments of foreign courts must necessarily bind ours, and be considered as conclusive, at least in those cases, where the aid of this court is not asked to carry their judgments into effect.”), *aff’d*, 2 U.S. (2 Dall.) 231 (Pa. 1795).

⁵² See, e.g., *Walker v. Witter*, (1778) 99 Eng. Rep. 1, 4 (K.B.).

⁵³ 3 Blackstone, *supra* note 49, at *25; see also *Phillips*, 126 Eng. Rep. at 622 (Eyre, L.C.J., dissenting) (“It is in one way only that the sentence or judgment of the Court

The foreign/domestic distinction in the manner of proof created a parallel distinction in a judgment's substantive effect. Courts determined the authenticity of a domestic judgment as a matter of law, and as a "record" or "specialty," the domestic judgment could serve as an independent and conclusive ground of a lawsuit. A foreign judgment, however—even from a jurisdiction such as Ireland or Scotland⁵⁴—would be submitted with other evidence to the jury, and was merely one component of a standard contract claim. Thus, in 1778, Lord Mansfield held in *Walker v. Witter* that a domestic record conclusively established the defendant's duty to pay, but a foreign judgment (for example, from the British colony of Jamaica) was "examinable" by the jury and was only *prima facie* evidence of the debt.⁵⁵

The same distinction arose in the types of defenses available to a judgment debtor. In addition to special pleas such as subsequent payment, debtors had two general pleas to choose from: *nul tiel record* and *nil debet*. When the plaintiff relied on a record, *nul tiel record* defended on the ground that the record was nonexistent, facially invalid, or incapable of supporting the action; the plea could be defeated only with a sealed exemplification or the judgment it-

of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it."); cf. *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 442 (1808) (Washington, J.) (describing the English doctrine as holding that "[t]he judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is *prima facie* evidence").

⁵⁴ See *Douglas v. Forrest*, (1828) 130 Eng. Rep. 933 (Ct. Com. Pl.) (treating a Scottish judgment like that of any other foreign country); *Otway v. Ramsay*, (1737) 107 Eng. Rep. 1113 n.a (K.B.) (Ireland); cf. Engdahl, *supra* note 25, at 1604–05 (discussing *Otway*).

⁵⁵ *Walker*, 99 Eng. Rep. at 4; see also *id.* at 6 (opinion of Buller, J.) ("[I]t is stated to be a judgment of a Court in Jamaica. As such it is to be tried by the country, . . . and not by the Court."); *Hall v. Odber*, (1809) 103 Eng. Rep. 949, 951–52 (K.B.); *Collins v. Mathew*, (1804) 102 Eng. Rep. 1152, 1152 n.b (K.B.); *Galbraith v. Neville*, (1789) 99 Eng. Rep. 5 n.2, (K.B.); *Crawford v. Witten*, (1773) 98 Eng. Rep. 584, 584 (K.B.); *Anon.*, (1773) 98 Eng. Rep. 582 (K.B.); *Sinclair v. Fraser*, (1771) 2 Pat. App. Cas. 253, 254 (H.L.) (receiving a Jamaican judgment "as evidence *prima facie* of the debt," and thus requiring the defendant "to impeach the justice thereof, or to show the same to have been irregularly obtained"); cf. *Croudson*, 8 U.S. at 442. See generally Engdahl, *supra* note 25, at 1599–1601 (describing the history of this doctrine in England).

2009]

Full Faith and Credit

1215

self.⁵⁶ When the plaintiff sued without a sealed record, the defendant could plead *nil debet* and generally deny the debt, allowing lesser evidence and other arguments to reach the jury.⁵⁷ The plea of *nul tiel record* made the record conclusive if it existed, while *nil debet* came to be associated with prima facie effect.

Apart from these rules of procedure, courts also had substantive reasons to refuse conclusive effect to foreign judgments. A foreign court was foreign, and might apply an uncivilized and barbarous law. Permitting a new action at home to enforce a foreign award risked participating in foreign injustices. Such reasoning explains why courts were more willing to treat foreign judgments as conclusive for purposes of defensive estoppel—which at worst left the status quo in place, and at best denied plaintiffs a second bite at the apple—as well as to recognize the judgments of foreign admiralty courts, which all theoretically applied the same international law of admiralty.⁵⁸ (Common law courts were particularly obliged to recognize admiralty judgments, because they had no jurisdiction of their own to revisit an admiralty ruling.⁵⁹)

⁵⁶ See Gilbert, *supra* note 40, at 26; see also 1 Joseph Chitty, *A Practical Treatise on Pleading, and on the Parties to Actions, and the Forms of Actions* 480–81 (London, W. Clarke & Sons 1809).

⁵⁷ *Id.*

⁵⁸ See, e.g., *Ewer v. Jones*, (1703) 92 Eng. Rep. 124, 125 (K.B.) (Holt, C.J.) (“The sentence of a Civil Law Court in a foreign realm shall be executed in a Court of the same nature here, and proceeding after the same law; and no prohibition, because the temporal Courts proceed by a due law, and we must give credit to the sentence” (footnote omitted)); see also *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 116 (1795) (opinion of Cushing, J.); *M’Grath v. Candalero*, 16 F. Cas. 127, 128 (D.S.C. 1794) (No. 8809) (citing *Ewer*); *Ludlow v. Dale*, 1 Johns. Cas. 16, 17 (N.Y. 1799) (Kent, J.) (noting that admiralty judgments were regarded as universally binding, while other kinds of foreign judgments were respected only as a matter of comity).

⁵⁹ See, e.g., *R. v. Grundon*, (1775) 98 Eng. Rep. 1105, 1109 (K.B.) (Mansfield, C.J.) (“The King’s Courts, if the college do not exceed their jurisdiction, have no cognizance, no superintendance. . . . So with respect to sentences of the Ecclesiastical Court; the Temporal Courts must consider them as final and conclusive until reversed. So in cases within the jurisdiction of the Admiralty Courts, their judgment is conclusive until reversed.”); see also *McConnell v. Kenton*, 1 Ky. (Hughes) 257, 290 (1799) (argument of counsel) (“It is a settled principle that where any matter belongs to the jurisdiction of one court so peculiarly, that other courts can only take cognizance of the same subject indirectly and incidentally, the latter are bound by the decision of the former, and must give credit to it.”); *Vandenheuevel v. United Ins. Co.*, 2 Cai. Cas. 216, 257 (N.Y. 1805) (opinion of Kent, J.) (“But if a matter belongs to the jurisdiction of one court so peculiarly as that other courts can only take cognisance of the same subject indirectly and incidentally, the rule is then more extensive and un-

One common reason why courts might refuse to enforce a foreign judgment was that the original forum had violated the international law of personal jurisdiction.⁶⁰ In *Buchanan v. Rucker*, for example, the King's Bench refused to enforce the default judgment of a Tobago court which had been rendered without personal notice to the defendant. Even had the law of Tobago explicitly sanctioned such practices, Lord Ellenborough wrote, "[c]an the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"⁶¹ Practices of foreign attachment and service by publication were not unknown in England and the colonies: Massachusetts, for example, used foreign attachment into the nineteenth century.⁶² But these judgments were enforceable only within their own jurisdiction; beyond their borders, judgments rendered without notice would be looked upon with suspicion.⁶³

II. THE CLAUSE AND ITS HISTORY

The common law tradition sharply distinguished domestic from foreign judgments, with regard to both authentication and substantive effect. How did the Full Faith and Credit Clause change this picture? This Part attempts to answer the question in three ways. First, it examines the uses of the term "full faith and credit" during

equivocal. The latter courts are bound by the sentence of the former, until it be reversed, . . . and must give credit to it universally and without exception. This rule has been illustrated in the case of sentences in the ecclesiastical courts touching marriages and wills; in the exchequer touching the condemnation of forfeited goods; and in the admiralty touching prizes, and in all of which cases, those courts have exclusive jurisdiction.").

⁶⁰ See generally Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775 (1955).

⁶¹ (1808) 103 Eng. Rep. 546, 547 (K.B.).

⁶² See *Bartlet v. Knight*, 1 Mass. (1 Will.) 401, 410 (1805) (opinion of Sedgwick, J.).

⁶³ Compare Thomas Erskine, *The Speech of Lord Erskine, in the House of Lords, (the 8th of March, 1808) on Moving Resolutions Against the Legality of the Orders in Council 47-48 (London, James Ridgway 1808)* (arguing that admiralty decisions based on the law of nations would be recognized, "because full faith must be given to the acts of courts of competent jurisdiction," but when "particular [foreign] governments have taken upon them to make ordinances and regulations contrary to the law of nations, and without the consent of other states," English courts "uniformly pronounce such ordinances to be absolutely void"), with *id.* ("If this could be *legally* done by any particular state [e.g., by domestic law], our courts here would be bound to respect such ordinances as engrafted on the law of nations . . .").

2009]

Full Faith and Credit

1217

the century before the Constitution was written. Second, it considers the predecessor clause in Article IV of the Articles of Confederation. Third and finally, it discusses the circumstances surrounding the adoption of the Full Faith and Credit Clause and describes the different purposes that the Clause may have served.

A. "Full Faith and Credit" in Early Usage

While some have argued that the phrase "full faith and credit" sprang full-grown from the Articles of Confederation,⁶⁴ the term had been used for over a hundred years to indicate high evidentiary value. For example, a 1662 London translation of a Franco-Spanish treaty provided for both governments to issue maritime passports and bills of lading, to confirm a vessel's ownership and cargo—"unto which Passes and Sea Letters, full Faith and Credit shall be given."⁶⁵

Though its meaning was always evidentiary, the phrase could appear in multiple contexts. A first context concerned the authentication of documents. A clerk's manual in 1740 provided a form for certifying various records in a "due and authentick Manner, in their own original Forms, or true and exact Copies thereof, faithfully collated and compared therewith, and sealed with an authentick Seal, so that full Faith and Credit may be given as well in as

⁶⁴ See, e.g., Laycock, *supra* note 6, at 304 ("The complete phrase 'full faith and credit' appears not to have been used prior to the Articles of Confederation . . ."); cf. Radin, *supra* note 29, at 16 (arguing that "[t]he combination 'faith and credit' does not demonstrably occur in England before" the 1770s).

⁶⁵ George Carew, *Fraud and Violence Discovered and Detected: Or, a Remonstrance of the Interested in the Ships Bona Esperanza and Henry Bona Adventura of London 110* (London, William Godbid 1662); see also *The Treaty of Peace Between the Crowns of France and Spain, Concluded and Sign'd by His Eminency Cardinal Mazarine, and Don Lewis Mendez de Haro, Plenipotentiarys of Their Most Christian and Catholick Majestys, in the Isle Call'd of the Pheasants, in the River of Bidassoa, upon the Confines of the Pyrenean Mountains, the Seventh of November, 1659*, art. XVII, in *A General Collection of Treatys, Declarations of War, Manifestos, and Other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the Present Time 39, 47* (London, J. Darby 1710); cf. William Barton, *A Dissertation on the Freedom of Navigation and Maritime Commerce, and Such Rights of States, Relative Thereto, as Are Founded on the Law of Nations 236-37* (Phila., John Conrad & Co. 1802) ("Sea-papers, therefore, relating to the shipping and marine trade of a particular country, and verified in due form by officers of the customs, admiralty, or other proper agents of that government, should justly meet with full faith and credit from the public agents of other nations.").

out of Court, under Pain of the Law, and Contempt thereof.”⁶⁶ (This was the sense in which Gilbert wrote that a jury must “give Credit” to certain records “under the Penalty of an Attaint,” for “there is more Faith due to [them] . . . than any other Transactions whatever”⁶⁷) A second context was diplomatic; “full faith and credit” could describe the full confidence one should have in an agent’s representation of his principal.⁶⁸ A third was notarial; a notary’s certificate of a document’s authenticity could be said to deserve “full Faith and Credit” by virtue of his official position.⁶⁹

In each of these contexts the usage could be ambiguous. The uncertainty is not whether the phrase “describe[d] anything less than conclusive effect”⁷⁰—which it did not—but rather what the credited evidence was meant to be conclusive *of*. To say of a notary that “all Affidavits before him made” should receive “full and undoubted Faith and Credit”⁷¹ was to say that the affidavits were truly made

⁶⁶ A Monition for the Transmission of a Process in a Cause of Appeal in the Arches, in *The Clerk’s Instructor in the Ecclesiastical Courts* 378, 380 (London, E. & R. Nutt 1740).

⁶⁷ Gilbert, *supra* note 40, at 14.

⁶⁸ See Robert Brady, *A Continuation of the Complete History of England* 206 (London, Edward Jones 1700) (describing a letter from King Edward III to Parliament, and noting that “[a]t the Close of his Letter he tells them, . . . [t]hat the *Persons* [with whom the letter was sent] came over to *declare* his *Condition* and *Business*, willing them to give full Faith and Credit to what they should say”).

⁶⁹ Dominick Molloy, *The Vindication of Dominick Molloy, Merchant, Against the False and Scandalous Aspersions of John Crump and Hosea Coates, Merchants* 24 (Dublin, n. pub. 1750) (reproducing an affidavit certified by Charles Asgill, as well as a certificate by Anthony Weldon that Asgill was “one of his Majesty’s Justices of the Peace for this City of *London* . . . and that to all Affidavits before him made, and by him signed, full and undoubted Faith and Credit is and ought to be given, both in Judgment Courts and out thereof”); see *id.* (adding a further certificate by other notaries “[t]hat Mr. *Anthony Weldon* . . . is a Notary and Tabellion Public . . . faithful, lawful and of Trust; to whose Acts full Faith and Credit is and ought to be given, both in Courts and thereout”); see also *Adultery: The Very Interesting and Remarkable Trial of Mrs. Elizabeth Hankey* 6–7 (London, Proprietor 1783) (noting, with respect to an affidavit, “that the said paper, marked No. 1, is duly signed by and with the proper hand writing of Mark Holman, deputy register of the said court, and that full faith and credit, is and ought to be given thereto”); 1 Nicolas Magens, *An Essay on Insurances* 299 (London, J. Haberkorn 1755) (“We the underwritten Merchants here in Leghorn do attest, that the above-written Dr. *Gio Battista Gamerra* is, as he stiles himself, a Notary Public, and that to his Firm and Signature full Faith and Credit is given in Court and without; and in Testimony thereof, &c.”).

⁷⁰ Laycock, *supra* note 6, at 304.

⁷¹ Molloy, *supra* note 69.

2009]

Full Faith and Credit

1219

by their declarants, not that every statement contained therein was true. But to say that the notarial certificate was entitled to full faith and credit also meant that the certificate itself should be considered trustworthy, and not merely authentic.

The same equivocations were found in the judicial context. A copy of a judicial record received “faith and credit” when admitted as evidence equal to the original.⁷² But occasionally the same term was used to accord *res judicata* effect to the underlying proceeding. When an ecclesiastical or admiralty judgment came before the common law courts, the latter had no jurisdiction to revisit the previous holding (rendered under the civil law).⁷³ Once such a judgment was admitted in evidence, its holding was necessarily conclusive, and the court would be said to give “faith and credit” to the decision.⁷⁴

⁷² See, e.g., 2 John Erskine, *An Institute of the Law of Scotland* 657 (Edinburgh, John Bell 1773) (“After the writings are produced in court, just duplicates of them are made out, collated, and signed by the clerk, which are called *transumps*, and are, by the decree of the judge, declared to bear as full faith or credit as an extract from the record of that court. As therefore an extract from a proper record is as effectual as the principal writing, except in an action of proper improbation, so is a decree of transumpt”); John E. Hall, *The Practice and Jurisdiction of the Court of Admiralty* 98 (Balt., Geo. Dobbin & Murphy 1809) (asking that a registered copy of an instrument “have as full faith and credit as the original”); *id.* at 87 & n.* (noting that the proceedings in one case “shall have full faith and credit” as admissible evidence in another case, “[f]or the records in one judgment are proof in another”).

⁷³ See *Dacosta and Villa Real*, (1733) 93 Eng. Rep. 968, 969 (K.B.) (describing the ecclesiastical judgment as “proper and conclusive evidence,” for “it was a cause within their jurisdiction”); *Jones v. Bow*, (1692) 90 Eng. Rep. 735, 735 (K.B.) (“And upon debate the Court were all of opinion, that this sentence, whilst unrepealed, was conclusive against all matters precedent, and that the Temporal Courts must give credit to it until ‘tis reversed, it being a matter of [mere] spiritual conusance.”); *Bunting v. Lepingwell*, (1585) 76 Eng. Rep. 950, 952 (K.B.) (noting that “the conusance of the right of marriage belongs to the Ecclesiastical Court, and the same Court has given sentence in this case”); Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 244 (London, Strahan & Woodfall 5th ed. 1790) (“[W]here-ever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter”); see generally Engdahl, *supra* note 25, at 1612–13 (describing the effect of ecclesiastical judgments).

⁷⁴ *Bunting*, 76 Eng. Rep. at 952, *cited in* *Robins v. Crutchley*, (1760) 95 Eng. Rep. 721 (K.B.) (argument of counsel); see also *Phillips v. Hunter*, (1795) 126 Eng. Rep. 618, 622 (Exch. Ch.) (Eyre, L.C.J., dissenting) (“In [such] cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us.”); Nadelmann, *supra* note 25, at 44–46.

These various uses of “full faith and credit” continued from seventeenth-century England into Founding-era America.⁷⁵ A proposed treaty between the revolutionary United States and France in 1782 enabled maritime consuls to record sailors’ wills and testaments, noting that “copies of any act duly authenticated by the consuls . . . shall receive full faith and credit in all courts of justice, as well in France as in the United States.”⁷⁶ Similar phrases appear several times (in various senses) in the Journals of the Continental Congress,⁷⁷ as well as in state ratifications of the Bill of Rights.⁷⁸ After the enactment of the Constitution’s Clause, these usages would be frequently cited in the debates over its meaning.⁷⁹

⁷⁵ See, e.g., Whiting Sweeting, *A Remarkable Narrative of Whiting Sweeting; Who Was Executed at Albany in the State of New York for Murder 5–6* (Early Am. Imprints, 1st ser., No. 27,768, Exeter, N.H., Henry Ranlet 2d Exeter ed. 1794) (“Would it not have deserved a moment’s thought, whether a party of men having a lawful warrant, and though clothed with the authority of law, getting drunk and committing a riot, ought not to leave a doubt on the mind whether full faith & credit ought to be placed upon their testimony in a cause of life & death; and of the truth of so many circumstances related by them, happening in their heat and zeal; fomented by many extraordinary circumstances, and plentiful draughts of rum, which they said they had with them?”).

⁷⁶ 22 J. Continental Cong. 20. Of course, the heightened evidentiary value was not given to the content of the sailor’s will, but rather to its authenticity.

⁷⁷ See 27 J. Continental Cong. 571 (certifying, in a 1784 letter from the speaker of the Georgia Assembly to the Continental Congress, “that John Wilkinson . . . is . . . Clerk of the said House of Assembly, and that I have carefully compared the said Extracts with the Original Journals, . . . and find the same to be just and true Copies therefrom,” and therefore that “all due Faith and Credit are and ought to be had and given to the Attestation of the said John Wilkinson, and to the said Extracts”); see also 11 id. at 663 (“full faith and absolute Credit”); 31 id. at 623 (“all due faith, credit and authority”); Letter from Charles, King of Spain, to Congress (Sept. 25, 1784), in 6 *The Revolutionary Diplomatic Correspondence of the United States* 820, 820 (Francis Wharton ed., Wash., D.C., Gov’t Printing Office 1889) (naming Don Diego De Gar-doqui as his negotiator, and asking “that you will give entire faith and credit to all that in my name he shall say to you”).

