FULL FAITH AND CREDIT IN THE EARLY CONGRESS

Stephen E. Sachs

ABSTRACT

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

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

This article has been accepted for publication by the *Virginia Law Review*.

FULL FAITH AND CREDIT IN THE EARLY CONGRESS

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> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[1]

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1. U.S. CONST. art. IV, § 1.

INTRODUCTION

The Full Faith and Credit Clause, once described by Justice Jackson as "a neglected one in legal literature,"[2] today is neglected no longer. The Defense of Marriage Act (DOMA)[3] has pushed the Clause to the forefront of political and legal debates, which have generated at least as much heat as light.

Despite its current popularity, however, the basic features of the Clause are still poorly understood. For example, its first, self-executing sentence—"Full Faith and Credit shall be given . . ."—is widely thought to require the direct enforcement of the laws and judgments of sister states.[4] As Douglas Laycock has written, "[f]ull faith and credit is the maximum possible credit; it is conceptually impossible to give faith and credit that is more than full."[5] Thus, the Clause is today read as "requiring each state . . . to treat the law of sister states as equal in authority to its own."[6] Such statements are common in the doctrine as well as the literature: the Supreme Court has described the Clause as "exacting," and has held that a final judgment of a competent state court thereby "gains nationwide force."[7]

But as the controversy over DOMA has shown, such an interpretation runs quickly into contradictions. The Clause not only contains a self-executing command, but also grants power to Congress to prescribe the manner of proof of sister-state acts and records, as well as "the effect thereof." Congress has exercised this power by, for example, providing interstate effect to orders concerning child support and child custody.[8] Yet if states must accord each other's laws and judgments "full" faith and credit—and if nothing could possibly be

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

3. 28 U.S.C. § 1738C.

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

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

6. *Id.*

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

8. *See* 28 U.S.C. §§ 1738A-1738B.

more than "full"—then what obligations could Congress create that the states don't already bear? And if the Constitution itself requires "full" faith and credit, then how could Congress in any way reduce the faith and credit that is due? In other words, the prevailing interpretation has allowed the first, self-executing sentence to swallow the remainder of the text—leading some scholars to portray Congress's power under the Clause as nearly a dead letter,[9] and others to invest Congress with a general (albeit unenumerated) power to relax any of the provisions of Article IV.[10]

These contradictions have emerged in practice as well as theory. Though the Clause itself draws no distinctions among sister-state acts, records, and judicial proceedings, the Supreme Court "has always differentiated 'the credit owed to laws (legislative measures and common law) and to judgments.'"[11] Similarly, although the Clause appears to treat all sister-state laws equally, so-called penal statutes have never been enforceable across state lines.[12] Stirring declarations of broad constitutional purpose (making the states "integral parts of a single nation"[13]) have coexisted uncomfortably with ad hoc exceptions ("[I]t is for this Court to choose in each case between the competing public policies involved.").[14] And no matter how "exacting" the language may seem, the Court has also reminded us that full faith and credit is "not an inexorable and unqualified command."[15]

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9. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2003 (1997) (describing the Clause as granting a power to "refine and implement, not undermine or abolish," and arguing that DOMA exceeded that power by allowing states to disregard marriages sanctioned elsewhere).

10. *See, e.g.*, Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

11. Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 152 (1999) (quoting *Baker*, 522 U.S. at 232).

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

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

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

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

The situation is even worse with respect to the Full Faith and Credit Statute, 28 U.S.C. § 1738. First enacted in 1790 (the "1790 Act"),[16] the Statute today commands that the public records of sister states "have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."[17] This rule is often understood as requiring a judgment of State A to be given the same effect in State B as it has in A's own courts.[18] Yet this rule, too, is riddled with exceptions. Why is it, for example, that State B's statute of limitations can block the enforcement of State A's judgment, which would not occur in A's own courts?[19] Why would a Michigan injunction lose its effect once the enjoined party leaves for Missouri?[20] And how could the current Restatement claim that a judgment "need not be recognized or enforced" if it would "involve an improper interference with important interests of [a] sister State"?[21]

Both the Clause and the Statute suffer from the same problem: a "top-down" interpretation that accords them immense and unjustified substantive force, while leaving the courts to carve out exceptions and clean up the mess. A small group of commentators, however—Ralph Whitten and Kurt Nadelmann prominent among them—have argued that the proper interpretation is "bottom-up": that the actual requirements of the Clause and 1790 Act were far less exacting and were designed to permit adjustment by a future Congress.[22] On this view, the Clause and 1790 Act were primarily evidentiary in nature,

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16. An Act To Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated so as To Take Effect in Every Other State, ch. 11, 1 Stat. 122 (1790).

17. 28 U.S.C. § 1738.

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

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

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

21. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 103.

22. *See, e.g.*, Whitten, *supra* note 4; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 Mem. St. U. L. Rev. 1 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Examination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 Creighton L. Rev. 499 (1981); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957).

requiring states to admit sister-state records into evidence without mandating the particular substantive effect those records would have. While I do not believe the case for either interpretation is conclusive, in this essay I provide additional evidence for the evidentiary position.

