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The Classic Rule of Faith and Credit

ABSTRACT. Since the late nineteenth century, orthodox doctrine under the Constitution's Full Faith and Credit Clause has presumed that the interpretation of that Clause set forth in Justice Joseph Story's 1833 *Commentaries on the Constitution of the United States* was essentially sound. This Article argues, however, that Justice Story's view had been endorsed by almost no one before him and actually contradicted the "classic rule" of faith and credit, which Justice Story had articulated in 1813. The Supreme Court, moreover, consistently reiterated the "classic rule" despite Justice Story's change of mind, continuing to do so even after his death. By the 1880s, perhaps due to a lack of critical attention, the "classic rule" of faith and credit had quietly fallen into desuetude, obscured by respect for Justice Story's name and the impression of authority associated with his works. This contradiction at the root of modern orthodox Full Faith and Credit doctrine has never been confronted until now. This Article assesses the historicity and soundness of both the "classic rule" and Justice Story's interpretation, which is now the orthodox view, concluding that the "classic rule" is far more defensible textually, grammatically, historically, and politically. This Article also examines the process by which, and the purpose for which, discretion over the "Effect" of sister-state "public Acts, Records, and judicial Proceedings" was conferred upon Congress by the second sentence of the Full Faith and Credit Clause. Finally, this Article argues that the complete and unqualified nature of the discretion thus vested regarding sister-state effects is an important element of the Constitution's system of separation of powers and facilitates pragmatic and responsible resolution, from time to time, of any issues in the conflict of laws that might give rise to significant concern or controversy on a national scale.

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INTRODUCTION

The Full Faith and Credit Clause of our Federal Constitution, after requiring states to give full "faith and credit" to one another's "public Acts, Records, and judicial Proceedings," goes on to provide in its second sentence that "the Congress may by general Laws prescribe" not only "the Manner in which such Acts, Records and Proceedings shall be proved" but also "the Effect thereof."[1] The 1790 Act[2] first exercising this congressional power prescribed suitable methods for verifying the authenticity and accuracy of state legislative acts, records, and judicial proceedings, and provided—in a substantially different phrase using the same "faith and credit" idiom—that "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" of their origin.[3]

Before the Constitution, Article IV of the Articles of Confederation had mandated giving "full faith and credit" to proceedings of sister-state "courts and magistrates."[4] Recognizing the "faith and credit" idiom as equivocal, however, James Madison described the provision as "extremely indeterminate," and "of little importance under any interpretation which it will bear."[5] Perhaps for this reason, the resolutions that he and other Virginia delegates prepared in anticipation of the 1787 Constitutional Convention, aimed at strengthening the national union, included nothing at all resembling the Articles of Confederation's "faith and credit" provision. Weeks later, however, the Convention's Committee of Detail proposed adding such a provision, and the delegates of six states approved the Committee's proposal in an amended form that mandated the national legislature to prescribe sister-state effect not only for "Records and judicial Proceedings," but also for "public Acts."

At the same time, apparently prompted by the statements of those opposed to *mandating* that the national legislature require states to enforce sister-states' "public Acts" at odds with their own laws and policies, Madison immediately

1. U.S. CONST. art. IV, § 1. "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." *Id.*

2. Act of May 26, 1790, ch. XI, 1 Stat. 122. For the relevant text of the 1790 Act, see *infra* text accompanying note 217.

3. *Id.* (emphases added).

4. ARTICLES OF CONFEDERATION of 1781 art. IV, para. 3; *see infra* note 100 and accompanying text.

5. THE FEDERALIST NO. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961).

moved to make it discretionary with Congress whether and how far to prescribe sister-state "Effect." Madison's amendment mitigated the concerns of opponents, and no one objected to the change. The language as altered by Madison's amendment—"the Congress *may* by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof"[6]—was then so generally approved as to obviate any formal count of the states.

As ultimately promulgated for ratification, the first sentence of the Full Faith and Credit Clause still retained the equivocal "faith and credit" phrase, but court decisions under the Articles of Confederation had construed that phrase as mandating only admissibility and evidentiary sufficiency.[7] In contrast, the power (and discretion) newly conferred upon Congress in the second sentence of the Constitution's Clause explicitly pertained to sister-state "Effect." Therefore, while he deprecated the old Articles provision Madison expressed confidence that "[t]he power here established, may be rendered a very convenient instrument of justice,"[8] noting by way of example that Congress could prescribe enforcement (without further judicial proceedings) of sister-state court orders against judgment debtors absconding with goods.

The First Congress's decision to repeat the "faith and credit" idiom in its 1790 Act, albeit with different adjectival terms ("such faith and credit . . . as" instead of "full"[9]), caused confusion among lawyers, judges, and even legislators. Many believed the statute merely reiterated the evidentiary principle ordained by the constitutional Clause. In unanimous opinions during the tenures of Chief Justices Marshall, Taney, and Chase, however, the Supreme Court consistently affirmed that the phrase "such faith and credit. . . as" in the last sentence of the 1790 Act prescribed the sister-state "Effect" to be given to state records and judicial proceedings. In other words, the last sentence of the 1790 Act was held to be an exercise of the power over

6. U.S. CONST. art. IV, § 1 (emphasis added). For documentation and further detail of the Convention proceedings summarized in this and the preceding paragraphs, see *infra* Part III.

7. *See infra* text accompanying notes 139-162. Even late in the colonial era there were reasons for such a provision, which some states had addressed whether or not they undertook to give other colonies' judgments or other records local effect. *See infra* text accompanying notes 77-99.

8. THE FEDERALIST NO. 42 (James Madison), *supra* note 5, at 287.

9. Compare the text of the 1790 Act—"the said records and judicial proceedings . . . shall have *such faith and credit* given to them . . . *as* they have by law or usage in the courts of the [originating] state"—with the Full Faith and Credit Clause—"*Full* Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" (emphases added). *Supra* notes 1-2 and accompanying text.

sister-state effect conferred upon Congress by the second sentence of the constitutional Clause.[10]

Thus arose what I call the "classic rule" of faith and credit: that this idiom as used in the Constitution (where it appears with the adjective "full"—a term used at the time in evidence law to designate prima facie sufficiency) states a constitutional principle of evidence, while the comparative adjectival phrase employing the same idiom in the federal statute dating from 1790 ("such faith and credit . . . as") constitutes a congressional prescription of sister-state effect. To put it another way: the only provisions of federal law requiring that any of the United States give *effect* (as distinguished from prima facie evidentiary sufficiency) to sister-state "Acts," "Records," or "judicial Proceedings" are those provisions (if any) that Congress has legislatively prescribed.

By the last quarter of the nineteenth century, however, this "classic rule" was yielding to quite a different view. After generations the phrase "full faith and credit" (quite apart from its use in the different context of financial obligations) had come to be considered a term of art regarding judgments from other forums. Moreover, habituation to the longstanding replication rule prescribed by the 1790 Act had induced the impression that this term of art—without regard to the "such. . . as" adjectival phrase of the 1790 Act—by itself imported sister-state replication of effect. Ironically, while that crucial modifying phrase in the 1790 Act was ignored, the modifier "full" in the constitutional Clause—which almost no one in the Founding generation had opined could mean anything more than *evidentiary sufficiency*[11]—came to be

10. Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301-02 (1866) (reciting that the Clause empowered Congress, whose Act prescribed effect); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (attributing sister-state effect to Congress's prescription); Hampton v. McConnel, 16 U.S. (3 Wheat.) 234 (1818) (reaffirming unanimously Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813), which distinguished the import of "full faith and credit" in the constitutional provision from the import of "faith and credit" in the "such . . . as" clause of the Act).

The opinion in *Christmas v. Russell* also cited to Justice Joseph Story's *Commentaries on the Constitution*, without evident recognition that before writing that treatise Justice Story had abandoned the classic rule articulated in *Mills*, and was arguing instead that replication of the effect of sister-state judgments is mandated by the constitutional provision itself. *See infra* text accompanying notes 308-309. The widespread circulation and prestige of Justice Story's treatise—and the profession's failure to notice (or to appreciate) his deviation from the classic rule—seem to have been chiefly responsible for the post-Civil War shift in construing the Full Faith and Credit Clause.

11. Notably, the 1790 Act prescribing the replication rule of effect did *not* employ the word "full." Not until enactment of the 1948 Judicial Code, ch. 646, 62 Stat. 947 (codified as amended at 28 U.S.C. § 1738 (2000)), was "full" added to the "faith and credit" phrase in the statute.

freighted with superlative import, smothering any doubt that the Clause *by itself* was a mandate of sister-state *effect*. Thus, by a gradual process of intellectual slippage that was neither recognized nor remarked upon at the time, it came to be assumed that for a state to give "full faith and credit" to a sister-state's judgment, for example, *means* to replicate the effect that it had where rendered.

This corruption of meaning did more than simply render the last sentence of the 1790 Act redundant. Treating the putative "term of art" as itself a mandate to replicate sister-state effect made the Full Faith and Clause entirely "self-executing" and rendered its last four words ("and the Effect thereof") peculiar and puzzling—if not indeed superfluous.[12] Obscuration of the "classic rule" also rendered nugatory the longstanding determination of Congress against prescribing *any* sister-state effect for state "public Acts."[13] In 1887, Chief Justice Waite asserted in dictum that "[w]ithout doubt" the constitutional Clause by itself means that "the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home."[14] I call this "Cooley's folly," because the earliest instance that I have found of this simply ignorant proposition was its assertion by Michigan Judge and Professor Thomas M. Cooley, who offered neither relevant authority nor explanation.[15] Oblivious to its unprecedented novelty, Chief Justice Waite blithely called this "the logical result of the principles announced as early as 1813. . . and steadily adhered to ever since."[16] Chief Justice Waite's interpretation, however, was not a logical result of any principle announced in relevant Supreme Court opinions; it rather was an extrapolation from the entirely different view which, by the end of the Constitution's first century, without critical scrutiny had managed to displace the "classic rule."[17]

12. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 293 (1992) ("If the constitutional clause is self-executing and legislation is optional, which is what the constitutional text plainly says, then Congress was not obliged to speak and congressional silence means nothing.").

13. Not until enactment of the 1948 Judicial Code did Congress extend its "such . . . as" rule to embrace legislation. For discussion of this aspect of the 1948 Code and the consequent reach of the present federal statute, see *infra* text accompanying notes 318-323.

14. Chi. & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887).

15. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 185 (1880).

16. *Chi. & Alton R.R.*, 119 U.S. at 622.

17. The different view was that of Justice Story. Although he wrote the Court's first and most thorough opinion propounding the classic rule in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), Justice Story later abandoned it and propounded the very different view articulated in his widely circulated treatises and other writings. For further discussion, see *infra* text

Conceiving the mandate to replicate effect as *constitutional* rather than *statutory* in origin entirely changed the perceived allocation of power between the legislative and judicial branches. This sea change occurred during the same period when due process clauses, both state and federal, were reaching their zenith as rubrics to justify curtailing legislative discretion by judicial oversight of substantive regulatory policies.[18] It seems more than coincidental that, beginning in 1887 in one of Chief Justice Waite's last opinions,[19] and continuing for some thirty years,[20] Supreme Court Justices routinely employed the idiom "*due* faith and credit" as equivalent to, or in lieu of, the "full" faith and credit phrase. As in the "substantive due process" realm, the Justices were taking unto themselves the prerogative to decide matters constitutionally entrusted to the representative political branch.

Since late in the nineteenth century, the proposition that the Full Faith and Credit Clause constitutionally mandates in "plain language"[21] the sister-state replication of effect, so that the Supreme Court is entitled to determine as a matter of *constitutional* law the sister-state effect of "public Acts, Records and judicial Proceedings," has been treated as axiomatic.[22] Grand (albeit phantasmal) conceptions of grand purpose[23] for this essentially technical

accompanying notes 302-313. Ironically, Justice Story himself never applied his changed view to statutes. Indeed, its subsequent extrapolation to them violated Justice Story's own premises regarding legislative jurisdiction. *See infra* note 312 and accompanying text.

18. An early example was *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890), which confused policy with "truth" as "eminently a question for judicial investigation." *Id.* at 457-58. The most noted exemplar, of course, was *Lochner v. New York*, 198 U.S. 45 (1905).

19. Plumb v. Goodnow's Adm'r, 123 U.S. 560, 562 (1887).

20. Among the dozens of cases employing the idiom (which virtually disappeared from use after 1918), were *Gasquet v. Fenner*, 247 U.S. 16, 17 (1918); *Bates v. Bodie*, 245 U.S. 520, 531 (1918); *Fall v. Eastin*, 215 U.S. 1, 2 (1909); *Haddock v. Haddock*, 201 U.S. 562, 603, 605 (1906); *Andrews v. Andrews*, 188 U.S. 14, 33-42 (1903); and *Huntington v. Attrill*, 146 U.S. 657, 666 (1892).

21. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1976 (1997).

22. *See, e.g.*, Thomas v. Wash. Gas Light Co., 448 U.S. 261, 271-72 (1980) (Stevens, J.) (plurality opinion) (noting that "this Court's responsibility for the final arbitration of full faith and credit questions," specifically includes questions of "extraterritorial effect"); Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939) ("This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state . . . by the statute of another state.").

23. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935) ("The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation . . . ."); *see also* Kramer, *supra* note 21, at 1986 ("The central object of the Clause was, in fact, to eliminate a

"lawyer's clause"[24] are reiterated as if they were historically sound, while in fact they are only unfounded assertions that have deterred, by intimidation, critical assessment of modern full faith and credit orthodoxy. Thus, dominant scholarly opinion recites that the sister-state effect—not only of judgments but also of state statutes (and, many argue, even of nonstatutory law)—is mandated by the Full Faith and Clause to whatever extent the judiciary, under the guise of constitutional construction, might decide.[25]

In a few relatively recent instances regarding certain matters, however, Congress has undertaken to alter sister-state obligations regarding effect.[26] One especially controversial measure even purports to abrogate entirely any obligation of states to "give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage."[27] These indications of a heightened awareness by Congress of its power regarding sister-state effect, the consequent rekindling of scholarly debate over the scope of that power, and a sense that Congress might be approaching the threshold of greater involvement in choice of law questions, warrant this reexamination of the origins and evolution of the idiom "faith and credit" in the context of out-of-state judicial, legislative, and other official acts, records, and proceedings.

The conclusions summarized in the foregoing paragraphs are among those to which my study has led, but they exceed what can be thoroughly documented in this one Article alone. Before undertaking elsewhere to detail them further, however, it is necessary to examine the status quo ante both to verify the historicity of what has been lost and to facilitate an assessment of

state's prideful unwillingness to recognize other states' laws or judgments on the ground that these are inferior or unacceptable. If anything should be off-limits in such a system, it is the public policy doctrine.").

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

25. *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS § 3.3.1, at 150-53 (2d ed. 1995); DAVID P. CURRIE, HERMA HILL KAY & LARRY KRAMER, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 320 (6th ed. 2001); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 26-27 (1991); Laycock, *supra* note 12, at 290-91. As to statutes and nonstatutory law, however, there is significant dissent. *See, e.g.*, Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1635-36 (2005).

26. *See* Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 2265 (2000); Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A; Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B.

27. Defense of Marriage Act § 2(a), 28 U.S.C. § 1738C.

benefits that might ensue were it restored. Thus, the aims of this Article are as follows: to lay bare the ancient roots from which the classic American rule of faith and credit emerged; to document that classic rule in contrast to the initially idiosyncratic construction that rose to dominance in the later nineteenth century and prevails as the orthodox view today; to note the resulting loss of a deliberate and important aspect of the Constitution's separation of powers; and to argue that choice of law problems—if addressed at all by our national government—are to be resolved in the discretion of the legislative branch, with its characteristic capacity for accommodation and political compromise and its greater potential responsiveness to practical experience and changing needs. These characteristics of the legislative process—the precipitating reasons, indeed, for the classic rule of faith and credit—render it particularly suitable to resolving matters controversial enough to excite sharply divisive passions in a complex and diverse nation still organized into separate states with populations having independent public policy prerogatives of their own.

Adequate understanding often requires reaching back in history to a time before our current habits of thought and expression were formed. Enlightenment and the opportunities it affords—and not some obligation to the past for its own sake—is what justifies a thorough study of data from the period of the Constitution's Framing. The historical information relevant to the Full Faith and Credit Clause has been characterized as "meager"[28] and "sparse."[29] Because considerable work has already been done,[30] it has even been asserted that "there is nothing new to be said."[31] Scholarship, however, is a relay event; and on this lap some hitherto neglected data—as well as previously unnoticed connections among data already familiar—have been found.[32] The

28. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 739 (1986); Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 153 (1949).

29. James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299, 1302 (1987).

30. *See, e.g.*, 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 Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

31. Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 491 (2005).

32. In addition to the present article, the interested reader will find enlightening the forthcoming work of Stephen Sachs. *See* Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. (forthcoming Sept. 2009) (on file with author). Although the first

findings, moreover, point toward conclusions that are highly unorthodox today.

Part I of this Article examines the practice of English courts regarding prior judgments during periods that were relatively recent and familiar history to the Framers. It reveals a variety of practices not only differing in common law courts from other English tribunals, but also differing within common law courts themselves depending on the nature of the previous forum. The situation was more complicated than subsequent scholars' generalizations accounted for. Failures to recognize the earlier complexities operated to obscure and even to discredit the longstanding distinction in English practice between treating an earlier judgment as prima facie evidence and according it conclusive effect. Also obscured was the demonstrable equivocation in English legal usage of such words as "credit," "faith," and "full." A more accurate picture of older English practice is thus fundamental to an accurate understanding of American provisions that were formulated against the backdrop of that older and now unfamiliar practice.

Part I also identifies two features of the older English practice that significantly obstructed enforcement of judgments in the colonies, and examines the legislative responses of certain colonies to those features. These responses more or less prefigured the remedy that, in the post-Revolution period, the "full faith and credit" mandates of the Articles of Confederation and the Constitution evidently were meant to provide.

Part II examines the "full faith and credit" mandate appearing in the Articles of Confederation. Beyond considering the words of that provision in

part of Sachs's article surveys the context and some of the development of the "faith and credit" phrase, the principal focus of his work is the decades of effort in Congress, ending in 1822, regarding various proposals to amend or replace the faith and credit statute enacted by the first Congress in 1790. He documents very well the disagreement that persisted during that period, even after the Supreme Court had spoken on the matter, as to whether the 1790 Act actually prescribed any sister-state effect at all, as distinguished from merely affirming the prima facie evidence rule mandated by the Full Faith and Credit Clause itself. While Sachs avoids endorsing my own understanding of the 1790 Act's meaning regarding sister-state "Effect" any further than to acknowledge that it "is intriguing," *id.* (manuscript at 16 n.103), his work is more than merely complementary to mine; for he reaches the same conclusion that the Full Faith and Credit Clause itself was certainly *not* understood in that period to mandate any sister-state "effect." That was precisely why—until the Supreme Court's "classic rule" came to be generally accepted—so much effort was repeatedly expended toward enacting a (more incontestable) *statutory* rule of "Effect."

Of course, the strongest evidence of what the Full Faith and Credit Clause meant to the people in whose time it was written is to be found in surviving records of the historic and contemporary usage of the phrase and the words comprising it, and the actual legal practices of that time; evidence that contemporaries did not fall prey to the misunderstandings pervasive today is simply corroborative—albeit significantly so.

the context of contemporaneous legal usage, Part II examines a report of a Continental Congress committee as well as state court opinions from the Articles period to show that, while the Articles of Confederation's "faith and credit" mandate served important evidentiary purposes, it was not generally regarded as addressing the "Effect" that state records or proceedings should have in sister states.

That question, however, was expressly addressed when the counterpart provision was considered at the 1787 Constitutional Convention. Prior studies of the Convention materials have failed to discern either the fact of, or the reasons for, the delegates' acceptance of James Madison's motion to vest entire discretion over sister-state effect in the national legislature. In Part III, new insight into the relevant actions at the Convention is produced by a much closer parsing of successive committee reports, delegate dialogue, and motions than has been undertaken in previous works.

Part IV documents the exercise by the First Congress of its discretion in choosing among conceivable alternatives regarding not only possible methods of proving state acts, records, and proceedings, but also the effect (if any) that sister-states should be obligated to give them. Part IV also reviews the diversity of judicial opinion during the early period as to whether, by the peculiar wording of its 1790 Act, the First Congress had actually prescribed any sister-state effect at all. The reader will note, however, that nearly everyone in that period whose opinion was recorded and survives appears to have agreed that the Constitution plainly distinguishes between evidentiary "full faith and credit" (mandated by the Clause itself) and sister-state effect (which was assigned for Congress to prescribe).

Part V examines the Court's opinion in *Mills v. Duryee*[33] as well as the separate opinions earlier expressed by the several Justices who sat together in 1813 to consider that first—and classic—Supreme Court Full Faith and Credit Clause case. It also summarizes how Justice Joseph Story—who wrote the Court's opinion articulating the "classic rule" in *Mills*—later changed his view and, through his extrajudicial publications, became the person most responsible for ultimately displacing the classic rule of faith and credit.