⁷⁸ See 1 H.R. Jour. app. at 314 (“These are to certify, that Bowes Reed, Esquire, whose name is subscribed to the annexed certificate, certifying the annexed law to be a true copy taken from the original enrolled in his office, is, and was at the time of signing thereof, Secretary of the State of New Jersey; and that full faith and credit is, and ought to be due to his attestation as such.”); see also id. app. at 311–12 (North Carolina, Rhode Island).

⁷⁹ See, e.g., *Hitchcock v. Aicken*, 1 Cai. 460, 469 (N.Y. 1803) (Livingston, J., dissenting) (“[I]f credit is given to an ambassador by the court to which he is sent, the latter do not thereby only admit that he is invested with that character, but that what he says is true. It is the same when a witness is credited; it is his relation which is believed; not merely that he appears as a witness. In like manner if full faith and credit

2009]

Full Faith and Credit

1221

B. The Articles of Confederation

America's first full faith and credit clause was enacted in the Articles of Confederation. While the history of the Confederation's Clause has been discussed in detail elsewhere,⁸⁰ a brief summary suggests that it was concerned more with evidentiary authentication than with substantive effect.

1. Statutory Precedents

Before the Articles of Confederation, at least four states had enacted statutes concerning sister-state records. Three of these primarily addressed authentication, explaining which documents could serve as evidence of a foreign record. Connecticut's statute, adopted in approximately 1650, enabled the judgments of other colonies with reciprocal policies, if "presented under authentic testimony," to have "a due respect in the several courts of this jurisdiction," and in particular to be "accounted good evidence for the party, until better evidence or other just cause appear to alter or make the same void."⁸¹ Maryland's statutes "providing what shall be good Evidence to prove foreign and other Debts" made the exemplifications of foreign records "sufficient Evidence to prove the same."⁸² Likewise, South Carolina's 1731 law avoided the need for live witnesses, providing that exemplifications under the seal of sister colonies or public notaries "shall be deemed and adjudged [as] good and sufficient in law . . . as if the witnesses to such deeds were produced and proved the same *viva voce*."⁸³ These three statutes

be given to a deposition, it does not only imply that we admit there is such a writing, but that we fully and implicitly rely on its contents."); see also *Curtis v. Gibbs*, 2 N.J.L. 399, 400–05 (1805) (opinion of Pennington, J.).

⁸⁰ See sources cited *supra* note 25.

⁸¹ Nadelmann, *supra* note 25, at 38–39.

⁸² Act Providing What Shall Be Good Evidence To Prove Foreign and Other Debts, and To Prevent Vexations and Unnecessary Suits at Law, Pleading Discounts in Bar (Md. 1729), *reprinted in* James Bissett, *Abridgment and Collection of the Acts of Assembly of the Province of Maryland, at Present in Force* 136, 136 (Early Am. Imprints, 1st ser., No. 8391, Phila., William Bradford 1759). This statute repealed and re-enacted an earlier act of 1715. See Bissett, *supra*, at 359; see also Nadelmann, *supra* note 25, at 39.

⁸³ Act of Assembly 1731, P.L. 129 (S.C.), *reprinted in* 1 Joseph Brevard, *An Alphabetical Digest of the Public Statute Law of South-Carolina* 316, 316 (Charleston, S.C., John Hoff 1814); see also Nadelmann, *supra* note 25, at 39; cf. Act of Assembly 1721, P.L. 117 (S.C.), *reprinted in* 1 Brevard, *supra*, at 315–16 (making certain copies of do-

concerned the authentication question, explaining how a document could serve as evidence of a foreign record; under South Carolina's statute, for example, a notary's seal could take the place of live witnesses.

Shortly before the Revolution, however, Massachusetts took a different approach. As the preamble to its 1774 statute noted, "it frequently happen[ed]" that judgment debtors from neighboring colonies "remove[d] with their effects into this province, without having paid or satisfied such judgments."⁸⁴ Because "the record of such judgments," stuck in another colony's archives, could not "be removed into the said courts in this province," and because "it ha[d] been made a doubt whether by law such judgments [that is, copies of judgments] can be admitted as sufficient evidence of such judgments, whereby honest creditors [we]re often defrauded . . . by negligent and evil minded debtors," the colony addressed the matter by statute.⁸⁵ One section addressed authentication, allowing a creditor to introduce a "true copy" of a sister-colony judgment—without a seal and merely attested to by a court clerk or justice of the peace—as "good and sufficient evidence" of the judgment, with "the same effect and operation" as the original document would have had if introduced.⁸⁶ But the Massachusetts statute also went further, providing that a judgment creditor could bring an action of debt on a sister-colony judgment just as "they might have done, if such judgment . . . had been originally recovered" in a Massachusetts court.⁸⁷ In other words, unlike the earlier colonial statutes, Massachusetts went beyond the authentication of judgments to provide for their substantive effect.

mestic records "as good evidence in the said courts as the original could or might have been, if produced to the said courts").

⁸⁴ An Act To Enable Persons To Bring Forward and Maintain Actions of Debt in the Executive Courts Within This Province upon Judgments Recovered in the Neighboring Governments, and upon Judgments Recovered Before Justices of the Peace in this Province, ch. 322, pmbl., 14 Geo. 3 (Mass. 1774), in *The Charters and General Laws of the Colony and Province of Massachusetts Bay 684* (Early Am. Imprints, 2d ser., No. 32,028, Boston, T.B. Wait & Co. 1814) [hereinafter *Massachusetts Act 1774*]; see also Nadelmann, *supra* note 25, at 40.

⁸⁵ *Massachusetts Act 1774* pmbl.

⁸⁶ *Id.* § 2.

⁸⁷ *Id.* § 1.

2009]

Full Faith and Credit

1223

2. *Text and Amendment*

When the Continental Congress debated the subject in 1777, the states were hardly unified in their treatment of sister-state records. Perhaps as a result of this dissension, Congress refused to specify what substantive effect such records would receive—a refusal explicitly noted by contemporaries.

As initially reported by committee on November 11, a draft clause of the Articles of Confederation would have coupled full faith and credit with a separate reference to substantive effect. It provided that “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, *and* that an Action of Debt may lie in the Court of Law in any State” for the recovery of a sister-state judgment debt, provided that the judgment creditor posted a bond in case the original judgment were reversed.⁸⁸ The language concerning the action of debt was “struck out in Congress,”⁸⁹ and only the first half of the draft was approved in debate the next day.⁹⁰ A proposed amendment would have restored the extra language, adding a requirement that the defendant have had “notice in fact of the service of the original writ upon which such judgment shall be founded,” but this amendment was defeated on a lopsided vote.⁹¹

The journals do not explain why these substantive additions were rejected.⁹² Perhaps the delegates thought them unnecessary,

⁸⁸ 9 J. Continental Cong. 887 (emphasis added). The full provision stated “[t]hat 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, and 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 State; provided the Judgment Creditor gives sufficient Bond with Sureties before Said Court before whom [the] Action is brought to respond in Damages to the Adverse Party in Case the original Judgment Should be afterwards reversed and Set aside.” *Id.* Minor changes to the language were made in the handwriting of delegate James Duane. See *id.* at 887 n.5.

⁸⁹ *Id.* at 887 n.5.

⁹⁰ *Id.* at 895–96.

⁹¹ *Id.* In final form, the clause read as follows: “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.” Articles of Confederation art. IV, cl. 2.

⁹² Radin read the journals differently; he portrayed the printed version of the November 11 committee report as inaccurate, since it included additional language not suggested (on his view) until the proposed amendment of November 12. See Radin, *supra* note 29, at 4 n.8. But this reading ignores the differences in language between

believing that an action of debt on a record—in which the foreign judgment might well have been conclusive⁹³—would have been available as a matter of course. But the need for a specific statute in Massachusetts casts doubt on this explanation. And if the proponents of the additional language tried to gain support by watering down their provision, adding an extra requirement of actual notice to the defendant, the more likely explanation is that Congress was unwilling to commit to a stronger substantive position. In other words, the Confederation's Clause was not understood to endow sister-state judgments with the substantive effect that the "action of debt" language would have guaranteed; instead, it left the existing law on recognition of judgments in place.

Indeed, no sooner had the Articles come into force than some in Congress called for strengthening this clause. A committee charged with preparing "supplemental articles" in 1781 included as the fourth of its twenty-one suggestions "declaring the method of exemplifying records & the operation of the Acts [and] Judicial Proceedings of the Courts of one State[], contravening thos[e] of the States in which they are asserted."⁹⁴ The perceived need to declare the mode of authentication and the "operation" of a record—the exact functions later committed to Congress by the Constitution—shows that "full Faith and Credit" alone did not answer these questions.

3. *Judicial Interpretation*

The divergence between "authentication" and "effect" interpretations of the Confederation's Clause soon appeared in contempo-

the report's version and the amendment (notably the insertion of the second proviso), as well as the statement that the report's extra language was "struck out in Congress" (rather than simply not added in the first place). 9 J. Continental Cong. 887 n.5. Indeed, other clauses proposed by the committee also had some of their language "struck out" by Congress, even though the journals contain no mention of the process of striking them. See *id.* at 887 & n.2 (concerning the power to discipline members of Congress); *id.* at 890 & n.1 (concerning lands claimed under grants of different states).

⁹³ See Whitten, *supra* note 4, at 280 n.82.

⁹⁴ Committee Report on Carrying the Confederation into Effect and on Additional Powers Needed by Congress (Aug. 22, 1781), *in* 1 The Documentary History of the Ratification of the Constitution 143, 144 (Merrill Jensen ed., 1976) (first and third alterations in original). The committee was composed of Edmund Randolph, Oliver Ellsworth, and James M. Varnum. *Id.* at 143; see also Engldahl, *supra* note 25, at 30.

2009]

Full Faith and Credit

1225

rary state court decisions. The strongest statement in favor of an “effects” reading may have come from the South Carolina case of *Jenkins v. Putnam*, which concerned the enforcement of the admiralty judgment of a prize court.⁹⁵ Admiralty courts dealt with matters outside the purview of the common law; the South Carolina court therefore announced that because it was “bound by common law rules,” it had “no such power” to “try[] the legality of the capture over again,” and was “bound by the sentence of the court of admiralty . . . and . . . obliged to give due faith and credit to all its proceedings.”⁹⁶ While this usage certainly sounds more in effect than authentication, the court did not rest its decision on the Confederation’s Clause alone; rather, it also rested on the general principle of international law that allowed admiralty courts to exercise universal jurisdiction, stating that “[t]he act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it.”⁹⁷ Other cases had similarly mentioned a degree of substantive respect due under the Articles, but ultimately rested their decisions on more general grounds.⁹⁸

⁹⁵ 1 S.C.L. (1 Bay) 8, 8 (C.P. & Gen. Sess. 1784).

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*; accord *M’Grath v. Candalero*, 16 F. Cas. 127, at 127–28 (D.S.C. 1794) (No. 8809) (responding to a claim that courts must give “full faith and credit” to admiralty judgments by noting that “the sentence of an admiralty court duly constituted must receive full credit in foreign countries”).

⁹⁸ See, e.g., *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786) (“It appears by the pleadings, that the defendant was . . . not within the jurisdiction of the Court . . . at the time of the pretended service of the writ; therefore, the court had no legal jurisdiction of the cause, and so no action ought to be admitted on said judgment: But full credence ought to be given to judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit”); *Millar v. Hall*, 1 U.S. (1 Dall.) 229, 232 (Pa. 1788) (noting that the court had considered “the principles of the law of nations, and the reciprocal obligation of the states under the articles of confederation”); *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403 (Pa. C.P. Phila. County 1788) (recognizing a confiscation proceeding in Connecticut without mentioning the Confederation Clause, instead relying on “the peculiar relation that these States stand in to one another,” as “bound together by common interests, and . . . jointly represented and directed as to national purposes, by one body as the head of the whole”); *Doane’s Adm’rs v. Penhallow*, 1 U.S. (1 Dall.) 218, 219–20 (Pa. C.P. Phila. County 1787) (“[W]e think ourselves indispensably bound to give full faith and credit to the legal acts of our Sister States; and . . . the judgments given in their courts will have their full effect here. But it is not every discontinuance that will disable a Plaintiff to hold a Defendant to bail in a second action . . .”).

By contrast, a powerful voice for an “authentication” reading came from the Pennsylvania case of *James v. Allen*, which construed the effect in that state of a debtor previously discharged from civil arrest by a New Jersey court.⁹⁹ While *James* noted that the “[l]aws of foreign countries . . . would in some cases be taken notice of here,” such as when “such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties at the time of making them,” it construed the New Jersey insolvency law to afford a purely domestic remedy of release from debtor’s prison, and to have “no connection with the merits of the cause.”¹⁰⁰ Even if the New Jersey judgment had been broader in scope, the court held that a strong “effects” reading of the Clause—one that made the records of sister states equivalent to domestic records—was implausible, “for, otherwise executions might issue in one State upon the judgments given in another.”¹⁰¹ Rather, the Clause seemed “chiefly intended to oblige each State to receive the records of another as full evidence of such Acts and judicial proceedings.”¹⁰² In other words, the Clause concerned authentication, leaving the substantive effect of records unaltered.¹⁰³

⁹⁹ 1 U.S. (1 Dall.) 188, 188–89 (Pa. C.P. Phila. County 1786).

¹⁰⁰ Id. at 191.

¹⁰¹ Id. at 191–92.

¹⁰² Id. at 192 (emphasis added). Likewise, in *Phelps v. Holker*, 1 U.S. (1 Dall.) 261 (Pa. 1788), the Pennsylvania Supreme Court rejected a claim that the judgments of other states, even if rendered without actual notice, had conclusive res judicata effect. Indeed, Justice Rush asked whether, “[i]f this Judgment were as conclusive as the Plaintiff contends, might he not issue an execution at once?” Id. at 264 (opinion of Rush, J.). Although the court did not discuss the issue more broadly than the case required, the defense counsel had argued generally for an authentication-based reading of the Articles, stating that they “only provide, that, in matters of evidence, mutual faith and credit shall be given to the records, acts, and judicial proceedings of the States,” id. at 261–62 (argument of counsel).

¹⁰³ Engdahl reads the *James* court’s reference to “full evidence,” as well as Gilbert’s use of the word “full,” to indicate “evidentiary sufficiency,” in the sense that a foreign money judgment was prima facie sufficient to support a recovery (if still rebuttable). See Engdahl, supra note 25, at 1608–09, 1615; cf. Gilbert, supra note 40, at 19. He thus reads the Clause’s reference to “Full Faith and Credit” to “allud[e] to the prima facie evidence rule long employed by the common law courts,” although Congress retains a power of augmenting this effect by statute. Engdahl, supra note 25, at 1609; see also id. at 1621. This interpretation is intriguing, but there are at least two reasons for doubt.

First, Engdahl draws the parallel from Gilbert’s description of the testimony of a single witness as prima facie sufficient for a fact to be “fully proved.” See id. at 1609 (emphasis added); see also Gilbert, supra note 40, at 20. This mild description is a far

2009]

Full Faith and Credit

1227

*C. The Constitutional Convention**1. Textual Changes*

The Constitution adopted the Confederation's Clause as part of Article IV, with certain alterations. These alterations only strengthen the authentication reading. Because the history of the Clause's adoption in the convention debates is discussed more extensively elsewhere,¹⁰⁴ this Section focuses on the two most significant changes to the Clause between the Confederation and the Constitution.

The first change was the addition of "faith and credit" for legislative acts. While the Confederation's Clause dealt only with the acts of "courts and magistrates," the current Clause addresses the "public Acts . . . of every other State." As the debates make clear, the delegates understood this term to refer to "the acts of the Legislatures."¹⁰⁵

The second change was the grant of congressional power to specify the authentication and effect of sister-state records, thereby implementing the 1781 committee's recommendation for improving

cry from the mandatory conclusions that Gilbert thought must be drawn from records given under the Great Seal or Broad Seal—records which were "of the greatest Validity, and to which the Jury ought to give Credit, under the Penalty of an Attaint." Gilbert, *supra* note 40, at 14; accord Monition, *supra* note 66, at 380 (referring to full faith and credit given "under Pain of the Law, and Contempt thereof").

Second, this interpretation muddies the Clause's distinction between the "Faith and Credit" of a record and its "Effect." To the extent that the reference to "Full" faith and credit concerned issues of admissibility, if "Full" meant "prima facie," it would be odd for a properly-authenticated state judgment to be merely prima facie evidence of its own existence and contents. Alternatively, if "Full" addressed issues of substantive effect—and mandated that a record "shall be given" prima facie effect in particular—then its grant of a power in Congress to "declare the Effect" would seem to contradict this mandate, unless the first sentence is implausibly read as a default rule only. Some of the proposals in Congress extended something less than prima facie effect to certain judgments, but they did not generate constitutional objections on these grounds. See *infra* Part III.F.

¹⁰⁴ See, e.g., Engdahl, *supra* note 25; Laycock, *supra* note 6, at 291–93; Nadelmann, *supra* note 25, at 53–62; Whitten, *supra* note 4, at 288–95.

¹⁰⁵ See 2 The Records of the Federal Convention of 1787, at 188 (Max Farrand ed., 1911) [hereinafter 2 Farrand]. In debates on August 29, James Wilson and Dr. William Johnson understood the Clause as providing that "Judgments in one State should be the ground of actions in other States," and that legislative acts should be included "for the sake of Acts of insolvency &c," which prompted Charles Pinckney to propose a separate bankruptcies clause. *Id.* at 447.

the Articles of Confederation.¹⁰⁶ On August 6, James Madison proposed giving power to Congress “to provide for the *execution* of Judgments in other States, under such regulations as might be expedient—He thought that this might be safely done and was justified by the nature of the Union.”¹⁰⁷ Randolph, however, argued that “there was no instance of one nation executing judgments of the Courts of another nation,” and instead suggested a version of the Clause that—like the rejected amendment to the Articles—would have specified in advance the manner of authentication and the effect of sister-state records.¹⁰⁸ Gouverneur Morris countered with a proposal leaving the authentication and effect “of such acts, records, and proceedings” up to Congress.¹⁰⁹ When a committee returned with a draft restricting the effects power only to “judgments,”¹¹⁰ Morris promptly sought to change it back, using the phrase “the effect thereof”—that is, of the acts, records, and proceedings.¹¹¹ James Wilson emphasized the importance of this power, noting that “if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations.”¹¹²

Further technical amendments by Madison and the Committee of Style would bring the Clause into its current form. Yet Madison’s discussion of the Clause in *The Federalist* No. 42 demonstrated his belief that the grant of power to Congress was the one truly novel and significant component of the Clause. He described

¹⁰⁶ See supra note 94 and accompanying text.

¹⁰⁷ 2 Farrand, supra note 105, at 448.

¹⁰⁸ Id. (“Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.”).

¹⁰⁹ Id. (“Full faith ought to be given in each State to the public acts, records, and judicial proceedings of every other State; and the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings.”).

¹¹⁰ Id. at 485 (“Full faith and credit ought to be given in each State to the public acts, records, and Judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which Judgments obtained in one State, shall have in another.”).

¹¹¹ Id. at 488.