Current scholarship on the Full Faith and Credit Clause is not particularly historical.[23] Those who do examine the Clause historically have tended to focus on the same source material: the Articles of Confederation, the debates in the Constitutional Convention, and especially the decisions of federal appellate courts.[24] The standard accounts also tend to portray this history as one long road to the Supreme Court's decision in *Mills v. Duryee*,[25] which is then taken to have settled the issue forever.[26]

This essay adopts a different approach. It focuses on the history of congressional efforts, from the Founding to the 1820s, to exercise the power granted by the Effects Clause.[27] During this period, influenced by dissension and disagreement in the state courts, members of Congress repeatedly proposed legislation that would have clarified the effect of the judgments of sister-state courts. This source material provides another window into the early understanding of the Full Faith and Credit Clause and its accompanying Statute.

While the evidence is by no means one-sided, three general insights emerge from these sources. First, *Mills* did not immediately resolve the

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23. *See, e.g.*, Kramer, supra note 9. *See generally* James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299, 1302 (1987) (asserting that "[t]he constitutional history of the full faith and credit clause is sparse").

24. *See, e.g.*, Edward S. Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371 (1933); George P. Costigan, Jr., *The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 COLUM. L. REV. 470 (1904); Jackson, *supra* note 2; Laycock, *supra* note 5; Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 16 (1944); G.W.C. Ross, *"Full Faith and Credit" in a Federal System*, 20 MINN. L. REV. 140, 143 (1936); James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224 (1955); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004); Rex D. Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137 (1997).

25. 11 U.S. (7 Cranch) 481 (1813).

26. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 103 (1997).

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

interpretive disputes over the Clause and Statute, which were hotly debated for many years afterward. While *Mills*' position eventually became accepted, it was by no means the only or even the most natural possibility.

Second, even as late as the 1820s, many people believed that Congress had *not yet exercised* its power to accord substantive, rather than merely evidentiary, effect to sister-state records in the 1790 Act. Thus, the states were still free to accord their own measure of substantive effect based on local common and statutory law. Rather than a mere quirk of history, this belief reflected an intellectually respectable position, and, indeed, may well have been right.

Third, early understandings of the Full Faith and Credit Clause tended to attribute far less importance to its first self-executing sentence, which was often understood as part of an evidentiary framework, and far more importance to Congress's power to determine the substantive effect of sister-state records. That an evidentiary interpretation may seem strange to us today is more a function of the changes in civil procedure and evidence law over the last two centuries than of any intrinsic feature of the theory. In fact, the creativity of the early congressional debates in re-envisioning interstate relations could inspire a variety of modern legislative possibilities. A belief that the commitments of the Clause and the Statute are narrower than we thought is hardly constraining; it instead leaves the field open for deliberation and legislative choice over the structure of our federal system.

This essay proceeds in four Parts. Part I explains the historical context of the Full Faith and Credit Clause, from the perspective of a Founding-era creditor seeking to enforce a sister-state judgment. Part II builds on this framework to describe the immediate historical antecedents of the Clause, and develops the evidentiary interpretation. Part III then explores the legislative history of the Clause, describing both the activity of Congress and contemporaneous developments in the courts. Part IV concludes.

I. FULL FAITH AND CREDIT IN CONTEXT

Understanding the Full Faith and Credit Clause requires an understanding of the legal environment in which it was written. Suppose that, in the Founding period, "Creditor" obtained a judgment against "Debtor" in State A's courts and under its laws—after which

Debtor fled in the night to State B. Under the law of England and the American colonies before the Articles of Confederation—i.e., before any applicable Full Faith and Credit Clause—how could Creditor have enforced his judgment and collected his debt?

A. Authentication and Evidence

The first problem facing Creditor was quite basic: simply obtaining a copy of the law or judgment on which he relied. While authenticated copies of judgments could be obtained from most court clerk's offices, regular publication of federal statutes, for example, did not begin for many years after the Founding.[28] The first statute on the subject required copies of new enactments to be published in at least three newspapers, and to be distributed to Congressmen and state executives. Authenticated copies also could be purchased from the State Department, but the laws themselves were not regularly published.[29] This system did little to encourage the distribution of legal texts. In 1817, the reporter of decisions in Kentucky found that the Full Faith and Credit Statute was itself so difficult to find, "particularly in remote courts," that he appended it to his case reports.[30]

Even when records could be found, the copies were highly unreliable. In an era before mimeographs or Xerox machines, legal copying was done by hand, and it was easy for a copyist's mistake to change the meaning of authoritative legal texts. In one criminal prosecution in 1826, copies of Massachusetts statutes were introduced in the form of "printed copies of the acts, with certain erasures and interlineations in writing," and with a separate piece of paper providing an "attestation in the following words: 'A true copy, attest, Edward D. Bangs, Secretary.'"[31] How was the court to know that none of the "erasures and interlineations" was a forgery? As the defense counsel complained,

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

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

30. *See* Tarlton v. Briscoe, 8 Ky. (1 A.K. Marsh.) 67, 1817 WL 1160, at *2 (1817).

31. United States v. Amedy, 24 U.S. (11 Wheat.) 392, 393 (1826) (reporter's headnote)

> [t]hese papers are, evidently, from the face of them, torn from some printed book . . . . These printed papers are not connected directly with the seal. The seal is on a distinct piece of white paper, and by a single thread these pretended acts of the legislature are connected with that. Some essential parts are again connected with those through which the thread passes with wafers. Does the seal prove these? If a thread or wafer were now to be used to connect either, or any of these sheets, with a newspaper, it would be equally well authenticated.[32]

Justice Story described it as a "matter of most serious regret, that an exemplification so loose and irregular, should have been permitted to have found its way into any Court of justice."[33] In today's courts, such questions of authentication are almost inconceivable;[34] yet at the time of the Founding, the legal distinction between a foreign record and a document *purporting* to be a foreign record could not be ignored.