Finally, in conclusion I will discuss the possibility that a revival of the classic rule—reaffirming and employing an important, though long neglected, facet of the Constitution's separation of powers—might substantially contribute toward constructive resolution, now and for the future, of controversial issues involving the choice of law.

33. 11 U.S. (7 Cranch) 481 (1813).

I. THE PRACTICE BEFORE AMERICAN INDEPENDENCE

A. The Common Law's Treatment of Prior Judgments

Chief Justice Stone in the mid-twentieth century declared that the "clear purpose" of the Full Faith and Credit Clause of the Constitution was to "establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered."[34] Chief Justice Stone's estimate of the purpose of the Clause, however, was conditioned by an oversimplified impression of older English practice that by his time had become widely accepted. This Part takes a closer look.

The old Royal Courts of Justice at Westminster applying England's "common law" were the Court of King's Bench, the Court of Common Pleas, and the Court of the Exchequer.[35] Their jurisdictions were originally distinct but gradually overlapped. They were called the "courts of record"[36] because parchment transcripts of pleadings and rulings there were kept secure in the Treasury. These "Records"—"the Invention that perpetuate the Decisions of Law," and "lye as Precedents for future Observation"[37]—were considered "authentick beyond all Manner of Contradiction,"[38] and thus were incontrovertible proof of what had happened in each case: "they admit no averment, plea, or proofe to the contrarie."[39] Once a matter had gone to judgment in one of these three courts, relitigation was precluded by doctrines of res judicata: the common law claim was extinguished by "merger" into the judgment, and the parties were estopped from maintaining contrary to the issues adjudged.

34. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

35. The judges or barons of any two of these tribunals could sit in the Exchequer Chamber to review some decisions of the third. Parliament also decided some cases by the common law. At least from the early eighteenth century, Parliament occasionally created other tribunals as "courts of record," such as the Courts of Conscience. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 189-91 (7th ed. 1956).

36. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 438 (1st American ed. 1853) (1628).

37. GEOFFREY GILBERT, THE LAW OF EVIDENCE 61, 92 (3d ed. 1769).

38. *Id.* at 7.

39. 2 COKE, *supra* note 36, § 438.

A judgment of one of these three courts could be pleaded in bar, and if it were, the proper plea in traverse was "*nul tiel record*" ("no such record").[40] If that issue were joined, instead of a jury trial there would be a "trial by record," the proponent producing the record for examination by the judges themselves. The original record could not be produced, however, for it must remain in the Treasury; instead, a copy would be produced, authenticated, and verified by appropriate official seal.[41] The original being incontestable, a true copy was as well—and the judges, themselves bound by the record, would decide the issue on that record alone.

Also, a common law judgment could be offered as evidence on issues joined on a plea of the general issue or some other appropriate plea, but in these circumstances a copy attested either by official seal or by testimony would be put to the jury like other evidence.[42] If the jury found the prior judgment as a fact, however, it was bound to return a verdict consistent therewith, for "[a] jury cannot find against an *estoppel* in a point tried."[43]

There were many courts in England that were not "courts of record" and not bound to apply the common law. Some of these were also royal courts: the Admiralty, the Chancery, and various ecclesiastical courts (since the king was head of the Church in England). The common law courts were bound to defer to these other royal courts within their respective jurisdictions—but not because of res judicata, for that doctrine applied only to common law judgments. The obligation of deference to the other royal courts derived instead from the fact that they were instruments of the same sovereign, each performing their functions on behalf of the same crown.

Also among England's courts not-of-record were many that were not part of the royal justice system at all. These "inferior" courts, as they were called, included the county courts, courts of the hundreds, courts baron, and others that had existed even before the eleventh-century Norman Conquest. Because they were not royal courts, these inferior courts merited no deference; and because they were not common law courts, the res judicata doctrines of merger

40. HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 122 (London, Butterworth & Son 1824).

41. *See* GILBERT, *supra* note 37, at 14 ("[T]he Courts of Justice that put their Seals to the Copy, are supposed more capable to examine, and more exact and critical in their Examinations, than any other Person is or can be; and besides there is more Credit to be given to their Seal, than to the Testimony of any private Person; and therefore we are more sure of a fair and perfect Copy when it comes attested under their Seals, than if it were a Copy sworn to by any private Person whatsoever.").

42. *See id.* at 21-30.

43. Trevivan v. Lawrence, (1704) 87 Eng. Rep. 1003, 1004 (Q.B.) (Holt, C.J.).

and estoppel could not apply. A plaintiff who had prevailed in an inferior court, however, might bring an action of debt (or later, *indebitatus assumpsit*) in a common law court, counting on the inferior court judgment as a constructive debt or implied undertaking by the other party. The inferior court's judgment—proved by the testimony of witnesses to that proceeding (since there was no "record" of it)—would be taken as prima facie proof of the obligation that the plaintiff claimed, and would shift to the defendant the burden of pleading and proving inaccuracy, mistake, or some other injustice sufficient to defeat the prima facie case.[44]

The question of giving effect to *foreign* adjudications arose first in the Admiralty. "[T]he proceedings in the Court of the Admiralty are according to the course of the civil law,"[45] and thus, sharing legal premises in common, England's Admiralty enforced determinations of civil law courts abroad, whether according to maritime law or under the Roman-based civil law in general. As early as 1536, there was a case in the Admiralty for "execution of sentence of French Court."[46] In 1607, the King's Bench denied the habeas corpus petition of a debtor imprisoned by the Admiralty to enforce a money judgment of a Dutch court, observing that "this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other," but adding that "the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm."[47]

44. Herbert v. Cook, (1782) 99 Eng. Rep. 560, 563 (K.B.); 1 COKE, *supra* note 36, § 175.

45. Thomlinson's Case, (1605) 77 Eng. Rep. 1379, 1379 (C.P.); *see* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 23-24 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1739); Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, *in* 3 LAW: A CENTURY OF PROGRESS: 1835-1935, at 342, 355 (1937).

46. De Pratte v. Le Cherewyck, Y.B. (Adm. 1536), *noted in* 2 SELECT PLEAS IN THE COURT OF ADMIRALTY, *in* 11 SELDEN SOCIETY PUB., at lxv (1897). A similar case is *Mychell v. Ronnall* (Adm. 1570), *printed in* 11 SELDEN SOCIETY PUB., at 140. Max Radin considered each of these cases to be "not a matter of maritime law but an ordinary suit in contract or tort." Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 13-14 (1944).

47. Wier's Case, Pasch 15 Jae. 1, Roll. 530 (1607), *reprinted in* 6 CHARLES VINER, GENERAL ABRIDGEMENT OF LAW AND EQUITY 512-13 (2d ed. 1792). The case is also cited and summarized as "Wibred and Wyer's case" in *Jurado v. Gregory*, (1669) 84 Eng. Rep. 320 (K.B.). Rolle's account is quoted in full in Hessel E. Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 29, 1143 n.22 (1935) (reprinting 1 HENRY ROLLE, UN ABRIDGMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEG pl. 12, at 530 (London 1663)).

The Chancery, too, treated foreign judgments as binding—although only between the parties, and not on the court itself.[48]

England's common law courts treated foreign *admiralty* determinations as conclusive.[49] The leading case was *Hughes v. Cornelius*, in which the jury by special verdict acknowledged a French condemnation decree, but also found that the ship was not lawfully subject to that condemnation. The King's Bench held the French decree conclusive nevertheless.[50] Commentators on "full faith and credit" have commonly cited *Hughes v. Cornelius* as if it typified the treatment that foreign judgments of all kinds received (or should have received) from England's common law courts,[51] but that is a profound mistake. Its holding turned entirely on the peculiar characteristics of admiralty.[52] With its international ramifications and its in rem jurisdiction, admiralty was the exception, not the rule.

The English common law courts treated foreign *nonadmiralty* judgments very differently. The common law doctrines of merger and estoppel could no more apply to nonadmiralty judgments from foreign civil law countries than to judgments of "inferior" English tribunals; thus, these foreign judgments could not be pleaded in bar. They could be used, however, as evidence under some other appropriate plea. For example, they could be used in an action of debt or *indebitatus assumpsit* as prima facie evidence of a debt or implied undertaking; or they could be used upon requisite showings[53] in defense. Alluding to the

48. *See, e.g.*, Burrows v. Jemino, (1726) 93 Eng. Rep. 815 (Ch.); Gold v. Canham, (1679) 36 Eng. Rep. 640 (Ch.).

49. Bernardi v. Motteux, (1781) 99 Eng. Rep. 364, 365, 367 (K.B.); Lumly v. Quarry, (1702) 87 Eng. Rep. 1061 (K.B.).

50. Hughes v. Cornelius, (1682) 83 Eng. Rep. 247 (K.B.). Other reports of the same leading case appear at Hughes v. Cornelius, (1682) 90 Eng. Rep. 28 (K.B.) and Hughes v. Cornelius, (1682) 89 Eng. Rep. 907 (K.B.).

51. *See, e.g.*, Nadelmann, *supra* note 30, at 45; Radin, *supra* note 46, at 14-15; Sack, *supra* note 45, at 382-83.

52. This accords with the explanation of *Hughes v. Cornelius* given by the Attorney General in argument of a highly celebrated case, the transcript of which was published by order of the House of Peers as *The Trial of Elizabeth Duchess Dowager of Kingston for Bigamy*. THE TRIAL OF ELIZABETH DUCHESS DOWAGER OF KINGSTON FOR BIGAMY 52 (1776), *reprinted in* 20 STATE TRIALS No. 551, at 355-652 (photo. reprint 2000) (T.B. Howell ed., 1814); *see also* TRIAL OF THE DUCHESS OF KINGSTON 134 (Lewis Melville ed., 1927).

53. See the discussion by Lord Hardwicke, soon after he left King's Bench, in *Gage v. Bulkeley*, (1744) 27 Eng. Rep. 824 (Ch.). One would have to be able to discern exactly what had been determined. *See, e.g.*, Bernardi v. Motteux, (1781) 99 Eng. Rep. 364, 365, 367 (K.B.); *cf.* Barzillai v. Lewis, (1782) 99 Eng. Rep. 573 (K.B.). It would also have to be shown who was the foreign judge, in what forum he acted, and "for what the sentence was given." Beak v. Tyrrell, (1689) 90 Eng. Rep. 623 (K.B.).

former in a 1705 opinion, the Lord Keeper observed, "Although the plaintiff obtained a judgment or sentence in *France*, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit* . . . ."[54] Being only evidence, however, the prior judgment would of course be vulnerable to impeachment or being outweighed by contrary evidence.

Most notable for our present purposes, England's common law courts treated judgments from other common law jurisdictions the same as they treated those from civil law countries: common law determinations from places outside of England herself—whether subject to England by virtue of conquest, diplomacy, colonization, or otherwise—were treated as "foreign" by England's common law courts. Foreign common law "records" were not records in the eyes of the courts sitting at Westminster. Hence, in England there was no merger or estoppel with respect to these foreign common law judgments. Lacking res judicata effect, such judgments could not be pleaded. Lord Hardwicke wished that it were otherwise, and observed in a 1737 case that a rule of res judicata as between the courts of Ireland and England would be "very desirable"; but he and his fellow Justices in that case were obliged to recognize that such was not the law.[55] Seventeen years later, Lord Hardwicke expressed a similar wish for res judicata as between Scotland and England,[56] but that wish, too, went unfulfilled.

Foreign common law judgments, however, could be used as evidence under the same prima facie rule that applied to foreign civil law judgments and to judgments of English inferior courts not-of-record. Thus in 1771, in *Sinclair v. Fraser*, the House of Lords considered a determination by the Court of Sessions in Scotland that the plaintiff in an action on a judgment from the colony of Jamaica must prove the "ground, nature, and extent of the demand on which the judgment in Jamaica had been irregularly or unduly obtained."[57] The Lords held that the Jamaican judgment must "be received as evidence prima facie of

54. Dupleix v. De Roven, (1705) 23 Eng. Rep. 950, 951 (Ch.). Lord Hardwicke made the same point. *See Gage*, 27 Eng. Rep. at 824.

55. Otway v. Ramsay, (1737) 107 Eng. Rep. 1113, 1114-15 (K.B.); *see infra* text accompanying notes 88-94.

56. 1 ALEXANDER F.T. WOODHOUSELEE, MEMOIRS OF THE LIFE AND WRITINGS OF THE HONOURABLE HENRY HOME OF KAMES 294-98 (2d ed. 1814); 1 PHILIP C. YORKE, THE LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN 623 (1913).

57. Walker v. Witter, (1778) 99 Eng. Rep. 1, 3n-4n (H.L.) (discussing the 1771 case Sinclair v. Fraser); *see also* 2 THOMAS S. PATON, REPORTS OF CASES DECIDED IN THE HOUSE OF LORDS UPON APPEAL FROM SCOTLAND 1757-84, at 253-54 (reporting *Sinclair*, although with less detail).

the debt," leaving it "upon the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained."[58]

In *Crawford v. Witten* in 1773, the King's Bench gave judgment for the plaintiff in an action of assumpsit on the judgment of a court in Bengal, overruling defendant's demurrer that "they are governed by different laws."[59] Any underlying difference of law, Chief Justice Mansfield declared, could not rebut "a promise confirmed by judgment in a territory subject to Great Britain."[60] Justice Ashhurst added, "I have often known assumpsit brought on judgments in foreign Courts; the judgment is a sufficient consideration to support the implied promise."[61] Justice Aston observed that "[t]he Court has no doubt about the matter."[62]

Walker v. Witter in 1778 was an action of debt in the King's Bench on a Jamaican judgment. Defendant pleaded *nul tiel record*, and moved for judgment on that plea when plaintiffs produced a judgment under seal of the Jamaican court. Defendant maintained that the judgment from Jamaica was not a "record."[63] The Justices agreed it was not technically a "record," because "[t]hat description is confined properly to certain Courts in England, and their judgments cannot be controverted. Foreign Courts, and Courts in England not of record, have not that privilege, nor the Courts in Wales, &c."[64] While agreeing that "the plea of *nul tiel record* was improper,"[65] however, they disregarded that plea as a "mere nullity"[66] because plaintiffs' declaration had fairly described it "as a record of a Court in Jamaica,"[67] and "[a]s such it [was] to be tried by the country . . . and not by the Court."[68] "Foreign judgments are a ground of action every where, but they are examinable," said Lord Mansfield, recalling an illustration from Lord Hardwicke's time.[69] The other three Justices

58. *Walker*, 99 Eng. Rep. at 3n (discussing the 1771 case Sinclair v. Fraser).

59. Crawford v. Witten, (1773) 98 Eng. Rep. 584 (K.B.). The case is discussed in *Walker v. Witter*, 99 Eng. Rep. at 2n-3n.

60. *Crawford*, 98 Eng. Rep. at 584.

61. *Walker*, 99 Eng. Rep. at 3n (quoting Justice Ashhurst's statement in *Crawford*).

62. *Crawford*, 98 Eng. Rep. at 584.

63. *Walker*, 99 Eng. Rep. at 4-6.

64. *Id.* at 4 (footnote omitted).

65. *Id.*

66. *Id.* at 6.

67. *Id.* at 4.

68. *Id.* at 6.

69. *Id.* at 4-5.

were "of the same opinion."[70] Defendant Witter did have an opportunity to rebut the foreign judgment, for he also had pleaded *nil debet* (the "general issue" to an action of debt), but on the issue joined under that plea, the jury had returned for the plaintiffs.

In 1789, in *Galbraith v. Neville*, Justice Buller declared,

> The doctrine which was laid down in *Sinclair v. Fraser* has always been considered as the true line ever since; namely, that the foreign judgment shall be primâ facie evidence of the debt, and conclusive till it be impeached by the other party. . . . It was . . . held [in *Walker v. Witter*], that the foreign judgment was only to be taken to be right primâ facie; that is, we will allow the same force to a foreign judgment, that we do to those of our own Courts not of record. . . . In short the result is this; that it is primâ facie evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreement, viz. that it shall be considered as good till it is impeached.[71]

This was the practice known to early Americans trained in the English common law. The nineteenth century, however, brought profound changes in England's law and legal institutions.[72] Before long, the traditional prima facie rule regarding foreign judgments, as well as the circumstances of common law theory and practice in which it had flourished, had passed beyond easy recall. Those circumstances having grown so obscure, in the twentieth century even the distinguished comparativist Hessel Yntema deprecated the prima facie rule as "apparently fixed in the English common law for a period by Lord Mansfield."[73] Legal historian Max Radin similarly disparaged *Walker v. Witter* as a "quite aberrant decision,"[74] describing the statements of Mansfield and his fellow justices therein as indicative of "a great confusion."[75] Kurt Nadelmann in turn called *Walker v. Witter* "probably the first English decision denying conclusive effect to a foreign judgment rendered by a court of competent

70. *Id.* at 6.

71. (1789) 99 Eng. Rep. at 5 n.2 (K.B.).

72. *See* A CENTURY OF LAW REFORM: TWELVE LECTURES ON THE CHANGES IN THE LAW OF ENGLAND DURING THE NINETEENTH CENTURY (photo. reprint 1993) (1901).

73. Hessel E. Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1129, 1143 n.22 (1935).

74. Radin, *supra* note 46, at 16.

75. *Id.* at 12.

jurisdiction."[76] In significant contrast, no doubt as to the historicity of the prima facie rule was ever expressed by those living when and where America's institutions were being formed.

On the other hand, two features of English law presented important obstacles for the colonies regarding foreign (including each other's) judgments. These are discussed in the Section that follows. Recognizing these typically overlooked obstacles is crucial to understanding the purpose and function of the "full faith and credit" provisions later inserted in the Articles of Confederation and the Constitution.

B. *Foreign Seals and the Local Enforcement Rule: The Holdings in* Olive *and* Otway

The first of these obstacles was the difficulty of proving the authenticity and accuracy of purported judgments from another colony or other place. In England, copies of records and other documents bearing "Seals of Public Credit," such as those of England's royal courts, were accepted as authentic and accurate and were considered "full Evidence in themselves," without testimonial corroboration, because those seals (like the law itself) "are supposed to be known to every Body."[77] This rationale could not avail as to *foreign* seals, any more than it could as to *private* seals, which "'tis not possible to suppose . . . to be universally known"[78] in England.

On this ground, the Exchequer Barons held in 1659, in *Olive v. Gwin*, that a copy under the seal of a court in Wales was not evidence.[79] Wales had been a principality of England, and then in formal union with her for over a hundred years; if its official seals were not probative in England's common law courts, a fortiori seals from abroad surely could not be. *Olive* was therefore regarded as foreclosing the most convenient and efficient means of proving copies of foreign (including colonial) judgments in common law courts, either in England or anywhere else where the common law prevailed—including, of course, the American colonies.

The Exchequer Barons "agreed that a sworn copy of a record in Wales, might be given in evidence,"[80] but no such testimony had been offered in *Olive*

76. Nadelmann, *supra* note 30, at 50.

77. GILBERT, *supra* note 37, at 19-20.

78. *Id.* at 20.

79. (1659) 145 Eng. Rep. 409 (Exch.). Parliament, however, could and did ordain that particular seals be accepted for some purposes. *See id.* at 410.

80. *Id.* at 410.

v. Gwin.[81] The reason for this failure is not explained, but speculation is hardly required: at common law, parties could not testify on their own behalf, and therefore someone else who had compared the copy with the original located elsewhere (perhaps far away) would have to be brought from that place to swear to its authenticity and accuracy. Occasionally this might not be too difficult, but given eighteenth-century conditions of travel and accommodation, it often must have been inconvenient and expensive—sometimes prohibitively so. The rule of *Olive v. Gwin* precluding acceptance of foreign seals thus posed a significant impediment to proof of sister-colony and other "foreign" judgments in colonial courts, whether or not the rationale for that rule seems persuasive today.

Some colonies eventually overcame this resistance to foreign seals. Maryland, for example, enacted in 1715 an act "Providing what shall be good Evidence to prove Foreign and other Debts," stating "That all Debts or records, whether by judgment, recognizance, Deed inrolled, and upon Record, the Exemplification thereof, under the Seal of the Courts where the said Judgment was given, or was recorded, shall be a sufficient Evidence to prove the same."[82] Similarly, South Carolina in 1731 enacted a law stating that a variety of documents, including "exemplifications of records" and other instruments under seal,

> attested to have been proved upon oath under the corporation seal of the Lord Mayor of London, or of any other Mayor or chief officer of any city, Borrough or town corporate, in any of his Majesty's dominions, or under the hand of the Governor and public seal of any of his Majesty's plantations in America, or under the notarial seal of any notary public, shall be deemed and adjudged good and sufficient in law, in any of the courts of judicature in this Province, as if the witnesses to such deeds were produced and proved the same *viva voce*.[83]

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81. A separate report of the case reveals the Barons eventually did rule for the defendant, but no accompanying explanation survives. *See Olive*, 82 Eng. Rep. at 1304.