¹¹² Id.

it as “an evident and valuable improvement on the clause relating to this subject in the articles of confederation,” whose meaning was “extremely indeterminate; and can be of little importance under any interpretation which it will bear.”¹¹³

2. *Implications*

The Full Faith and Credit Clause, as it emerged from Philadelphia, can be divided into three functional parts: (1) the first, self-executing sentence (“Full Faith and Credit shall be given . . .”); (2) the power of Congress to prescribe the manner of proof; and (3) the power of Congress to prescribe the effect of acts, records, and judicial proceedings. Any successful theory of the Clause’s meaning must identify how these parts fit together. Yet two of these three parts—the self-executing sentence and the effects power—seem in direct tension with one another. If the Constitution guarantees “Full Faith and Credit,” and thereby accords some degree of substantive effect to State *A* judgments in State *B*, how can it be up to Congress to prescribe that effect?

Under the prevailing reading of the Clause, the self-executing sentence does all the work. Yet the near-identical language of the Confederation Clause had failed to determine the “operation” of judgments in other states, and was considered by Madison to be “of little importance.” If the Confederation Clause had given conclusive nationwide effect to state judgments, it would have been of very great importance, and indeed might have obviated the need for Madison’s proposal to allow executions in other states. Madison clearly had such creditors in mind when he proposed the effects power: as he wrote in *The Federalist*, “[t]he power here established, may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice, may be suddenly and secretly translated in any stage of the process, within a foreign jurisdic-

¹¹³ The Federalist No. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961). The Clause was discussed briefly in the Virginia ratification convention, where George Mason asked “how far it may be proper that congress shall declare the effects” of state acts. 3 Jonathan Elliot, *The Debates in the Several State Conventions* 529 (Wash., D.C., Jonathan Elliot 1836). Madison replied that “this is a clause which is absolutely necessary. I never heard any objection to this clause before, and have not employed a thought on the subject.” *Id.*

tion.”¹¹⁴ Neither he nor his audience believed that the Confederation Clause did enough to prevent this evasion.

If the prevailing reading is wrong, then what does the self-executing sentence accomplish? Wilson, at the Convention, described it as nothing more than “what now takes place among all Independent Nations,”¹¹⁵ but that perhaps was uncharitable. On an authentication reading, the first sentence requires state courts to treat the public records of sister states (once properly authenticated) as full evidence of their own existence and contents: there can be no dispute before the jury over whether a court in State *A* really gave judgment for Creditor.¹¹⁶ Congress may supplement or displace local law on how to authenticate documents as sister-state records.¹¹⁷ But whether Congress has exercised this power or not, a court is obligated to admit properly authenticated sister-state records into evidence, and to accord them the substantive effect to which they are entitled under preexisting law.¹¹⁸

One further piece of evidence may help illustrate this interpretation. A little more than a year before the Convention assembled at Philadelphia, another state statute was passed concerning “faith and credit,” this time by Delaware. Yet Delaware’s statute had nothing to do with giving effect to sister-state records. Rather, it awarded to the Bank of North America the right to a corporate seal within the state—a seal that would be recognized by courts, or, in Gilbert’s words, one “universally known to every Body” without need for sworn testimony.¹¹⁹ The statute provided that “all Acts heretofore certified under the said Seal, or hereafter to be certified

¹¹⁴ The Federalist No. 42, *supra* note 113, at 287.

¹¹⁵ 2 Farrand, *supra* note 105, at 488.

¹¹⁶ See Whitten, *supra* note 4, at 264.

¹¹⁷ Cf. *Bissell v. Edwards*, 5 Day 363, 367 (Conn. 1812) (Baldwin, J., concurring) (“The Constitution . . . provides, that Congress *may*, by law, prescribe the manner in which they shall be proved, and the effect thereof. Until Congress shall prescribe the mode of proof, they are to be proved to the satisfaction of the court; and perhaps, according to the mode required by the common law, for proving foreign judgments; and when so proved, full faith is to be given to them.” (emphasis added)).

¹¹⁸ Some have argued along these lines that the Clause *requires* states to give effect to judgments according to preexisting international law. The better view, however, seems to be that the Clause merely leaves such law in place, to operate of its own force. See generally Caleb E. Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 593–95 (2003) (citing sources).

¹¹⁹ Gilbert, *supra* note 40, at 19.

2009]

Full Faith and Credit

1231

under that or any other Seal of the said Corporation, shall have full Faith and Credit in all . . . Courts within this State.”¹²⁰ This use of “full Faith and Credit” could not have meant conclusive substantive effect in the sense the Clause has been given today; this bank could not write its own laws and demand that they be enforced. But full faith and credit did entitle the bank to recognition that its acts were authentic, that they were its own, and that no other evidence could be admitted to deny them—the same force that the Constitution gave the authenticated acts, records, and judicial proceedings of the several states.¹²¹

III. THE LEGISLATIVE HISTORY OF FULL FAITH AND CREDIT

A. *The 1790 Act*1. *Text and Origins*

Congress did not wait long to exercise its power under the Clause. Yet the 1790 Act created a puzzle that would divide the courts for the next three decades. The Act read in full as follows:

An Act to Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated so as to Take Effect in Every Other State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United

¹²⁰ Act of Feb. 2, 1786 § 9 (Del.), in *Laws of the General Assembly, of the Delaware State* 9, 10 (Early Am. Imprints, 1st ser., No. 19,600, Wilmington, Del., Jacob A. Killen & Co. 1786).

¹²¹ A similar law was enacted by Virginia in 1805. See *An Act for Carrying into Execution the Constitution of the Mutual Assurance Society Against Fire on Buildings of the State of Virginia, Lately Adopted at a General Meeting* § 18, ch. 24 (Va. Jan. 29, 1805) (providing that “a copy relative to any delinquent member or subscriber [of the society], from the records of the said society, . . . [properly authenticated] under the seal of the society, shall be received as evidence, and have as full faith and credit in all the courts of this commonwealth, as if the originals were produced in any action, motion or suit”), reprinted in 3 (n.s.) Samuel Shepherd, *The Statutes at Large of Virginia*, from October Session 1792, to December Session 1806, Inclusive 145, 148 (Richmond, Samuel Shepherd 1836).

States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.¹²²

While the authentication provisions were relatively clear, the last sentence of the Act, giving authenticated records and judicial proceedings “such faith and credit . . . as they have by law or usage” in the rendering state, led to years of confusion. Did it mean that all records from State *A* would have the same conclusive effect in State *B*, and that no plea or defense would be good in State *B* unless it would be accepted in State *A* as well? Or did it mean only that State *A* records had the same evidentiary force—that is, were equally good evidence of certain public transactions—as the original records in their home courts? And why did the last sentence speak of “records and judicial proceedings” only, apparently leaving out legislative acts? Thirty-eight years later, New Hampshire’s high court complained that “so various have been the opinions expressed, and the different opinions have been stated with so much clearness and ability, that . . . it is very questionable, whether there is not now quite as much doubt and uncertainty upon the subject, as there was before it had ever been discussed in a court of justice.”¹²³

Worse still, the legislative history of the 1790 Act is extremely obscure. The original version of the bill is not extant,¹²⁴ and the fi-

¹²² Ch. 11, 1 Stat. 122 (1790) (codified as amended at 28 U.S.C. § 1738 (2006)).

¹²³ *Robinson v. Prescott*, 4 N.H. 450, 453 (1828).

¹²⁴ The issue was brought before the First Congress by Rep. William Loughton Smith of South Carolina, who on February 1, 1790, suggested that a bill be drafted to exercise Congress’ powers under the Clause. 1 *Annals of Cong.* 1144 (Joseph Gales ed., 1834). Smith’s interest in an issue dear to creditors was understandable; a commercial attorney and a member of the Middle Temple, he had “opposed the strong debtor-relief measures that the legislature passed in the mid-1780s,” and was a Federalist supporter of Hamilton’s economic programs. “Smith, William Loughton,” in *American National Biography* 314 (John A. Garraty & Mark C. Carnes eds., 1999).

A three-person committee was then appointed to draft the bill, presenting it on April 28. 1 *Annals of Cong.* 1144 (Joseph Gales ed., 1834); 2 *Annals of Cong.* 1601

2009]

Full Faith and Credit

1233

nal statute incorporated at least one amendment, the text of which is unknown.¹²⁵ Contemporary newspapers largely reprinted the brief accounts later published in the *Annals of Congress*.¹²⁶ Moreover, discussion was confined primarily to the House; the bill passed easily in the Senate.¹²⁷

2. Interpretation

Despite the paucity of this evidentiary record, there is substantial evidence that the Act's central purpose was to declare the mode of authentication, not the effect of state records.

a. The title of the Act provides the first clue. The Act prescribes how records are to be authenticated "*so as to take effect*" in other states, applying the law of substantive effect as it finds it rather than imposing a new rule. Early descriptions of the Act seem to match this understanding: at least one contemporary newspaper described Smith as proposing "a bill to describe *the manner of authenticating the records of the several States*, agreeable to the first section of the fourth article of the Constitution."¹²⁸ The published *Annals of Congress* similarly placed his statement under the label "Of Proving Public Records from Other States";¹²⁹ subse-

(1834). The committee consisted of John Page, George Thatcher, and James Jackson. 1 *id.* at 1144. Thatcher and Jackson both had legal training. See Biographical Directory of the U.S. Congress, Jackson, James, (1757–1806), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000017> (last visited Apr. 4, 2009); Biographical Directory of the U.S. Congress, Thatcher, George, (1754–1824), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000141> (last visited Apr. 4, 2009).

¹²⁵ See 2 *Annals of Cong.* 1603 (1834) ("The committee [of the whole] made an amendment to the bill, which was reported to the House; and being concurred with, the bill was ordered to be engrossed for a third reading.").

¹²⁶ See, e.g., *American Legislation*, *Vt. J. & Universal Advertiser* (Windsor, Vt.), Mar. 3, 1790, at 1; *House of Representatives: April 28*, *Herald of Freedom* (Boston), May 7, 1790, at 63; *Proceedings of the Columbian Federal Congress*, *Mass. Spy: Or, The Worcester Gazette* (Worcester, Mass.), Feb. 18, 1790, at 2.

¹²⁷ See 1 *Annals of Cong.* 1005–07 (Joseph Gales ed., 1834). The Senate records on the day the bill passed are particularly sparse. See 9 *Documentary History of the First Federal Congress* 260 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (Diary of William Maclay, May 4, 1790) ("I felt in some degree the effects of the bad Wine We had drank. for I had an head Ach. . . . A great deal of Business was done this day in the Senate in the Way of passing & reading bills but no Debate of any Consequence.").

¹²⁸ *Congress*, *House of Representatives*, *Pa. Mercury & Universal Advertiser* (Phila.), Feb. 6, 1790, at 3 (emphasis added).

¹²⁹ 1 *Annals of Cong.* 1144 (Joseph Gales ed., 1834).

quent debates were printed under “Authentication of Records”¹³⁰ or “Mode of Authenticating Records.”¹³¹

b. A second clue is provided by contemporary models of authentication statutes. These statutes typically shared the same structure: first describing a method of authentication, and then in an implementing clause granting authenticated copies the same evidentiary effect as their originals. For example, when Congress renamed the State Department in 1789—only a few months before passing the 1790 Act—it authorized the Secretary of State to “cause a seal of office to be made for the said department,” ordering that “all copies of records and papers in the said office, authenticated under the said seal, shall be evidence equally as the original record or paper.”¹³² The last sentence of the 1790 Act may have been no more than an implementing clause.

Such implementing clauses often used the terms “faith” and “credit” to describe the evidentiary force they conferred. In the Process Act of 1792, Congress addressed the records of the obsolete court of prize appeals created by the Articles of Confederation;¹³³ these records were to be kept by the Supreme Court’s clerk

¹³⁰ 2 Annals of Cong. 1601 (1834).

¹³¹ *Id.* at 1603, 1605. In one mention of the bill, the Annals also leave off the last clause of the title (“so as to take effect in every other State”), but this may be a simple error, as the House Journal for the same day records the full title. See 1 H.R. Jour. 204; 2 Annals of Cong. 1601 (1834). Another mention of the bill without reference to “effect” seems more clear; see *id.* at 1605 (“A message from the Senate informed the House that they have passed the bill to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated.”); Proceedings of Congress, Providence Gazette & Country J., May 22, 1790, at 2 (“A message was received from the Senate, informing the House, that they have passed the bill prescribing the mode of authenticating the acts, records and proceedings, of the several States.”).

Statutory compilations do not provide a clear characterization of the 1790 Act. Compare Thomas Herty, *A Digest of the Laws of the United States of America* 428 (Balt., W. Pechin 1800) (listing the Act under the heading “Records &c. Authentication of”), with 1 *The Laws of the United States of America* 115 (Phila., Richard Folwell 1796) (labeling the last sentence of the 1790 Act in the margin as pertaining to “the effect thereof”). See also *Roe v. Doe ex dem. Neal*, Dud. 168, 1 Ga. Rep. Ann. (Michie) 441, 443 (Warren Super. Ct. 1832) (describing the 1790 Act as “the act of congress, directing how the records of the courts of one State to another should be certified”).

¹³² An Act To Provide for the Safe-Keeping of the Acts, Records, and Seal of the United States, and for Other Purposes, ch. 14, § 5, 1 Stat. 68, 68–69 (1789).

¹³³ The provision likely refers to the court of appeal for prize cases, see Articles of Confederation art. IX, § 1; Henry J. Bourguignon, *The First Federal Court: The Fed-*

2009]

Full Faith and Credit

1235

and copied on request like the Court's own records, "which copies shall have *like faith and credit* as all other proceedings of the [Supreme Court]." ¹³⁴ Likewise, in 1797, Congress provided that authenticated copies of certain federal bonds or contracts "shall have equal validity, and be entitled to the *same degree of credit*, which would be due to the original papers, if produced and authenticated in court." ¹³⁵

In later years, the term "effect" was also used in this context. An 1823 statute, intended to provide citizens with copies of land grants and "to *declare the effect* of such copies," made it "the duty of the Secretary of the Treasury to cause such copies to be made out and authenticated, under his hand and seal," and added that "such copies, so authenticated, shall be evidence equally as the original papers." ¹³⁶ An 1849 statute concerning public records followed this pattern, providing that copies of records from a variety of government departments would have the same "force and effect" as those produced for the Department of State. ¹³⁷

Despite their repeated references to "faith," "credit," or "effect," none of these statutes made copied records anything more than admissible evidence in place of the originals. As used in the Process Act of 1792, "faith and credit" did not give obsolete records of prize appeals the same substantive force as Supreme Court decisions; that would have raised serious constitutional questions as to Congress' power over the judicial system. Instead, the Act only made copies of those records admissible evidence in court, just like other copied documents authenticated by the Supreme Court's clerk. Indeed, when the Supreme Court later considered the substantive effect of a past prize appeal, neither the

eral Appellate Prize Court of the American Revolution, 1775–1787, at 113 (1977), rather than the tribunal created to settle disputes between the states, see Articles of Confederation art. IX, § 2.

¹³⁴ An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses (Process Act of 1792), ch. 36, § 12, 1 Stat. 275, 279 (1792).

¹³⁵ An Act To Provide More Effectually for the Settlement of Accounts Between the United States, and Receivers of Public Money, ch. 20, § 2, 1 Stat. 512, 513 (1797) (emphasis added).

¹³⁶ An Act To Enable the Proprietors of Lands Held by Titles Derived from the United States To Obtain Copies of Papers from the Proper Department, and To Declare the Effect of Such Copies, ch. 6, 3 Stat. 721 (1823).

¹³⁷ An Act for Authenticating Certain Records, ch. 61, § 3, 9 Stat. 346, 347 (1849).

Court nor counsel invoked the language of the Process Act to settle the question.¹³⁸

c. A third clue is provided by a dog that did not bark: namely, the absence of any limitation in the Act on the substantive effect of judgments rendered *ex parte* or without personal service. To recognize and enforce a foreign judgment was to accept the foreign court's exercise of jurisdiction in the case. At the time, it was black-letter law that judgments rendered without jurisdiction were void,¹³⁹ yet different states had vastly different jurisdictional rules. Many states, including major commercial states such as Massachusetts, were well known to permit foreign attachment or other practices that conferred jurisdiction on state courts without actual notice or personal service to the defendant.¹⁴⁰ Rules of international law disfavored such procedures, and limited the recognition of such judgments abroad,¹⁴¹ but they did not trump the obligation of the courts where such customs held to apply the jurisdictional rules of their own states.¹⁴²

For this reason, *every* proposal explicitly according substantive effect to sister-state judgments—in the drafting of the Articles of Convention,¹⁴³ the Philadelphia Convention,¹⁴⁴ and in the first several decades of the federal Congress¹⁴⁵—restricted the substantive effect of judgments rendered without notice. To do otherwise

¹³⁸ See *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54 (1795). One attorney claimed that Congress had “declared the Effect of the Records of the State Courts,” but *not* “of the former courts of Adm[iralt]y.” William Patterson's Notes of Arguments in the Supreme Court (Feb. 12, 1795), in 6 *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 465 (Maeva Marcus ed., 1998).

¹³⁹ See, e.g., William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1828–31 (2008).

¹⁴⁰ See *Bartlet v. Knight*, 1 Mass. 401, 409–10 (1805) (opinion of Sedgwick, J.).

¹⁴¹ See *Buchanan v. Rucker*, (1808) 103 Eng. Rep. 546, 547 (K.B.); see also sources cited in James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 *Va. L. Rev.* 169, 191–99 (2004).

¹⁴² See *Bartlet*, 1 Mass. at 410.

¹⁴³ See 9 J. Continental Cong. 895–96 (requiring “notice in fact . . . of the original writ upon which such judgment shall be founded”); see also *supra* note 91 and accompanying text.

¹⁴⁴ See 2 Farrand, *supra* note 105, at 448 (providing that a sister-state judgment should be “binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said [judgment was rendered]”); see also *supra* note 108 and accompanying text.

¹⁴⁵ See *infra* Parts .C, .E–.F.

2009]

Full Faith and Credit

1237

would, as Justice Johnson wrote in his dissent in *Mills v. Duryee*, have allowed “a judgment for \$150,000 [to be] given in Pennsylvania upon an attachment levied on a cask of wine” to bind the defendant in every state.¹⁴⁶ Yet the 1790 Act contained no requirement of service or actual notice. To the extent that its last sentence concerned substantive effect, it would have given the judgments of each state the same effect that “they have by law or usage in the courts of the state from whence the said records are or shall be taken.” In other words, so long as a judgment by foreign attachment would be respected in its home state, no other state could fail to enforce it.

Some courts would later read a requirement of notice into the 1790 Act—most notably the Supreme Court sixty years later in *D’Arcy v. Ketchum*.¹⁴⁷ But as the discussion below will make clear, no such limitation was perceived at the time of the Act’s enactment. Either the 1790 Act concerned substantive effect, and was more aggressive in enforcing the judgments of other states than any proposal made before or since, or it was concerned merely with authentication. If the latter is true, the Act would have sensibly left in place the preexisting rules constraining the force of foreign judgments rendered without notice.

d. An authentication reading of the 1790 Act helps resolve another mystery: why neither the Clause nor the Act specified what “faith and credit” was due to *federal* acts, records, or judicial proceedings.¹⁴⁸ Once we recognize that “faith and credit” is primarily concerned with authentication, that absence is less surprising. The Process Acts of 1789 and 1792 provided for the authentication of judicial records and proceedings by seal, while the 1789 statute renaming the Department of State did the same for legislative acts and executive records.¹⁴⁹ Moreover, the substantive effect due to federal statutes or judicial proceedings could never have been in

¹⁴⁶ 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting).

¹⁴⁷ 52 U.S. (11 How.) 165 (1850).

¹⁴⁸ See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506–07 (2001); Currie, *supra* note 31, at 103.