Creditor's task was complicated further by the rule of evidence known as the "best evidence" rule. The eighteenth-century treatise of Geoffrey Gilbert, frequently cited by American courts in the Founding period, explained the rule as requiring "the greatest Evidence that the Nature of the Thing is capable of."[35] In other words, when better evidence might be in the party's "own Possession and Power," any second-best evidence would be held "insufficient and prove[] nothing . . . . For if the other greater Evidence did not [tend] against the Party, why did he not produce it to the Court?[36]

For those seeking to introduce evidence of official actions into court, the best evidence rule created a hierarchy of public records. At the top of the pyramid were the original records in the archives of the courts themselves, for "there can be no greater Demonstration in a Court of Justice, than to appeal to its own Transactions."[37] Next came

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

33. *Id.* at 406 (majority opinion).

34. *But see* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 295-98 (noting that modern courts have relied on unenacted titles of the U.S. Code despite contrary inferences from the text of the actual session laws).

35. GEOFFREY GILBERT, THE LAW OF EVIDENCE 15 (London, J.F. & C. Rivington et al. 4th ed. 1777). For more on Gilbert's influence, *see* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

36. GILBERT, *supra* note 35, at 15.

37. *Id.* at 7.

exemplifications, or copies of the records on which had been placed an official seal. When given under the Great Seal or Broad Seal, such exemplifications were "of themselves Records of the greatest Validity, and to which the Jury ought to give Credit, under the Penalty of an Attaint; for there is more Faith due to the most solemn Attestations of Public Authority than any other Transactions whatever . . . ."[38] Then came exemplifications under the seal of a particular court, which were themselves of "more Credit"—i.e., higher evidentiary force—than "sworn copies," mere transcriptions of the official documents by persons who would testify to their accuracy in open court.[39] When a document bore the seal of a public body, it was known in a technical sense as a "record." The seal itself served as "full Evidence" of the document's authenticity as a matter of law, for "the Seals thereby created [by the legislature], are supposed universally known to every Body"; but the seal of a private person or corporation was "no Evidence, but by an Oath concurring to their Credibility."[40]

This hierarchy of evidence was sensible enough. Yet it had difficulty addressing records brought from other jurisdictions. Return to the example of our Creditor and Debtor; the original records of the State A court would obviously have to remain in State A's archives and could not be taken into State B. Nor would sealed exemplifications always be accepted, as State B courts might not recognize the seals and devices of State A, and the question of their authenticity would typically go to a jury.[41] Even obtaining sworn copies might be difficult,

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38. *Id.* at 14.

39. Gilbert described exemplifications as "of better Credit than any sworn Copy: For the 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." *Id.*; *see also* Owings v. Nicholson, 4 H. & J. 66, 1815 WL 275, at *23 (Md. 1815) (Buchanan, J., dissenting) (discussing "the established rule of evidence, that authenticated copies of records are required, in the absence of the originals, as the next best evidence, and cannot be supplied by parol").

40. GILBERT, *supra* note 35, at 19.

41. *See, e.g.*, Frey v. Wells, 4 Yeates 497, 1808 WL 1463, at *4 (Pa. 1808) ("The record of a foreign court was not evidence to the court, and must go to the jury proveable by testimony. In the nature of the case, it could not be otherwise; because the judge could not be supposed to know the seal or attestation of the foreign court, so as to try upon inspection. For this, or other

since they required a witness to testify; the parties themselves would be disqualified from testifying in common law proceedings, and the clerks and recordkeepers of State A would be beyond the reach of State B's process.

B. Pleading and Substantive Effect

Assuming that suitable evidence of the judgment could be found, how would Creditor obtain relief in a State B court? The accepted English doctrine at the time of the Founding was that he could bring actions of debt or assumpsit. Debt on a sealed instrument (a "specialty") was an ancient form of action, and the record of a judgment was certainly a specialty: the entire species of "contracts of record," or *cognovit* contracts, took the form of confessed judgments.[42] If a record were recent enough and from a domestic court, the plaintiff could simply sue out a writ of execution and take possession of the money owed. Alternatively, if his time limit for execution (or for revival of the award through the writ of *scire facias*) had expired, he could collect the judgment through an action of debt.[43] The judgment of a foreign court, however, could not be said to be a "record," since it did not bear a domestic seal that the courts would officially recognize. English law therefore allowed foreign judgments to be enforced through a contract theory: the State B judgment was taken as consideration for an implied promise to pay, which could then be enforced against Debtor in the same manner as a simple contract debt.[44]

The distinction in the manner of proof thereby created a similar distinction in a judgment's substantive effect. A domestic judgment would be found authentic by the court as a matter of law, and as a "record" or "specialty" could be an independent ground for the action; a foreign judgment would be submitted with other evidence to the jury, and was merely one component of a standard contract claim. Thus, in *Walker v. Witter*, a 1778 decision of King's Bench frequently cited in Founding-era America, Lord Mansfield held that a domestic record would conclusively establish the defendant's duty to pay, but that a

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reasons, it was a principle that a foreign judgment could not be declared upon as a record . . . .").