82. Act of June 3, 1715, *printed in* ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF MARYLAND, FROM 1612, TO 1715, No. 85 (London, John Baskett 1723); *see* Robert E. Childs, *Full Faith and Credit: The Lawyer's Clause*, 36 KY. L.J. 30, 35-36 (1947) (quoting the act); Whitten, *supra* note 30, at 275 (same). Copies of records under seal "are call'd by a particular Name Exemplifications, and are of better Credit than any sworn Copy." GILBERT, *supra* note 37, at 14.

83. Act of Aug. 20, 1731, No. 552, § 40, *printed in* PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 123, 129 (photo. reprint 1981) (John Faucheraud Grimké ed., 1790); *see* Nadelmann, *supra* note 30, at 39; Whitten, *supra* note 30, at 276. A similar but more limited

Both of these measures seem designed to overcome the rule of *Olive v. Gwin*, the colonists apparently being more confident that they could distinguish genuine foreign seals from fake ones than the Exchequer Barons had been generations before. It is notable, however, that neither Maryland nor South Carolina contemplated a rule of intercolonial res judicata: both called for exemplifications to be "sufficient," or "good and sufficient" evidence, but not to be "conclusive." "Sufficient" evidence establishes a fact prima facie, but subject to contrary proof if any can be shown at trial.

The second obstacle regarding foreign judgments resulted from application of the old "locality" rule. In medieval England, because they were to judge by their own knowledge, it was essential that jurors be drawn from the place where the facts of a case occurred. Common law pleadings were therefore required to identify that place—to "lay the venue." For the same reason, "the rule became established that a jury could not inquire into any matter that did not take place within the given locality."[84]

This locality rule relaxed gradually throughout the sixteenth and early seventeenth centuries as cases involving facts in more than one place grew more common,[85] but it remained true that proceedings for enforcement of common law judgments "must be brought in the same county, where the first action was laid."[86] Consequently, for example, "if a man recover a debt in the Court of Norwich, and will bring his action of debt upon that record in the Common Pleas, he must lay his action in Norwich."[87]

On this principle, in 1737 the King's Bench held in *Otway v. Ramsay* that an action of debt could not lie in Ireland on a judgment of King's Bench in England.[88] Ireland at that time was "part of the dominions of the Crown of England, but no part of the realm,"[89] although it shared the common law.

statute was enacted by Parliament the next year, (1732) 5 Geo. 2, c. 7 (Eng.), but it was crafted specifically to assist residents of the homeland.

84. Sack, *supra* note 45, at 346 (citing fourteenth-century cases). In addition, a statute required (on pain of abatement) that "writs of debt and accompt, and all other such actions," be "taken in their counties . . . where the contracts of the same actions did rise." (1383) 6 Rich. 2, c. 2 (Eng.).

85. *See* Sack, *supra* note 45, at 357-71.

86. Musgrave v. Wharton, (1611) 80 Eng. Rep. 154 (Exch.).

87. Hall v. Winckfield, (c. 1620) 80 Eng. Rep. 342, 343 (C.P.). Chief Justice Hobart explained in that case that peculiar circumstances might sometimes warrant a choice of venue. *Id.*

88. Otway v. Ramsay, *quoted in* (1734, 1736 & 1738) 107 Eng. Rep. 1113, 1113 n.(a) (K.B.). The *Otway* case is briefly noted also in Otway v. Ramsay, (1738) 93 Eng. Rep. 1051 (K.B.).

89. *Otway*, 107 Eng. Rep. at 1114-15 n.(a).

"[A]ctions of debt upon judgments," Chief Justice Hardwicke explained, "must be considered as a local matter."[90] Justice Probyn agreed—as did Justice Page, who added, "the actions brought upon judgments must be local; and as this has been determined in regard to the different counties of England, sure it ought to hold between the kingdoms of England and Ireland."[91]

The Justices in *Otway* were unhappy with the result they felt compelled to reach, and noted that happier results prevailed among civil law systems (and in admiralty matters, even in England). As Chief Justice Hardwicke explained,

> [I]t seems hard if a judgment given here [in King's Bench] should not be res judicata in Ireland. For in proceedings by the civil law where all nations proceed by the same rules a sentence given in one nation is held valid by another; wherefore a sentence given in France by the Court of Admiralty there for the condemnation of a ship, is, by a proper certificate of the Court, held valid here.[92]

Indeed, Chief Justice Hardwicke had ordered additional argument specifically addressing "what credit is to be given by one Court, to the acts of a Court of another nation" where both proceed by the common law, because "[i]t is very desirable in such case that the judgment given in one kingdom should be considered as res judicata in another."[93] In the end, though, he and the Justices with him felt compelled to acknowledge that the law was to the contrary.

Otway's enforcement venue rule would equally preclude actions in England to enforce judgments of Irish courts; indeed, it would preclude suits in *any* common law jurisdiction to enforce judgments from any other.[94] While *Otway*'s rule might not countermand a colonial act like that of South Carolina or Maryland quoted earlier, it would otherwise prevent one American colony from enforcing money judgments of another colony.

Later in the eighteenth century, both the refusal to accept foreign seals and the requirement of local venue for enforcement seem to have lost much

90. *Id.* at 1115 n.(a).

91. *Id.* Justice Chapple, on the other hand, thought his colleagues' opinions "very hard," because in that case it meant that "plaintiff cannot recover his loss." *Id.*

92. *Id.* at 1114 n.(a).

93. *Id.*; *see also supra* text accompanying note 56 (discussing Hardwicke's similar unfulfilled wish regarding Scotland).

94. The willingness of England's common law courts to countenance fictions circumventing this restriction, *see* Sack, *supra* note 45, at 370-71, does not prove a similar disposition among *colonial* jurists.

importance in England itself. The action of Parliament in *Sinclair* and the actions of King's Bench in *Crawford*, *Walker*, and *Galbraith*[95] seem inconsistent with commitment to either proposition, although neither was squarely addressed. Counsel in *Walker* had relied upon both *Olive* and *Otway*,[96] but the case report indicates no mention of either by any Justice.

In the British colonies, however, the older cases seem to have remained a source of concern, or at least of confusion. Hence, three years after *Sinclair v. Fraser*, the Massachusetts Bay Colony enacted a more elaborate solution. The colony's Governor Hutchinson described it to the Board of Trade in London as designed "[t]o make the record [more accurately, a *copy* of the record] of a judgment in the neighboring Colonies evidence equal to the judgment itself [that is, to the original record]. As the Superior Court have been in doubt whether such record [such copy] could be admitted, the provision by the Act becomes necessary."[97] This 1774 Massachusetts Bay act authorized judgment creditors under sister-colony judgments to bring actions of debt thereon in Massachusetts, "in such way and manner as he or they might have done if such judgment or judgments had been originally recovered . . . in this province."[98] This obviated for Massachusetts Bay the enforcement venue rule represented by *Otway v. Ramsay*. In addition, the issue of authenticity and accuracy of foreign seals was addressed by specifying "a true copy of the record . . . according to the custom and usage of the colony where said judgment or judgments were . . . recovered"[99]—permitting, for example, copies sealed in compliance with the practice of the colony whence they came. Thus, the 1774 Massachusetts Bay act also obviated for Massachusetts Bay the obstacle represented by *Olive v. Gwin*.

95. *See supra* text accompanying notes 58-71.

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

97. Nadelmann, *supra* note 30, at 37 (internal quotation marks omitted) (quoting Governor Hutchinson).

98. 5 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY (1769-1780), § 1, at 323 (1774) [hereinafter ACTS AND RESOLVES], *reprinted in* CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 684 (1814).

99. *Id.* § 2, at 685.

II. THE PRACTICE DURING THE CONFEDERATION ERA

A. The "Full Faith and Credit" Mandate of the Articles of Confederation

No surviving document details the considerations that led to including in the Articles of Confederation the mandate that "[f]ull faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."[100] This was another attempt, like the Massachusetts Bay act and the earlier efforts in Maryland and South Carolina, to deal with the lingering consequences of *Olive* and *Otway*—this time on a union-wide basis.

None of those colonial measures had used the phrase "full faith and credit"—nor, for that matter, any of those words separately.[101] Nevertheless, in addition to having been used for centuries in diplomatic instruments to vouch for the authenticity of instruments and the authority of envoys,[102] and continuing to be used in notarial and other certifications to vouch for identity, authority, and authenticity,[103] all of the words in the phrase "full faith and credit" were in regular use by English and American lawyers at the time in discussions about evidence.

"[T]he most influential eighteenth-century book on evidence,"[104] "the leading work on the subject,"[105] was Sir Geoffrey Gilbert's *Law of Evidence*,

100. ARTICLES OF CONFEDERATION of 1781 art. IV, para. 3. No such provision appeared in the draft considered in 1776; it was added before the final version was approved "in Congress assembled" the next year.

101. The word "faith" came into Middle English from the Old French "*feit*," derived from the Latin "*fidem*"—belief, reliance, or trust. 5 THE OXFORD ENGLISH DICTIONARY 678 (2d ed. 1989). "Credit" came from a French modification of the Italian "*credito*," derived from the Latin "*creditus*," a past participle meaning "believed." 3 *id.* at 1138. This etymology confirms the usage of these terms—and of derivatives such as credible, creditable, creditworthy, and faithful, and equivalents like trust, trustworthiness, believability, and belief—that continues even today.

102. *See* Nadelmann, *supra* note 30, at 47-48 & nn.70-74; Radin, *supra* note 46; G.W.C. Ross, *"Full Faith and Credit" in a Federal System*, 20 MINN. L. REV. 140, 140-41 & nn.4-5 (1936); Sachs, *supra* note 32 (manuscript at 17-20).

103. Easily accessible examples appear in the early Supreme Court case of *Yeaton v. Fry*, 9 U.S. (5 Cranch) 335 (1809). This usage long continued. *See, e.g.*, Sewall v. Haymaker, 127 U.S. 719, 720-21 (1888) (certification by court clerk); Johnson v. United States, 13 F. Cas. 868, 871 (McLean, Circuit Justice, C.C.D. Me. 1830) (No. 7418) (attestation by Secretary of the Treasury); Langford v. United States, 12 Ct. Cl. 338, 345 (1876) (certification by court clerk).

104. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172 (1996).

apparently completed around 1711 but published only posthumously in 1756, with several later editions. Nadelmann ascertained that "[i]n the American Colonies, the *Law of Evidence* was in constant use in the courts soon after appearance."[106] This foundational treatise frequently used "faith," and constantly used "credit"—as a noun, as a verb, and in adjectival forms—to refer to the relative probative worth of evidence and to the degree of belief or confidence it deserved.

Gilbert frequently used comparative adjectives such as "more," "better," "higher," "highest," "greatest," and "most absolute" to signify different degrees of credit.[107] Previous commentators have asserted that Gilbert used the adjective "full" in the same way, to denote the highest level of credit: "conclusive eviden[ce],"[108] or "res judicata effect."[109] A closer reading of Gilbert, however, reveals that his ubiquitous treatise on evidence employed the word "full" very differently.

For example, while he distinguished among different "Seals of Publick Credit" in terms of the degree of credit they deserved (the Broad Seal being "the highest Evidence" and meriting "more Faith"[110]), Gilbert stressed that all

105. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 504 (1999); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *367 n.(n) (calling it an "excellent treatise"); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE, at iv (1801) (calling Gilbert's book "the basis of every subsequent work on the subject"); James Wilson, *Of Man as an Individual*, *in* 1 THE WORKS OF JAMES WILSON 197, 221 (Robert Green McCloskey ed., 1967) (describing Gilbert as "deservedly the most approved writer on this part of the law").

106. Nadlemann, *supra* note 30, at 41.

107. *See* GILBERT, *supra* note 37, at 10, 14, 17, 60, 159.

108. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 522 (1981) [hereinafter Whitten, *State-Court Jurisdiction*]; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 12-13 (1981) 12-13 [hereinafter Whitten, *State Choice of Law*]. Nadelmann had made the same mistake of assuming that Gilbert used "full" to import the highest level of credit. Nadelmann, *supra* note 30, at 44; *see also* Laycock, *supra* note 12, at 296 ("*Full* faith and credit is the maximum possible credit; it is conceptually impossible to give faith and credit that is more than full.").

109. Whitten, *State-Court Jurisdiction*, *supra* note 108, at 523; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1304, at 180 (1833) ("[T]he framers of the confederation, and the constitution . . . intended to give, not only faith and credit . . . but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied . . . .").

110. GILBERT, *supra* note 37, at 14-15.

of them "are *full* Evidence in themselves without any Oath made."[111] He contrasted the Seals of Publick Credit to "Seals of Private Courts or of private Persons," which he said "are not *full* Evidence by themselves without an Oath concurring to their Credibility."[112]

The same usage of "full" occurs in Gilbert's discussion of testimonial evidence: "[E]very plain and honest Man affirming the Truth of any Matter under the Sanction and Solemnities of an Oath, is intitled to Faith and Credit, so that under such Attestation the Fact is understood to be fully proved."[113] Yet this "full" proof could certainly be refuted or impeached: there might be contrary witnesses greater in number; or one with a clearer memory; or one with "more plain and evident Marks and Signs of his Knowledge";[114] or the contrary might be shown by a copy of a document under public seal (which would be entitled to "greater" or "higher" credit), or under the Broad Seal (which would be "the highest Evidence that the Nature of the Thing is capable of").[115]

Thus, Gilbert used the adjective "full"—and even the phrase, "Faith and Credit, so that . . . the Fact is understood to be fully proved"—to denote *evidentiary sufficiency*: the adequacy of certain evidence, without more, to establish a fact prima facie so as to shift the burden of proof, but not to preclude a contrary showing. Consequently, given the commonplace usage of the words at that time, "full faith and credit" was a very apt phrase for alluding to the prima facie evidence rule long employed by the common law courts—first with regard to determinations by England's "inferior" courts not-of-record, and later with regard to judgments from the colonies and elsewhere outside the realm.

Indeed, the committee draft from which the "full faith and credit" provision in the finished Articles of Confederation derived actually specified

111. *Id.* at 19 (emphasis added). With the same import, but using yet another word, Gilbert said that "things under [public] Seal are supposed to have an intrinsic Credit," whereas writings not under public seal "have no intrinsic Credit in themselves, . . . they have no Credit but what they derive from something else, *viz.* from the Oath of the Person who attests them, or from some Presumption in their Favour." *Id.* at 18-19.

112. *Id.* at 20 (emphasis added). Again, just like "the seals of the King, and of the Publick Courts of Justice, Time out of Mind," so also "the Seal of a Court created by Act of Parliament, is of *full* Credit without further Attestation, for the Act of Parliament is of the same Notoriety with the Common Law, and therefore the Court, and the Seals thereby created, are supposed universally known to every Body." *Id.* at 19-20 (emphasis added).

113. *Id.* at 142.

114. *Id.* at 158.

115. *See id.* at 15.

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."[116] No surviving notes explain why this additional language in the committee draft was stricken before final approval—a circumstance that has occasioned some conjecture[117]—but since an action of debt (or of *indebitatus assumpsit*) treating a prior judgment as a debt (or implied undertaking) had long been the procedure in which the prima facie rule was applied, the extra verbiage may well have been deemed surplusage, and its specification of "an action of debt" deemed too restrictive for states preferring *indebitatus assumpsit*. In any event, there is nothing whatsoever to suggest any attempt to repudiate the long-established prima facie evidence rule by stealth maneuver.

Moreover, persuasive reasons exist for rejecting the suggestion that the "full faith and credit" mandate of the Articles of Confederation contemplated anything like interstate res judicata. First, when the Articles were drafted and approved, the American Revolution was still being fought and the states were heady with their newly seized independence. They were parsimonious in yielding power, and took care to articulate that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right" not "expressly delegated."[118] Those Articles did not contemplate the "more perfect Union"[119] that another decade of hard experience would persuade Americans to prefer. It would have been incongruous for the states to impose any greater constraints on their separate judicial systems than were already familiar.[120]

Second, and even more persuasive, when the Articles of Confederation came into force in 1781, and before the "full faith and credit" provision had been litigated in any court, the Continental Congress appointed a committee to report on the implementation and possible improvement of those Articles. The committee's report dated August 22, 1781, included two recommendations regarding the full faith and credit provision. The report stated that there was need, first, for "declaring the method of exemplifying records," and second, for

116. 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 887 (1907).

117. *See, e.g.*, Nadelmann, *supra* note 30, at 35-36; Radin, *supra* note 46, at 5-7; Ross, *supra* note 102, at 141-42; Whitten, *State Choice of Law*, *supra* note 108, at 25-29.

118. ARTICLES OF CONFEDERATION of 1781 art. II.

119. U.S. CONST. pmbl.

120. Whitten, *State-Court Jurisdiction*, *supra* note 108, at 541 ("[I]t seems unlikely that the draftsmen of the Articles would have been willing to prescribe a conclusive effect on the merits for sister state judgments, given their general desire to preserve state autonomy.").

"declaring . . . the operation of the Acts and judicial proceedings of the Courts of one State contravening those of the States in which they are asserted."[121]

The first of these needs—coping with the *Olive v. Gwin* problem of the authenticity and accuracy of foreign seals—had been addressed earlier by the Maryland and South Carolina enactments, and then by the 1774 Massachusetts Bay act.[122] The second need, however, had never been addressed prior to the 1774 Massachusetts Bay act. So far as appears, the 1774 Massachusetts Bay act was the first attempt to go beyond any evidentiary issues and address the question of sister-colony effect. It said that a duly authenticated sister-colony judgment was not only to be "good and sufficient evidence of such judgment," but also was to "have the same effect and operation, as if the original judgment and proceedings had been rendered and had in the court where such action of debt shall be brought and depending."[123] In other words, Massachusetts courts would have to apply Massachusetts preclusion rules to duly authenticated sister-colony judgments, rather than any different preclusion rules applicable in the jurisdiction of origin. (Interestingly, the 1774 Massachusetts Bay rule was exactly the converse of the rule prescribed under the Full Faith and Credit Clause of the Constitution ever since the First Congress: that a judgment's force in a second state is to be measured by its force in the state of its origin.[124])

The 1781 Continental Congress committee did not advocate Massachusetts's approach, nor did it propose any other. But it is significant that this committee of the same body that had drafted and proposed the Articles of Confederation perceived the Articles's "full faith and credit" mandate as silent on the question of sister-state "operation," while identifying such operation (in other words, sister-state "Effect") as a separate matter still needing attention.

All things considered—including the usage of the words at the time—the phrase "full faith and credit" was an appropriate way of alluding to the familiar prima facie evidence rule, ensuring admissibility but nothing more than evidentiary sufficiency. It also presented opportunity for confusion, however, because similar combinations of some of the same words were sometimes used with quite a different meaning.[125] Nadelmann has noted this different usage, but overstates its significance. He asserts that "giving faith and credit" was a

121. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 894 (1912).

122. For a discussion of the colonies' attempts to address the *Olive* and *Otway* problems, see *supra* text accompanying notes 77-99.

123. 5 ACTS AND RESOLVES, *supra* note 98, § 2, at 68.

124. *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230, 236-37 (1908).

125. *See infra* text accompanying notes 126-136.

"term of art" in England, "regularly recurred to in discussion of the effect to which decisions of the ecclesiastical courts were entitled in the common law courts."[126] This is a considerable overstatement because it slights the limiting history that made the use of these words in that ecclesiastical context quite peculiar.

Under the religious establishment in England, ecclesiastical tribunals were assigned exclusive jurisdiction over a number of matters, some of which—like the lawfulness of marriages and the legitimacy of children—had important ramifications for secular affairs. Consequently, from the eleventh century forward, secular courts in proprietary cases requested rulings from the bishop on these questions and adjudicated proprietary rights accordingly. This was called "trial by certificate."[127] Over time, this deference to ecclesiastical determinations, especially regarding marriage, degenerated to include even prior and collateral rulings, even when the parties were not the same.[128] Also, the practice ceased to be confined to proprietary actions; and it made no difference if the ecclesiastical court had decided on grounds discountenanced by the secular law,[129] or if it had departed from proper ecclesiastical procedure.[130] It made no difference either that the ecclesiastical court might

126. Nadelmann, *supra* note 30, at 44. Whitten followed Nadelmann's lead, characterizing "faith" and "credit" as "evidentiary terms of art." Whitten, *State Choice of Law*, *supra* note 108, at 17; Whitten, *State-Court Jurisdiction*, *supra* note 108, at 520.

127. STEPHEN, *supra* note 40, at 122.

128. *See, e.g.*, Bunting v. Lepingwell, (1585) 76 Eng. Rep. 950, 952 (K.B.) (reporter's note); David E. Engdahl, *"Full Faith and Credit" in Merrie Olde England: New Insight for Marriage Conflicts Law from the Thirteenth Century*, 5 VAL. U. L. REV. 1, 8 n.46 (1970) (discussing William de Cardunville's Case, 1 CALENDARIUM GENEALOGICUM, at 57 (c. 1254)).