¹⁴⁹ See Process Act of 1792, ch. 36, § 1, 1 Stat. at 275–76; An Act To Regulate Processes in the Courts of the United States, ch. 21, § 1, 1 Stat. 93, 93 (1789); An Act To Provide for the Safe-Keeping of the Acts, Records, and Seal of the United States, and for Other Purposes, ch. 14, 1 Stat. 68, 68 (1789). These functions are now performed by Fed. R. Civ. P. 44(a)(1).

doubt. While the several states remained “foreign” to each other in their judgments and laws,¹⁵⁰ the United States was different: its sovereignty ran throughout each state, and its acts and judgments applied of their own force. Federal records thus received their full effect without needing special assistance.¹⁵¹

e. An authentication reading also helps explain why the last clause mentions only “records and judicial proceedings,” but not “acts.”¹⁵² As Whitten has noted, not all state courts at the time were courts of record; the documentation of many “judicial proceedings,” like those held by justices of the peace, was of limited evidentiary value in the superior courts.¹⁵³ Evidence of such a proceeding might not be admissible even in its home state, and Congress had no reason to make it more admissible in other states. No state, however, would have restricted the admissibility of its own statutes, and such a restriction was unnecessary with regard to “acts.”

f. Finally, a substantive reading of the 1790 Act would prove far too much—in particular, by allowing writs of execution to issue on sister-state judgments. Although the original understanding of the 1790 Act is obscure, we know that the Act was *not* understood to allow immediate cross-border execution of judgments (Madison’s original hope for the effects power).¹⁵⁴ Yet if the “such faith and credit” clause meant that State *A* judgments must be treated no differently in State *B* than they were at home, the Act would have had precisely that effect.

A number of nineteenth-century commentators interpreted the Act as giving the records of each state the technical status of “records” in every state; that is, turning a State *A* judgment into a domestic judgment in State *B*’s courts. Nathan Dane argued in 1824

¹⁵⁰ See *Warder v. Arell*, 2 Va. (2 Wash.) 282, 298 (1796) (“[T]hough they form a confederated government, yet the several states [in] their individual sovereignties, and, with respect to their mu[tu]al laws, are to each other foreign.”).

¹⁵¹ See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 246–49 (2000).

¹⁵² Laycock has argued that “records” should be read here to include legislation. Laycock, *supra* note 6, at 294. But given the frequent and precise listing of “Acts, Records, and Judicial Proceedings,” both in the title of the Act and in the language of the Clause itself, a reading that would make “Acts” superfluous seems unlikely.

¹⁵³ See Whitten, *The Constitutional Limitations on State Choice of Law*, *supra* note 25, at 52–53; see also *supra* note 53 and accompanying text.

¹⁵⁴ The very idea was considered a *reductio*. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813); see also *Phelps v. Holker*, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (opinion of Rush, J.).

that every sister-state judgment “must be either as a *foreign* judgment, or as a *domestic* one”; there could be no third option, as “any middle ground taken, must be a source of endless distinctions and controversy.”¹⁵⁵ Since sister-state judgments were not foreign, Dane claimed, they must be domestic. Likewise, an 1802 treatise discussed the 1790 Act in the context of the locality of actions. Debt or *scire facias* on a judgment were local actions at common law, because they could only be brought in the court where the record was located, or in a superior court that might order the record sent in.¹⁵⁶ But “[b]y the constitution and laws of the United States,” the treatise argued, “judgments in *one state* are no longer *local*, as they respect the courts in *another state*”;¹⁵⁷ rather, the “production of the original record is dispensed with,” and “the action is now transitory,” capable of being raised anywhere with the same binding effect.¹⁵⁸

While the symmetry of such views is appealing, it must also have been incorrect. If a State *A* judgment were truly a domestic judgment of State *B*, there would have been no need to bring an action of debt; the plaintiff could simply move straight to a *scire facias* or execution. And we know that the 1790 Act did not entitle plaintiffs to execute sister-state judgments directly;¹⁵⁹ when Congress wanted to enable cross-border execution, it said so explicitly.¹⁶⁰ The 1790

¹⁵⁵ 5 Nathan Dane, *A General Abridgment and Digest of American Law, with Occasional Notes and Comments* 217 (Boston, Cummings, Hilliard & Co. 1824).

¹⁵⁶ *American Precedents of Declarations* 31 (Benoni Perham ed., Boston, Barnard B. Macanulty 1802); compare with Engdahl, *supra* note 25, at 1604–06 (discussing locality).

¹⁵⁷ *American Precedents of Declarations*, *supra* note 156, at 31.

¹⁵⁸ *Id.* at 32.

¹⁵⁹ See *Mills*, 11 U.S. at 485; cf. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 241 (1998) (Scalia, J., concurring in judgment) (“[T]he Constitution ‘did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*. No execution can issue upon such judgments without a new suit in the tribunals of other States.’” (quoting *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 462–63 (1873))).

¹⁶⁰ See *An Act to Provide More Effectually for the Settlement of Accounts Between the United States, and Receivers of Public Money*, c. 20, § 6, 1 Stat. 512, 515 (1797) (“*And be it further enacted*, That all writs of execution upon any judgment obtained for the use of the United States, in any of the courts of the United States in one state, may run and be executed in any other state, or in any of the territories of the United States, but shall be issued from, and made returnable to the court where the judgment was obtained, any law to the contrary notwithstanding.”).

Act did treat state judgments differently from those of, say, France or Jamaica, but only for the purpose of *authentication*; as to substantive effect, neither the Clause nor the Act had altered the pre-existing law.¹⁶¹

B. *The 1804 Act*

1. *Intervening Developments*

The thirteen years between the 1790 Act and Congress' next consideration of its full faith and credit powers saw a number of significant developments in the state and lower federal courts. These decisions addressed three different topics: (a) the general background law of recognition of judgments, (b) the manner of authentication under the 1790 Act, and (c) the effect of sister-state judgments. Together, the decisions show that confusion about the Act emerged relatively quickly, as did radically divergent understandings of Congress' power under the Effects Clause.

a. Even after the 1790 Act's enactment, courts continued to rely on general principles of international law on the recognition of foreign judgments. For example, in 1795 a Connecticut court admitted into evidence certain notarial certificates from the West Indies; although they were not fully "of record," the court stated, "faith and credence is by the universal consent of all nations given to the attestations of a notary public."¹⁶² Similarly, the Connecticut Supreme Court of Errors in 1802 held Vermont's confiscation of property to be valid on the ground that it was "the act[] of a legislature and of a court of a foreign state, and, as such, to be respected."¹⁶³

Courts recognized that the Full Faith and Credit Clause had force on this question, but did not always clarify how much. The Pennsylvania Supreme Court noted that "[w]e are bound to consider the judgments of a court to be right and just," but that "this rule holds in a much stronger degree by the laws of the union,

¹⁶¹ As Whitten notes, a judgment could have a conclusive effect without itself serving as a ground for a writ of execution. See Whitten, *supra* note 4, at 284–85. Yet under the theory of domestic judgments employed by these commentators, that possibility is ignored: if sister-state records were domestic for the purposes of a debt action, they would not be foreign for the purposes of execution.

¹⁶² *Spegail v. Perkins*, 2 Root 274, 274 (Conn. Super. Ct. 1795).

¹⁶³ *Baldwin v. Kellogg*, 1 Day 4, 7 (Conn. 1802).

2009]

Full Faith and Credit

1241

when the judicial proceedings of the court of a sister state come before us.”¹⁶⁴ South Carolina’s constitutional court, in receiving a Virginia judgment into evidence, noted that it “was fair and regular to presume that the record and judgment were agreeable to the laws and the usual course of proceedings in that state,” and also that “they were bound to give due faith and credit to them, and the more especially as the exemplification of the judgment appears to be in due form.”¹⁶⁵ The Clause and 1790 Act, however, were read to supplement, rather than displace, this preexisting law.

b. Courts also continued to apply the preexisting law on authentication, in cases not covered by the 1790 Act. Some courts did hold the Act’s modes of authentication to be exclusive,¹⁶⁶ in light of arguments that “full faith is to be given to the records of another state, and Congress [has] the power to ascertain the manner of giving it etc.”¹⁶⁷ Other courts, however, understood the 1790 Act merely to offer an additional statutory route to authentication, and not to abolish “such modes of authentication as were used here before it passed.”¹⁶⁸

c. Finally, the 1790 Act quickly produced disagreement on whether the money judgments of other states would be conclusive evidence in new actions brought by judgment creditors. In the first federal case to discuss the matter, *Armstrong v. Carson’s Executors*,¹⁶⁹ the defendants had pleaded *nil debet* to an action on a judgment from New Jersey. The plaintiffs argued that the courts of

¹⁶⁴ *Nixon v. Young*, 2 Yeates 155, 160 (Pa. 1796).

¹⁶⁵ *Mathew Coleman v. Guardian of a Free Negro Named Ben*, 2 S.C.L. (2 Bay) 485, 487 (Const. App. 1803); see also *Pettit v. Seaman*, 2 Root 178, 180 (Conn. Super. Ct. 1795) (“The person of the petitioner being attached . . . gave jurisdiction to the courts of this state Yet the plaintiff by this acquired no greater rights . . . than he would have had, had he prosecuted the action in the state of New York.—*Besides*, by the Constitution . . . full faith and credence is to be given, by each state to the laws, records and judicial proceedings of the other states; we are therefore bound to respect the laws and judicial proceedings of the state of New York.” (emphasis added)).

¹⁶⁶ See, e.g., *Adams v. Griffeth*, 1 Del. Cas. 243 (Del. C.P. 1799); *Smith v. Blagge*, 1 Johns. Cas. 238, 239 (N.Y. 1800) (“We cannot officially know the forms of another state, and therefore they ought to be proved [under the 1790 Act].”); see also *M’Farlane v. Harrington*, 2 S.C.L. (2 Bay) 555 (Const. App. 1804).

¹⁶⁷ *Adams*, 1 Del. Cas. at 244 (argument of counsel).

¹⁶⁸ *Ellmore v. Mills*, 2 N.C. (1 Hayw.) 359, 359 (N.C. Super. L. & Eq. 1796); see also *Pepoon v. Jenkins*, 2 Johns. Cas. 119, 119 (N.Y. 1800) (“[I]t remains with the court to decide upon the sufficiency of the evidence.”).

¹⁶⁹ 2 U.S. (2 Dall.) 302 (C.C.D. Pa. 1794).

New Jersey would not have accepted any other plea than *nul tiel record* (thus treating the sister-state judgment as equivalent to a domestic record), and Jared Ingersoll, the defendant's counsel, "declined arguing the point for the defendant, thinking it clearly against him."¹⁷⁰ Justice Wilson, on circuit, agreed:

If the plea would be bad in the Courts of New Jersey, it is bad here: for, whatever doubts there might be on the words of the Constitution, the act of Congress effectually removes them; declaring in direct terms, that the record shall have the same effect in this Court, as in the Court from which it was taken.¹⁷¹

While some courts favored Wilson's interpretation,¹⁷² others did not. In 1796, a Delaware court found a "record of the State of Maryland" not to be "conclusive here," citing *Walker v. Witter*.¹⁷³ Some explicitly argued that Congress had not yet exercised its power under the Effects Clause: in 1801, Judge Jacob Rush of Pennsylvania declared that Congress "have done no such thing."¹⁷⁴ Rush distinguished between the "*faith and credit* of a record, and the *effect* or operation of [a] record."¹⁷⁵ The Constitution made sister-state records legal evidence in other states, but gave Congress the power to decide on their authentication and substantive effect. The 1790 Act, by granting the "same faith and credit" to a sister-state record, had done no more than make it "as completely legal

¹⁷⁰ Id. at 303 (reporter's headnote).

¹⁷¹ Id. (Wilson, J.). Indeed, Wilson was among those who had previously had "doubts" on the meaning of the self-executing sentence; see *supra* text accompanying note 115.

¹⁷² See, e.g., *Bastable v. Wilson*, 1 Cranch C.C. 124, 2 F. Cas. 1012, 1012 (C.C.D.C. 1803) (No. 1097) (refusing, without argument, a plea of *nil debet* to an action of debt on a Virginia judgment); *Banks v. Greenleaf*, 2 F. Cas. 756, 759 (C.C.D. Va. 1799) (No. 959) (Washington, Circuit Justice) *King v. Van Gilder*, 1 D. Chip. 59, 60–61 (Vt. 1797) (opinion of Chipman, C.J.) ("In cases to which [the 1790 Act] extends, I consider that we are bound to admit copies authenticated in the mode therein prescribed, and to allow the judgments their full effect, yet, they may be admitted on other proof of their authenticity; but, unless the record be authenticated agreeably to that act, the judgment will be considered as having the effect of a foreign judgment only.").

¹⁷³ *Sykes v. Goldsborough*, 1 Del. Cas. 491, 492 (Del. C.P. 1796) (Johns, J.) (also citing *Phelps v. Holker*, 1 U.S. (1 Dall.) 261 (Pa. 1788)).

¹⁷⁴ *Wright v. Tower*, 1 Browne app. at i, xi (Pa. C.P. Luzerne County 1801).

¹⁷⁵ Id. at x–xi.

2009]

Full Faith and Credit

1243

evidence of the existence and correctness of such record, *out* of the state, as it would be *in* the state.”¹⁷⁶

Likewise, in *Hammon v. Smith*, South Carolina’s constitutional court rejected *Armstrong*’s doctrine in a three-way vote.¹⁷⁷ Justice Grimke argued that neither the Constitution nor the Act had accorded conclusive substantive effect to sister-state judgments; instead, the Clause (and, by implication, the Act as well) “only declares, that [the record] shall be received with full faith and credit.”¹⁷⁸ The “evident[] meaning” of the Clause was to distinguish between a judgment’s evidentiary force “as evidence of such a debt, and the recovery thereof [in court],” and its substantive force as “being full and unequivocal proof of the debt.”¹⁷⁹

¹⁷⁶ *Id.* at xi; see also Whitten, *supra* note 4, at 306–11 (describing Rush’s argument in great detail). An earlier decision in Pennsylvania had been unclear, treating authenticated copies as “conclusive evidence,” but arguably conclusive only as to the existence of the original. See *Baker v. Field*, 2 Yeates 532, 532 (Pa. 1800) (“To make a record conclusive evidence, and to give it ‘such faith and credit in every other court of the United States, as it has by law or usage in the courts of the state, from whence such record is taken,’ it must be authenticated according to the act of the Union; but . . . the usual certificates may be received as *prima facie* evidence of the record [that is, of its existence and contents], and may be shewn to the jury.” (last emphasis added)). *Wright* neither mentioned nor attempted to distinguish *Baker*, which suggests that the two decisions were not seen as inconsistent.

¹⁷⁷ 3 S.C.L. (1 Brev.) 110 (Const. App. 1802).

¹⁷⁸ *Id.* at 114 (opinion of Grimke, J.).

¹⁷⁹ *Id.* (opinion of Grimke, J.). By contrast, Justice Johnson, who would later dissent in *Mills*, did not enter the dispute between conclusive and *prima facie* effect. Instead, he argued that the evidentiary effect was separate from the question of the proper plea. The plaintiffs would receive “all the benefit intended to be secured by the constitution, by giving an exemplification in evidence, under the plea of *nil debet*”; were sister-state judgments treated as the sort of domestic judgments appropriate for *nul tiel record*, “the next step would be to decide that a [writ of execution on] a judgment in a sister State, might be maintained in this State.” *Id.* (opinion of Johnson, J.).

Johnson and Grimke were each joined by another justice, while Justice Brevard dissented on grounds similar to those of *Armstrong*. See *id.* (Brevard, J., dissenting) (noting that foreign judgments are merely *prima facie* evidence of the debt, but that “surely this is not the footing on which the solemn judgments, and judicial proceedings of the courts of law of the several States, united under the same general government, and constituting the nation, are placed in relation to each other”). Brevard later recognized, however, that the judgments of sister states lacked the full effect of domestic judgments. See *Reynold’s Ex’rs v. Torrance*, 4 S.C.L. (2 Brev.) 59, 61 (Const. App. 1806) (“[T]he authority derived from the probate of a will . . . in another of the United States, will not extend to this, so as to empower the executor to meddle with the effects . . . of the deceased within this State.”).

Armstrong was also rejected by Justice James Kent and a majority of his colleagues on New York's high court in 1803.¹⁸⁰ In *Hitchcock v. Aicken*, Kent found it "pretty evident that the Constitution meant nothing more by full faith and credit, than what respected the evidence of such proceedings; for the words are applied to public acts, as well as to judicial matters."¹⁸¹ The Constitution had "evidently distinguished between giving *full faith and credit*, and the giving effect to the records of another state"; thus, "until Congress shall have declared by law what that effect shall be, the records of different States are left precisely in the situation they were in under the articles of confederation," which did not prescribe the effect of judgments.¹⁸² Moreover, he interpreted the 1790 Act to "leave[] the question as to the *effect* of such records precisely where it found it": requiring "full assent to the proceedings contained in the record, as matters of evidence and fact, but not as absolutely barring the door against any examination of the regularity of the proceedings, and the justice of the judgment."¹⁸³

Two justices dissented in *Hitchcock*, and Justice Henry Livingston, in particular, argued strenuously for the conclusive effect of a sister-state judgment. Livingston based his argument en-

¹⁸⁰ The court had previously encountered the issue in 1800 and 1801, but had declined to reach it, describing it as "a question of considerable moment." *Rush v. Cobbett*, 2 Johns. Cas. 256, 257–58 (N.Y. 1801); see also *Smith v. Blagge*, 1 Johns. Cas. 238, 238–39 (N.Y. 1800).

¹⁸¹ 1 Cai. 460, 481 (N.Y. 1803) (opinion of Kent, J.).

¹⁸² *Id.* at 480 (emphasis added); see also *id.* at 475–76 (opinion of Radcliff, J.) ("The full faith and credit, intended by the Constitution[,], cannot be interpreted to mean their legal effect, for otherwise the subsequent provision that Congress may prescribe the *effect* would be senseless and nugatory." (emphasis added)); *id.* at 476 ("When a judgment or recovery in our own courts is pleaded, it is alleged as a fact, the record of which cannot be denied, and is conclusive of the fact . . . but its legal effect, or operation, on the rights of the parties, is still to be considered, and frequently may form a distinct question."); *id.* at 483 (opinion of Lewis, C.J.) ("For, where is the use of Congress prescribing, by general laws, the effect of such judgments . . . if by *full faith and credit* absolute verity is intended." (emphasis added)).

¹⁸³ *Id.* at 480 (opinion of Kent, J.) (emphasis added); see also *id.* at 477 (opinion of Radcliffe, J.) ("When so authenticated, they are entitled to full faith credit; but they are to be received as *evidence* merely, by which their contents are undeniably established, and their effect or operation, not being declared, remains as at the common law." (emphasis added)). Kent's *Commentaries*, published long after *Hitchcock*, would not take this view, but would merely restate the Supreme Court's subsequent holdings in *Mills v. Duryee* and *Hampton v. M'Connel*. See 1 James Kent, *Commentaries on American Law* 243–44 (N.Y., O. Halstead 1826).

tirely on the Clause rather than on the 1790 Act,¹⁸⁴ which forced him into a strained reading of the effects power: he found it unclear “that Congress had anything to do with the effect of domestic judgments.”¹⁸⁵ If “Full Faith and Credit” meant conclusive effect, what would be left for Congress to declare? Livingston therefore read the effects power as referring only to the effect of the “proof to be prescribed by Congress”—that is, the effect of the *authentication*, and not that of a record or judicial proceeding itself.¹⁸⁶ Of course, Livingston did not yet have access to the unpublished notes of the Convention debates, to see the actual nature of Morris’ original proposal and amendment; nor would he necessarily have known about the committee recommendations for amendment of the Articles of Confederation.¹⁸⁷ But *The Federalist* had also mentioned the possibility of providing for the execution of judgments of one state in another,¹⁸⁸ as had state court decisions¹⁸⁹—an outcome that would only be possible on a different reading of “Effect.” And Livingston’s tortured construction of the Clause forced

¹⁸⁴ 1 Cai. at 468 (Livingston, J., dissenting) (“To introduce a distinction between domestic and foreign judgments . . . must have been their intention; otherwise, they would have been silent.”); see also *id.* at 463–64 (Thompson, J., dissenting) (“The framers of this Constitution, doubtless, well understood the light in which foreign judgments were viewed in courts of justice, and must have intended, by this article, to place the States upon a different footing with respect to each other than that on which they stood in relation to foreign nations . . .”).