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

43. See Ross, *supra* note 24, at 143.

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

foreign judgment (in this case from the British colony of Jamaica) would only be prima facie evidence of the debt, and was "examinable" in this regard by the jury.[45] This correspondence of evidentiary and substantive force was not logically required; one could imagine a system in which a record's authenticity was a jury question, while its substantive effect (assuming authenticity) was conclusive as a matter of law. But this correspondence seemed logical enough at the time, and it appropriately tracked the existing mechanisms of proof.

A similar correspondence was found in the types of defenses available to a judgment debtor. In addition to special pleas such as subsequent payment, Debtor would have had two general pleas to choose from: *nul tiel record* and *nil debet*. The first was used in cases where the plaintiff could have had access to a sealed record; *nul tiel record* represented a claim that the record was nonexistent, facially invalid, or incapable of supporting the action, and the plea could be defeated only with a sealed exemplification of the judgment itself.[46] In cases without a sealed record, the defendant could plead *nil debet* and generally deny the debt, a plea that would allow lesser evidence and other arguments to reach the jury.[47] As above, while there was no logical requirement that *nil debet* be associated with prima facie effect, the two tended to go together—and a plea of *nul tiel record* certainly made the record conclusive if it existed.

There was, however, a substantive (and not merely procedural) reason why courts might refuse conclusive effect to foreign judgments. A foreign court was foreign: it might be corrupt or untrustworthy, or apply an uncivilized and barbarous law. To treat its judgments as

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45. *Id.*; *see also id.* at 6 (opinion of Buller, J.) ("[I]t is stated to be a judgment of a Court in Jamaica. As such it is to be tried by the country, . . . and not by the Court.").

46. *See* Gilbert, *supra* note 35, at 26; *see also* 1 Joseph Chitty, A Practical Treatise on Pleading, and on the Parties to Actions, and the Forms of Actions 480-81 (London, W. Clarke & Sons. 1809) ("In debt or *scire facias* on a *record*, when the record is the foundation of the action and not merely inducement, the plea of *nil debet* is insufficient, and *nul tiel record* is the proper plea where there is either no record, or where there is variance in the statement of it; but as this plea merely puts in issue the existence of the record as stated, any matter in discharge must be pleaded, such as payment, . . . and as it is a maxim in law, that there can be no averment in pleading against the validity of a record, though there may be against its operation, therefore no matter of defence can be pleaded which existed anterior to the recovery of the judgment . . . ." (footnotes omitted)).

47. *Id.*

conclusive, and in particular to actively *enforce* the collection of its awards, would be to participate in such injustices. In particular, the authority of foreign judgments was limited by recognized principles of international law concerning personal jurisdiction.[48] In *Buchanan v. Rucker*, for example, the King's Bench refused to enforce the default judgment of a Tobago court which had been rendered without personal notice to the defendant. Even had the law of Tobago explicitly sanctioned such practices, Lord Ellenborough wrote, "[c]an the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"[49] Practices of foreign attachment and service by publication were not unknown in England and the colonies. But they were understood to be enforceable only within the states that practiced them; outside those states, they were prohibited by international legal principles of personal jurisdiction, and judgments rendered without notice would be looked upon with suspicion.

C. *Summary*

The above discussion highlights two problems in the recognition of judgments. The first is authentication: how was a court to know that the document introduced by Creditor was actually a judgment? The second is substantive effect: once a judgment were identified, what consequence would it have in the lawsuit? Part II explores how the Full Faith and Credit Clause might have answered both of these questions.

II. THE CLAUSE AND ITS HISTORY

The previous Part described a common law tradition that drew a sharp division between domestic and foreign judgments. How did the Full Faith and Credit Clause change this picture? This Part will attempt to answer the question in three ways. First, it will look at the uses of the term "full faith and credit" during the century before the Constitution was written. Second, it will look at the use of "full faith and credit" in Article IV of the Articles of Confederation, the predecessor clause to the Constitution's Article IV, Section 1. And third, it will examine briefly

48. *See generally* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955).

49. (1808) 103 Eng. Rep. 546, 547 (K.B.).

the circumstances surrounding the adoption of the Full Faith and Credit Clause and describe the different purposes that the Clause may have served.

A. *"Full Faith and Credit" in Early Usage*

While some have argued that the phrase "full faith and credit" sprang full-grown from the Articles of Confederation,[50] it had in fact been known in English usage for over a hundred years before the Articles as a term for high evidentiary value. For example, a 1662 London translation of a Franco-Spanish treaty provided for both governments to issue maritime passports and bills of lading, to confirm a vessel's ownership and cargo—"unto which Passes and Sea Letters, full Faith and Credit shall be given."[51]

Though its meaning was always evidentiary, the phrase could appear in multiple contexts. A first concerned the authentication of documents. A clerk's manual in 1740 provided a form for certifying various records in a "due and authentick Manner, in their own original Forms, or true and exact Copies thereof, faithfully collated and compared therewith, and sealed with an authentick Seal, so that full Faith and Credit may be given as well in as out of Court, under Pain of the Law, and Contempt thereof."[52] A second context was diplomatic;

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50. *See, e.g.*, Laycock, *supra* note 5, at 304 ("The complete phrase 'full faith and credit' appears not to have been used prior to the Articles of Confederation . . . ."); *cf.* Radin, *supra* note 24, at 16 (arguing that "[t]he combination 'faith and credit' does not demonstrably occur in England before" the 1770s).