129. *See, e.g.*, Case LXXXIV, (1365) 145 Eng. Rep. 33 (Exch.) ("Where the cognizance of a cause belongs to the spiritual courts, and they give sentence in it, and express the cause of their sentence, although this cause of the sentence be null and void in our law; yet our law approves the sentence."); *see also* Caudrey's Case, (1591) 77 Eng. Rep. 1, at 8-9 (Q.B.) (holding that, despite noncompliance with a statute, ecclesiastical deprivation of a clergyman's benefice "was such as the Judges of the Common Law ought to allow to be given according to the ecclesiastical laws: for seeing their authority is to proceed and give sentence in ecclesiastical causes, according to the ecclesiastical law . . . the Judges of the Common Law ought to give faith and credit to their sentence, and to allow it to be done according to the ecclesiastical law").

130. *See, e.g.*, Grove v. Elliot, (1670) 86 Eng. Rep. 296, 298 (C.B.).

have erred or been misled,[131] or even that the ecclesiastical proceeding was collusive.[132]

Over the course of centuries, this practice was sometimes referred to as giving "credit,"[133] or "credence,"[134] or "faith and credit,"[135] or simply "faith,"[136] to determinations made by ecclesiastical courts. The necessary—and sufficient—basis of this practice, though, had been that the ecclesiastical tribunals had *exclusive* jurisdiction, and the secular courts had *no* jurisdiction, over the particular questions as to which the practice occurred.

As to marriage, this justification was avulsed by the secularization of English marriage law in the mid-eighteenth century,[137] and then the practice was radically curtailed by the House of Lords. The occasion for this curtailment was the internationally celebrated trial of the Duchess of Kingston on a charge of bigamy in 1776. The Duchess was convicted despite an ecclesiastical court's earlier determination, occurring before she married the Duke, that she was a spinster free of marital tie (notwithstanding her unfortunate, but not childless, long-secret marriage to another in her distant youth). Her entire defense consisted of centuries of precedent giving "faith and credit" to ecclesiastical determinations. But after hearing four days of argument over the relevant precedents—and on the legal advice of all twelve of the common law Justices and Barons against her defense—the Lords voted her guilty, without dissent. [138]

After that event, it might seem that no informed person—even in America, where news of the trial circulated—could be confident that the words "faith" and "credit" in any combination would be understood to mean conclusive effect, or res judicata. On the other hand, the prominently publicized

131. Baker v. Rogers, (1600) 78 Eng. Rep. 1018, 1019 (C.B.); *see also* Kenn's Case, (1606) 77 Eng. Rep. 474, 476 (Exch.) ("[W]e will never examine the cause, whether it be true or not . . . ."). For another example, see Noell v. Wells, (1668) 83 Eng. Rep. 385 (K.B.).

132. *See, e.g.*, Hatfield v. Hatfield, (1725) 2 Eng. Rep. 559 (H.L).

133. *E.g.*, Jones v. Bow, (1692) 90 Eng. Rep. 735 (B.R.); Nedham's Case, 8 Co. Rep. 135a, 135b, (1610) 77 Eng. Rep. 678, 679 (C.P.); *Kenn's Case*, 77 Eng. Rep. at 476; *Bunting*, 76 Eng. Rep. at 952.

134. *E.g.*, *Baker*, 78 Eng. Rep. at 1019; Hitcham & Glovers Case, (1618) 81 Eng. Rep. 623 (K.B.).

135. *E.g.*, *Grove*, 86 Eng. Rep. at 298; *Bunting*, 76 Eng. Rep. at 952; *Caudrey's Case*, (1591) 77 Eng. Rep. 1, 9 (Q.B.).

136. The parallel text of Coke's report of *Caudrey's Case*, which is in Latin, uses the word "faith" but omits "credit": "communis legis Judices ipsorum sententiae fidem adhibere eandem approbare, juxta legem ecclesiasticam latam fuisse debent." 5 Co. Rep. 1a, 7a, (1591) 77 Eng. Rep. 1, 9.

137. Clandestine Marriages Act, 1754, 26 Geo. 2, c. 33 (Eng.); *see* David E. Engdahl, *The Secularization of English Marriage Law*, 16 U. KAN. L. REV. 505 (1968).

138. *See supra* note 52.

association of the words "faith" and "credit" with the claim of conclusive effect for a prior tribunal's determination might have encouraged the similar arguments that some American lawyers would soon (unsuccessfully) advance under the Articles of Confederation.

B. Cases Under the Articles of Confederation's Full Faith and Credit Provision

The first reported case implicating the Articles of Confederation's full faith and credit provision was *Jenkins v. Putnam*, an action of trover in South Carolina for cargo from a ship condemned in a North Carolina admiralty court and eventually sold. The South Carolina court per curiam said, "We are bound by the sentence of the court of admiralty in *North-Carolina* . . . and are obliged to give due faith and credit to all its proceedings. The act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it."[139]

For its statement about the law of nations, the South Carolina court appropriately cited cases illustrating the settled exception regarding foreign admiralty decrees. Its added allusions to "the act of confederation"[140] and to "due faith and credit"[141] were not elaborated upon by the court. Some advocates thereafter claimed *Jenkins* as authority for treating the Articles's full faith and credit provision as a general mandate of sister-state effect, but *Jenkins* remained the only case under the Articles where that view received even a passing judicial nod—and after all, the case involved an *admiralty* decree.

In *James v. Allen* in 1786, the debtor under a New Jersey judgment had been sued on that judgment in Pennsylvania. He defaulted in the Pennsylvania case before being discharged under New Jersey's Insolvent Law, and then moved to set aside the default so he could plead the New Jersey discharge in defense to the Pennsylvania action. Invoking the Articles's full faith and credit provision, his attorney argued that if the New Jersey judgment "was only *prima facie* evidence before, this would render it conclusive," so that "[w]hat Lord *Mansfield* declares in [*Walker v. Witter*] to be the case with respect to certain Courts in *Westminster Hall* (whose decisions and proceedings are

139. Jenkins v. Putnam, 1 S.C.L. (1 Bay) 8, 1784 WL 36 (S.C. Com. P. Gen. Sess. 1784).

140. This presumably was a reference to the Articles of Confederation.

141. "Due" faith and credit, as distinguished from "full" faith and credit, was a formula routinely used, for example, in notarial certifications, while "full" was the adjective used in "the act of confederation." Thus, in contrast to arguments made in some later cases, at least the South Carolina court did not rely upon misconstruction of the word "full."

unexaminable evidence) is also true when applied to the several Courts of Justice in the States of the American Union."[142]

Plaintiff's counsel, including Jared Ingersoll,[143] however, recalled that unlike judgments of the common law courts at Westminster,

> judgments in foreign Courts were only *prima facie* evidence, except in Courts of Admiralty, whose decrees were conclusive, because founded upon the law of nations, which is common to all the world . . . . That, even if the validity of a foreign proceeding is admitted, a right to examine the ground, upon which it was founded, remains.[144]

Agreeing with plaintiff's counsel, the Pennsylvania court said,

> The Articles of Confederation, which direct that full faith and credit shall be given in one State to the Records, Acts, and judicial proceedings, of the others, will not admit of the construction contended for [on behalf of the debtor] . . . but seem chiefly intended to oblige each State to receive the records of another as *full evidence* of such Acts and judicial proceedings.[145]

Note that in this case, the Pennsylvania court used the word "full" exactly as Gilbert had used it,[146] denoting evidentiary sufficiency in contrast to conclusive effect.

The same year, the Superior Court in Connecticut in *Kibbe v. Kibbe* issued a one sentence per curiam opinion upholding a demurrer to a claim of debt on a Massachusetts default judgment.[147] The judgment was for alleged breach of a covenant of title to Massachusetts land that the defendant had conveyed to the plaintiff. The Connecticut court held that since the defendant had not been served in Massachusetts, that state "had no legal jurisdiction of the cause."[148] In dictum, however, the Connecticut court added that "full credence ought to be given to judgments of the courts in any of the United States, where both

142. James v. Allen, 1 Dall. 188 (Pa. C.P. 1786).

143. Ingersoll was reputed to be the "ablest jury lawyer in Philadelphia." MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 21 (1913).

144. 1 Dall. at 190.

145. *Id.* at 191-92 (emphasis added).

146. *See supra* text accompanying notes 111-115.

147. 1 Kirby 119, 119, 126 (Conn. 1786).

148. *Id.*

parties are within the jurisdiction of such courts . . . and are duly served with the process, and have or might have had a fair trial of the cause."[149] Judge Dyer agreed with the holding, but the dictum prompted him to say more: "the original action was upon a covenant real, and [thus] locally annexed where the lands lie [in Massachusetts]; and the judgment being by default, this [Connecticut] court never could take cognizance of or examine into the justice of the cause"—an examination that application of the prima facie rule would have required. Being thus unable to afford the defendant the requisite opportunity to rebut the prima facie showing, Judge Dyer reasoned that even if there had been sufficient service in Massachusetts, the Connecticut court "cannot enforce the judgment on which this action is brought."[150] Judge Dyer's point was that the prima facie rule itself would operate to preclude interstate res judicata, even if Massachusetts had jurisdiction.

In 1788, a few months after the Constitutional Convention but while the Articles of Confederation still were in force, the Pennsylvania Supreme Court decided two other relevant cases. In the first one, *Millar v. Hall*,[151] Jared Ingersoll—having earlier vindicated the prima facie rule in *James v. Allen*—this time represented a debtor discharged under Maryland's insolvent law but whose obligations scheduled in the Maryland proceeding had not included the obligation to which the Pennsylvania suit pertained. All of the client's assets, however, had been surrendered in the Maryland proceeding for the benefit of the creditors who were scheduled there; the only recourse available to the debtor's Pennsylvania creditor was to seek the debtor's imprisonment on the Pennsylvania debt.

Ingersoll sought to relieve his client not of the obligation, but only of the imprisonment sanction. Among his several arguments were some based on English law writers, on "general principles," and on "positive authorities" of different countries; he also argued "the reason of the thing" and "the mischievous consequences of a contrary position," and included an argument from the Pennsylvania constitution.[152] Most relevant for our purposes, Ingersoll urged giving effect to the Maryland discharge under the full faith and credit provision (and the free ingress and regress and privileges and

149. *Id.* The court's brief opinion did not explain what this dictum contemplated as "full credence," but once latter-day preconceptions are laid aside, those words are quite suitable for alluding to the traditional prima facie rule.

150. *Id.* at 126 (opinion of Dyer, J.).

151. 1 Dall. 229 (Pa. 1788).

152. *Id.* at 231.

immunities provisions) of Article IV of the Articles of Confederation.[153] The Pennsylvania court granted the relief that Ingersoll sought for his client, and the opinion recites that the court had "considered . . . the reciprocal obligation of the states under the articles of confederation."[154] The court declined to explicate that obligation, however, and did not base its holding on that ground. Instead, while denying the Maryland act any extra-territorial "coercive operation," the court said it acted "upon equitable grounds, for general and just purposes," and grounded its decision on considerations of "general conveniency, expediency, justice, and humanity" and on "the general principles of justice."[155]

Three months later, in *Phelps v. Holker*,[156] Ingersoll appeared in the Supreme Court of Pennsylvania again, this time representing a creditor suing on a Massachusetts default judgment for money. The defendant, a Pennsylvanian, sought to defeat the prima facie force of the Massachusetts judgment by challenging the "justice" of the Massachusetts proceeding, which had been commenced without notice by attachment of a blanket allegedly his. (This procedure complied with Massachusetts law, and the Articles of Confederation contained no restriction resembling our Fourteenth Amendment Due Process Clause.) This time, Ingersoll conceded that the prima facie rule would have applied if a foreign judgment had been at issue, but he insisted that the Massachusetts judgment "cannot be considered as a foreign judgment, for, it is the record of a Court of one of the States of the Union, and, as such, it is entitled to *full faith and credit* in each of them."[157]

Having attended the Constitutional Convention, which had ended just six months before, Ingersoll surely remembered the steps taken there to empower the proposed new Congress to prescribe sister-state effect.[158] But for the time being, the Articles still were in force, and Ingersoll had a client to serve. Thus, arguing that the Articles of Confederation's "design must certainly have been to form a stronger cement, than that by which the States themselves [when colonies] were hitherto connected, or by which they are, at this day, connected with other nations," the resourceful advocate seized upon the full faith and credit provision's use of the word "record," arguing that "[t]he very term

153. *Id.*

154. *Id.*

155. *Id.* at 232.

156. 1 Dall. 261 (Pa. 1788).

157. *Id.* at 261.

158. *See infra* text accompanying notes 173-204 (detailing these relevant steps at the Constitutional Convention).

Record must be conclusive; for what is a record in *one State*, by this article, becomes such in *every State*, and it is the nature of a record to preclude every idea of scrutiny and contradiction."[159]

Ingersoll's opponent, however, maintained that "[j]udgments given in one State, are not made obligatory upon the Courts of another, by the Articles of Confederation; which only provide, that, in matters of evidence, mutual faith and credit shall be given to the records, acts, and judicial proceedings of the States."[160] This was the argument that prevailed. As the Chief Justice said, "[T]he Judgment obtained in *Massachusetts* cannot be considered as conclusive evidence of the debt, and, therefore, the Defendant ought still to be at liberty to controvert and deny it."[161]

Thus, the sum of the cases under the Articles's full faith and credit provision was that—except as to admiralty decrees, which England's own common law courts regarded as conclusive—American state courts under the Articles of Confederation treated sister-state judgments the same as England's common law courts had long treated judgments of foreign, colonial, and England's own "inferior" courts. That is, they took them as "full" evidence, sufficient to meet the prima facie standard, but not as conclusive or binding. Instead, they remained controvertible.[162]

At the same time, the meaning of the Articles of Confederation's faith and credit mandate remained in some dispute. Ingersoll's practice nicely illustrates the range of arguments being seriously advanced. The fact of such forensic disharmony helps to explain James Madison's observation—made after the foregoing South Carolina and Connecticut cases and the first one or two of those in Pennsylvania—that the meaning of the Articles's faith and credit provision was "extremely indeterminate."[163] Madison's observation was surely well founded, regardless of whether, in the decade after independence, the problems illustrated by the *Olive* and *Otway* cases[164] had been sufficiently

159. 1 Dall. at 263.

160. *Id.* at 261-62.

161. *Id.* at 264.

162. Further evidence that "full faith and credit" was typically understood during the Confederation period to import authenticity and evidentiary sufficiency without precluding further inquiry is a 1786 Delaware statute, discussed in Sachs, *supra* note 32 (manuscript at 19). The Delaware statute ordained that instruments bearing the seal of the Bank of North America "shall have full Faith and Credit in all and every the Courts within this State." *Id.*

163. THE FEDERALIST NO. 42 (James Madison), *supra* note 5, at 287.

164. *See supra* text accompanying notes 77-99.

obviated that the Articles's provision became "of little importance under any interpretation which it will bear."[165]

III. "FULL FAITH AND CREDIT" AND "EFFECT" IN DRAFTING THE CONSTITUTION

Previous scholars seeking to illuminate the Full Faith and Credit Clause have made forays into surviving records of the Constitutional Convention, but their efforts have shed little light. This is not a task to be done by scanning Madison's notes like a prosecutor adept only at proving facts by confession; the evidence is much harder to come by. One must begin with a clear understanding of the relevant legal background, both in England and in pre-1787 America, and then carefully trace each step in developing the text of the Full Faith and Clause through successive reports and motions, attentively considering the evident concerns of those Constitutional Convention delegates whose comments were deemed significant enough at the time for Madison or others to record. Thus, while the account presented in this Article makes reference to some already familiar data, it discovers new meaning—both in that data and in data overlooked heretofore.

Of such little importance did Madison and his fellow Virginians consider the Articles of Confederation's full faith and credit provision that when they drew up the Resolutions used to begin deliberations at the 1787 Constitutional Convention,[166] they included no provision resembling it. Young Charles Pinckney of South Carolina offered a plan of his own[167] that did include such a provision, which he characterized as "formed exactly upon the principles of" the Articles's provision;[168] but Pinckney's plan as a whole was never brought up for discussion, so its influence was piecemeal.

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165. *See* THE FEDERALIST NO. 42 (James Madison), *supra* note 5, at 287.

166. *See* FARRAND, *supra* note 143, at 68 ("Internal evidence shows much of Madison's handiwork in forming these resolutions, but from the fact that they were presented by Randolph they were commonly referred to as the Randolph Resolutions . . . ."). The Resolutions were introduced at the beginning of the Convention, on May 29, 1787. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18-23 (Max Farrand ed., 1937) [hereinafter FARRAND, RECORDS] (Madison).

167. 1 FARRAND, RECORDS, *supra* note 166, at 23 (Madison).

168. *See* Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia, on the 28th of May, 1787*, *in* 3 FARRAND, RECORDS, *supra* note 166, at 106, 112. The document sent by Pinckney to John Quincy Adams in 1818, which Adams published as Pinckney's in the official Journal, is not considered Pinckney's original plan. *See* 3 FARRAND, RECORDS, *supra* note 166, at 501-15, 595. Paragraph 13 of the draft published

When the Convention, after almost two months, appointed a "Committee of Detail" to report "a Constitution conformably to the Proceedings" completed thus far,[169] there still had been no discussion of sister-state "faith" or "credit." Along with the approved Resolutions, however, Pinckney's plan was also referred to the Committee for consideration.[170] Apparently prompted by it, the Committee included as Article XVI in its August 6, 1787 Report that "[f]ull faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."[171]

Edmund Randolph of Virginia and Oliver Ellsworth of Connecticut were members of this Committee of Detail. Both also had been members seven years earlier of the Continental Congress's committee recommending improvements to the Articles of Confederation. That earlier committee had reported that the Articles's full faith and credit provision needed modification to reach the questions of authentication and sister-state effect,[172] but the Detail Committee's proposed Article XVI, like the Articles's provision, remained silent on both points.

On September 1, the "full faith" phrase in the Detail Committee's proposed Article XVI provision was replaced by the longer phrase "full faith and credit"—the same phrase appearing in the Articles of Confederation—but the shortcomings of the Articles's provision could hardly be supplied by simply restoring this redundancy. The Convention would address the matters of authentication and sister-state effect later, with entirely new language contained in a new and separate sentence. The steps by which that new language took shape illuminate why the Full Faith and Credit Clause eventually attained the particular phrasing that it did.

Although the issue had never been litigated, it was questionable whether the Articles's full faith and credit provision applied to statutes. It embraced "records, acts, and judicial proceedings *of the courts and magistrates*."[173] If the prepositional phrase were to be read as modifying only "judicial proceedings" rather than "records" and "acts" as well, the provision could be understood to

in the Journal, *id.* at 601, is almost identical to the clause reported by the Committee of Detail ten weeks later; it is unknown which copied which in this particular instance.

169. 2 FARRAND, RECORDS, *supra* note 166, at 85-87, 97 (Journal).

170. *Id.* at 98 (Journal).

171. *Report of the Committee of Detail*, *in* 2 FARRAND, RECORDS, *supra* note 166, at 177, 188. In the original print, this was misnumbered XV. *See id.* at 181 n.5.

172. *See supra* text accompanying note 121.

173. ARTICLES OF CONFEDERATION of 1781 art. IV (emphasis added).

reach the records and acts not only of magistrates and courts but also "acts" of legislative assemblies (which Gilbert had included even as "records"[174]).

The Detail Committee eliminated this uncertainty by proposing that "[f]ull faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."[175] When this Article came up for discussion on August 29, however, it was opposed by some who apparently believed that statutes were *not* embraced by the Articles's provision, and to whom their inclusion seemed problematic. The "eccentric but good-humored"[176] Dr. Hugh Williamson of North Carolina said he did not "understand precisely the meaning of the article" as reported by the Committee, and moved to substitute instead the wording of the Articles of Confederation provision.[177]

The Detail Committee's language ought not to have troubled those who understood "full faith" (or "full faith and credit") as an allusion to the familiar prima facie evidence rule. As we have seen, however, some lawyers already had argued that the Articles's provision required giving sister-state effect; and as long as that remained arguable, extending the rule to statutes could hardly have failed to excite concern.

Brief reflection should indicate why. Courts were not then considered to be makers of law or organs of public policy. Rather, courts were perceived in Blackstonian terms as applying preexisting law to particular disputes of particular parties on particular facts.[178] A forum might sometimes decide particular claims of particular parties under another sovereign's law, but this was done as a matter of comity, or by virtue of "choice of law" precepts of the forum itself. Moreover, because only the private interests of particular parties

174. Gilbert included under the heading of "records" not only "Letters Patent," but also "Acts of Parliament," distinguishing these from "Public Matters that are not Records" such as the Domesday Book, the ports survey, and the register of christenings and burials. GILBERT, *supra* note 37, at 10, 76-79, 92.