¹⁸⁵ *Id.* at 471 (Livingston, J., dissenting).

¹⁸⁶ *Id.*; cf. 5 Dane, *supra* note 155, at 217 (“The effect of what? Of the *record* that is before declared by the constitution to be entitled to full faith and credit, when found to be a record. The effect thereof then applies to the proof . . .”). But see Corwin, *supra* note 29, at 374 (1933) (describing it as “clear[]” that “the word ‘effect’ is construed as referring to the effect of the records when authenticated, not to the effect of the authentication”). Justice Story would later take a similar position to Livingston’s in his *Commentaries on the Constitution*, see 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1306–07, at 181–83 (Boston, Hilliard, Gray & Co. 1833); Engdahl, *supra* note 25, at 1588 n.10, 1589 n.17, 1652–54, but this was not his position as of 1805, see Joseph Story, *A Selection of Pleadings in Civil Actions* 295–96 (Salem, Mass., Barnard B. Macanulty 1805) (attributing a judgment’s effect to the 1790 Act, not the Clause, in response to another’s argument that “[t]he act of Congress seems to provide for the evidence only”).

¹⁸⁷ See *supra* note 94 and accompanying text.

¹⁸⁸ See *supra* text accompanying notes 113 & 114.

¹⁸⁹ See, e.g., *Farley v. Shippen*, Wythe 254, 266 n.e (Va. Ch. 1794) (noting that, although removal across state borders might defeat a writ of execution, the Effects Clause seemed “to shew that provision for such cases as these, among others, was intended to be made”).

him to read the last sentence of the 1790 Act exactly as the *Hitchcock* majority did, as providing for the full evidentiary equivalence of an authenticated copy with its original:

[A]nd, perhaps, this is the true intent of the [1790 Act], which substantially says, that such proof (after prescribing its nature) shall be as good evidence abroad, of the *existence of the judgment*, as the record itself is at home.¹⁹⁰

Livingston's interpretation also required him to accord conclusive effect to judgments rendered without notice or personal service, so long as they would have been conclusive at home. This was not a conclusion he reached gladly; he noted that "in some instances, mischief may result from making this rule universal, or from too rigid an adherence to it; particularly when the proceedings are by foreign attachment, or without a personal summons or arrest of the defendant."¹⁹¹ But he recognized that on his account, the words of the Constitution would apply to *ex parte* determinations as well, and that any *ad hoc* exceptions would be unwarranted. "Sitting here '*jus dicere et non jus dare*,'" he wrote, "it would be a sufficient answer to all complaints of this kind to say, '*ita lex scripta est*.'"¹⁹²

2. Congressional Action

In returning to the Full Faith and Credit Clause in 1803–1804, Congress failed to resolve the controversy surrounding the 1790 Act. Rather, the 1804 Act merely extended the older statute to cover executive records and office books in addition to judicial re-

¹⁹⁰ *Hitchcock*, 1 Cai. at 471 (Livingston, J., dissenting) (emphasis added); but see *id.* at 465–66 (Thompson, J., dissenting) ("If nothing more was intended than to declare the manner of authenticating such records and proceedings, this part of the act is useless; nay, worse, it is mischievous, being calculated to mislead.").

¹⁹¹ *Id.* at 472 (Livingston, J., dissenting).

¹⁹² *Id.* Livingston wondered whether, "in extraordinary cases," a court might be empowered to declare particular judgments "as exceptions to the general law, and as not contemplated by the Constitution"; such intervention, he argued, "would be a better course than to render null and void one of its most important and salutary provisions." *Id.* Kent, however, would have none of this. See *id.* at 481–82 (opinion of Kent, J.) ("[I]f we may question the binding force of the proceeding or judgment in one case, we may in another; for, the act of Congress has no exceptions, and must receive a uniform construction.").

2009]

Full Faith and Credit

1247

cords,¹⁹³ and to include the public records of territories and possessions (such as the recently-approved Louisiana Purchase).¹⁹⁴ Representative Joseph Nicholson, a Maryland lawyer and future judge, asked the House on November 1, 1803, to appoint a committee to inquire “whether any additional provisions are necessary to be made to the act” of 1790.¹⁹⁵ The next day, he presented a draft

¹⁹³ The act reads in full as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be farther authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are, or shall be taken.

Sec. 2. *And be it further enacted,* That all the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.

An Act Supplementary to the Act Intituled “An Act To Prescribe the Mode in Which the Public Acts, Records and Judicial Proceedings in Each State Shall Be Authenticated so as To Take Effect in Every Other State,” ch. 56, 2 Stat. 298, 298–99 (1804) (codified as amended at 28 U.S.C. § 1739 (2006)).

¹⁹⁴ See Scott A. Taylor, *Enforcement of Tribal Court Tax Judgments Outside of Indian Country: The Ways and Means*, 34 N.M. L. Rev. 339, 352 (2004).

¹⁹⁵ 13 Annals of Cong. 554 (1852). The committee was composed of Nicholson, Thomas Griffin of Virginia (who was at the time also a justice of oyer and terminer in his home state), and James Holland of North Carolina, a former justice of the peace. See Biographical Directory of the U.S. Congress, Griffin, Thomas, (1773–1837), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000467> (last visited Mar. 29, 2009); Biographical Directory of the U.S. Congress, Holland, James, (1754–1823), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000718> (last visited Mar. 29, 2009).

bill,¹⁹⁶ which was debated on November 25 and was sent back to a larger committee for redrafting “[a]fter considerable discussion, developing much diversity of opinion.”¹⁹⁷ More than two months later, on February 7, Nicholson presented an amended bill that varied only slightly from its original text.¹⁹⁸ The measure sat dormant until March 23, when the House debated it briefly and passed it without amendment; it then quickly passed the Senate and was signed into law four days later.¹⁹⁹

What caused the dissension that sent the bill back to committee? Not the substance of the amendments themselves, which differed from the original in only three respects. The amended measure applied not only to “records,” but also to sealed and certified exemplifications of everyday “office books” kept in public offices;²⁰⁰ it contained slightly more complicated mechanisms of authentication; and it applied to “countries subject to the jurisdiction of the United States” as well as organized territories. Coming on the heels of the Louisiana Purchase, this may have been an important addition—but it was unlikely to have generated “much diversity of opinion.”²⁰¹ What could generate controversy, however, was the extent to which the 1790 Act had prescribed the effect of judicial records in other states. And not only did Congress fail to clarify “such faith and credit” in the 1804 Act, it repeated the ambiguous language:

And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or

¹⁹⁶ A Bill Supplementary to the Act, Intituled, “An Act To Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated so as To Take Effect in Every Other State,” 8th Cong. (Nov. 2, 1803).

¹⁹⁷ See 13 Annals of Cong. 625 (1803); see also 4 H.R. Jour. 436 (1803), 440, 446, 459.

¹⁹⁸ 13 Annals of Cong. 979 (1804); see A Bill Supplementary to the Act, Entitled, “An Act To Prescribe the Mode in Which the Public Acts, Records and Judicial Proceedings in Each State, Shall Be Authenticated so as To Take Effect in Every Other State,” 8th Cong. (Feb. 7, 1804).

¹⁹⁹ 4 H.R. Jour. 681–82 (1804); 3 S. Jour. 402–04 (1804).

²⁰⁰ The issue of “office copies” of court records had arisen in *Jenkins v. Kinsley*, 3 Johns. Cas. 2d 474 (N.Y. 1794), and had been resolved in favor of admitting them on commonlaw grounds. See also Gilbert, *supra* note 40, at 23–24 (discussing office copies).

²⁰¹ See Nadelmann, *supra* note 25, at 61.

2009]

Full Faith and Credit

1249

usage in the courts or offices of the state from whence the same are, or shall be taken.²⁰²

Why would Congress have relied on language that was already confusing the courts? The “diversity of opinion” hints that it was aware of the controversy; perhaps the majority thought the courts would eventually come around to their own preferred outcome, or perhaps no single clarification had the votes to succeed.

Yet the 1804 statute does provide evidence against a strong substantive interpretation of the 1790 Act. What would it mean for exemplifications of office books to be given the same substantive effect in sister states as in their home state? The states presumably differed in the sorts of questions that could be answered by executive records, and such records and office books were far more likely than judicial judgments to be created *ex parte* and without notice to affected parties. (Would a deed recorded in State *A* control land in State *B*, even if the latter had different rules for recordation?) As a result, it is hard to believe that Congress would have lightly given them conclusive effect throughout the Union.

Reading the “faith and credit” language as merely making these records admissible evidence, however, would parallel similar statutes enacted contemporaneously by the states. In 1792, Virginia provided that “policies of insurance, charter parties, powers of attorney, foreign judgments, specialties on record, [and] registers of births and marriages” executed and registered in other states or foreign countries could be authenticated by a notary public and made “evidence in all the courts of record within this Commonwealth, as if the same had been proved in the said courts.”²⁰³ Likewise, South Carolina in 1803 had allowed parties to introduce office copies of land grants (including those issued by North Carolina) if the original had been lost.²⁰⁴

Rather than conferring conclusive substantive effect on executive records, the 1804 Act was more likely to have resembled those state statutes, as well as the multitude of federal statutes that pro-

²⁰² 2 Stat. at 299.

²⁰³ Act of Dec. 8, 1792–Oct. 1, 1893, ch. 100, § 2 (Va.), *reprinted in* Joseph Tate, *A Digest of the Laws of Virginia* 456 (Richmond, Shepherd & Pollard 1823).

²⁰⁴ Act of Assembly 1803, 2 Faust 498 (S.C.), *reprinted in* 1 Brevard, *supra* note 83, at 319–20.

vide for the authentication of federal records. Consider 28 U.S.C. Section 1733, which provides in part:

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.²⁰⁵

One might think it useless to enact a formal statute making government records evidence of the transactions they were meant to record, or making copies of such records evidence equally with the originals—especially if they have already been “[p]roperly authenticated.” Surely the common law and common sense would do as much. Yet Section 1733 is only one of a number of statutes regarding the admissibility of copied federal records, such as lost court records,²⁰⁶ extracts from the House and Senate Journals,²⁰⁷ consular papers,²⁰⁸ or patent materials.²⁰⁹ If it is sensible to have such rules on the books today, it was far more important to have them at the time of the Founding, when technological limitations, let alone jurisdictional boundaries, placed a far greater premium on admissibility.

²⁰⁵ 28 U.S.C. § 1733 (2006).

²⁰⁶ Id. § 1734 (empowering courts to enter an order reciting the substance of a lost or destroyed court record, and providing that “[s]uch order, subject to intervening rights of third persons, shall have the same effect as the original record”).

²⁰⁷ Id. § 1736 (“Extracts from the Journals of the Senate and the House of Representatives, and from the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or the Clerk of the House of Representatives shall be received in evidence with the same effect as the originals would have.”).

²⁰⁸ Id. § 1740 (“Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals.”).

²⁰⁹ Id. § 1744 (“Copies of letters patent or of any records, books, papers, or drawings belonging to the United States Patent and Trademark Office and relating to patents, authenticated under the seal of the [PTO] and certified by the Under Secretary of Commerce for Intellectual Property and Director of the [PTO], . . . shall be admissible in evidence with the same effect as the originals.”).

2009]

Full Faith and Credit

1251

*C. The 1806–1808 Bills**1. Intervening Developments*

Not long after the new statute became law, the controversy over the 1790 Act deepened. In June 1804, a North Carolina court adopted a conclusive-effect interpretation of the Act in *Wade v. Wade*.²¹⁰ The next year, however, the Massachusetts high court in *Bartlet v. Knight*—with members of the First Congress among its ranks—unanimously rejected the conclusive interpretation in favor of an authentication-based reading.²¹¹

The defendant in *Bartlet*, Abraham Knight, was sued in New Hampshire for defaulting on a promissory note. He did not appear, and a default judgment issued. When the plaintiff tried to enforce his award in Massachusetts, Knight argued that he should not be bound by the judgment, as he had always been a Massachusetts resident, had never been given notice of the New Hampshire suit, and had at the time of signing the note been only fourteen years old. Counsel in the case confined their arguments to the meaning of the 1790 Act, with the plaintiff arguing that the judgment “would be absolutely incontrovertible evidence of a debt” in New Hampshire, and the defendant arguing that the record was only “incontrovertible evidence of every thing that appeared by the record, viz., that the judgment was recovered, by and against the parties named, for the sum and for the cause of action expressed.”²¹²

Justice Thatcher, who delivered the first opinion in the case, had been one of the three House committee members who drafted the 1790 Act.²¹³ Thatcher stated that “the constitution of the *United States* and the act of congress, which have been cited, do not admit of the construction contended for”; as the note itself would have been void under Massachusetts law if executed locally, the same

²¹⁰ *Wade v. Wade*, 1 N.C. 601, Cam. & Nor. 486 (Ct. Conf. 1804). In 1805, New Jersey’s Justice Pennington argued at length for a conclusive-effect reading of the 1790 Act in his concurrence in *Curtis v. Gibbs*, 2 N.J.L. (1 Penning.) 399 (1805) (opinion of Pennington, J.), but the majority held only that New Jersey would not enforce a judgment rendered by foreign attachment.

²¹¹ 1 Mass. (1 Will.) 401 (1805). According to the reporter, the court had taken a different position “some years since” in the unreported case of *Noble v. Gold*, but none of the justices seemed concerned by the precedent. See *id.* at 410.

²¹² *Id.* at 404.

²¹³ See *supra* note 124.

defenses would be available to a sister-state judgment founded on the note.²¹⁴ Thus, even if the record were taken as conclusive evidence of the proceedings in New Hampshire, it did not carry conclusive effect in sister states. Justice Sewall agreed, describing the authenticated New Hampshire proceedings as “having, *as evidence of a public record*, the same faith and credit with us, as it would have in *New Hampshire*.”²¹⁵ Finally, Justice Sedgwick—who, like Thatcher, had been a member of Congress in 1790²¹⁶—noted that “the effect of records, &c., [as well] as their mode of authentication, is, by the constitution, within the authority of congress.” Yet “[w]hat the effect shall be is not declared by the [1790] statute,” which provided only “that [sister-state records] shall be incontrovertible and conclusive evidence of their own existence, and of all the facts expressed in them. The *act*, however, stops short of declaring what shall be their effect; and congress have wisely left this to the judicial department.”²¹⁷

After finding that the 1790 Act had failed to declare the effect, the court in *Bartlet* applied in its place the preexisting law on recognition of judgments. Justice Sewall noted that at common law, the action of debt on a judgment was founded on a theory of an implied promise to pay; because the record in the case at bar revealed facts (particularly Knight’s minority) that would vitiate such a promise, “a judgment liable to these objections, must be determined to be no just or legal consideration, from which a promise or debt of the party, nominally charged by it, ought to be implied or inferred.”²¹⁸

Likewise, Justice Sedgwick’s opinion explored what it meant for a judgment to be *prima facie* evidence. As Justice Kent had argued in *Hitchcock*, the general standard of review for judgments of courts not of record—to which foreign courts had been analogized²¹⁹—was that a defendant could still “impeach the justice” of a sister-state judgment, and “show [it] to have been irregularly or

²¹⁴ 1 Mass. (1 Will.) at 404–05 (opinion of Thatcher, J.).

²¹⁵ *Id.* at 407 (opinion of Sewall, J.) (first emphasis added).

²¹⁶ See Nadelmann, *supra* note 25, at 64.

²¹⁷ *Bartlet*, 1 Mass. (1 Will.) at 409.

²¹⁸ *Id.* at 407–08.

²¹⁹ See, e.g., *supra* note 53 and accompanying text; see also *Cole v. Driskell*, 1 Blackf. 16, 16 (Ind. 1818) (“Foreign Courts, and Courts not of record, are in this respect considered in the same point of view.”).

2009]

Full Faith and Credit

1253

unduly granted.”²²⁰ The defendant in *Bartlet* thus tried “to show that such judgment was unduly or irregularly obtained.”²²¹ Sedgwick agreed, noting that “the courts of the other states shall never be charged with collusion, corruption, or a *mere* error of judgment.”²²² Where, however, the proceedings had in some way been fundamentally unfair—as, for example, when the judgment was rendered without personal notice to the defendant—the common law presumption in favor of foreign judgments would have been rebutted. He noted that “many of the states, of which *this* [Massachusetts] is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him.”²²³ Sedgwick was under no illusions, therefore, that a judgment without service or notice would be always and everywhere invalid; as a Massachusetts judge, he was obliged to enforce his own state’s statutes. Rather, the lack of personal notice was sufficient to rebut *prima facie* evidence of a judgment’s reliability,²²⁴ and the law did not treat sister-state proceedings as anything more than that.

2. Congressional Action

Congress returned to the topic of full faith and credit soon after the decision in *Bartlet*. To have different rules applied by the largest commercial jurisdictions in the country was intolerable; and on January 22, 1806, Barnabas Bidwell—a representative from Massachusetts—spoke of “the necessity of uniformity in certain judicial proceedings of the States.” He then proposed that a committee “consider whether any . . . further provision ought to be made by law for prescribing the manner in which the public acts, records,

²²⁰ *Hitchcock v. Aicken*, 1 Cai. 460, 480 (N.Y. 1803) (opinion of Kent, J.). Thus, while “matters proper for jury determination, which appear from the record to have been fairly submitted to them, cannot be overhauled,” this rule did not “bar[] the door against any examination of the regularity of the proceedings, and the justice of the judgment.” *Id.* Kent would also argue later that “the defendant must *impeach* the judgment, by showing, affirmatively, that it was unjust, by being irregularly or unfairly procured”; rather than “granting a new trial . . . upon every question of fact,” something must be shown to have been *procedurally* wrong or unfair in the initial judgment. *Taylor v. Bryden*, 8 Johns. 173, 177 (N.Y. 1811) (Kent, J.).

²²¹ *Bartlet*, 1 Mass. (1 Will.) at 404 (argument of counsel).

²²² *Id.* at 409.

²²³ *Id.* at 410.

²²⁴ Cf. *Smith v. Rhoades*, 1 Day 168 (Conn. 1803) (finding that a lack of personal service could be cured by notice and appearance).

and judicial proceedings of the respective States shall be proved, and the effect thereof.”²²⁵ A committee was appointed, and a month later, on February 26, Bidwell presented a bill “[p]rescribing the effect, in each state, of the records of judgments and decrees of the courts of record of every other state.”²²⁶

a. *Analysis*

Bidwell’s proposal was notable in three respects, each of which highlights the divergence between modern and Framing-era interpretations of the Clause. First, Bidwell’s bill applied exclusively to the judgments or decrees of courts of record. Judgments of inferior courts, such as those held by justices of the peace, were not given the same degree of respect. If “Full Faith and Credit” accorded conclusive effect to *all* “judicial Proceedings” of sister states, however, this distinction would have contradicted the constitutional text.