51. George Carew, Fraud and Violence Discovered and Detected: Or, a Remonstrance of the Interessed in the Ships Bona Esperanza and Henry Bona Adventura of London 110 (London, William Godbid 1662); *see also* The Treaty of Peace Between the Crowns of France and Spain, Concluded and Sign'd by His Eminency Cardinal Mazarine, and Don Lewis Mendez de Haro, Plenipotentiarys of Their Most Christian and Catholick Majestys, in the Isle Call'd of the Pheasants, in the River of Bidassoa, upon the Confines of the Pyrenean Mountains, the Seventh of November, 1659, art. XVII, *in* A General Collection of Treatys, Declarations of War, Manifestos, and Other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the Present Time 39, 47 (London, J. Darby 1710) (same).

52. *A Monition for the Transmission of a Process in a Cause of Appeal in the Arches*, *in* The Clerk's Instructor in the Ecclesiastical Courts 378, 380 (London, E. & R. Nutt 1740). Note that Gilbert had similarly described documents under the Broad Seal as deserving "Credit, under the Penalty of an Attaint." Gilbert, *supra* note 35, at 14.

"full faith and credit" could be used to describe the full confidence one should have in an agent's accurate representation of the views of his principal.[53] A third was notarial; a notary's certificate as to a document's authenticity could be said to deserve "full Faith and Credit" by virtue of his official position.[54] A fourth was judicial; in *Bunting v. Lepinguel* and other cases, English common law courts had given "faith and credit" to the ecclesiastical judgments of church courts that they themselves were not competent to review.[55]

In each of these contexts there could be uncertainty in usage. The ambiguity in the phrase was not whether it "describe[d] anything less than conclusive effect"[56]—which it did not—but rather what the credited evidence was meant to be conclusive *of*. Regarding a notary, for example, saying that "all Affidavits before him made" were to

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53. *See* Robert Brady, A CONTINUATION OF THE COMPLETE HISTORY OF ENGLAND 206 (London, Edward Jones 1700) (describing a letter from King Edward III to Parliament, and noting that "[a]t the Close of his Letter he tells them, . . . [t]hat the Persons [with whom the letter was sent] came over to declare his Condition and Business, willing them to give full Faith and Credit to what they should say").

54. DOMINICK MOLLOY, THE VINDICATION OF DOMINICK MOLLOY, MERCHANT, AGAINST THE FALSE AND SCANDALOUS ASPERSIONS OF JOHN CRUMP AND HOSEA COATES, MERCHANTS 24 (Dublin, n. pub. 1750) (reproducing an affidavit certified by Charles Asgill, as well as a certificate by Anthony Weldon that Asgill was "one of his Majesty's Justices of the Peace for this City of London, who administered the Oath in due Form of Law, in Presence of me, Notary to the Deponent therein mentioned; and that to all Affidavits before him made, and by him signed, full and undoubted Faith and Credit is and ought to be given, both in Judgment Courts and out thereof"); *see id.* (adding a further certificate by other notaries "[t]hat Mr. Anthony Weldon . . . is a Notary and Tabellion Public . . . faithful, lawful and of Trust; to whose Acts full Faith and Credit is and ought to be given, both in Courts and thereout"); *see also* ADULTERY: THE VERY INTERESTING AND REMARKABLE TRIAL OF MRS. ELIZABETH HANKEY 6-7 (London, Proprietor 1783) (noting, with respect to an affidavit, "that the said paper, marked No. 1, is duly signed by and with the proper hand writing of Mark Holman, deputy register of the said court, and that full faith and credit, is and ought to be given thereto . . . ."); 1 NICOLAS MAGENS, AN ESSAY ON INSURANCES 299 (London, J. Haberkorn 1755) ("We the underwritten Merchants here in Leghorn do attest, that the above-written Dr. *Gio Battista Gamerra* is, as he stiles himself, a Notary Public, and that to his Firm and Signature full Faith and Credit is given in Court and without; and in Testimony thereof, &c.").

55. (1585) 76 Eng. Rep. 950, 952 (K.B.), *cited in* Robins v. Crutchley, (1760) 95 Eng. Rep. 721 (K.B.) (argument of counsel); *see also* Nadelmann, *supra* note 22, at 44-46.

56. Laycock, *supra* note 5, at 304.

receive "full and undoubted Faith and Credit" was not to say that the affidavits were themselves free of falsehoods—only that they were actually and authentically made. But to say that his notarial certificate was entitled to full faith and credit would also mean that it was to be considered trustworthy, rather than merely authentic. Similarly, an exemplification of a judicial proceeding might receive "faith and credit" in the sense of res judicata effect,[57] or it might be considered merely equal evidence to the original record.[58]

The use of "full faith and credit" continued from seventeenth-century England into Founding-era America.[59] A proposed treaty between the revolutionary United States and France in 1782 provided for the recordation of sailor's last wills and testaments by maritime consuls, noting that "copies of any act duly authenticated by the consuls . . . shall receive full faith and credit in all courts of justice, as well in France as in the United States."[60] Similar phrases appear several times (in various senses) in the Journals of the Continental Congress,[61]

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57. *See Bunting*, 76 Eng. Rep. at 952; *see also* Phillips v. Hunter, (1795) 126 Eng. Rep. 618, 622 (Exch. Ch.) (Eyre, L.C.J., dissenting).

58. 2 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND 657 (Edinburgh, John Bell 1773) ("After the writings are produced in court, just duplicates of them are made out, collated, and signed by the clerk, which are called *transumpts*, and are, by the decree of the judge, declared to bear as full faith or credit as an extract from the record of that court. As therefore an extract from a proper record is as effectual as the principal writing, except in an action of proper improbation, so is a degree of transumpt . . . .").