175. 2 FARRAND, RECORDS, *supra* note 166, at 188.

176. FARRAND, *supra* note 143, at 24.

177. 2 FARRAND, RECORDS, *supra* note 166, at 447 (Madison).

178. Even a few decades into the nineteenth century, after some judges had begun to take more proactive views of their judicial role, it remained generally accurate to say that

> [i]n the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are . . . . The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws.

Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).

were determined and no matter of public policy (aside from the policy of comity itself) was involved, even an obligation to give effect to sister-state judgments would not seriously threaten a state's sovereign independence.

In contrast, statutes were the standard means by which governments in the Anglo-American tradition established and changed public policy and undertook to control behavior within their geographic bounds—not merely of parties to particular litigation but of the general population. To declare that a forum state must credit the duly authenticated statute of a sister state as being the law governing in that sister state was inoffensive. But to require the forum state to give effect to a sister state's statute as the law to govern in the forum state itself, displacing the forum's own law on point, would doubly affront the postulate of territorial limits to governing power—enabling the one state to govern beyond its boundaries while disabling the other state to govern within its own.[179]

Copies of the Detail Committee's Report had been in the delegates' hands for more than three weeks before coming up in formal deliberation,[180] so the prospect of an obligation to apply sister-state statutes already might have been discussed at the taverns between sessions. To so unsettling a prospect, Dr. Wilkinson's comment and accompanying motion to substitute the original wording of the Articles of Confederation provision seems quite a temperate response. Several commentators have noted the brief ensuing dialogue regarding insolvency acts,[181] but that fails to explain the level of concern that

179. *Cf.* Ala. Packers Ass'n. v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935) (containing Justice Stone's famous argument against the "absurd result" that "the statute of each state must be enforced in the courts of the other, but cannot be in its own"). Whereas Justice Stone inferred that it was therefore "unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another," *id.*, this Article argues that the Framers at Philadelphia deliberately left this quandary for solution by the states severally, subject only to Congress's political control with no oversight role for the federal judiciary at all.

180. *See* 2 FARRAND, RECORDS, *supra* note 166, at 176 (Journal).

181. According to Madison's notes, James Wilson (who was a member of the Committee of Detail) and Connecticut's William Samuel Johnson (who was not) answered Williamson by saying they supposed this was to include insolvency acts—"private" acts of state legislatures for relief of individual debtors. 2 FARRAND, RECORDS, *supra* note 166, at 447. Recall that some of the cases litigated under the Articles's "full faith and credit" provision had involved insolvency acts.

Immediately after these comments, however, Mr. Pinckney proposed adding power for the national legislature to "establish uniform laws upon the subject of bankruptcies," *id.* at 445 (Journal); *id.* at 447-48 (Madison), and eventually that proposal was approved with scant opposition, *id.* at 486 (Journal); *id.* at 489 (Madison). Moreover, Gouverneur Morris promptly proposed replacing "acts of the Legislatures" with the broader phrase "public

the Detail Committee's proposal aroused with respect to *statutes*—and worse, it obscures the importance of what occurred next.

Virginia's Governor Edmund Randolph, a member of the Detail Committee (and previously a member of the 1781 Continental Congress committee which had reported that words in addition to "full faith and credit" were requisite should a rule for sister-state effect be desired) seems not to have realized until Dr. Williamson's query that some could take the "full faith and credit" phrase by itself to mean giving sister-state effect. But now that the question of sister-state effect had been opened and the specter of extraterritorial application of statutes had emerged, Governor Randolph hastily prepared a rather long and ungainly motion, the import of which has been ignored by scholars. In addition to providing for authentication by exemplification under the originating state's seal, Governor Randolph's motion proposed as a rule for the sister-state effect of any state act, "whether legislative executive or judiciary," that 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."[182] This went beyond the prima facie evidence rule explicitly to mandate conclusive effect ("operation . . . binding in every other State")—*but only within the limits of* "cognizance and jurisdiction," which as to statutes (certainly at that time) would mean the territorial limits of the enacting state.[183]

In response, Gouverneur Morris of Pennsylvania proposed a simpler expedient: simply punting the ball. Morris moved that the task of determining not only the proof, but also "the . . . effect of such acts, records, and proceedings," be left to the national legislature.[184] He proposed that "[f]ull 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."[185] This proposal by Morris was the original form of what eventually would become the second sentence of the Full Faith and Credit Clause.

For a reason that will later prove important, it should be noted that the provision took this form specifically in contemplation of the complicating concerns over jurisdiction and state policy that had worried Dr. Williamson

acts," *id.* at 445 (Journal); *id.* at 448 (Madison), which would render irrelevant any allusion to insolvency acts. Morris's broader phrase was adopted by the Committee and eventually approved. *Id.* at 445, 486 (Journal); *id.* at 489 (Madison).

182. 2 FARRAND, RECORDS, *supra* note 166, at 445 (Journal); *id.* at 448 (Madison).

183. *Id.* at 445 (Journal).

184. *Id.*

185. *Id.* at 448 (Madison).

and Governor Randolph, and that the "Effect" it addressed was explicitly and unambiguously the "effect of such acts, records, and proceedings"—not the effect of such "manner of proof" as the legislature might determine. It should also be noted that Morris's motion plainly contemplated that the sister-state "effect of such acts, records, and proceedings" was appropriate for determination in the national legislature (where experience and practical considerations could be taken into account), rather than for a priori rigidification by constitutional command.[186]

Both Governor Randolph's and Gouverneur Morris's proposals were committed to a special committee of five, along with the proposal from the Committee of Detail. When this special committee (four members of which—including Wilson and Randolph—had been on the Committee of Detail[187]) reported three days later,[188] it had followed Morris's proposal in replacing the phrase "acts of the Legislatures" with "public Acts," but it had only partially followed Morris's proposal to punt the complicating considerations to the legislature. Morris had proposed punting the questions of both proof and effect regarding all three categories ("public acts, records, and judicial proceedings") to the legislature. The committee of five instead proposed requiring the legislature to prescribe the *manner of proof* for all three, but to prescribe sister-state *effect* as to *judgments* only—conspicuously omitting any provision regarding sister-state effect for "public acts." Their wording was that "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."[189] This would have left the sister-state effect of "public acts" (as well as of any "records" other than judgments) unspecified in the Constitution but not delegated to Congress, and therefore determinable by the several states each resolving for itself the questions of jurisdiction and public policy involved.

When this proposal of the committee of five came up for discussion on September 3, Morris moved to amend it by replacing everything following the word "Effect" with the single word "thereof."[190] That would bring the

186. *Id.* at 445 (Journal).

187. *Id.* The other members were John Rutledge of South Carolina and Nathaniel Gorham of Massachusetts, who also had served on the Committee of Detail, and William Samuel Johnson of Connecticut, who had not. This committee of five was also to consider some other issues raised the same day.

188. *Id.* at 484-85 (Madison).

189. *Id.* at 485 (Madison).

190. *Id.* at 488 (Madison) ("[T]he Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect thereof.").

committee's proposal into conformity with the substance of his own motion of August 29. Morris's new motion, however, triggered responses from three members of the committee of five.[191]

William Samuel Johnson of Connecticut, evidently in opposition,[192] highlighted the problem by pointing out that Morris's amendment "would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State."[193] Randolph spoke out with considerably more vigor. Five days earlier he had remarked on the anomaly of one state exercising authority within another,[194] and overall he had grown very uneasy with the breadth of national legislative competence countenanced by the delegates thus far. In Morris's latest motion, Randolph saw the portent of still further usurpation of state authority, since the word "shall" *required* the national legislature to prescribe giving effect—within each state's own territory, and notwithstanding its own public policy—to the statutes of other states. Randolph believed this went much too far, and (according to Madison's notes) Randolph denounced Morris's proposal as

> strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers. He was for not going farther than the

191. *Id.* at 488-89 (Madison). There is no reason to suppose that Morris (or anyone else) conceived the word "thereof" as referring to the manner of proof, rather than to "acts, Records, & proceedings." The effect of "acts, Records, & proceedings" had been the whole point of dispute between Morris's earlier motion and the more limited proposal of the committee of five.

192. *Id.* at 488 (Madison). Madison did not specify whether Johnson spoke for or against Morris's motion. One must infer his position from the fact that he was on the committee of five that now was advancing a proposal contrary to Morris's. If this is true, the discussions in committee might have changed Johnson's view from what it seems to have been on August 29, when he and Wilson responded to Dr. Wilkinson's query about the Detail Committee's proposed "full faith" clause embracing "acts of the Legislature."

Madison also reports a comment by Colonel Mason of Virginia, which makes little sense as Madison reports it. Madison says Mason "favored" Morris's motion "particularly if the 'effect' was to be restrained to judgments & Judicial proceedings." *Id.* at 488. The purpose of Morris's motion, however, was to *eliminate* that restraint. Perhaps Madison got Mason's comment out of sequence, as it had been made *before* Morris's motion; or perhaps Madison mistook Mason's position, as Mason had actually spoken for the Committee's proposal instead of for Morris's.

193. *Id.* at 488 (Madison).

194. *Id.* at 448 (Madison).

> Report, which enables the Legislature to provide for the effect of *Judgments*.[195]

James Wilson was the third member of the committee of five responding to Morris's September 3 motion. As to judgments, Wilson observed that unless the national legislature were authorized to "*declare the effect*," the nascent "full faith and credit" clause "would amount to nothing more than what now takes place among all Independent Nations"[196]—an allusion to the prima facie evidence rule that was accurate at the time as to nations (like ours, and like Wilson's native Scotland) that followed the common law, but not as to the practice of some other countries. Wilson's point was that, without the second sentence's grant of power to the legislature, the Full Faith and Credit Clause would remain simply a prima facie evidence rule—as the court in Wilson's own Pennsylvania had held the full faith and credit provision in the Articles of Confederation to be.[197] That was why Wilson and the rest of the committee of five, seeking to improve upon the Articles of Confederation, had followed Morris so far as to empower the national legislature to prescribe sister-state "effect," albeit only for judgments.

Morris, however, wanted more. He wanted the effect of sister-state statutes, no less than of judgments, to be prescribed by the national legislature rather than determined severally by the states. Remember that at this stage of the Constitution's drafting, the wording of what would become the second sentence of the Clause was still mandatory: "[T]he Legislature shall by general laws prescribe." Morris's motion therefore meant the legislature would be mandated to prescribe rules regarding sister-state effect as well as authentication or proof, and regarding statutes as well as "[r]ecords & proceedings." Anyone cognizant of Randolph's concern would have understood that, whatever might be the particular rule prescribed for sister-state effect, there definitely would be some displacement—or "usurping," to use Randolph's word—of the states' sovereign power to determine the law and public policy applicable within their respective bounds.

Morris's motion nonetheless passed six states to three.[198] Madison thereupon moved to change the word "shall" in the second sentence to

195. *Id.* at 488-89 (Madison).

196. *Id.* at 488 (Madison).

197. Phelps v. Holker, 1 Dall. 261 (Pa. 1788).

198. 2 FARRAND, RECORDS, supra note 166, at 486 (Journal); *id.* at 489 (Madison).

"may."[199] This plainly would tend—and from its timing, seems to have been designed—to mollify Randolph's concern by making it explicit that Congress *need not* engage in the overreaching that Randolph feared, but would have discretion to distinguish, for example, between the sister-state effect of judgments and any sister-state effect of "public Acts." Madison's motion, in other words, seems to have been calculated to accommodate such concerns as Randolph had expressed, while still affording Congress ample power to mandate such sister-state effects as the lawmakers' judgment, conditioned by the nation's experience and its changing needs from time to time, might advise.

With regard to Randolph's "usurpation" concern, E.S. Corwin remarked in 1933 that "the objection went unheeded."[200] It appears to the contrary, however, that Randolph's fear of usurpation of state sovereignty precipitated Madison's extremely important amendment. Morris's motion had been hotly debated and had passed with a third of the states still opposed; but Madison's amendment seems to have satisfied all, for no one opposed it, and the entire clause as so amended was approved "witht. a count of Sts."[201] With this, except for some nonsubstantive changes made later by the Committee of Style,[202] the Full Faith and Credit Clause attained its final form.

The new, second sentence of the Full Faith and Credit Clause is a grant of legislative power to Congress, and legislative power imports discretion. On its face, the discretion so granted over proof and effect is as plenary within the terms of the grant as is, for example, the discretion given Congress over "Commerce . . . among the several States."[203] The word "may" in the second sentence imports discretion, both as to what and as to whether Congress should prescribe. General laws regarding authentication procedures might seem useful, or they might seem unnecessary; the question of whether to prescribe them, and whether to make them the same for "public Acts" as for judicial records, might turn on practical considerations best left for the Congress to assess. Madison evidently thought the same as to sister-state effect. His amendment thus empowered Congress, following its own judgment, to fashion whatever "general Laws"[204] it deemed advisable about

199. *Id.* at 486 (Journal); *id.* at 489 (Madison). The same motion changed the word "may" in the *first* sentence of the draft clause to "shall." *See infra* text accompanying notes 214-215.

200. Edward S. Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371, 388 (1933).

201. 2 FARRAND, RECORDS, supra note 166, at 489 (Madison); *see id.* at 486 (Journal).

202. For the Report of the Committee of Style, see *id.* at 590-603. For discussion of the Full Faith and Credit Clause, see *id.* at 601.

203. U.S. CONST. art. I, § 8, cl. 3.

204. To construe this "general Laws" requirement as precluding subject-matter specificity, rather than as contemplating nationwide applicability, would serve no purpose identifiable with

either of the two matters addressed in the new sentence (that is, "proof" and "Effect"), and with respect to any (or none) of the three specified categories ("public Acts," "Records," and "judicial Proceedings"). Congress was thus given discretion to decide these matters sooner or later, if at all, and to change its mind as well.

This plenary discretion was surely not meant to invite whimsy. It reflects a practical understanding that not only the methods of authentication, but also the *effects* to be imposed on sister-states, might need to differ for different sorts of state actions, and that an undiscriminating mandate at the constitutional level might prove to be dysfunctional or at least unwise. Granting this discretion to Congress enabled it to accommodate whatever competing considerations it might deem appropriate. Thus, by its choice of prescription, Congress could facilitate interstate cooperation and integration when and wherein its practical wisdom might suggest and its public accountability might allow.

This "textually demonstrable constitutional commitment"[205] to Congress of discretion to prescribe sister-state effect is explicit and unequivocal. "Textual commitments" much more equivocal than this have been held to render questions nonjusticiable.[206]

Some scholars have argued that this congressional power to prescribe sister-state effect is far more limited, however. Laurence Tribe, for example, in a 1996 letter denying Congress's power to enact the so-called Defense of Marriage Act, analogized Congress's power regarding sister-state effect to the "one-way ratchet" operation of Congress's enforcement power under certain constitutional amendments.[207] Senator Edward Kennedy inserted Tribe's letter into the *Congressional Record*,[208] and Tribe repeated the thesis in the third edition of his *American Constitutional Law* treatise in 2000.[209] Meanwhile, Larry Kramer had elaborated upon the supposed analogy in a 1997 article, arguing that Congress could "not undermine or abolish," but could only "implement

concerns aired at the Convention and would severely curtail the discretion the surviving records indicate the delegates intended to ensure.

205. Baker v. Carr, 369 U.S. 186, 217 (1962).

206. *E.g.*, Gilligan v. Morgan, 413 U.S. 1 (1973); Coleman v. Miller, 307 U.S. 433 (1939).

207. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

208. 142 CONG. REC. 13,359 (1996) (reprinting Letter from Laurence Tribe, Professor, Harvard Law Sch., to Edward M. Kennedy, U.S. Senator (May 24, 1996)).

209. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1247 n.49 (3d ed. 2000).

and facilitate," the replication rule he attributed to the constitutional Clause itself.[210]

The Enforcement Clauses, however, were deliberately patterned after the Necessary and Proper Clause,[211] and both it and they are specifically written in explicitly telic[212] terms. In contrast, nothing on the face of the Full Faith and Credit Clause even remotely suggests that the power it gives to Congress might be similarly confined. Indeed, not even the proponents of this restrictive view apply it to the other matter that precisely the same words place in Congress's untrammeled discretion: "[T]he Manner in which such Acts, Records and Proceedings shall be proved . . . ."[213]

Other commentators have opined on what Madison's September 3 motion accomplished in the first sentence of the pending draft of the Clause: changing its permissive "may" to "shall," so as to provide that "full faith and credit shall be given."[214] But that part of Madison's motion simply restored the mandatory "shall" to the very same place it had occupied in the Article of Confederation's provision.[215] As the Confederation Congress's own committee had observed (and as the case decisions had confirmed), the Articles of Confederation had left the question of sister-state effect completely unaddressed. That is why the mandatory requirement of "full faith and credit" under the Articles had not displaced the prima facie rule. That part of Madison's motion, therefore, accomplished nothing new or remarkable at all.

In contrast, no previous commentator has acknowledged the very great significance of the change that Madison's motion made in the second sentence of the Clause: the change from the mandatory "shall" to the discretionary authority "the Legislature may . . . prescribe." When this change has been noted at all, its full significance has not been acknowledged. Gillian E. Metzger, for example, noted this change. Accepting the modern orthodox view that the Full Faith and Credit Clause itself mandates sister-state effect, however, she

210. Kramer, *supra* note 21, at 2003, 2004.

211. U.S. CONST. art. I, § 8, cl. 18.

212. "Telic" derives from the Greek *telos*, meaning "end." The term denotes the "means-to-end" essence of the Necessary and Proper Clause (and its Enforcement Clause analogues): power "for carrying into Execution" other enumerated powers (or "to enforce" constitutional protections).

213. U.S. CONST. art. IV, § 1.

214. *See, e.g.*, Laycock, *supra* note 12, at 292 (stating that "[t]he effect of Madison's amendment was to make the clause self-executing"—meaning, to Laycock, self-executing as to sister-state effect).

215. ARTICLES OF CONFEDERATION of 1781 art. IV, para. 3 ("Full faith and credit shall be given in each of these states . . . .").

assumed that the second sentence gave Congress only *subordinate*—rather than *exclusive*—discretion regarding whether and how far to mandate sister-state effect.[216]

IV. THE FIRST CONGRESS AND SISTER-STATE EFFECT

In several respects, when the First Congress exerted its power under the Full Faith and Credit Clause in 1790, it demonstrated deliberate exercise of the discretion conferred upon it. By choosing whether and how to deal with various matters at that time, it created legislative precedent for treating its discretion in this regard as untrammeled. The 1790 Act stated,

> That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and 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.[217]

The first sentence of the Act addressed authentication or proof, and Congress, in its discretion, tailored two different methods. The first clause of the sentence, dealing with "the acts of the legislatures of the several states," provided that they "shall be authenticated by having the seal of their respective states affixed thereto." The second clause prescribed a much more elaborate, three-step process of attestation, seal, and certification by which "records and judicial proceedings of the courts of any state" "shall be proved or admitted"[218]

216. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1497-98 (2007). See also the commentary of Douglas Laycock, whose error inheres in the orthodox fallacy that a mandate for sister-state effect is "what the constitutional text plainly says." Laycock, *supra* note 12, at 293.

217. Act of May 26, 1790, ch. XI, 1 Stat. 122 (emphasis added).

218. Unlike in the first main clause, here the word "authenticated" was not used. The second sentence of the Act, however, referred to "records and judicial proceedings authenticated as" specified in the first sentence—showing that the different terms were used as equivalents. *Id.*

in "any other court within the United States." The difference was not whimsical; it responded to different needs.[219]

That second clause of the Act's first sentence shows the exercise of discretion in another respect as well. From the immediate juxtaposition of adjective and noun, it is plain that the only "proceedings" contemplated by that clause of the statute were "judicial" ones. The noun "records" was separated from the adjective "judicial" by a conjunction, however, making it grammatically possible to argue that nonjudicial "records," as well as judicial ones, were embraced. But grammar cannot control apart from context; taking the statute's second clause as a whole, one is driven to conclude that this second clause contemplated only judicial "records." The clause required attestation by a court's clerk, with a court's seal, and certification by "the judge, chief justice, or presiding magistrate, as the case may be"; the entire clause applied only to proving such records "in any other court"; and in its final phrase ("whence the said records are or shall be taken"), the single word "records" was used to embrace all of "said records and judicial proceedings authenticated as aforesaid."[220]

The contextual factors constraining the meaning of "records" in that clause of the statute, however, are absent from the Constitution's Full Faith and Credit Clause. While earlier legal usage could impose a similar constraint on the meaning of records in the constitutional provision,[221] in common discourse by the late eighteenth century that term was usually taken to include nonjudicial "records" as well. Yet it was not until 1804 that Congress passed an Act prescribing either proof or effect for *nonjudicial* "records."[222] Thus, by dealing in 1790 with only some of the "records" it regarded as embraced by the Clause, and waiting to deal with others until 1804, Congress again exercised the discretion deliberately conferred upon it by the second sentence of the Clause.