Second, Bidwell’s bill explicitly declared the effect of judgments both at law and in equity; unlike the “action of debt” language proposed for the Articles of Confederation, it would have given conclusive effect to the “debt *or right*” established in the rendering state’s “judgment *or decree*.”²²⁷ Again, if the Clause had conferred

²²⁵ 15 Annals of Cong. 372 (1806).

²²⁶ H.R. 46, 9th Cong., (1st Sess. 1806). The bill reads in full as follows:

Sec. 1. *BE it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That in any action at law or suit in chancery, in a court of any state, on a judgment or decree of a court of record of any other state, or in which such judgment or decree is given in evidence, the record of the said judgment or decree, exemplified and proved in the manner prescribed in the [1790 Act], shall be *conclusive* evidence of the debt or right therein adjudged or decreed, against any party thereto, who appeared, or was personally served with legal notice to appear, in the action or suit, wherein the said judgment or decree was rendered or passed; but against a party, who neither appeared, nor was personally served with legal notice to appear, it shall be *prima facie* evidence only:

Provided always, that nothing herein contained shall operate to prevent any party from pleading, or giving in evidence, a reversal, release or satisfaction of such judgment or decree, or any other cause of defence in law or equity, accruing after the said judgment or decree.

Id.

²²⁷ Id. (emphasis added). Foreign money judgments had been enforced on a theory that the judgment created an implied promise to pay; such a theory would not extend to adjudications of rights other than money damages, such as divorces. See Jackson v.

2009]

Full Faith and Credit

1255

substantive effect on all judgments, it would apply equally to cases in law and equity; but the deliberations of early America had focused specifically on money judgments, and even today “[c]ourts have never been sure about the applicability of full faith and credit to equitable decrees.”²²⁸

Third, and most important, Bidwell’s proposal would have made authenticated judgments and decrees “*conclusive* evidence of the debt or right therein adjudged or decreed,” but only against “any party thereto, who appeared, or was personally served with legal notice to appear, in the action or suit.”²²⁹ Against parties “who neither appeared, nor [were] personally served with legal notice to appear,” such judgments were to be considered “*prima facie* evidence only.”²³⁰ This was a clear departure from existing law; to the extent that courts had found the lack of notice relevant, they had taken it to *rebut* the *prima facie* effect of a foreign judgment, not merely to reduce that effect from conclusive to *prima facie*.²³¹ Yet if the Clause itself conferred conclusive effect on all judgments, this restriction of effect was unconstitutional; and if *ex parte* judgments were implicitly excluded from the Clause, then this measure would have exceeded the powers of Congress.

b. History

Bidwell’s measure enjoyed some early success. It was debated in the Committee of the Whole on March 24, and taken up by the House on April 11, when “[a] debate of considerable length arose on this bill.”²³² A motion was made by George Washington Campbell of Tennessee to postpone it indefinitely, which failed,²³³ and amendments were made at the clerk’s table, the contents of which

Jackson, 1 Johns. 424 (N.Y. 1806) (holding illegitimate a Vermont divorce of New York domiciliaries); see also *Barber v. Root*, 10 Mass. (10 Tyng) 260, 266 (1813) (describing Vermont’s laws, which allowed citizens of other states to obtain divorces there, as “an annoyance to the neighboring states, injurious to the morals and habits of their people, and . . . to be reprobated in the strongest terms, and . . . counteracted by legislative provisions in the offended states”).

²²⁸ Price, *supra* note 21, at 756.

²²⁹ H.R. 46.

²³⁰ *Id.*

²³¹ See *supra* note 61 and accompanying text.

²³² 15 *Annals of Cong.* 1010 (1806).

²³³ *Id.*

are not preserved.²³⁴ The next day, after a brief debate,²³⁵ the bill passed the House on April 12 by a lopsided margin of 67 to 18.²³⁶ Despite its victory in the House, however, the bill was lost in the Senate. It was first amended by a committee on April 16, and failed on a majority vote the next day.²³⁷

The bill's supporters in the House tried again in the next session, weakening the bill's provisions in an attempt to gain support. This time, Evan Alexander of North Carolina took the lead, requesting a committee on January 2, 1807, to which he and Bidwell (among others) were appointed.²³⁸ The committee reported a bill on January 19, which contained only minor differences from the 1806 version: the new bill gave judgments conclusive effect only if the defendant had been served "within the state" where the judgment was rendered.²³⁹ The draft was referred to the Committee of the Whole, where it died,²⁴⁰ and was not brought up again before the end of the Ninth Congress.

Alexander made one more attempt at the close of the Tenth Congress. In December 1808, he proposed a third bill "[p]rescribing the effect of records of judgments and decrees of courts of one state in another state."²⁴¹ Meanwhile, the dissension in the courts had continued. In the Spring of 1808, a Tennessee court had adopted an authentication-based view of the 1790 Act, while Kentucky did the opposite.²⁴²

²³⁴ 5 H.R. Jour. 380 (1806).

²³⁵ 15 Annals of Cong. 1017 (1806).

²³⁶ *Id.* The vote does not appear to have followed party lines.

²³⁷ 15 Annals of Cong. 236, 240, 242 (1806). The committee was composed of Joseph Anderson of Tennessee, Samuel Mitchill of New York, and Israel Smith of Vermont. *Id.* at 236. While the Annals record neither the committee's amendments nor the Senate's concerns, it is worth noting that Anderson represented a rural Western state, with fewer creditors and more debtors. The House delegations from Tennessee and Kentucky had been generally opposed to the measure; of the nine House representatives from these states in the Ninth Congress, four had spoken or voted against the bill, and none had voted in favor. See *id.* at 1010, 1017.

²³⁸ 16 Annals of Cong. 245 (1807).

²³⁹ See H.R. 37, 9th Cong., 2d Sess. (1807).

²⁴⁰ 16 Annals of Cong. 359 (1807).

²⁴¹ H.R. 20, 10th Cong., 2d Sess. (1808).

²⁴² Compare *Wilson v. Robertson*, 1 Tenn. (1 Overt.) 266, 268 (Super. L. & Eq. 1808) ("The true rule seems to be, that as a matter of evidence, we are bound by the Constitution and act of Congress to consider it a record of the judgment, being authenticated as the act prescribes; but the manner of effectuating or obtaining execution of

2009]

Full Faith and Credit

1257

Alexander's 1808 bill contained some differences from its previous incarnations. First, it applied whenever judgments were given in evidence "either as the ground or foundation of such action or suit as aforesaid, or otherwise"²⁴³—that is, beyond actions directly enforcing a prior judgment, to those involving the judgment in a collateral or incidental way. Second, it took a more expansive view of the conclusiveness of sister-state judgments, holding them to be "conclusive evidence of the debt, *damages*, right *or thing* therein adjudged."²⁴⁴ Third, it relaxed the in-state service requirement, imposing conclusive effect whenever the party in the initial action "appeared or was personally served with process, or had legal notice to appear."²⁴⁵ Yet this bill also died quickly; it was referred to the Committee of the Whole and never brought up again while the House was in session.²⁴⁶

D. The 1812 Attempt

The next attempt at a bill was in 1812. In the interim, the conclusive-effect position had strengthened, both in state courts (such as Kentucky and Virginia)²⁴⁷ and in lower federal courts.²⁴⁸ Not all

the judgment is left to the laws of the State where suit is brought upon it."), with *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 416–17 (adopting a conclusive-effect reading, but cautioning that "[w]here the trial is evidently *ex parte* . . . it would be too rigid and unjust, to say that such cases were contemplated by the constitution, and by the act of congress"). That November, a South Carolina court reiterated that the 1790 Act "does not declare what *effect* such authenticated proceedings shall have, as it might have done under the authority of the constitution." *Flourenoy v. Durke*, 2 S.C.L. (2 Brev.) 256, 258 (Const. App. 1808).

²⁴³ H.R. 20.

²⁴⁴ *Id.* (emphasis added).

²⁴⁵ *Id.*

²⁴⁶ 19 *Annals of Cong.* 898 (1809).

²⁴⁷ See, e.g., *Garland v. Tucker*, 4 Ky. (1 Bibb) 361 (1809); *Lassly v. Fontaine*, 14 Va. (4 Hen. & M.) 146, 149 (1809) (Tucker, J.).

²⁴⁸ Justice Washington, who had cited *Armstrong* approvingly on circuit ten years earlier, see *Banks v. Greenleaf*, 2 F. Cas. 756, 759 (C.C.D. Va. 1799) (No. 959), did so again in the 1810 case of *Green v. Sarmiento*, 10 F. Cas. 1117 (C.C.D. Pa. 1810) (No. 5760), as did the Circuit Court of the District of Columbia in *Short v. Wilkinson*, 22 F. Cas. 15 (C.C.D.C. 1811) (No. 12,810). Washington's explanation of the doctrine in *Green*, however, was somewhat strained; he noted that it would be "idle, if not mischievous," for Congress to reduce the credit accorded to sister-state judgments based on "the rule of the state laws and usages"; yet he also praised the 1790 Act for giving "only such credit, as they possess in the state where they were rendered." 10 F. Cas. at 1119–20. Moreover, while Washington declined to reach the question of whether

were convinced, however: in 1811, an American edition of Isaac Espinasse's treatise on pleading stated flatly that "[i]t is certain that the public acts, records and judicial proceedings so authenticated are evidence; but *the effect thereof not being declared by congress*, a diversity of opinion has prevailed in the different states."²⁴⁹ Likewise, Senator William Harris Crawford argued during an unrelated debate on the Bank of the United States that "no law [had yet] been passed to prescribe the effect of a record" under this clause.²⁵⁰

The 1812 attempt, however, would be as short-lived as the others. On January 10, James Milnor of Pennsylvania sought a committee to "report whether any, and what, amendments are necessary" to the 1790 Act.²⁵¹ After considering undescribed amendments to what it called "the laws respecting the *authentication* of records, &c., of one State in the courts of another," the committee on March 23 "reported against the expediency of making any amendments in said act or acts."²⁵²

judgments would be conclusive even in the absence of personal notice, he stated that "if they should be so found, then I can only say, that the act of congress was not passed with sufficient consideration." *Id.* at 1120.

²⁴⁹ 2 Isaac Espinasse, *A Digest of the Law of Actions and Trials at Nisi Prius* 443 (N.Y., Gould, Banks & Gould 3d London ed. corr. 1811) (emphasis added).

²⁵⁰ Senate Debates, Feb. 11, 1811, *in* Legislative and Documentary History of the Bank of the United States: Including the Original Bank of North America 305 (M. St. Clair Clarke & D.A. Hall eds., Wash., D.C., Gales & Seaton 1832). Crawford's justification of this state of affairs, however, was somewhat idiosyncratic: "The effect of a record ought to depend upon the laws of the State of which it is a record, and therefore the power to prescribe the effect of a record was wholly unnecessary, and has been so held by Congress—no law having been passed to prescribe the effect of a record." *Id.*

²⁵¹ 23 *Annals of Cong.* 719 (1812). Milnor, Langdon Cheves of South Carolina, and Lyman Law of Connecticut were appointed to the committee.

²⁵² 24 *Annals of Cong.* 1232 (1812) (emphasis added); see also House of Representatives, N.Y. Com. Advertiser, Mar. 26, 1812, at 3 ("Mr. Milnor, of the committee who were appointed to enquire what alterations are necessary in the act respecting *the authentication* of the public acts, records, &c. of one state in another, reported that it is not expedient at present to make any alterations—ordered to lie on the table" (emphasis added)). The full content of the report is unfortunately not preserved in the *Annals*, *American State Papers*, or the U.S. Congressional Serial Set.

2009]

Full Faith and Credit

1259

*E. The 1813–1814 Bill**1. Intervening Developments*

By 1813, almost ten years had passed since Congress had last enacted a measure under the Full Faith and Credit Clause, and the divisions in the courts had only deepened. The Supreme Court of Tennessee noted that year that

[u]pon this general question [of the effect of sister-state judgments] the opinions of legal characters in the United States have been very much divided. So much has been said upon the subject that, at the present day, a man may with more propriety be said to adopt the opinion of another than to form one for himself.²⁵³

That March, the Supreme Court would rule in *Mills v. Duryee*,²⁵⁴ a decision today regarded as having settled the issue. Yet the question first came before Chief Justice Marshall, sitting on circuit in *Peck v. Williamson* in November 1812.²⁵⁵ *Peck* concerned the effect of a Massachusetts judgment in the Circuit Court for the District of North Carolina. Marshall began with an analysis of the constitutional Clause, stating that he found it “very clear that the constitution makes a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in the other.”²⁵⁶ Thus, unless Congress had exercised its power, the judgment should be “allowed only such [effect] as it possesses on common law principles.”²⁵⁷ He then turned his attention to the 1790 Act, stating that “[i]n our opinion Congress have not prescribed its effect.” The 1790 Act only accorded state records “such faith and credit” as they had in their home states, and to suppose that Congress used this language to prescribe substantive effect “is to believe that they use the words ‘faith and credit’ in a sense different from that which they have in the clause of the constitution upon

²⁵³ *Winchester v. Evans*, 3 Tenn. (1 Cooke) 420, 428–29 (1813).

²⁵⁴ 11 U.S. (7 Cranch) 481 (1813).

²⁵⁵ 19 F. Cas. 85 (C.C.D.N.C. 1812) (No. 10,896). Nadelmann notes that some editions provide an erroneous date of 1813. Nadelmann, *supra* note 25, at 65 n.157. Marshall would join the majority in *Mills*, which Nadelmann and Whitten attribute to his general custom of refraining from dissents. See *id.* at 68; Whitten, *supra* note 4, at 329 n.249.

²⁵⁶ 19 F. Cas. at 85.

²⁵⁷ *Id.*

which they were legislating.”²⁵⁸ Thus, the Massachusetts judgment was entitled only to prima facie effect. Marshall announced these positions despite his awareness that most of his Supreme Court colleagues—who had already decided related cases on circuit—would disagree with him, and that he would soon be overruled. Although *Mills* was at that point already on the Supreme Court’s docket,²⁵⁹ Marshall noted that “this very important question has not yet been decided in this court, nor in the supreme court of the United States,” and thus the court felt “at liberty to pronounce that opinion which our own judgment dictates.”²⁶⁰

The opinion in *Mills*, concerning the appropriate plea to an action on a sister-state judgment, was handed down four months later.²⁶¹ Joseph Story, writing for the majority, could perceive “no rational interpretation of the act of congress unless it declares a judgment conclusive” whenever it would have been conclusive at

²⁵⁸ Id. Marshall had earlier described the term “full faith and credit” in the context of authenticating copies of foreign laws, describing that task as not among those functions of foreign consuls “to which, to use its own language, the laws of this country attach full faith and credit.” *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 237 (1804) (Marshall, C.J.).

²⁵⁹ The case was filed on Feb. 3, 1812. See Index to the Appellate Case Files of the Supreme Court of the United States, 1792–1909, National Archives Microfilm Publication No. 408 (1963), roll 11.

²⁶⁰ 19 F. Cas. at 85.

²⁶¹ 11 U.S. (7 Cranch) 481, 483 (1813). Also decided in March was *Bissell v. Briggs*, 9 Mass. 462 (1813), in which the Massachusetts Supreme Judicial Court reversed its earlier holding in *Bartlet v. Knight* and adopted an intermediate position, whereby sister-state judgments were neither fully foreign nor fully domestic. Chief Justice Parsons repeated Justice Livingston’s position that the self-executing sentence of the Clause itself gives judgments “all the effect . . . which they can have,” yet he argued that the “jurisdiction of the court rendering it is open to inquiry,” even if it would not have been in the state of origin. Id. at 467. Justice Sewall wrote a spirited dissent, noting that his colleagues in the *Bartlet* majority (Thatcher and Sedgwick) had been absent for the argument and decision of the case—and had they been present, the three could have formed a majority for reaffirming *Bartlet*. See id. at 470 (Sewall, J., dissenting). Sewall also sharply criticized Parsons’ intermediate position, arguing that “[t]o inquire of the jurisdiction of a supreme or superior court, from which a judgment is certified,” is to deny the decision “the effect to which [it] would be entitled” in the rendering state. Id. at 474. Moreover, a sister-state judgment might have misapplied the law of the enforcing state, or might have been based on laws contrary to public policy; and the prima facie standard allowed such judgments to be revisited. Id. at 476–77. Finally, he noted that in the case at bar, the defendants were officers of Massachusetts, who were sued in trespass while visiting New Hampshire for official acts done in Massachusetts, with their plea of their offices in defense rejected on demurrer. Id. at 477–78.

home.²⁶² Thus, if *nil debet* would have been an inadmissible plea in New York, it could not be pleaded elsewhere. Leaving the judgments as prima facie evidence only would render “this clause in the constitution . . . utterly unimportant and illusory,” since the common law “would give such judgments precisely the same effect.”²⁶³ The Constitution, however, had given Congress power “to give a conclusive effect to such judgments,” and it had done so in the 1790 Act.²⁶⁴ Story did not, however, argue that the Constitution had conferred substantive effect on the judgment by its own force: that role was performed by the 1790 Act.

Justice Johnson wrote the sole dissent, maintaining the position he had adopted eleven years earlier in *Hammon v. Smith*.²⁶⁵ He agreed with Story that the 1790 Act, as authorized by the Constitution, required courts to “receiv[e] the record of the state Court properly authenticated as conclusive evidence of the debt.”²⁶⁶ Yet he argued that the prior judgment was only conclusive as to the facts of the case, and did not require courts to obey the rendering state’s law of judgments. *Nul tiel record* required an examination of the original record, and unlike *nil debet*, allowed no objection that the judgment was rendered in violation of standard jurisdictional principles. Johnson worried in particular that if *nul tiel record* must be pleaded even in cases without personal service, “it would be difficult to find a method by which the enforcing of such a judgment could be avoided.”²⁶⁷

In fact, the issue of personal service loomed over the decision in *Mills*. As the record of the case reveals—but Justice Story’s opinion does not—the original judgment had been rendered against both Mills and a co-defendant, Eliphalet Frazer, who had not been found in the jurisdiction and had not been served with process.²⁶⁸ As would occur thirty-seven years later in *D’Arcy v. Ketchum*,²⁶⁹

²⁶² *Mills*, 11 U.S. at 485.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ 3 S.C.L. (1 Brev.) 110, 1802 WL 520 (Const. App. 1802).

²⁶⁶ *Mills*, 11 U.S. at 486 (Johnson, J., dissenting).

²⁶⁷ *Id.*

²⁶⁸ See Transcript of Record at 1–3, *Mills*, 11 U.S. (7 Cranch) 481 (1813) (No. 536), reprinted in Appellate Case Files of the Supreme Court of the United States, 1792–1831, National Archives Microfilm Publication No. 214 (1962), roll 22.

²⁶⁹ 52 U.S. (11 How.) 165 (1850).

the plaintiff's subsequent action was filed against both defendants, even though Frazer had still never been served. Story's bland qualification that Mills himself had "had full notice of the suit"²⁷⁰ only postponed the decision on whether a judgment against Frazer, or any other absent party, would be taken as conclusive.