59. *See, e.g.*, WHITING SWEETING, A REMARKABLE NARRATIVE OF WHITING SWEETING; WHO WAS EXECUTED AT ALBANY IN THE STATE OF NEW YORK FOR MURDER, at 6-7 (Exeter, N.H., Henry Ranlet 2d Exeter ed. 1794) ("Would it not have deserved a moment's thought, whether a party of men having a lawful warrant, and though cloathed with the authority of law, getting drunk and committing a riot, ought not to leave a doubt on the mind whether full faith & credit ought to be placed upon their testimony in a cause of life and death; and of the truth of so many circumstances related by them, happening in their heat and zeal; fomented by many extraordinary circumstances, and plentiful draughts of rum, which they said they had with them?").

60. 22 JOURNALS OF THE CONTINENTAL CONG. 20. Of course, the heightened evidentiary value was not given to the content of the sailor's will, but rather to its authenticity.

61. *See* 27 JOURNALS OF THE CONTINENTAL CONG. 571 (certifying, in a 1784 letter from the speaker of the Georgia Assembly to the Continental Congress, "that John Wilkinson . . . is . . . Clerk of the said House of Assembly, and that I have carefully compared the said Extracts with the Original Journals, . . . and find the same to be just and true Copies therefrom," and therefore that "all due Faith and Credit are and ought to be had and given to the Attestation

as well as in state documents (reproduced in the journals of the House and Senate) concerning the ratification of the Bill of Rights.[62] And after the enactment of the Constitution, these usages would be explicitly relied upon in the debates over its meaning.[63]

B. *The Articles of Confederation*

America's first Full Faith and Credit Clause is found in Article IV of the Articles of Confederation. While its history and meaning have been discussed in detail elsewhere,[64] a brief summary shows that it, too, was afflicted by an essential ambiguity between evidentiary authentication and substantive effect. While a solid argument can be made for an authentication-based view of the Articles, the evidentiary interpretation draws more support from the ways in which the Confederation's Clause differs from that found in the Constitution.

1. *Statutory Precedents*

Before the Articles of Confederation, at least four states had enacted statutes concerning sister-state records. Connecticut's statute,

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of the said John Wilkinson, and to the said Extracts"); *see also* 11 *id.* at 663 ("full faith and absolute Credit"); 31 *id.* at 623 ("all due faith, credit and authority"); Letter from Charles, King of Spain, to Congress (Sept. 25, 1784), *in* 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 820 (Francis Wharton ed., Wash., D.C., Gov't Printing Office 1889) (naming Don Diego De Gardoqui as his negotiator, and asking "that you will give entire faith and credit to all that in my name he shall say to you").

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

63. *See, e.g.*, Hitchcock v. Aicken, 1 Cai. R. 460 (N.Y. 1803) (Livingston, J., dissenting) ("If credit be given to an ambassador, by the court to which he is sent, the latter do not thereby only admit that he is invested with that character, but that what he says is true. It is the same when a witness is credited; it is his relation which is believed; not merely that he appears as a witness. In like manner if full faith and credit be given to a deposition, it does not only imply that we admit there is such a writing, but that we fully and implicitly rely on its contents."); *see also* Curtis v. Gibbs, 2 N.J.L. (1 Penning.) 399, 1805 WL 553, at * 3 (1805) (opinion of Pennington, J.).

64. *See* sources cited *supra* note 22.

adopted in approximately 1650, provided for reciprocal recognition of judgments, "presented under authentic testimony," to have "a due respect in the several courts of this jurisdiction," and to be "accounted good evidence for the party, until better evidence or other just cause appear to alter or make the same void."[65] Maryland's 1715 statute "providing what shall be good evidence to prove foreign and other debts" made the exemplifications of foreign records "sufficient evidence to prove the same"; likewise, South Carolina's 1731 law provided that exemplifications bearing the seal of government officials or public notaries "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*."[66] These three statutes concerned the authentication question, explaining how a document could serve as evidence of a foreign record; under South Carolina's statute, for example, a notary's seal could take the place of live witnesses.

Shortly before the Revolution, however, Massachusetts took a different approach. As the preamble to its 1774 statute noted, "it frequently happens" that judgment debtors from neighboring colonies "remove with their effects into this province without having paid or satisfied such judgment."[67] Because "the record of such judgments cannot be moved into the said courts in this Province"—i.e., it was stuck in State A's archives—and because "it has been made a doubt whether by law such judgments [i.e., copies of judgments] can be admitted as sufficient evidence of such judgments, whereby honest creditors are often defrauded . . . by negligent and evil minded debtors," the colony addressed the matter by statute.[68] The first section of the statute dealt with the effect question, providing that a judgment creditor from another colony could bring an action of debt in Massachusetts just like a domestic plaintiff in possession of a domestic

65. Nadelmann, *supra* note 22, at 38.

66. *Id*. at 39.

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

68. *Id*.

record.[69] The second section then dealt with the authentication question, providing that in response to a plea of *nul tiel record*, the foreign creditor could introduce a "true copy" of the foreign judgment, attested by a court clerk or a justice of the peace, as "good and sufficient evidence of such judgment," with "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."[70] In other words, unlike the earlier colonial statutes, Massachusetts went well beyond the authentication question to provide for conclusive effect.