219. Justice Washington explained later at circuit why the less elaborate process could suffice to authenticate legislative acts: "The seal [of a state] is in itself, the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy, as to the officer entitled to affix the seal, which is a regulation very different in the different states." United States v. Johns, 4 Dall. 412, 416 (Washington, Circuit Justice, C.C.D. Pa. 1806).

220. *See supra* text accompanying note 217.

221. Lord Chief Justice Coke had limited "records" to the rolls containing the pleadings and associated rulings in England's few "courts of record." 1 COKE, *supra* note 36, § 175, 2 *id.* § 438. While Gilbert had stretched the word to include letters patent and acts of parliament, he had explicitly excluded such public archives as the Domesday Book, the ports survey, and the register of christenings and burials. *See* GILBERT, *supra* note 37, at 76-79.

222. Act of Mar. 27, 1804, ch. LVI, 2 Stat. 298, 289-99.

Regarding the "Effect" to be given, the second sentence of the 1790 Act required that "records and judicial proceedings authenticated as" the first sentence specified must be given "such faith and credit . . . as they have by law or usage in the courts from whence the said records are or shall be taken." The Clause, of course, mandates that "full faith and credit" be given "in each State" without limiting the obligation to particular departments or branches; and Congress could have been just as comprehensive in prescribing sister-state "effect." Instead, the 1790 Act prescribed only the effect to be given by "every court." In this respect, too, Congress went further in its 1804 Act, stating that the nonjudicial records first embraced in that year "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."[223] Again, the critical point is that the First Congress exercised its discretion by doing *less* than the Full Faith and Credit Clause made it competent to do.

The most conspicuous example of Congress's exercise of its discretion to prescribe less sister-state effect than it has power to prescribe is the First Congress's decision against prescribing *any* sister-state effect for "public Acts." (Indeed, no subsequent Congress decided otherwise for over a century and a half.[224]) Some members of the First Congress had participated at the recent Constitutional Convention, and must have been aware of the objections raised there regarding sister-state effect for state statutes. It cannot have been inadvertent that, while prescribing how to *authenticate* the "public Acts" of one state in another, Congress kept conspicuously silent about their sister-state *effect*. It was instead a deliberate exercise of Congress's discretion to leave the question of sister-state effect for statutes untouched. This left the states free to determine how far (if at all) to give effect to sister-state laws, based on their respective conceptions of comity and such choice of law rules as each might elect to apply.

223. *Id.* at 299. At the same time, the 1804 Act employed the same "such faith and credit . . . as" construction that was used in the 1790 Act—even though the 1804 Act dealt only with records and books "not appertaining to a court," and prescribed such faith and credit as were given in nonjudicial "offices" in the state of origin. *Id.* at 298. While nonjudicial records and books might indeed serve as evidence, either in or out of court, the nonjudicial "offices" of their origin would not have "adjudicated" them; they could not have res judicata effect, either at their origin or elsewhere. It thus seems apparent that, in this instance at least, the phrase "faith and credit" was being used and understood to import nothing more than credibility and sufficiency as evidence, and not incontestable conclusiveness.

224. No act of Congress undertook to prescribe sister-state effect for statutes before the Act of June 25, 1948, ch. 646, 62 Stat. 947 (codified as amended at 28 U.S.C. § 1738 (2000)).

This deliberate omission of any congressional directive regarding the sister-state effect of statutes was not supplied even by the 1804 Act. By then, the nation had gained experience in practical aspects of governing territory outside the boundaries of any state, including some issues similar to those that the 1790 Act had addressed regarding states. Accordingly, Congress prescribed that

> all the provisions of this [1804] act, and the [1790] 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.[225]

Notably, there still was no mention of any effect that "public acts" must be given. This 1804 language simply made the 1790 Act and the other 1804 provisions applicable for the territories "as well." While the latter prescribed the effect to be given to territorial "records, office books, and judicial proceedings," nowhere did either Act prescribe any effect for "public acts."

By far the most important feature of the 1790 Act's second sentence, however, was its use of the adjectival phrase "such . . . as." The Clause itself specified "full" faith and credit, but the 1790 Act prescribed "such faith and credit . . . as" was had in the forum of origin. The two expressions crucially differ in meaning. The key is not the "faith and credit" phrase itself, but the choice of adjectives used with that phrase.

As already shown, "full" was in common use at that time with reference to the sufficiency of evidence to constitute prima facie proof. That is how courts applying the "full" faith and credit provision of the Articles of Confederation had construed it. Arguments that "full" in the Articles's provision meant "conclusive" had been judicially rejected. No evidence has ever been offered to suggest that those who framed the Constitution's Full Faith and Credit Clause contemplated a different meaning for the phrase "full faith and credit" than it had carried in the Articles of Confederation.

In contrast, the adjectival expression "such . . . as" is comparative, importing similarity or equivalence of the matters compared. The "such . . . as" phrase in the 1790 Act thus prescribed that the second forum replicate what pertained in the first, so that, for example, if in the court of its origin a judgment were conclusive on the parties, it must be taken as conclusive on the

225. Act of March 27, 1804, ch. LVI, 2 Stat. 298.

parties by the courts of sister states. If it were interlocutory where rendered, it must likewise be treated as interlocutory in sister states, and so on.

This "such . . . as" rule was not the only option available to Congress regarding sister-state effect, and therefore it surely was not the only alternative considered. In fact, Madison had noted one alternative three years before at the Constitutional Convention: when other delegates referred to judgments from one state being "the ground of actions in other States,"[226] he had suggested instead "provid[ing] for the execution of Judgments in other states, under such regulations as might be expedient."[227] He envisioned a judgment creditor presenting his Virginia judgment, for example, to a Maryland sheriff for levy against the debtor's Maryland property. Madison thought this "might be safely done and was justified by the nature of the Union."[228] It has been widely acknowledged that this still remains within Congress's discretion to prescribe.[229]

Without providing for execution in sister states, Congress could have prescribed that a second state must regard a sister state's judgment as conclusive even if it might be subject to reconsideration or modification where rendered, unless and until such reconsideration or modification by the original forum occurred. Such a rule would have resembled the treatment that English secular courts for centuries had afforded English ecclesiastical determinations, which—at least as to marriage—always remained open to ecclesiastical reconsideration.[230] Drawbacks to this alternative might well have been perceived; indeed, Justice Washington identified several some years later.[231]

226. *See* 2 FARRAND, RECORDS, *supra* note 166, at 447 (Madison).

227. *Id.* at 448.

228. *Id.*

229. *See, e.g.*, Jackson, *supra* note 24, at 21 ("In 1927 a committee of distinguished lawyers made an exceptionally able report to the American Bar Association including a proposed bill to carry out Madison's idea, and the Association recommended its adoption by Congress. The reform seems to have died a-borning."); Note, *Constitutionality of a Uniform Reciprocal Registration of Judgments Statute*, 36 N.Y.U. L. REV. 488 (1961). For other discussions of Congress's option to prescribe a system like Madison envisioned, see, for example, *Green v. Sarmiento*, 10 F. Cas. 1117, 1118 (Washington, Circuit Justice, C.C.D. Pa. 1810) (No. 5760); and Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919).

230. *See* Kenn's Case, (1606) 77 Eng. Rep. 474, 476 (K.B.) ("[*S*]*ententia contra matrimon' nunquam transit in rem judicat'*."). This proposition, roughly translated as "a determination controverting a marriage never becomes res judicata," was repeated in a large number of cases spanning centuries.

231. *Sarmiento*, 10 F. Cas. at 1119-20.

The point here, though, is that such a rule was another available alternative the First Congress did not choose.

Yet another alternative was the one that Massachusetts, while still a colony, had enacted in 1774 and still had on its statute book when the First Congress acted under the Constitution. The Massachusetts statute provided that judgments from other states, when sued on in Massachusetts, were to "have the same effect and operation, as if" rendered in the Massachusetts court, regardless of what might have been their "effect and operation" where rendered.[232] In 1788, Jared Ingersoll of Philadelphia had tried unsuccessfully to persuade the Pennsylvania Supreme Court that this was the import of the Articles of Confederation's full faith and credit provision,[233] but Congress prescribed the exact converse by the 1790 Act.

Which of these rules is better is beside the point. What matters is that Congress had several options for sister-state effect (including no effect at all) and had untrammeled discretion to choose among them. Today one might conclude, perhaps even for reasons apart from familiarity, that the rule the First Congress chose for judgments was the best of all possible options. Nevertheless, the "such . . . as" rule remains a legislative choice made by Congress in 1790, and was not at all compelled by the Constitution's Full Faith and Credit Clause.

There was early disagreement, however, as to whether Congress indeed had prescribed any sister-state effect even for judgments. The first case to consider that question affirmed that Congress had indeed done so: *Armstrong v. Carson*[234] was an action of debt on a New Jersey judgment brought in diversity in 1794 in the Federal Circuit Court for Pennsylvania. Defendants pleaded *nil debet* (the general issue to an action of debt), under which plea the defendants could have produced evidence to defeat the obligation that the

232. *See supra* note 123 and accompanying text.

233. Ingersoll argued,

> [I]f it is admitted that by this article, the authors of the system intended to make a Judgment in New Jersey as binding in Pennsylvania, as if it had been obtained in any County of this State, no other form of words, or mode of expression, could have been selected more clearly to convey that intention.

Phelps v. Holker, 1 Dall. 261, 263 (Pa. 1788) (emphasis omitted) (quoting the argument of counsel).

Not long after Congress enacted its 1790 Act, Massachusetts repealed its contrary statute—which already had been superseded by virtue of the Supremacy Clause. The 1774 Massachusetts act and its 1795 repeal are both referred to in *Bissell v. Briggs*, 9 Mass. (1 Tyng) 462, 465-66 (1813).

234. 1 F. Cas. 1140 (Wilson, Circuit Justice, C.C.D. Pa. 1794) (No. 543).

plaintiff would have proven prima facie by showing his New Jersey judgment.[235] *Nil debet* could not have been pleaded in New Jersey, however, for that plea would open the merits and in New Jersey the first judgment was res judicata. Thus, applying the "such . . . as" rule prescribed by Congress's 1790 Act, Justice Wilson held,

> If the [*nil debet*] 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.[236]

Justice Wilson's 1794 ruling heralded a revolution in American practice, proclaiming the end of the prima facie rule for sister-state judgments. Under the practice of that period, *nil debet* had been the proper plea in traverse to an action of debt on a sister-state judgment, but Justice Wilson declared it forbidden—at least as to judgments that were res judicata at home. In *Walker v. Witter*, Lord Mansfield had called a traverse by plea of *nul tiel record* in such an action "improper," and Justice Buller had called that plea a "mere nullity."[237] In stark contrast, Justice Wilson now pronounced it the only plea allowed. Most importantly, Justice Wilson attributed this revolution not to the Full Faith and Credit Clause, but rather to Congress's 1790 Act.[238]

Justice Wilson's trumpet did not sound the end of the battle. Nineteen years later the Supreme Court would affirm that Justice Wilson had gotten it right,[239] but until then controversy would rage. The fact that the second sentence of the 1790 Act did not use the specific word "Effect," instead using the same ambiguous "faith and credit" phrase employed in the Full Faith and Credit Clause itself, gave rise to confusion and disagreement—another unhappy consequence of the "indeterminateness" of this phrase that Madison lamented.[240]

In 1801, for example, Judge Jacob Rush of the Pennsylvania Court of Common Pleas said that Congress

235. Walker v. Witter, (1778) 99 Eng. Rep. 1, 4 (K.B.).

236. *Armstrong*, 1 F. Cas. at 1140.

237. 99 Eng. Rep. at 4, 6.

238. *Armstrong*, 1 F. Cas. at 1140 ("[W]hatever doubts there might be on the words of the constitution, the act of congress effectually removes them . . . .").

239. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813).

240. *See* THE FEDERALIST NO. 42 (James Madison), *supra* note 5, at 287.

> have not said a word, as to what shall be its *effect* in another state. . . . [T]hey only say, it shall have "*the same faith* and *credit*" it had in the *courts of the states*, from which it was brought. The plain meaning of which is, it shall be as completely legal evidence of the existence and correctness of such record, *out* of the state, as it would be *in* the state. . . .
>
> . . . .
>
> In our opinion, where debt is brought on a judgment obtained in another state, the defendant should always plead *nil debet*, in order to let the court into the circumstances of the case . . . . And this is the law and practice in *England*, in actions of debt on foreign judgments.[241]

Justice Radcliff of the New York Supreme Court took the same view in 1803, in *Hitchcock v. Aicken*, stating,

> At first view, the framers of this act seem to have intended a regulation beyond the provision contained in the constitution; but if this was their intent, I think they have not accomplished their end. . . .
>
> . . . The constitution . . . makes the distinction . . . between credit and effect. With this distinction, plainly drawn, I cannot suppose that congress meant to confound it by treating the terms faith and credit, as synonymous with effect. . . . Nothing more than the mode of authentication was, therefore, provided for by the act of congress. When so authenticated, they are entitled to full faith and 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.[242]

241. Wright v. Tower, Browne Rep. app., at i, xi, xvi (Pa. C.P. Luzerne County 1801). In that case there was a New York judgment against a Pennsylvanian on notes given to a New Yorker for land in Pennsylvania. The Pennsylvanian claimed fraud in the transaction, but he could not have pleaded fraud in the New York action at law because, in New York, fraud was cognizable only in equity in the separate Court of Chancery. The Pennsylvanian therefore pleaded *nil debet* in the Pennsylvania suit on the New York judgment at law against him, in order to raise the fraud defense he had no opportunity to prove in New York's court of the common law.

242. Hitchcock v. Aicken, 1 Cai. 460, 475-76 (N.Y. Sup. Ct. 1803) (opinion of Radcliff, J.).

And in the same New York case, Justice James Kent[243] opined,

> The act of congress does not declare the record shall have the same *effect*, but only the same *faith and credit*, and there is a manifest and essential difference between the one mode of expression and the other. . . .
>
> It is 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; nor ought the act of congress to be carried further than the words will warrant. . . .
>
> . . . .
>
> The result of my opinion is, that the judgment in question is to be considered in the light of a foreign judgment, and only *prima facie* evidence of the demand.[244]

Judge Sedgwick of Massachusetts joined the list of *Armstrong v. Carson*'s critics in 1805, saying that the 1790 Act "stops short of declaring what shall be their effect."[245]

It should be noted that none of the foregoing state judges maintained that the Full Faith and Credit Clause itself mandated giving "Effect" to sister-state judgments. Instead, those who construed the 1790 Act as silent about effect concluded that, even under the terms of the Clause itself, one state's judgment need be regarded by other states as nothing more than prima facie evidence.

In contrast, other state judges shared Justice Wilson's understanding of the 1790 Act. New York Supreme Court Justice Smith Thompson, for example, in the 1803 New York case mentioned above, wrote,

> Although the act of congress does not adopt the term *effect* . . . yet, if it means any thing, it means to declare the effect. . . . It being a subject

243. Justice Kent would become Chief Justice of the New York Supreme Court the next year, and Chancellor ten years later.

244. *Hitchcock*, 1 Cai. at 481, 483 (opinion of Kent, J.). In *Taylor v. Bryden*, 8 Johns. 173 (N.Y. Sup. Ct. 1811), Justice Kent reaffirmed the prima facie rule of the earlier case, but gave effect to the judgment out of comity because the defendant failed to produce evidence sufficient to impeach it.

245. Bartlet v. Knight, 1 Mass. (1 Will.) 401, 409 (1805) (opinion of Sedgwick, J.). The other members of the court shared Justice Sedgwick's conclusion that the sister-state judgment could be reexamined, just as before the Constitution, taking neither the Clause nor the 1790 Act to displace the prior practice.

> within the power of congress to declare the *effect,* I do not see why the act ought not to receive the same construction. 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.[246]

New Jersey's Judge Pennington also supported Justice Wilson's view, saying in 1805 of New York Justices Radcliff and Kent,

> [I]f I understand them, they found their reason principally on the fact that Congress hath not made use of the word *effect.* I do not know that it is necessary for the Legislature in the exercise of a power delegated to them by the constitution, to make use of the precise words of the constitution itself. The power given is to prescribe the effect of certain records. The execution of the power is a law declaring that those records "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." Is this not to prescribe the effect? . . . Suppose Congress, instead of enacting what it hath done, had enacted that those records should have such faith and credit given to them in every court of the United States, as the records of the courts of Jamaica, Ireland, France and England have in the said courts of the United States, would not the effect have been different? Would it not change the effect from conclusive to prima facie evidence? . . . The effect is to depend on the credit given them. If the credit given them is such as that they cannot be contradicted, they will have one effect; if the credit given them is such as to make them prima facie evidence only, then another effect will be produced from them . . . .[247]

And so the disagreement persisted.[248]

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246. *Hitchcock*, 1 Cai. at 464-65 (opinion of Thompson, J.).

247. Curtis v. Gibbs, 2 N.J.L. 399, 403-04 (N.J. 1805) (Pennington, J.). North Carolina judges opted for Justice Wilson's *Armstrong* view, too, in *Wade v. Wade*, 1 N.C. 601 (Super. L. & Eq. 1804).

248. For further documentation of this disagreement, see Sachs, *supra* note 32 (manuscript at 19-47). For a generation, the disagreement was persistent and prominent enough to stir repeated efforts for clarifying legislation. *Id.* Notably, however, it appears that during the first quarter-century under the Constitution no member of Congress, and no state or federal judge other than New York's Judge Livingston in his idiosyncratic dissent in the 1803

V. HEGEMONY AND ECLIPSE OF THE CLASSIC RULE

A. The Early Views of the Supreme Court Justices

The Supreme Court had no occasion to apply the 1790 Act until long after Justice Wilson had died, but individual Justices had occasion to deal with the Act in their Circuit Court duties. Five of the six Justices who would later participate in the Supreme Court's decision opined separately on the Act, on the Clause, or on both; and their views were not harmonious. Each is discussed here in turn.

1. Bushrod Washington

Justice Bushrod Washington, who succeeded Justice Wilson in 1799, was the next to opine on the "such . . . as" rule of the 1790 Act.[249] In *Banks v. Greenleaf*[250] in 1799, and again a decade later in *Green v. Sarmiento*,[251] Justice

Hitchcock case, *see infra* notes 269-276, went on record as maintaining that any sister-state effect was mandated by the Constitution's Full Faith and Credit Clause itself.

249. In *Peck v. Williamson*, 19 F. Cas. 85 (Marshall, Circuit Justice, C.C.D.N.C. 1813) (No. 10,896), Chief Justice Marshall alluded to a ruling by Justice Cushing while sitting at circuit in Virginia, but if any report of that ruling was made and survives, I have not found it. *See also* Bastable v. Wilson, 2 F. Cas. 1012, 1012 (C.C.D.C. 1803) (No. 1097) (indicating that the "plea of nil debet" was "refused without argument" and that "[j]udgment [was] confessed saving equity").

250. 2 F. Cas. 756 (Washington, Circuit Justice, C.C.D. Va. 1799) (No. 959). The opinion in this case has sometimes been misunderstood. Greenleaf pleaded a subsequent discharge under Maryland's bankrupt law to Banks's suit against him in Virginia based on a bond contract, but Banks demurred, having had no notice of the Maryland proceedings and not having been party to them. Justice Washington first determined that, under principles of private international law (apart from admiralty), the Maryland judgment was not one that "can bind persons [like Banks] residing out of that state," for "if a law of a foreign country were to declare that a decision of causes, without notice, should bind everybody, no foreign country would observe it." *Id.* at 758. Then he inquired what difference, if any, should result from applying the Full Faith and Credit Clause.

Focusing first on the opening sentence, Justice Washington observed, "Full faith must be given. Therefore you cannot question the validity of the judgment. This is the construction given in the case of Armstrong v. Carson, in the circuit court of Pennsylvania, by Judge Wilson . . . ." *Id.* at 759 (citation omitted). Next, however, Justice Washington paraphrased the very language that Justice Wilson had used to redirect inquiry toward the 1790 Act. Justice Wilson had judged sister-state effect according to the "such . . . as" rule of that Act (enacted under the second sentence) and had taken the Act—not the Clause—to preclude a plea in Pennsylvania that could not have been made in New Jersey if enforcement of the New Jersey judgment had been sought in New Jersey instead. The same "such . . . as" rule would mean that Greenleaf's plea of a discharge in Maryland would be good in Virginia

Washington applied and enlarged upon Justice Wilson's view. In the latter case he observed that a major purpose of the Full Faith and Credit Clause was "to invest congress with the power to declare the judgments of the courts of one state, conclusive in every other"[252]—or "even to clothe them with a still more extended force and effect."[253] In contrast, he said, Congress has no power to

if—but only if—it would have been a good plea in Maryland had Banks sued Greenleaf there.