2. Congressional Action

A few months after *Mills*, Congress responded with its most detailed attempt yet to rewrite the Full Faith and Credit statute. On December 15, Bartlett Yancey of North Carolina asked that the Committee on the Judiciary "inquire into the expediency of amending the laws of the United States, as to the effect which a judgment of record of one State shall have, when offered as evidence in a suit in another State."²⁷¹ A bill was accordingly reported on February 3, 1814,²⁷² by Charles Jared Ingersoll of Pennsylvania, whose father had declined to argue for the evidentiary interpretation in *Armstrong v. Carson's Executors*.²⁷³ The younger Ingersoll had expressed his own strong views on the Clause in an 1808 tract on American commerce; amidst harsh criticism of the respect given to foreign prize courts (and to British precedents), he noted that "[e]ven our state courts, notwithstanding the imperative injunction of the constitution, have refused conclusive operation to each other's judgments."²⁷⁴

Accordingly, his bill went further than any previous attempt to accord strong substantive effect to the judgments of other states. Designed as a replacement rather than an amendment of the 1790 Act, the 1814 bill clearly distinguished between the mode by which "the records and judicial proceedings of the courts of any state shall be authenticated so as to be admitted in evidence in the courts of any other state," and the effect such records and proceedings

²⁷⁰ *Mills*, 11 U.S. at 484.

²⁷¹ 26 Annals of Cong. 791 (1813).

²⁷² *Id.* at 1228.

²⁷³ The elder Ingersoll had, however, argued against a conclusive-effect reading of the Articles of Confederation's Clause in *James v. Allen*. See 1 U.S. (1 Dall.) 188, 190 (Pa. C.P. 1786).

²⁷⁴ Charles Jared Ingersoll, A View of the Rights and Wrongs, Power and Policy, of the United States of America 62 (1808) (emphasis added).

2009]

Full Faith and Credit

1263

would have once admitted.²⁷⁵ Ingersoll's bill would have made sister-state judgments conclusive as to the "debt, duty, or thing" they

²⁷⁵ H.R. 45, 13th Cong., 2d Sess., §§ 1–2 (1814). The bill read in full as follows:

To prescribe the mode of authenticating the public acts, records, and judicial proceedings of the several states, and for declaring the effect of certain judicial proceedings.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the original or transcripts of the public acts of the legislatures of any state shall be authenticated by having affixed thereto the seal of the state, accompanied by the certificate of the officer entrusted by law with the custody of such public acts: that the records and judicial proceedings of the courts of any state shall be authenticated so as to be admitted in evidence in the courts of any other state, by having the seal of the court, if any there be, affixed to such record or judicial proceeding, or a transcript thereof, accompanied by the certificate of the clerk of such court, or of the officer entrusted by law with the custody of such records or judicial proceedings, with a certificate of a judge or justice of the court, as the case may be, that the said attestation is in due form.

Sec. 2. *Be it further enacted,* That in all cases where a suit or action is brought in any court within the United States on a judgment or decree rendered or pronounced in a court of some state, other than the one where such second suit or action is brought, and it appears from the record or transcript authenticated as aforesaid, that the defendant or defendants had personal notice of the first suit or action, by the service of process or otherwise, the judgment or decree shall be considered as conclusive evidence of the right of the plaintiff or plaintiffs of the debt, duty, or thing expressed in such decree or judgment: but the person or persons so sued may nevertheless take advantage, in the regular way, of any satisfaction of such judgment or decree after the rendition or pronouncing thereof; and may also take advantage, in the proper way, of any good matter in bar of of [sic.] such decree or judgment, of which he, she, or they had been deprived of the use by the fraud of the adverse party or parties: *Provided,* The truth of such matter, with the fact of the fraud, be verified by the oath or solemn affirmation of the person or persons sued, or one or more of them before filing such defence.

Sec. 3. *Be it further enacted,* That in all cases where a suit or action is brought in any court within the United States, on a judgment or decree rendered or pronounced in a court of some state, other than the one where such second suit or action is brought, and it appears, from the record or transcript authenticated as aforesaid, that the defendant or defendants had not personal notice of such suit or action, the judgment or decree shall be considered as prima facie evidence of the right of the plaintiff or plaintiffs to the debt, duty, or thing expressed in such decree or judgment, and a judgment or decree shall be forthwith entered or pronounced therefor, unless the person or persons so sued sets forth in due course of law good matter in bar of the original suit or action, or in satisfaction or avoidance of the judgment or decree, verified in either instance by the oath or solemn affirmation of the defendant, or some one of the defendants where there are several, before the filing of such defence: *Provided always,* That persons sued as heirs, executors, administrators, or otherwise, in right of others, shall not be compelled to verify their defence as aforesaid, but by the oath or af-

concerned, so long as the defendant “had personal notice of the first suit or action, by the service of process or otherwise.”²⁷⁶

More important, the Ingersoll bill heightened the force given to judgments rendered without personal service. The latter were to be “prima facie evidence,” but the presumption they created could be rebutted only if “the person or persons so sued sets forth in due course of law good matter in bar of the original suit or action, or in satisfaction or avoidance of the judgment or decree, verified in either instance by the oath or solemn affirmation of the defendant . . . before the filing of such defence.”²⁷⁷ Such a provision was unusual, given the common law’s testimonial disqualification of parties for interest; it also gives the impression that Ingersoll’s strong interpretation of the Clause made him reluctant to relax the force of judgments, even those rendered without notice.²⁷⁸

firmation of some third person interested, or by their own affidavit to the best of their knowledge and belief.

Sec. 4. *Be it further enacted*, That the rights, powers, and privileges of executors and administrators, or others legally entrusted with the administration of the estates of deceased persons, in any of the United States, vested by law and the proper judicial tribunal, shall be in every other state as valid and effectual, to all intents and purposes, as in the state where vested or granted; and the record or judicial proceeding by which such powers are vested, or a transcript thereof, shall be authenticated in the manner prescribed herein in relation to other records and judicial proceedings, and be in like manner received as evidence.

Sec. 5. *And be it further enacted*, That this act shall be considered as repealing so much of any other preceding act as contravenes the provisions of this act.

Id.

²⁷⁶ Id. § 2. The bill also provided explicitly that fraud in procuring the original judgment would be a legitimate defense.

²⁷⁷ Id. § 3.

²⁷⁸ How was this relaxed effect for judgments without personal service consistent with Ingersoll’s personal views? As an advocate, his father had championed the enforcement of judgments even when personal service or actual notice was absent. See *Phelps v. Holker*, 1 U.S. (1 Dall.) 261, 263 (Pa. 1788) (argument of counsel) (“[T]here can be no difference between a Judgment in a *Foreign attachment*, and one obtained in any other species of action . . .”). Yet the younger Ingersoll’s bill did not treat judgments without personal service as conclusive; rather, he seemed to envision some range of freedom outside the self-executing constitutional requirement. Even this relaxed effect for such judgments creates some discomfort for modern audiences, who have learned that such service is unlawful under the Due Process Clause, as in *Pennoyer v. Neff*, 95 U.S. 714, 723–24 (1877). But Congress did not assume a judgment would always be set aside in the absence of personal service; the cases and bills discussed here show judgments rendered without personal service were thought to be potentially enforceable. This could have occurred even in federal cases, as the bills

Finally, the bill contained an additional provision that reflected a new sense of the power of the Effects Clause. Its fourth section provided that a decedent's executors or administrators in one state would have equal "rights, powers, and privileges" in all states.²⁷⁹ This provision extended well beyond asserting the evidentiary value of sister-state judgments, instead expanding their substantive effect: it would have entitled courts to endow private persons with legal powers in other states. It also went beyond the contemporary understanding of the 1790 Act, let alone the self-executing force of the Full Faith and Credit Clause: in 1803, the Supreme Court had refused effect in the District of Columbia to letters of administration granted in Maryland,²⁸⁰ and a number of state courts had done similarly,²⁸¹ even in the face of claims based on the Clause.²⁸²

But the measure's detailed drafting did not ensure it a warm reception. After the bill was reported out of committee, it was assigned to the Committee of the Whole, where it was never brought up for debate. A defeated Ingersoll withdrew the measure on April 15.²⁸³ No indication is given of why the bill was lost, but members of

were to apply to "any court within the United States," H.R. 45 §§ 2–3 (emphasis added), and there is no indication in the debates that such enforcement by a federal court would have violated due process.

²⁷⁹ H.R. 45 § 4.

²⁸⁰ *Fenwick v. Sears's Adm'rs*, 5 U.S. (1 Cranch) 259, 268 (1803).

²⁸¹ See, e.g., *Riley v. Riley*, 3 Day 74 (Conn. 1808); *Reynold's Ex'rs v. Torrance*, 4 S.C.L. (2 Brev.) 59 (1806); see also *Riley*, 3 Day at 76–77 (argument of counsel) (citing cases from Massachusetts, New York, North Carolina, and Pennsylvania). But see *Stephens's Ex'rs v. Smart's Ex'rs*, 4 N.C. 83, 83 (1814) ("[T]he probate and letters testamentary issued in South-Carolina, are sufficient to enable the plaintiff to sue here.").

²⁸² See *Riley*, 3 Day at 88 (argument of counsel) (citing the Clause).

²⁸³ 27 *Annals of Cong.* 2022 (1814). Contemporaneously, but without apparent awareness of the debates in the House, Senator Outerbridge Horsey of Delaware delivered an address on the appointment and removal powers of the President in which he expressed a belief that Congress had not yet exercised the power to prescribe the effect of state records—and, indeed, that the power could not be as vast as the text had made it seem:

Indeed there are parts of the constitution which will not bear a literal construction. Take for instance, Art. 4, Sect. 1 . . . Congress has undertaken to prescribe the manner in which such acts, records and proceedings shall be proved, but they have not undertaken, and probably never will undertake, to prescribe the effect they are to have. What is the true import of the words "full faith and credit," is a question that has puzzled the bar and the bench, and about which a contrariety of opinion exists among the learned in the law. But the word 'effect,' take it literally and it conveys a most extraordinary power to Congress—A

Congress may have had other things on their minds: Washington was burned by the British that August. On October 21, shortly after the start of the third session of Congress, Yancey made another attempt by asking the Judiciary Committee to report a bill,²⁸⁴ but none was ever produced.

F. The 1817–1818 Bill

1. Intervening Developments

Debate persisted after *Mills* in the courts as well as Congress. In New York, the state's high court in *Pawling v. Wilson* reaffirmed its earlier holdings that sister-state judgments were entitled only to prima facie effect—and *Mills* was not even mentioned in the reporter.²⁸⁵ Meanwhile, Justice Washington on circuit had held that even a judgment rendered without notice would be conclusive, writing that “nothing can be assigned for error, nor can any averment be admitted, which contradicts a record.”²⁸⁶ Surveying the law in 1816, a new American edition of an evidence treatise refused to assign a definitive answer to such questions, noting that “the courts in different states have essentially varied from each other.”²⁸⁷

power which would swallow up the state sovereignties. An act of the legislature of any one state is a public act, and by this section Congress has the power . . . to declare what *effect* such an act shall have in another state. The legislature of Virginia, for instance, [may] pass an act limiting the rights of suffrage to freeholders; take this section literally, and Congress may declare that such act shall have the same *effect* in Pennsylvania or Massachusetts as it has in Virginia and *vice versa*. An *effect* which I am sure would not be very kindly received either in Pennsylvania or Massachusetts.

Congress. Senate of the U. States, Daily Nat'l Intelligencer (Wash., D.C.), May 5, 1814, at 2.

²⁸⁴ 28 Annals of Cong. 416 (1815).

²⁸⁵ 13 Johns. 192 (N.Y. 1816). But see *Buford v. Buford*, 18 Va. (4 Munf.) 241 (1814) (adhering to *Mills* despite the defendant's arguments that the records “should be [only] of as much efficacy to the plaintiff, as if the originals were produced”).

²⁸⁶ *Field v. Gibbs*, 9 F. Cas. 15, 16 (C.C.D.N.J. 1815) (No. 4766).

²⁸⁷ S.M. Phillipps, *A Treatise on the Law of Evidence* 253 n.a (John A. Dunlap ed., N.Y., Gould, Banks, & Gould 1st Am. ed. 1816).

2009]

Full Faith and Credit

1267

2. *Congressional Action*a. *The Nelson Bill*

With the courts still in stalemate, the Fifteenth Congress once more attempted to exercise its power to declare the effect of state records. The attempt began on December 11, 1817, when John Canfield Spencer of New York, a former judge advocate general and assistant state attorney general,²⁸⁸ asked the Judiciary Committee “to inquire whether any, and if any, what legal provisions are necessary to prescribe the effect which the public acts, records, and judicial proceedings of each State, shall have in the courts of every other State.”²⁸⁹

Two weeks later, committee chairman Hugh Nelson—a former judge of Virginia’s General Court²⁹⁰—presented a report that described the committee’s interpretation of the existing law. After describing the “various and contradictory decisions” that “have been made upon the construction of the act of Congress,” the report offered the following remarkable conclusion:

Your committee are of opinion that Congress *has not yet executed* the power given by the Constitution, of prescribing the effect which such records shall have. At all events, so much doubt rests upon the question, that, in the opinion of your committee, it is highly expedient that Congress should interpose by a law which will produce uniformity in the decisions throughout the Union, and which, by the establishment of a fixed and certain rule, will give confidence and security to commercial men in every part of the United States.²⁹¹

At least three features of this report are noteworthy. First, the committee did not understand *Mills* to have settled the issue; indeed, the report does not even mention the decision, merely de-

²⁸⁸ See Biographical Directory of the U.S. Congress, Spencer, John Canfield (1788–1855), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000727> (last visited Feb. 9, 2009).

²⁸⁹ 31 Annals of Cong. 431 (1817).

²⁹⁰ See Biographical Directory of the U.S. Congress, Nelson, Hugh, (1768–1836), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000035> (last visited Apr. 2, 2009).

²⁹¹ 31 Annals of Cong. at 500–01 (1817) (emphasis added); see also H.R. Doc. No 15–17 (6 U.S. Cong. Serial Set, 1817).

scribing “the courts” as in disagreement. This perceived uncertainty strongly suggests that contemporaries did not believe the issue had been settled.

Second, the report argued that Congress “*has not yet executed the power . . . of prescribing the effect which such records shall have.*” Remember that this assertion came from the bill’s *supporters*, who would have had the strongest reason to argue that their bill merely restated existing law that errant state courts had misapplied. Indeed, none of those who later spoke against the bill portrayed it as an unnecessary recapitulation of existing law. Nor did the report take the position that the Constitution itself mandated such conclusive effect to sister-state judgments, and that Congress by enacting the bill would be giving effect to this constitutional mandate. Instead, both the bill’s supporters and its opponents portrayed the issue as entirely open for congressional action.

The bill that Nelson and the committee proposed differed markedly from its predecessors.²⁹² Unlike the Ingersoll bill, it was not de-

²⁹² The full text read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the record of any final judgment or final decree, in any suit of any court of any state, when authenticated in the manner required by law, shall have the same effect given to it in every court of the United States, and of every other state, as such record would have by law or usage, if used or prosecuted in any other court of the state from which the said record shall be taken: Provided, That no such record shall be deemed conclusive against the parties thereto, their heirs, executors, or administrators, or persons claiming under them, or either of them, unless it shall appear on the face of such record, that the party against whom such record shall be alleged, his testator, intestate, ancestor or grantor, had been personally served with process to compel his or their appearance, in the same suit and in the same court, or that such party had actually appeared in the same suit and in the same court, before the rendition of the judgment or the passing of the decree: And provided further, That no lien or charge shall be created by any such final judgment or final decree upon any real or personal estate, situated out of the state at the time, where such judgment was rendered or such decree was passed.

Sec. 2. And be it further enacted, that whenever manucaptors or bail, or sureties for the personal appearance of any person in any court of any state, shall produce to a judge or justice of some court of record in any other state, the recognizance of bail, or the copy of a bail piece, or a copy of the instrument by which such manucaptors, bail, or sureties became bound, duly authenticated according to law, it shall be the duty of such judge or justice, to certify upon some part of such recognizance, or copy of a bail piece, or instrument as aforesaid, that the same is duly authenticated according to law; and thereupon to endorse the same with his own proper hand, with the date of doing so; which certificate

2009]

Full Faith and Credit

1269

signed to replace the 1790 Act, only to supplement its provisions. Yet it diverged from what had gone before in the following ways:

1. *A more sophisticated approach to effect.* Previous bills had assigned certain records conclusive effect without regard to the records' effect in their state of origin (for instance, if a judgment had not yet become final, or if it had been rendered by an inferior court). Instead, the first section of the Nelson bill would have given a record "the same effect . . . as such record would have by law or usage, if used or prosecuted in any other court of the state from which the said record shall be taken."²⁹³

2. *Lessened effect for judgments rendered without actual notice.* While previous bills had treated judgments with personal service or notice differently from those without, Nelson's bill included stronger enforcement provisions, requiring the fact of service or appearance to "appear on the face of such record." When a judgment was rendered without appearance or service, the bill did not assign it prima facie effect, but rather left the common law as it found it, stating only "[t]hat no such record shall be deemed conclusive."²⁹⁴

3. *Limitations on jurisdiction.* The Nelson bill incorporated a rule "[t]hat no lien or charge shall be created . . . upon any real or personal estate, situated out of the state" in which the first judgment was rendered.²⁹⁵ This anticipated the Court's ruling nearly a century later in *Fall v. Eastin* (1909), in which a state court in Washington awarded to one of the divorcing parties the land they owned jointly in Nebraska.²⁹⁶ The Supreme Court held that Washington had jurisdiction over the parties *in personam*, but not over the *res* in Nebraska, and thus its decree did not actually change the ownership of that land. Under the Nelson bill, no court would have been

and endorsement, with the recognizance, or copy of a bail piece, or instrument as aforesaid, shall have the same effect to authorize the said manucaptors, bail or sureties to arrest and take their principal in such other state, and to remove him to such place as shall be proper and necessary for the purpose of surrendering him in their discharge, as the said recognizance, copy of a bail piece, or other instrument as aforesaid might or could have by law or usage in the state where such bail was given.

H.R. 17, 15th Cong., 1st Sess. (1817).

²⁹³ Id. § 1.

²⁹⁴ Id.

²⁹⁵ Id.

²⁹⁶ 215 U.S. 1 (1909).

bound to give effect to a sister-state judgment purporting to alter the ownership of property outside that state's borders.

4. *Legal powers across borders.* Nelson's proposal built on the Ingersoll bill's substantive provisions by allowing state courts to empower individuals with legal authority beyond their own borders. The second section of Nelson's bill entitled bail bondsmen or manucaptors to pursue a fugitive into other states; after presenting their authorization to a court of the latter state, they would be entitled to apprehend the fugitive and return him to the state of origin. (The provision would have applied to fugitives from both civil arrest and criminal prosecution.) This had not been the law previously, and it clearly had not been part of the self-executing force of the Full Faith and Credit Clause itself: indeed, Article IV contained its own mechanism for pursuing fugitives, which depended on the governments of each state to deliver up the accused on the demand of a sister state's executive.²⁹⁷ Had the Nelson bill been enacted, it would have in some sense merged the body of officialdom of all the states, weakening the legal force of state borders and to some extent altering the nature of state sovereignty. The bill's sponsors thus attributed to Congress a broad power to reshape "Our Federalism"²⁹⁸ by declaring the effect of state records.

b. *The Debates*

1. The debates on the Nelson bill reveal a wealth of information about contemporary attitudes toward the recognition of judgments. The debates began a week after the bill's introduction, on December 31, 1817, when the *Annals* record that "[t]he bill re-

²⁹⁷ U.S. Const. art. IV, § 2, cl. 2. But see *Respublica v. Gaoler of the City and County of Philadelphia*, 2 Yeates 263 (Pa. 1798) (holding, without explanation, that "[i]n the relation in which the several states composing the union, stand to each other, the bail in a suit entered in another state, have a right to seize and take the principal in a sister state, provided it does not interfere with the interests of other persons, who have arrested such principal").