2. *Text and Amendment*

These various approaches were seen in the Continental Congress's debate over full faith and credit on November 12, 1777. The clause, as then drafted (and as later incorporated into the Articles of Confederation), read as follows: "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State."[71]

Read alone, the clause was rather unclear. Did "full faith and credit" sound in effect, making the judgments of each state conclusive evidence of their own substantive correctness and legal force (and imposing the Massachusetts regime on all the other states)? Or did it sound in authentication, obliging the states to provide mechanisms by which each state's public records could be full evidence of their own existence and contents? Congress considered clarifying its rule with the following amendment:

> And an action of debt may lie in a court of law of any State for the recovery of a debt due on a judgment of any court in any other State; provided the . . . creditor shall give bond with sufficient sureties before the said court, in which the action shall be brought, to answer in damages to the adverse party, in case the original judgment should be afterwards revised and set aside, and provided the party against whom such judgment may have been obtained,

69. *Id.* § 1.

70. *Id.* § 2.

71. 9 JOURNALS OF THE CONTINENTAL CONG. 896.

> had notice in fact of the service of the original writ upon which such judgment shall be founded . . . .[72]

The amendment would have changed the provision in three ways. It would have extended Massachusetts's procedure for collecting judgment debts throughout the Confederation; it would have required judgment creditors to post bond in case of reversal; and it would have imposed an actual notice requirement to prevent unjust default judgments. Yet it failed, by a margin of seven states to two (with two more divided).[73]

While the reasons for the amendment's failure are unknown, Whitten persuasively argues that it was defeated in part because states were unwilling to commit to conclusive effect through an action of debt.[74] Only one state had previously provided by law for the substantive recognition of sister-state judgments,[75] and it seems unrealistic that in a document so protective of state prerogatives as the Articles, so many states would accept a *greater* restriction on sovereignty. Yet for the next 80 years, versions of this proposal would be repeatedly advanced to clarify the obscurity of "full faith and credit."

3. *Judicial Interpretation*

The divergence between "authentication" and "effect" interpretations of the Confederation's Clause quickly appeared in contemporary state court decisions. The strongest statement in favor of an "effects" reading may have come from the South Carolina case of *Jenkins v. Putnam*, which concerned the enforcement of the admiralty judgment of a prize court.[76] Like the ecclesiastical court in *Bunting*, prize courts dealt with matters outside the purview of the common law; the South Carolina court therefore announced that because it was "bound by common law rules," it had "no such power" to "try[] the legality of the capture over again," and was "bound by the sentence of

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72. *Id.*

73. Connecticut and Rhode Island voted in favor; Pennsylvania and Maryland were divided; and seven others, including Massachusetts and South Carolina, voted no. *Id.*

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

75. Indeed, Massachusetts voted against the amendment—though perhaps because the actual notice requirement would have weakened its own statute.

76. 1 S.C.L. (1 Bay) 8, 1784 WL 36 (C.P. & Gen. Sess. 1784).

the Court of Admiralty . . . and . . . obliged to give due faith and credit to all its proceedings."[77] While this usage certainly sounds more in effect than authentication, the court did not rest its decision on the Confederation's Clause alone; rather, it also rested on a general principle of international law that allowed admiralty courts to exercise universal jurisdiction, stating that "[t]he act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it."[78] Other cases had similarly mentioned a degree of substantive respect due under the Articles, while ultimately resting their decisions on more general grounds.[79]

On the other hand, a powerful voice for an "authentication" reading came from the Pennsylvania case of *James v. Allen*, which construed the effect in that state of a debtor previously discharged from civil arrest under New Jersey's insolvency law.[80] While the court noted that the "[l]aws of foreign countries . . . would in some cases be taken notice of here," such as when "such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties at the time of making them," it construed the New Jersey law to afford a purely domestic remedy of release from debtor's prison, and to have "no connection with the merits of the cause."[81] In response to counsel's citation of the Clause, it held that a strong "effects" reading—one that made the records of sister states equivalent to domestic records—was

77. *Id.* at *2.

78. *Id.*; *accord* Ludlow v. Dale, 1 Johns.Cas. 16 (N.Y. 1799) (Kent, J.) (noting that admiralty judgments were regarded as universally binding, while other kinds of foreign judgments were respected only as a matter of comity).

79. *See, e.g.*, Kibbe v. Kibbe, 1 Kirby 119, 1786 WL 119, at *3 (Conn. Super. Ct. 1786) ("It appears by the pleadings, that the defendant was . . . not within the jurisdiction of the Court . . . at the time of the pretended service of the writ; therefore, the court had no legal jurisdiction of the cause, and so no action ought to be admitted on said judgment: But full credence ought to be given the judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit . . . ."); Millar v. Hall, 1 U.S. (1 Dall.) 229, 232 (Pa. 1788) (noting that the court had considered "the principles of the law of nations, and the reciprocal obligation of the states under the articles of confederation"); Doane's Adm'rs v. Penhallow, 1 U.S. (1 Dall.) 218, 219-20 (Pa. C.P. 1787) ("[W]e think ourselves indispensably bound to give full faith and credit to the legal acts of our Sister States; and . . . the judgments given in their courts will have their full effect here. But it is not every discontinuance that will disable a Plaintiff to hold a Defendant to bail in a second action . . . .").

80. 1 U.S. (1 Dall.) 188 (Pa. C.P. 1786).