Even though he construed the "full faith and credit" mandate to mean "you cannot question the validity of the judgment," Justice Washington sustained Banks' demurrer. That was because he distinguished between the "validity" of a duly proven sister-state judgment (that is, its authenticity and accuracy as evidence of what the sister-state court had done) and its effect (that is, its legally obligatory force, if any). The first sentence of the Full Faith and Credit Clause concerned the former, but the second sentence of the Clause addressed the latter: it empowered Congress to go beyond questions of authenticity and accuracy to prescribe sister-state effect—including whether and to what extent the judgment should be binding out-of-state. For this, the 1790 Act prescribed the "such . . . as" rule, which contemplated no greater effect elsewhere than at home; and therefore, if the judgment as rendered fell short of international law standards (for example, if it was entered without opportunity to defend), that defect would follow it everywhere.

This had not been an issue in *Armstrong*, but it was the basis of decision in *Banks*. Relying on the international law principle he had cited, *id.* at 758, Justice Washington said that "[t]his cannot be considered as a judgment . . . which can bind persons residing out of that state" who were not parties, had not received notice, and had not submitted to the jurisdiction. *Id.* In effect, he held the first forum's jurisdiction (in the international law sense) prerequisite to sister-state effect under the 1790 Act.

Ralph Whitten evidently misunderstood Washington's use of the word "validity," taking *Banks v. Greenleaf* to hold that the Full Faith and Credit Clause itself requires giving sister-state judgments some "nonevidentiary effect." Whitten, *supra* note 30, at 298. Whitten therefore concluded that Justice Washington's later opinion in *Green v. Sarmiento*, 10 F. Cas. 1117 (Washington, Circuit Justice, C.C.D. Pa. 1810) (No. 5760), applied a contrary rule. It did not; however, *Sarmiento* did make Justice Washington's position clearer.

251. 10 F. Cas. 1117. Nadelmann has dated the decision to April 1811. *See* Nadelmann, *supra* note 30, at 66.

252. *Sarmiento*, 10 F. Cas. at 1118.

253. *Id.* Justice Washington also maintained that Congress, if it chose, could render state judgments directly enforceable out-of-state:

> Why ought not an execution to issue, upon a judgment rendered in one state, against the person and effects of the defendant, found in any other? It is unnecessary, however, to moot the policy of the measure, which must rest with congress in its wisdom to adopt, if it should seem right to that body to do so.

Id. at 1120. This is what Madison had suggested at the Philadelphia Convention. *See supra* text accompanying notes 226-229.

specify what "faith and credit" must be given "as a matter of evidence," because the Clause itself did that.[254]

Justice Washington also noted that Congress was free to prescribe *less* than conclusive effect. To illustrate why this might be appropriate, he cited several "very embarrassing questions" and "mischievous consequences" that could follow if sister-state conclusiveness were prescribed for judgments that were not conclusive at home, or were conclusive there only in part, or only for a limited time.[255] Moreover, he said, if the 1790 Act's "such . . . as" rule should prove unsatisfactory, "then I can only say, that the act of congress was not passed with sufficient consideration; and that it may, and ought to be . . . amended."[256]

In sum, Justice Washington at circuit maintained the same view of both the Clause and the 1790 Act that his predecessor, Justice Wilson, had taken in *Armstrong v. Carson*.

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254. *Id.* at 1119. Justice Washington therefore concluded that, in saying that authenticated records and proceedings "shall have such faith and credit given to them . . . as . . . in the courts of the state from whence . . . taken," the 1790 Act must be understood not as requiring that "full faith and credit should be given to them as a matter of evidence," but rather as contemplating "one of the two objects, referred to [Congress] by the constitution"—to wit, manner of proof, and effect. Because the manner of proof was provided for in the first sentence of the 1790 Act, the Justice reasoned,

> the conclusion is inevitable, that this [second] sentence [of the Act] was intended, and could only have been intended, to declare the force and effect to be given to records and judicial proceedings, when so authenticated. Under this view of the subject, the power to limit the effect of such judicial proceedings, is undoubted; and it was wisely left to the discretion of congress, to regulate the degree of force to be given to such [sister-state] proceedings.

Id. at 1119; *see also* Field v. Gibbs, 9 F. Cas. 15, 16 (Washington, Circuit Justice, C.C.D.N.J. 1815) (No. 4766) ("The constitution declares, that they shall be entitled to 'full faith and credit,' and consequently, no law was necessary or would have been proper, to make them evidence. The law therefore in using the words, 'full faith and credit,' must have meant to express the effect, to which they were to be entitled in other states."). Incidentally, notice Justice Washington's—or the reporter's—mistake in adding the adjective "full" to the words used in the statute.

255. *Sarmiento*, 10 F. Cas. at 1119. These examples, Justice Washington explained, "and a variety of other cases, which might be put, show the wisdom of the legislature, in giving to such judgments, only such credit, as they possess in the state where they were rendered." *Id.* at 1120. Justice Washington used appositive phrases to emphasize the choice that Congress had made in prescribing the "such . . . as" rule: "as much faith and credit . . . as," and "the same faith and credit . . . which . . . ." *Id.* The appositive "same . . . as" was used again in *Short v. Wilkinson*, 22 F. Cas. 15, 15 (No. 12,810) (C.C.D.C. 1811) (per curiam).

256. *Sarmiento*, 10 F. Cas. at 1120.

2. Joseph Story

While still in his mid-twenties, Joseph Story intimated his understanding of the 1790 Act in an 1805 book on pleading.[257] First he recited the observation and query of another lawyer[258] as to

> whether a Court is bound "to enforce the judgment of a Court in another State as a matter of course, and without inquiry of the grounds of the judgment. The act of Congress seems to provide for the evidence only. In England the Courts will not enforce judgments rendered by the Courts of their colonies, *as judgments*, but only as evidence, prima facie, of a debt. . . . [A]nd so the law is laid down in Doug. 4, 5."[259]

Story responded, rejecting the prima facie rule referred to in this query by citing Justice Wilson's opinion in *Armstrong v. Carson*, which Story accurately perceived to mean "that no other plea could be admitted, but what would be admitted in the State Court whence the record was taken."[260]

Significantly, this exchange appeared in a section of Story's book about pleading to declarations of "Debt on Judgments," and under the heading of "*Nul Tiel Record*." There was no discussion at all of *nil debet*. In a competent book on pleading, this could hardly have been so had young Story not accepted as prevailing law the pleading revolution that Justice Wilson had heralded in *Armstrong v. Carson*. Elsewhere in the same book, and again discussing *nul tiel record*, Story noted that copies of judicial records and proceedings authenticated as prescribed by the 1790 Act "are thereby made of the same force as the originals in the courts where they are"[261]—that is, the 1790 Act made the authenticated copies as good in the second forum as the originals were in the first.

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257. JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS (Salem, Barnard B. Macanulty 1805).

258. Before publication, Story's *Pleadings* had been "perused by several learned Counsel," *id.* Preface at v n.•; and some had made comments which, Justice Story said, he had "quoted between commas without any *particular authority* being adduced." *See id.* at vi.

259. *Id.* at 296. "Doug. 4, 5" is a reference to Lord Chief Justice Mansfield's opinion in *Walker v. Witter*, (1778) 99 Eng. Rep. 1, 4-6 (K.B.), which was first published on pages 1 through 7 of the first volume of *Douglas's Reports*.

260. STORY, *supra* note 257, at 296.

261. *Id.* at 135 (falling under the heading of "FORMER JUDGMENT," in the section on "ASSUMPSIT—*IN BAR*").

3. John Marshall

Chief Justice John Marshall articulated his view at circuit a few weeks before the Justices, sitting together as the Supreme Court, would consider the issue. Like Justice Washington (and the late Justice Wilson and the young Justice Story), Chief Justice Marshall 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 another. With respect to the former, the constitution is peremptory that it must have full faith and credit; with respect to the latter, it provides that congress may prescribe the effect thereof.[262]

But Chief Justice Marshall took a different view of the 1790 Act than Justices Wilson, Washington, and Story. Like Judge Rush of the Pennsylvania Common Pleas in 1801 and Judge Radcliff of the New York Supreme Court in 1803,[263] Chief Justice Marshall maintained that although it could have done so, "congress have not prescribed [a sister-state judgment's] effect."[264] Like Judge Rush, Marshall therefore concluded that the sister-state's record "should be allowed only such [effect] as it possesses on common-law principles"[265]—that is, it should be taken as prima facie evidence subject to further inquiry.

Thus, like several of his contemporaries, Chief Justice Marshall was misled by Congress's use of the same ambiguous "faith and credit" phrase employed in the Clause itself. Instead of following Justices Wilson and Washington and the young Joseph Story past that verbal obstacle, Marshall said he was unable to believe that Congress "use[d] the words 'faith and credit' in a sense different from that which they have in the clause of the constitution upon which they were legislating."[266] Of course, Chief Justice Marshall knew that the terms "faith" and "credit" were commonly used in discussions of evidence, and he obviously did not believe that those terms by themselves either denoted or connoted conclusiveness or preclusion. By failing to consider the crucial words

262. Peck v. Williamson, 19 F. Cas. 85, 85 (Marshall, Circuit Justice, C.C.D.N.C. 1813) (No. 10,896).

263. *See supra* text accompanying notes 241-242.

264. *Peck*, 19 F. Cas. at 85.

265. *Id.*

266. *Id.*

"such . . . as"—which surround that phrase in the 1790 Act, but not in the Clause—Chief Justice Marshall missed the crucial point.

4. William Johnson

Sitting in 1802 as a member of the South Carolina Constitutional Court of Appeals, Judge William Johnson opined that the Clause would be satisfied by accepting another state's judgment as prima facie evidence, subject to further examination.[267] That much was the almost universal judicial view, shared (as we have seen) with Justices Washington and Story and the late Justice Wilson; but Judge Johnson reached an outcome different than Justices Washington or Story would have reached, because he applied a peculiar state rule of practice regarding proof of prior judgments.[268] Doing so was an affront to Congress's supervening power, under the second sentence of the Clause, to prescribe the manner in which sister-state judgments "shall be proved"; and no other Federal Justice made this mistake.

5. Henry Brockholst Livingston

In 1803, sitting as a New York Supreme Court Justice in *Hitchcock*, the same New York case discussed earlier,[269] Justice Henry Brockholst Livingston had construed the Clause very differently from anyone else. Justice Livingston seems to have been the first, and for some time the only, jurist to maintain that the constitutional Clause by itself requires a court where a judgment from a sister state is presented to replicate the effect which that judgment had whence it came. Indeed, in the entire first quarter-century under the Constitution, no other judge, state or federal, appears by my research to have gone on record as maintaining that sister-state effect was mandated by the Constitution's Full Faith and Credit Clause itself. (Neither, so far as it appears, was that position propounded by any member of Congress in the course of the several efforts

267. Hammon & Hattaway v. Smith, 3 S.C.L. (1 Brev.) 110, 114 (1802) (opinion of Johnson, J.).

268. Judge Johnson said that a rule of state practice precluded pleading *nul tiel record* to a sister-state judgment, and allowed only *nil debet*, because on replication to a *nul tiel record* plea "the original record ought to be inspected; but [with foreign or sister-state judgments] this is impossible. An exemplification of our own judgments is not evidence in such cases, and therefore an exemplification of the judgment of a sister State, certainly ought not to be." *Id.* at 114.

269. Hitchcock v. Aicken, 1 Cai. 460, 466 (N.Y. Sup. Ct. 1803) (opinion of Livingston, J.); *see supra* notes 242, 244, 246.

documented by Stephen Sachs[270] to amend further or to replace the 1790 Act during the thirty years following its enactment.) In Justice Livingston's own words in *Hitchcock*, that Clause requires any state court where a sister-state's judgment is presented to "believe it to be just, and that the matter in dispute was properly decided," disallowing any attempt to impeach it on the merits.[271] "[T]o give full faith and credit to a record," Justice Livingston asserted, "cannot consist with not believing it ourselves, or permitting others to make averments against it."[272]

Justice Livingston also said in *Hitchcock*,

> [M]y opinion is drawn from the constitution, and is altogether independent of this [1790] act; for it is not clear that congress had any thing to do with the effect of domestic judgments. It is extraordinary, to say the least, that after the constitution had declared that "full faith and credit" were to be given them, it should be left with congress to vary their operation, if they thought proper. . . . Instead, then, of expecting congress to settle the effect of domestic judgments, we must not look further than the constitution itself . . . .[273]

Thus did Justice Livingston's solitary and idiosyncratic opinion articulate what eventually[274] would become the modern "orthodox" view.

New York's Chief Justice Morgan Lewis had challenged Justice Livingston to explain what point there could be in empowering Congress, by the second sentence of the Full Faith and Credit Clause, to prescribe "the effect thereof," if the first sentence itself mandated such sister-state "effect." Justice Livingston had replied (with some strain on the grammar) that the word "thereof" refers not to "such Acts, Records and Proceedings," but only to "the Manner in which" they "shall be proved"—so that Congress was authorized to prescribe the effect only of such authentication procedures as it might prescribe.[275] This tortured construction utterly disregarded the drafting history of the Clause,[276] as to which Justice Livingston was plainly oblivious.

270. *See supra* note 32.

271. *Hitchcock*, 1 Cai. at 469.

272. *Id.*

273. *Id.* at 471.

274. *See infra* text accompanying notes 302-313.

275. *Hitchcock*, 1 Cai. at 468.

276. *See supra* text accompanying notes 185-201.

B. The Classic Supreme Court Construction of the Full Faith and Credit Clause and the 1790 Act

Presciently, when he stated his own view a few weeks earlier, Chief Justice Marshall had observed, "It is very doubtful, however, whether this opinion would receive the sanction of the supreme court."[277] Indeed, when the Justices at last considered the matter together in *Mills v. Duryee*,[278] the Chief Justice's interpretation of the 1790 Act was accepted by no one, and he even abandoned it himself. What prevailed in 1813 instead was the view propounded at length by Justice Washington at circuit,[279] and originally by the late Justice Wilson.[280]

The Supreme Court's opinion in *Mills*, however, was written not by Justice Washington but by the youngest of the Justices, Joseph Story, then age thirty-four, who with Justice Gabriel Duval had joined the Court just thirteen months earlier. As already noted, Story had evidenced his attachment to the Wilson (hence the Washington) view eight years prior, in his book on pleading. (His solitary switch to a contrary view would not occur until later.[281]) So far as it

277. Peck v. Williamson, 19 F. Cas. 85, 85 (Marshall, Circuit Justice, C.C.D.N.C. 1813) (No. 10,896).

278. 11 U.S. (7 Cranch) 481 (1813).

279. *See* Green v. Sarmiento, 10 F. Cas. 1117, 1118 (Washington, Circuit Justice, C.C.D. Pa. 1810) (No. 5760); Banks v. Greenleaf, 2 F. Cas. 756 (Washington, Circuit Justice, C.C.D. Va. 1799) (No. 959). Just as Justice Washington's opinion in *Banks* was misunderstood by Whitten, *see supra* note 250, so his opinion in *Sarmiento* had been misunderstood by Nadelmann. Justice Washington took considerable care repeatedly to distinguish between the "full faith and credit" to be given "as a matter of evidence," on the one hand, and "the force and effect to be given," on the other; and he said the Constitution only "pronounced upon" the former, while the latter was "wisely left to the discretion of congress." *Green*, 10 F. Cas. at 1119; *see supra* notes 250-253 and accompanying text. Yet Nadelmann characterized Justice Washington as "on record for deducing the conclusive effect from the Constitution," and therefore was puzzled "how a majority could have been obtained" two years later, in *Mills v. Duryee*, "for resting the [Supreme Court's] decision on the Act of Congress rather than on the Constitution." Nadelmann, *supra* note 30, at 68.

Indeed, Nadelmann actually faulted the Supreme Court's *Mills v. Duryee* opinion for comparing so poorly with Washington's "elaborate opinion" in *Sarmiento*, *id.* at 66, which Nadelmann regarded as holding to the contrary, *id.* at 68, although it certainly did not. Nadelmann's mistaken impression that the phrase "faith and credit" was "a term of art," a "formula" having a fixed meaning for centuries, *id.* at 44, overlooks Justice Washington's actual argument, which used that phrase with its very different (although demonstrably far more common) evidentiary meaning.

280. *See* Armstrong v. Carson, 1 F. Cas. 1140 (Wilson, Circuit Justice, C.C.D. Pa. 1794) (No. 543); *supra* text accompanying note 236.

281. Justice Story would propound that contrary view in his *Commentaries on the Constitution*. *See infra* text accompanying notes 302-313.

appears, both Justices Marshall and Livingston[282] now silently joined in Justice Story's opinion for the Court, as did Justice Duval and, of course, Justice Washington. Only Justice Johnson dissented, reiterating the view he had taken as a state judge eleven years before. The seventh Justice at the time, Thomas Todd, was absent.

Mills was an action of debt on a New York judgment.[283] The defendant had pleaded *nil debet*, to which the plaintiff had entered a general demurrer. Upon that demurrer the trial court held the *nil debet* plea bad. This comported with the rulings of Justices Wilson and Washington at circuit. The Supreme Court now affirmed.

To defendant's argument that the prior judgment "ought to be considered prima facie evidence only," Justice Story answered for the Court,

> It is manifest however that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.[284]

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282. It is perhaps conceivable that Justice Livingston silently retained his idiosyncratic view of the Clause, and reached the same result disregarding the statute. Nothing indicates, however, that he was less than fully persuaded by Justice Story's opinion for the Court; indeed, Chief Justice Marshall had intimated in *Peck v. Williamson*, 19 F. Cas. 85 (Marshall, Circuit Justice, C.C.D.N.C. 1813) (No. 10,896), that Justice Livingston had already changed his view. As to Chief Justice Marshall, we know that upon deliberation with his colleagues he abandoned his own earlier view—an illustration of his often overlooked amenability to persuasion by arguments better reasoned than his own. Chief Justice Marshall himself wrote for the Court five years later reaffirming *Mills* in *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234 (1818), again with the silent acquiescence (and seeming concurrence) of Justice Livingston.

283. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813). The second forum in *Mills* was actually not a state—it was the District of Columbia. The 1790 Act had made its "such . . . as" rule applicable not only to states (by virtue of its power under the Full Faith and Credit Clause), but to "every Court within the United States," *supra* note 217, supported by Congress's power of "Legislation in all Cases whatsoever" regarding the Federal District, U.S. CONST. art. I, § 8, cl. 17.

284. 11 U.S. (7 Cranch) 481, 485 (1813). Justice Story observed that the defendant's view would render the Full Faith and Credit Clause "utterly unimportant and illusory," because "[t]he common law would give such judgments precisely the same effect." *Id.* This was the same point James Wilson had made at the Constitutional Convention, saying 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." 2 FARRAND, RECORDS, *supra* note 166, at 488 (Madison). For further discussion of Justice Wilson's view, see *supra* text accompanying notes 234-236.

Thus, in notable contrast to the position that Livingston had previously taken,[285] Justice Story in *Mills* did not say the Clause by itself gave sister-state judgments conclusive effect. Instead, just like Justices Wilson and Washington earlier at circuit, he attributed the effect solely to the 1790 Act.

To the defendant's contention that "this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted," Justice Story answered,

> [t]his argument cannot be supported[.] The act declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken. If in such Court it has the faith and credit of evidence of the highest nature, viz. *record evidence*, it must have the same faith and credit in every other Court. Congress have therefore declared the *effect* of the record by declaring what faith and credit shall be given to it.[286]

This statement repudiated the view that Chief Justice Marshall had articulated at circuit. Just as Justices Washington and Wilson would have done, Justice Story reasoned, "[I]t is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also"[287]—not by virtue of the Full Faith and Credit Clause, but by virtue of the 1790 Act.

On the pleading point, Justice Story and the Court now held exactly as Justice Wilson had in 1794: the only permissible plea in traverse to an action on a sister-state judgment was *nul tiel record*. The plea of *nil debet* in such cases, Justice Story wrote for the Court, "cannot be sustained," because

> [t]he pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*; and when congress gave the effect of a record to the judgment it gave all the collateral consequences.[288]

285. *See supra* text accompanying notes 269-274.

286. *Mills*, 11 U.S. (7 Cranch) at 484.

287. *Id.*

288. *Id.*

In answer to the view taken in Justice Johnson's dissent, the Court responded, "[t]here is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the Court, of its own record."[289]

Thus, *Mills v. Duryee* completed the pleading revolution heralded by Justice Wilson in *Armstrong v. Carson*. Both *Mills* and *Armstrong* attributed this supervention of the prima facie rule for American interstate[290] practice not to the Full Faith and Credit Clause itself, but solely to the 1790 Act of Congress.