Article IV also contains a procedure for apprehending fugitive slaves. *Id.* § 2, cl. 3. Nelson was from Virginia, and while the effect of such a provision on fugitive slaves (or those assisting them) is not mentioned in the recorded debates, it was quite possibly on the minds of those discussing the measure. Cf. S. Doc. 26-273 (358 U.S. Cong. Serial Set, 1840) (reprinting an exchange of letters between the governors of Georgia and Maine concerning the latter's refusal to extradite persons accused of "stealing" a slave and bringing him North).

²⁹⁸ *Younger v. Harris*, 401 U.S. 37, 44 (1971) (Black, J.).

2009]

Full Faith and Credit

1271

ceived some amendments, and considerable discussion took place on its details.”²⁹⁹ Once reconvened on January 2, 1818, the Committee of the Whole turned to more substantive amendments, which revealed the divergent interests of the commercial East and rural West.³⁰⁰ Thomas Cobb of Georgia argued that sister-state judgments should be “regarded as foreign judgments” only, adding that “the different effects of judgments in the different States . . . would produce involvement, and frequently injustice,”³⁰¹ if they were given conclusive effect. He also noted that the “formality of proceedings” found in commercial centers “did not prevail to any extent in the country, particularly in the southern and western States,” which would render the judgments of the latter less enforceable than those of the former.³⁰² In opposing Cobb’s amendment, its sponsor John Spencer argued that the “principal benefit” of the measure was to provide “a confidence and extent to the commercial credit of the country, which it now wanted from the absence of some such provision.” This lack of confidence “was a great impediment to the increase of the trade between the Atlantic cities and the western country; the merchant fearing to credit, from apprehended difficulty in the recovery of his debts.”³⁰³

Such regional arguments continued throughout the debates. John Ross of Pennsylvania gave a half hour speech opposing the bill and detailing a “variety of illustrations and references to the practices prevailing in the different States.”³⁰⁴ He refused to

²⁹⁹ 31 Annals of Cong. 532. The amendments were minor and technical; the amended version is reprinted in *id.* at 534–35. Perhaps as a result, the subject was not sufficiently enthralling to keep the House’s attention for long:

After the Committee had spent some time on the subject, Mr. Clay (Speaker) rose, and observing that as—either from its being the last day of the year or from some other cause, he knew not what—the House seemed less interested in this subject than its importance merited, moved that the Committee rise . . . And the House adjourned to Friday next.

Id. at 532.

³⁰⁰ The committee report had described the purpose of the bill as to “give confidence and security to commercial men in every part of the United States,” which may have aroused the concern of debtor-state representatives. See *id.* at 501.

³⁰¹ *Id.* at 535.

³⁰² *Id.* at 536.

³⁰³ *Id.* at 535–36.

³⁰⁴ *Id.* at 564.

enable the New York merchant, when his customer had come there from Kentucky, to spring the trap upon him, compel him to confess judgment, or go to prison for want of bail, and [allow] that judgment . . . the same effect . . . in Kentucky as it would have had in New York.³⁰⁵

Similarly, George Poindexter considered the conclusive effect of judgments “radically defective,” taking a “legal view of the question” and arguing that the “variance” of the practices among the states “would make the provisions of the amendment unequal in their operation.”³⁰⁶

These arguments are not just the back-and-forth of regional interests. They serve as strong historical evidence that the Clause and 1790 Act had not yet been accorded the effect often attributed to them today. Rural legislators regarded with suspicion, and urban ones with hope, the prospect that money judgments would routinely receive conclusive effect across state lines. Spencer’s insistence on the bill’s advantages “in sustaining commercial confidence, and in strengthening the ties which bind the States together by making their co-operation more harmonious,”³⁰⁷ indicates that the bill’s passage would actually have changed contemporary practice. Modern interpretations of the Clause and 1790 Act must take account of the fact that for much of America’s early history, the modern view was a minority one.

2. For much of the next week, the Committee of the Whole debated amendments to the bill. Some of the debates were substantive: Henry Baldwin of Pennsylvania (a future justice of the Supreme Court) attempted to limit conclusive effect to judgments rendered “after trial by jury, or a hearing on the merits of the cause,”³⁰⁸ and an amendment to remove the second section (concerning manucaptors) occupied three days of the House’s calendar.³⁰⁹

Yet other debates were constitutional in nature. In these constitutional debates, three positions are recorded. Thomas Williams of

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 565.

³⁰⁸ *Id.* at 536. The amendment was subsequently defeated. *Id.* at 565.

³⁰⁹ See *id.* at 565, 591, 607.

2009]

Full Faith and Credit

1273

Connecticut attributed a conclusive-effect rule to the Clause itself, describing it as “not only the dictate of reason” but also “conformable to the spirit and almost to the letter of the Constitution, that judgments obtained in one State should not be mere prima facie evidence in another.”³¹⁰ Ross, by contrast, idiosyncratically argued that the “Constitution had given to Congress the power to declare what should make a record authentic, but not to prescribe its effect in any other State; and any other construction than this . . . tend[ed] to the establishment of a consolidated Government.”³¹¹

An intermediate position, and the last recorded discussion of the constitutional question, was delivered by Joseph Hopkinson of Pennsylvania. Hopkinson “gave at large, but with precision,” a “perspicuous” argument that “Congress were entirely at liberty to act on the subject”³¹²—that is, that Congress was neither required to afford conclusive effect nor prohibited from doing so. (Indeed, not even Williams had suggested that the “letter” of the Constitution required conclusive effect.) Hopkinson argued that “it was expedient” for Congress to act, “on account of the variety of constructions now given to the law on the subject”;³¹³ he presumably did not see *Mills* as having settled the question. Although some argued that the bill “would put the parties in a worse situation than they were in before,” he contended that “the bill would clear up much ambiguity, and, so far as it had effect, would be more favorable to the party sued than the present practice.”³¹⁴ Hopkinson’s position appeared to be the dominant view: that the Clause had not itself fixed the substantive effect of sister-state records, but that Congress had power to do so.

3. For all its inventiveness, however, the Nelson bill failed to achieve sufficient support. After the end of debates on January 8, almost two weeks went by without a mention of the bill. Finally, it

³¹⁰ *Id.* at 536.

³¹¹ *Id.* at 564. It is possible that these remarks were misreported, for the reporter during this period often showed greater interest than understanding. One report of the proceedings in Congress gives a very brief summary of the day’s debates, noting unhelpfully that “[t]his is a subject too dry and technical to interest readers generally; but it has afforded an occasion for the display of much legal ability and eloquence.” *Congress, N.Y. Com. Advertiser*, Jan. 12, 1818, at 2.

³¹² 31 *Annals of Cong.* 565 (1808).

³¹³ *Id.*

³¹⁴ *Id.*

was brought up again on January 23, and after being debated at “considerable length,” the Committee of the Whole ended its consideration of the measure.³¹⁵ For the rest of the Fifteenth Congress, no serious effort was made to clarify the effect of state records and judicial proceedings.³¹⁶

G. The 1820 Attempt

Amid the debates over the Nelson bill, the concerns over personal jurisdiction intensified. New York’s high court cited *Mills*, but did not rely on it, in *Borden v. Fitch*, where it held that a sister-state judgment against a person “not being within the jurisdiction of the court, nor having been served with process to appear, nor having appeared to defend the suit, will be absolutely void.”³¹⁷ Similar results were reached in Mississippi and New Hampshire,³¹⁸

³¹⁵ Id. at 799. John Forsyth of Georgia, an opponent of the bill, sought a vote “to try the principle of the bill, which, having been so largely debated, must by this time be perfectly understood.” A “large majority” then voted to postpone the bill indefinitely. The disappointment of the *Annals*’ reporter is clear: “So the bill, after so much learning, labor, and ability displayed upon it, was finally rejected.” Id. Nelson complained in a contemporaneous letter that other matters, such as “the case of John Anderson and the privileges of the House . . . have of late [occupied] us entirely and have shut out more important subjects from our consideration.” Letter from Sen. Hugh Nelson to Evette (Jan. 29, [1818]), in *Hugh Nelson Correspondence and Deposition, 1808–1833*, #47 (unpublished manuscripts, on file with the Library of Congress). For more on the case of John Anderson, see Josh Chafetz, *Democracy’s Privileged Few* 223–24 (2007).

³¹⁶ In the Senate, George Washington Campbell—who had opposed the 1806 bill as a member of the House, see *supra* text accompanying note 233—asked on March 4 that the Judiciary Committee inquire into whether the existing laws should be extended to the records and judicial proceedings of territories as well as states. 31 *Annals of Cong.* 228. The committee duly began its consideration, only to report two days later that this precise step had been taken in 1804—while Campbell had been a member of the House, see *Biographical Directory of the U.S. Congress*, Campbell, George Washington (1769–1848), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000083> (last visited May 18, 2007)—and that further legislation on the subject would be “unnecessary and inexpedient.” 31 *Annals of Cong.* at 230–31 (1808); see also S. Doc. 15–154 (Early Am. Imprints, 2d ser., No. 46,242, 1818).

³¹⁷ 15 *Johns.* 121, 143 (N.Y. 1818).

³¹⁸ *Chew v. Randolph*, 1 *Miss. (Walker)* 1 (1818); *Thurber v. Blackbourne*, 1 *N.H.* 242 (1818). The latter case also discussed the meaning of the Effects Clause, holding that the Constitution “provides for the admissibility of such records as evidence, but does not direct the mode in which they should be authenticated, nor does it declare what shall be the effect of the evidence when admitted.” Id. at 243.

with one Mississippi court describing the “much litigated question, as to the conclusiveness of judgments,” as remaining “open.”³¹⁹

In the Supreme Court, meanwhile, Chief Justice Marshall affirmed *Mills* as precedent in *Hampton v. M’Connel*, holding a plea of *nil debet* invalid despite a claim that the defendant may have lacked notice to appear.³²⁰ Yet the degree of judgments’ conclusiveness was still uncertain; the reporter Henry Wheaton noted that “the question is still open in this court” as to whether “a special plea of fraud,” or “a plea to the jurisdiction of the [rendering] court,” might serve to void the judgment.³²¹

The failure of the Nelson bill did not dissuade members of the House from attempting once more to clarify the 1790 Act. In the Sixteenth Congress, Joseph Brevard, who had sat on South Carolina’s high court in *Hammon v. Smith* (and who had adopted the conclusive-effect interpretation in dissent)³²² submitted a resolution on January 10, 1820, asking that the Judiciary Committee inquire into amendments of the 1790 Act. The resolution noted that “there have been, in the different courts of the several States, various and contradictory adjudications in consequence of the different constructions which have been given to the [1790 Act].”³²³ A bill would provide “greater certainty in the law, and greater uniformity and

³¹⁹ Gerault, *Adm’x v. Anderson*, 1 Miss. (Walker) 30 (1818); see also *id.* at 32–33 (comparing the various merits of *Hitchcock*, *Bartlet*, and *Bissel*). Courts in Kentucky and New Jersey delivered opinions adhering to the conclusive-effect position during this period, see *Cobb v. Thompson*, 8 Ky. (1 A.K. Marsh.) 507 (1819); *Olden v. Hallet*, 5 N.J.L. (2 Southard) 466 (1819), and by the next year the latter courts began to describe the issue as fully settled, compare *Lanning v. Shute*, 5 N.J.L. (2 Southard) 778, 779–80 (1820) (Kirkpatrick, C.J.) (“The question . . . has been considered and settled in this court . . . in the case of *Olden v. Hallet*; and since that time, in the same way, in . . . the case of *Hampton v. M’Connel*. This last is conclusive, for, being a constitutional question, it belongs to that court to settle the law, and, having settled it, we are bound by the decision; we have no further discretion upon it.”), with *id.* (Southard, J., concurring) (“I concur in the opinion of the court, but I do it under the irresistible weight of authority alone. My judgment is not satisfied.”).

³²⁰ 16 U.S. (3 Wheat.) 234, 234–35 (1818) (argument of counsel) (noting that “there was no averment in the declaration” that the defendant had appeared, “and the proceeding . . . might have been by attachment *in rem*, without notice to the party”).

³²¹ *Id.* at 235 n.c.

³²² 3 S.C.L. (1 Brev.) 110, 1802 WL 520, at *3 (Const. App. 1802) (Brevard, J., dissenting).

³²³ 35 Annals of Cong. 893 (1820).

consistency in the decisions of the courts thereupon.³²⁴ Note that this was written *seven years* after *Mills*, and almost two years after *Hampton v. M'Connel*; yet neither of these decisions were cited by Brevard, nor was the law yet thought to be sufficiently settled.

Brevard's resolution failed on a one-vote margin, ostensibly because "form and practice" were opposed to "prefixing preambles to resolutions of inquiry."³²⁵ The next day, Eldred Simkins (also of South Carolina) introduced a resolution on the same topic *sans* preamble.³²⁶ The resolution passed over opposition, but it died in committee and never came before the House.

H. The 1822 Attempt

By 1822, the last jurisdictions to oppose *Mills* had given way; New York overturned *Hitchcock* in 1821, accepting the authority of *Mills* and of *Hampton*.³²⁷ Accordingly, the last legislative effort to clarify the law was made in the Seventeenth Congress. Even this effort, however, may have reflected an understanding that the 1790 Act concerned the law of evidence, not substantive effect. On January 22, 1822, Hutchins Burton of North Carolina introduced a resolution "to inquire into the expediency of amending the law *making the records and judicial proceedings of the several States, evidence in each particular State*."³²⁸ Six days later, however, on a motion by John Sergeant of Pennsylvania, the committee was discharged from consideration of the resolution, ending without explanation Congress' final attempt to clarify the Act.³²⁹

I. Summary

The 1822 attempt brought efforts to rewrite the 1790 Act to a close. From 1822 to 1850, I have not found a single mention of the

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 897.

³²⁷ See *Andrews v. Montgomery*, 19 Johns. 162, 164 (N.Y. 1821) ("I consider that Court as paramount, when deciding on an article of the Constitution, and an Act of Congress passed under its express injunction; and whatever might be my individual opinion, I should feel it my duty to surrender it to their controlling authority.").

³²⁸ 38 *Annals of Cong.* 757 (1822) (emphasis added).

³²⁹ See *id.* at 803; Seventeenth Congress: First Session, *Providence Gazette*, Feb. 6, 1822, at 1.

2009]

Full Faith and Credit

1277

topic in the journals of the House and Senate. Even in the face of congressional inaction, however, there remained an understanding that the Constitution had given Congress the *power* to determine the effect of sister-state records. As the Massachusetts Supreme Judicial Court held a year after the failure of Burton's resolution:

It is perfectly clear that by this article [of the Constitution] nothing was settled but that the acts, &c., authenticated as Congress should prescribe, were to be received as conclusive evidence of the *doings of the tribunals* in which the acts passed. And it is equally clear, that the *effect* of such acts was to be determined by Congress.³³⁰

Why, then, did Congress stop attempting to exercise this power after 1822? Part of the answer was the growing acceptance of *Mills*; with less dissension in the courts, there was less of a need to clarify the older statute.

Another part of the answer was the reinterpretation of the Clause and 1790 Act with regard to the law of personal jurisdiction. Many early opinions (especially Livingston's in *Hitchcock* and Sedgwick's in *Bartlet*) had recognized service by publication or foreign attachment as a common practice among the states, even if they expressed distaste for it. As Sedgwick explicitly noted in *Bartlet*, suit without notice might be entirely lawful as a matter of a sister state's domestic law, and would be enforced by that state's own courts. To give a sister-state judgment the same conclusive effect it would have at home necessarily meant giving respect to the sister state's law of personal jurisdiction.

Once the conclusive-effect interpretation of the Act had taken hold, however, courts were reluctant to follow this interpretation to its logical conclusion. Although *Hampton* had explicitly recognized the absence of personal notice in the record, later courts backed away from *Hampton*'s willingness to accord conclusive effect to such a judgment. Instead, these courts read into the Clause and the Statute an exception for judgments rendered without notice. This exception was occasionally justified on the ground that a judgment rendered without jurisdiction was null and void,³³¹ but this argu-

³³⁰ Warren v. Flagg, 19 Mass. (2 Pick.) 448, 449 (1823) (first emphasis added).

³³¹ See, e.g., Flower v. Parker, 9 F. Cas. 323, 324–25 (C.C.D. Mass. 1823) (No. 4891) (Story, Circuit Justice) (“The judgments of no state courts can bind, conclusively, any

ment represented an elision between *international* notions of appropriate jurisdiction and *domestic* laws on the service of process, which were routinely respected in a state's own courts. Thus, by reading their own exceptions into the law, the courts removed any need for Congress to amend it properly.

In *D'Arcy v. Ketchum*, for example, the Court held that the 1790 Act had implicitly preserved "the international law as it existed among the states in 1790," which forbade recognition of judgments rendered without notice.³³² This argument, coming sixty years after the Act's passage, may have ignored the long history of those who argued for a conclusive-effect reading of the Act precisely because it would *overturn* "the international law as it existed among the states"—namely, the preexisting rule that foreign judgments had only *prima facie* effect. The best reading of the Act, in light of its text, circumstances, and subsequent history, is that it had declined to ascertain the effect of judgments in other states, precisely in order to avoid resolving such questions. By ascribing to the 1790 Act a greater effect than its authors intended, however, nineteenth-century courts began to encounter the difficulties of a top-down interpretation, founded in broad principles but often forced into *ad hoc* compromise.

CONCLUSION

The grand wording of the Full Faith and Credit Clause naturally inspires broad statements of principle. Yet for the Clause to become legally effective, it also required precision and clear understanding. Over the past 200 years, courts have made ever more of the spirit of the Clause and of its implementing statute, but in doing so they have rendered the doctrine less and less coherent. The

persons who are not served with process, or amenable to their jurisdiction . . . [T]he principal seems universal, and is consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction."); *Shumway v. Stillman*, 6 Wend. 447, 453 (N.Y. 1831) (identifying two exceptions to the conclusive-effect rule, namely when it appeared "by the record that the defendant was not served with process," and when a defendant claimed that he did not appoint the attorney who claimed to represent him); cf. *Mayhew v. Thatcher*, 19 U.S. (6 Wheat.) 129 (1821) (holding an appearance sufficient to cure a lack of personal service for full faith and credit purposes, "even supposing there was any objection to the proceeding by attachment").

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

2009]

Full Faith and Credit

1279

difficulties faced by the early Congress in fighting against this trend, in deflating inspiring words to dry corners of evidence law, show in part the dangers of this approach. The American effort to prescribe the effect of state records in other states began with the failed amendment to the Articles in 1777 and continued for almost fifty years without real success. (Indeed, in one sense the effort continued until 1861, when the secessionist Confederate Congress debated—and rejected—precisely such an amendment to its own draft constitution.³³³)

The history of Congress' inability to exercise its Effects Power, however, is more than a narrative of failure. Compared to the cases, the congressional debates show a greater sense of constitutional possibility, an avenue of achieving change through lawful and deliberate choice rather than artful evasion or the slow accretion of precedent. In this way, they remain a model for today's legislators, who under the text of the Clause enjoy no less authority than their predecessors did to reshape the structure of our federal system. Today's society may have abandoned the rules of evidence underlying the Full Faith and Credit Clause, but we retain the ability to make use of our inheritance.

³³³ See 1 Journal of the Congress of the Confederate States of America 881 (“And upon any judgment or decree rendered in a court of record of any one of the Confederate States upon personal service, an action may be maintained at any time within six years from the rendition of such judgment or decree in the proper court of any other State in which the defendant may reside.”).