The Court's holding in *Mills* was not immediately accepted by the courts in every state. Some disagreement persisted for more than a decade.[291] Certainly by using the "extremely indeterminate"[292] "faith and credit" phrase in prescribing its "such . . . as" rule, the First Congress had made the 1790 Act less pellucid than it could have been. As Stephen Sachs has very well shown, proposals in Congress to clarify, improve, or change that rule recurred for some thirty years.[293] Particularly in light of the practice preceding it and in the context of the 1790 Act as a whole, however, the import of that Act's "such . . . as" rule was plain enough to be seen; and as the Justices held firm in their collective opinion, disagreement gradually faded away. It thus became the settled understanding that in prescribing "such faith and credit . . . as they have" whence taken, the 1790 and 1804 Acts were not redundant to the Full Faith and Credit Clause at all. Rather, they stated Congress's will regarding sister-state effect, prescribing a replication rule for sister-state "Records and judicial Proceedings" and no federal requirement of effect at all for "public Acts."

289. *Id.*

290. For international cases, American courts continued applying the prima facie rule. Increasingly during the nineteenth century, however, habituation to the more generous rule statutorily prescribed for interstate cases (and growing familiarity with foreign institutions) encouraged departures from the prima facie rule, and a pronounced "tendency . . . to constantly narrow the differences between [sister-state] judgments and those of wholly foreign states by raising the latter to [the] same plane of recognition" was noted. 3 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1482 (Edward W. Tuttle ed., 5th ed. 1925).

291. *See, e.g.*, Commonwealth v. Green, 17 Mass. (17 Tyng) 515, 545-46 (1822); Bissell v. Briggs, 9 Mass. (8 Tyng) 462 (1813); Robinson v. Prescott, 4 N.H. 450 (1828); Pawling v. Willson, 13 Johns. 192 (N.Y. Sup. Ct. 1816); Buford v. Buford, 18 Va. (4 Munf.) 241 (1814); *see also* 2 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS, INCLUDING THE DOCTRINE OF RES JUDICATA § 856, at 1027 (1st ed. 1891).

292. THE FEDERALIST No. 42 (James Madison).

293. Sachs, *supra* note 32 (manuscript at 26-72).

Mills v. Duryee was followed five years later without dissent, with Chief Justice Marshall himself noting for the Court that "[t]his is precisely the same case as that of *Mills v. Duryee*."[294] *Mills* was followed again, and its rationale reiterated and reaffirmed, in *M'Elmoyle v. Cohen* in 1839.[295] There was no dissent in *M'Elmoyle*, where Justice Wayne observed for the Court that the phrase "and the effect thereof" in the second sentence of the Clause

> was intended to provide the means [to wit, "general laws"] of giving to [sister-state judgments] the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state. . . .
>
> . . . .
>
> . . . [This] provid[ed] in the Constitution for the deficiency which experience had shown to be in the provision of the confederation; as the Congress under it could not legislate upon what should be the effect of a judgment obtained in one state in the other states.[296]

Both the authenticity—that is, the manner of authentication or proof—of a judgment, "and its effect [in sister-states], depend upon the law made in pursuance of the Constitution," Justice Wayne emphasized.[297] He credited the 1790 Act's "such . . . as" phrase with making sister-state judgments

> record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently . . . conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the Courts of the state in which it was rendered.[298]

Only "the faith and credit due to it as the judicial proceeding of a state," Justice Wayne wrote, "is given by the Constitution, independently of all legislation."[299] In contrast, "the judgment is made [for sister-states] a debt of

294. Hampton v. McConnel, 16 U.S. (3 Wheat.) 234, 235 (1818). No one on the Court dissented even though Justice Johnson, who had dissented alone in *Mills*, was still sitting.

295. 38 U.S. (13 Pet.) 312 (1839).

296. *Id.* at 324, 326.

297. *Id.* at 325.

298. *Id.* at 326.

299. *Id.* at 324-25.

record, not examinable upon its merits," only "[b]y the law of the 26th of May, 1790."[300]

C. *Justice Story's Change of Mind*

The classic rule of faith and credit thus prevailed in the Supreme Court well into the 1860s.[301] By then, however, a contrary view was gaining support, and eventually it would displace the classic rule.

The idiosyncratic view that Justice Henry Brockholst Livingston had articulated as a state judge in 1803[302] had been taken up ten years later (without credit to Justice Livingston, who might have abandoned it already) by Massachusetts Chief Justice Theophilus Parsons and one of his colleagues. In *Bissell v. Briggs*,[303] they had seized upon the absence of two of the three still-active Justices remaining from when the same court had ruled unanimously to the contrary eight years before,[304] and by rump majority had adopted Justice Livingston's old notion as the rule for Massachusetts.[305]

That event in Boston occurred in March 1813, so near the very date of the *Mills* decision that, given primitive means of communication, the federal and state tribunals were probably not contemporaneously aware of each other's proceedings. But Chief Justice Parsons had been a mentor to Story, and Story

300. *Id.* at 325. Explaining further, the Court said that "under the first section of the fourth article of the Constitution [that is, the Clause itself], judgments out of the state in which they are rendered, are only evidence in a sister state that the subject matter of the suit has become a debt of record [where rendered]." *Id.* at 325. The Court also expressed agreement with the statement in a Georgia case that the Full Faith and Credit Clause "only provides, that as a matter of evidence it shall be entitled to full faith and credit." *Id.* at 329.

Justice Jackson and Nadelmann both misconstrued *M'Elmoyle* by supposing (as modern orthodoxy requires) that the 1839 Court instead was using the "faith and credit" phrase in the Constitution to mean sister-state effect. *See* Jackson, *supra* note 24, at 11; Nadelmann, *supra* note 30, at 74.

301. *See, e.g.*, Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301-02 (1866) (reciting that the Clause empowered Congress, whose Act in turn prescribed effect); *see also* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (attributing sister-state effect to intent of Congress with no suggestion that the Clause itself required such effect).

302. *See supra* notes 269-276.

303. 9 Mass. (8 Tyng) 462 (1813).

304. *See* Bartlet v. Knight, 1 Mass. (1 Will.) 401 (1805).

305. Nine years later, the next Massachusetts Chief Justice, Isaac Parker, wrote in *Commonwealth v. Green*, 17 Mass. (17 Tyng) 515, 545 (1822), that while *Mills v. Duryee* must be acknowledged, "[i]n this commonwealth the construction of the constitution, and of the act of congress, must be considered as definitively settled in the case of *Bissell v. Briggs*."

as a young legislator had championed some of Parsons's causes. Justice Story fondly reminisced to his own Harvard students of the many evenings of stimulating discussion he had enjoyed with the much older Parsons.[306] I have no proof, but it is easy to envision Justice Story being especially amenable to dissuasion when he found his own opinion in *Mills* at odds with that of this esteemed mentor. *Bissell* thus might have been the precipitant of Justice Story's change of mind. In any event, whether before or after he began his parallel career as Dane Professor at Harvard in 1829, Justice Story did abandon the view of the Clause and the 1790 Act that he had articulated for the Supreme Court in *Mills*. The view he endorsed as the "sounder interpretation" in his 1833 *Commentaries on the Constitution*[307] and later works[308] was the view propounded by Chief Justice Theophilus Parsons in *Bissell v. Briggs* and originally articulated by Judge Henry Brockholst Livingston in 1803.

Justice Story's various treatises circulated widely and came to be increasingly relied upon by advocates and courts. Thus, gradually and without

306. *See* 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 258-59 (1908).

307. 3 STORY, *supra* note 109, §§ 1306-1307, at 182.

308. *See, e.g.*, JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 137 (1840) (ignoring the prior year's *M'Elmoyle* opinion and reiterating instead the "sounder interpretation"—that Congress has power only to "prescribe the mode of authentication, and the effect of such authentication, when duly made"). Also in the 1841 second edition of his *Commentaries on the Conflict of Laws*, Justice Story expressed the disagreement with his *M'Elmoyle* colleagues that he had declined to give voice in the report of that case, asserting that the judgment at issue came "within the clause of the constitution, which declares that full faith, and credit, and effect shall be given," and omitting any mention of the 1790 Act. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 582a, at 841 (2d ed. 1841).

In addition, the same year that his *Commentaries on the Constitution* were published, Story prepared an "*Abridgement*" of them "for the use of Colleges and High-schools," indulging

> the hope, that even in this reduced form the reasoning in favour of every clause of the constitution will appear satisfactory and conclusive; and that the youth of my country will learn to venerate and admire it as the only solid foundation, on which to rest our national union, prosperity, and glory.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ABRIDGED BY THE AUTHOR, at vii-viii (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833). In his very brief treatment of the topic in this *Abridgement*, Justice Story repeated his assertion that the full faith and credit provisions in both the Articles of Confederation and the Constitution were "intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them," and he made no mention the 1790 statute or of the reasoning the Court in *Mills v. Duryee* had actually employed. *Id.* § 660, at 471-72.

any discussion focused on the point, what first had been Justice Livingston's eccentric opinion, abandoned by him but resuscitated by Chief Justice Parsons as the Massachusetts rule,[309] eventually became the orthodox view on the strength of Justice Story's name.[310] *Mills* continued to be cited sometimes (although shunned by Justice Story himself), but the fact that its opinion squarely contradicts the view that Justice Story propounded for the rest of his life seems never to have been recognized or confronted.

Justice Story had been able to join silently in the Court's 1839 *M'Elmoyle* opinion despite having already abandoned the classic rule which that case reemphasized and employed, because he considered it "not, practically speaking, of much importance" whether one attributed the requirement of replicating effect to the Act of Congress or instead to the Clause itself—*provided* the statute prescribed the same rule of effect that Justice Story had come to attribute to the Clause.[311] For judgments, the 1790 Act had done that, and therefore the distinction made no practical difference in *M'Elmoyle*. By virtue of his vigorous commitment to traditional territorial limits on legislative jurisdiction,[312] Justice Story seems never to have reckoned with any possible sister-state effect for statutes.[313]

309. *See supra* notes 302-305 and accompanying text.

310. *Mills*, *M'Elmoyle*, and *D'Arcy* all had attributed the replication rule solely to the 1790 Act. Early in the process of change, the Clause and Act were treated as imposing that rule together. *See, e.g.*, Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462, 465 (1873) (stating that the Act, "in connection with the constitutional provision which it was intended to carry out," required the same effect elsewhere as where rendered, "the constitutional provision and act of Congress giving full faith, credit, and effect"). In time, however, the replication rule came to be attributed to the Clause alone. *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230 (1908) (describing the rule as a constitutional one merely "confirmed by the Act of May 26, 1790"). Even the *Fauntleroy* dissent conceived the issue as whether the Clause itself produced the effect at issue, and never mentioned the statute. *Id.* at 244 (White, J., dissenting).

311. *See* 3 STORY, *supra* note 109, § 1307, at 182 ("[I]t is not, practically speaking, of much importance, which interpretation prevails; since each admits the competency of congress to declare the effect of judgments, when duly authenticated; so always, that full faith and credit are given to them; and congress by their legislation have already carried into operation the objects of the clause.").

312. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 7-9, 18, 20, 25 (1834).

313. Justice Story's discussion in his *Commentaries on the Constitution* mentioned statutes only with regard to "verity" (authenticity and proof), and never with regard to extra-state effect. 3 STORY, *supra* note 109, §§ 1303-1304, at 178-80. In his *Commentaries on the Conflict of Laws*, he treated the Full Faith and Credit Clause only in a chapter entitled "Foreign Judgments." *See* STORY, *supra* note 312, § 337, at 491.

CONCLUSION

Under the "classic rule" of faith and credit, the only provisions of federal law requiring that any of the United States give *effect* (as distinguished from prima facie evidentiary sufficiency) to sister-state "Acts," "Records," or "judicial Proceedings" are those provisions (if any) that Congress has legislatively prescribed. The Full Faith and Credit Clause is neutral as to what policies regarding sister-state effect Congress might elect to prescribe; and those policies, of course, might vary from subject to subject and from time to time. For well over two centuries, however, beginning in 1790, Congress has exercised its power in this regard rarely, responsibly, and—but for a curious 1948 lapse[314]—with reasonable care. This record justifies some confidence that Congress is unlikely now to begin dealing with sister-state effect in a manner destructive to the national Union.

Moreover, whatever its troubling inefficiencies and other, occasionally scandalous limitations, the legislative branch is far better suited to weigh popular wishes and answer felt social needs than any other government official or set of officials—executive, administrative, or even judicial—can be expected to be. That is the enduringly wise judgment made by the statesmen who crafted the second sentence of the Constitution's Full Faith and Credit Clause, by the citizens who approved it in the ratification process, and by the Justices who consistently obeyed it in Supreme Court decisions through most of the nineteenth century. That enduringly wise judgment has never been countermanded—although it has been neglected, forgotten, and obscured from view for about a century and a quarter. But it is not the endorsement of the Founders, or of other generations long dead, that makes recovery of the classic rule of faith and credit a worthy objective today. Rather, it is the practical wisdom inherent in that original, deliberately made choice.

The general statutory prescription that states replicate the effect of sister-state "records" and "judicial proceedings" has remained continuously in force for more than two centuries, with no change more substantial than the substitution of "same . . . as" for the "such . . . as" phrase of the 1790 Act.[315] This general prescription has proven to be wise and beneficent, and it stands at no risk of repeal. There is a large accumulation of judicial decisions construing and applying it. While judicial opinions since the 1880s have typically mistaken the requirement as a constitutional one, it is neither strengthened nor

314. *Compare* Act of June 25, 1948, ch. 646, 62 Stat. 947 (codified at 28 U.S.C. § 1738 (2000)), *with* Act of May 26, 1790, ch. XI, 1 Stat. 122, *and* Act of Mar. 27, 1804, ch. LVI, 2 Stat. 298.

315. *See supra* notes 13-20, 24 and accompanying text.

improved by its erroneous attribution to the Full Faith and Credit Clause. Moreover, the usefulness of most of the case law gloss will be undiminished by acknowledging that the requirement instead is a statutory one.

In fact, the ill-fated 1948 attempt to alter the scope of this prescription illustrates how resistant to change the statute's general requirement of replication has been. By that date, Congress's original decision *against* prescribing *any* sister-state effect for *legislative* acts had stood for over a century and a half, but decades of judicial error[316] and insufficiently critical commentary[317] had firmly ensconced the notion that the constitutional Clause was "self-executing"—not only as to the (evidentiary) "full faith and credit" mandate but as to sister-state effect as well. Consequently, when the revisers drafting the 1948 Judicial Code included "acts of the legislature of any State" within their "same . . . as" prescription of sister-state effect,[318] they assumed they were making no substantive change; and the Congress enacting their proposals presumably intended nothing more. "What, if anything, was intended to be accomplished by this amendment," Willis Reese wrote in 1952, "is by no means clear, since, so far as appears, it was enacted by Congress without discussion and the Revisers' Notes state simply that it 'follows the language' of the full faith and credit clause itself."[319] Prominent conflict of laws theorist Brainerd Currie, however, denounced the 1948 innovation as a "notably footless piece of draftsmanship" and ridiculed the notion of

316. *E.g.*, Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932); Chi. & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887); *see supra* text accompanying note 14; cases cited *supra* notes 19-20 and accompanying text.

317. *E.g.*, COOLEY, *supra* note 15; 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, 477, 478 n.2 (1904) (asserting that "while the proposition has never been expressly decided by the Supreme Court of the United States, the *dicta* are all to the effect that the first sentence of the full faith and credit clause is self-executing" as to effect, and that "[t]here seems to be no reason to doubt that" even outside the terms of the federal statute "the sister-state judgment would be given the full benefit of the constitutional provision"); Jackson, *supra* note 24, at 11-12 ("Congress has provided no guidance as to when extraterritorial recognition shall be accorded either to a state's statutes or to its common law. Since the Constitutional provision must now be regarded as self-executing [as to effect], however, the courts have been obliged to solve issues under it as best they could. . . . The Constitution by use of the term 'public acts' clearly includes statutes. But it makes no mention of decisional law. . . . [T]he Court has so acted and talked that we may deal with this . . . on the assumption that what is entitled in proper cases to credit is the law of a state by whatever source declared.").

318. 1948 Judicial Code, ch. 646, 62 Stat. 947 (codified as amended at 28 U.S.C. § 1738 (2000)).

319. Willis L.M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 343 (1952).

replicating the effect of sister-state statutes as "simply unintelligible."[320] And Ralph Whitten has observed, "[T]he Revisers obviously did not know what the Constitution meant. Indeed, it is questionable whether they gave it much thought."[321]

Absurd consequences[322] from that 1948 drafting fiasco have been avoided only because, in effect, the Supreme Court increasingly has declined to take the 1948 Code's nominal prescription to replicate the effect of sister-state legislative acts seriously.[323]

Calls for Congress to undertake comprehensive efforts toward uniform resolution of choice of law problems[324] have failed to stir significant action for generations, and there seems no reason to suppose that Congress will be more responsive to calls for comprehensive change in the future. Any future effort by Congress to prescribe sister-state effect for any state "public Acts," and any further departures from the general prescription to replicate the effect of "Records" and "judicial Proceedings," in all probability will be exceptional, occasional, and narrowly directed to address particular perceived needs. The

320. BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 200 (1963).

321. Whitten, *State Choice of Law*, supra note 108, at 62.

322. *See* Ala. Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935) (Stone, J.) ("A rigid and literal enforcement of the full faith and credit clause . . . would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.").

323. The accelerating flight from *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), so far has included the following: *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 307 (1981), which declared that typically a given set of facts "may justify, in constitutional terms, application of the law of more than one jurisdiction"; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985), which said that "[n]either the Due Process Clause nor the Full Faith and Credit Clause requires [a state] to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state"; *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988), which declared that "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate'"; *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998), which held that "[a] court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy"; and *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 494 (2003), which said the Constitution "does not compel" a state to substitute the statute of any other state for its own where it has legislative jurisdiction. In the words of Justice Scalia for the Court in the *Sun Oil* case, today's Justices firmly refuse to "embark upon the enterprise of constitutionalizing choice-of-law rules." 486 U.S. at 727-28.

324. *E.g.*, Walter W. Cook, *supra* note 229; Edward S. Corwin, *supra* note 200; Jackson, *supra* note 24; *see also* Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134 (1991) (calling for efforts through the National Conference of Commissioners on Uniform State Laws).

Parental Kidnaping Prevention Act of 1980[325] and the 1994 Full Faith and Credit for Child Support Orders Act[326] illustrate the scale of changes that might be realistically anticipated.

But this certainly does not diminish the importance of recognizing federal prescriptions of sister-state effect as dependent entirely on Congress's discretion. First, the 1980 and 1994 acts just mentioned are prototypes that might be found worthy of emulation or approximation in various other subject areas. And second, significant benefits from recognition of Congress's entire discretion over sister-state effect can be manifested by reflection upon section 2 of the 1996 Defense of Marriage Act (DOMA). That section's negation of any obligation that might otherwise exist to "give effect to any public act, record, or judicial proceeding of any other State" regarding same-sex relationships that such other state treats as a "marriage"[327] received overwhelming endorsements in both houses of Congress when it was enacted in 1996;[328] and it since has been buttressed by statutory or constitutional provisions (or both) in the vast majority of states. Many in the nation's younger generation now seem less determined to disallow same-sex marriage than do their elders, however; so that, as political times change, it might happen that DOMA will be repealed—or even replaced by a federal statute to the contrary, *requiring* sister-state replication of effect for such relationships.

Far more likely—and therefore more important—than such an eventuality, is the prospect of limited congressional modification of DOMA to eliminate or ameliorate various perverse and presumably unintended consequences that DOMA has entailed. Many of these have been catalogued by Andrew Koppelman,[329] and it is unnecessary to reiterate them here. But it is difficult to believe that any but the most resolute and rigid opponents of the freedom not to conform to conventional standards of human affection and relationship behavior, would insist—once duly informed—upon maintaining such

325. 28 U.S.C. § 1738A (2000).

326. 28 U.S.C. § 1738B; *see also* Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 2265.

327. Defense of Marriage Act (DOMA) § 2(a), 28 U.S.C. § 1738C.

328. DOMA passed by margins of more than five to one (342 to 67) in the House, and six to one in the Senate (85 to 14). *See* Final Vote Results for Role Call 316, http://clerk.house.gov/evs/1996/roll316.xml (last visited May 1, 2009); Roll Call Vote http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280 (last visited May 1, 2009). DOMA was signed into law by President William J. Clinton (who, at the time, was in his fourth year as President and anticipating a reelection campaign).

329. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006).

fortuitous, pointless, anomalous, and inhumane consequences. Some of these might fail to survive judicial scrutiny if they were litigated; but leaving insufficiently vetted legislation to be repaired (or further confounded) by hither-and-yon litigation over a span of decades is too random and expensive to be considered reasonable. Efforts to moderate and accommodate a free people's fiercely held differences is what statecraft and political dialogue—not judicial fiat—are for. Much justice can be done by piecemeal legislative adjustment, whether or not—or until—greater movement in any chosen direction can be made.

Or so the plain language of this highly important separation-of-powers provision in our imperfect but remarkably insightful and resilient Constitution—now illuminated by its origins and the first century of its history—presumes.