81. *Id.* at 191.

implausible, "for otherwise executions might issue in one State upon the judgments given in another."[82] Rather, the Clause seemed "chiefly intended to oblige each State to receive the records of another as full evidence *of such Acts and judicial proceedings*"; in other words, as authentication.[83]

C. *The Constitutional Convention*

1. *Textual Changes*

Had the Full Faith and Credit Clause remained in the form it had under the Articles of Confederation, its current meaning would be much more difficult to discern. However, the changes made to the Clause before its enactment in the Constitution strengthen the authentication reading. Because the convention debates are discussed far more extensively elsewhere,[84] this Section focuses on the two most significant developments of the Clause from the Confederation to the Constitution.

The first change was the addition of "faith and credit" for legislative acts. While the Confederation's Clause dealt only with the acts of "courts and magistrates," the current Clause mentions only the "public Acts . . . of every other State," and the debates make it clear that this term was understood to refer to "the acts of the Legislatures."[85]

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82. *Id.* at 191-92. Likewise, in *Phelps v. Holker*, 1 U.S. (1 Dall.) 261, the Pennsylvania Supreme Court rejected a claim that the judgments of other states, even if rendered without actual notice, had conclusive res judicata effect. Indeed, Justice Rush asked whether, "[i]f this Judgment were as conclusive as the Plaintiff contends, might he not issue an execution at once?" *Id.* at 264 (opinion of Rush, J.). The defense counsel in the case had argued that the Articles "only provide, that, in matters of evidence, mutual faith and credit shall be given to the records, acts, and judicial proceedings of the States," *id.* at 261-62 (argument of counsel), but the court only held that conclusive effect would not be granted in the case at hand.

83. *Id.* at 192.

84. *See, e.g.*, Laycock, *supra* note 5; Nadelmann, *supra* note 22; Whitten, *supra* note 4.

85. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 188 (Max Farrand ed. 1911) [hereinafter FARRAND]. In debates on August 29, James Wilson and Dr. William Johnson understood the Clause as providing that "Judgments in one State should be the ground of actions in other States," and that legislative acts should be included "for the sake of Acts of insolvency

The second change, and the more crucial, was the grant of congressional power to specify the authentication and effect of sister-state records. On August 6, James Madison proposed giving power to Congress "to provide for the *execution* of Judgments in other States, under such regulations as might be expedient— He thought that this might be safely done and was justified by the nature of the Union."[86] Randolph, however, argued that "there was no instance of one nation executing judgments of the Courts of another nation," and instead suggested a version of the Clause that—like the rejected amendment to the Articles—would have specified in advance the manner of authentication and the effect of sister-state records.[87] Gouverneur Morris countered with a proposal leaving the authentication and effect "of such acts, records, and proceedings" up to Congress;[88] when a committee returned with a draft restricting the effects power only to "judgments,"[89] Morris promptly sought to change it back, using the phrase "the effect thereof"—i.e., of the acts, records, and proceedings.[90] James Wilson emphasized the importance of this power, noting that "if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations."[91]

Further technical amendments by Madison and the Committee of Style would later bring the Clause into its current form. Yet Madison's discussion of the Clause in *The Federalist No. 42* demonstrated his belief

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&c," which prompted Charles Pinckney to propose a separate bankruptcies clause. *Id.* at 447.

86. *Id.* at 448.

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

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

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

90. *Id.* at 488.

91. *Id.*

that the grant of power to Congress was the one truly novel and significant component of the Clause. He described it as "an evident and valuable improvement on the clause relating to this subject in the articles of confederation," whose meaning was "extremely indeterminate; and can be of little importance under any interpretation which it will bear."[92]

2. *Implications*

The Full Faith and Credit Clause, as it emerged from Philadelphia, can be divided into three functional parts: the first, self-executing sentence ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State"); the power of Congress to prescribe the manner of proof; and the power of Congress to prescribe the effect of acts, records, and judicial proceedings. No theory of the Clause's meaning can be successful without identifying how these parts fit together. Yet two of the three—the self-executing sentence and the effects power—seem in direct tension with one another. If the Constitution guarantees "Full Faith and Credit," and this term implies some degree of substantive effect for State A judgments in State B, how can it be up to Congress to prescribe the effect?

One possible response is that the self-executing sentence does not in fact carry strong substantive effect—any more so than the Confederation Clause on which it is modeled, and which was described by Madison as being "of little importance." If the Confederation Clause had meant that judgments in each state had conclusive res judicata effect in every state, it would have been of very great importance; indeed, it would have almost entirely obviated the need for Madison's proposal to allow executions in other states. A judgment creditor could just as easily bring an action of debt first, and then seek execution second. Madison clearly had such judgment creditors in mind when he proposed the effects power: as he wrote in *The Federalist*, "[t]he power here established, may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice, may be suddenly and secretly translated in any stage of the process, within a foreign jurisdiction."[93]

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

93. *Id.*

Neither he nor his audience, one supposes, believed that the Confederation Clause did enough to prevent this evasion.

If that is the case, however, and if the first, self-executing sentence of today's Full Faith and Credit Clause ("Full faith and credit shall be given . . . ") is almost the same as the Confederation version, what does this self-executing sentence accomplish? Some would say very little; Wilson, at the Convention, had described it as accomplishing nothing more than "what now takes place among all Independent Nations."[94] One alternative answer is as follows: because it cannot plausibly be read as prescribing the substantive effect, the first sentence of the Full Faith and Credit Clause concerns authentication. Of its own force, the first sentence requires state courts to treat the public records of sister states—once it knows that it has them—as full evidence of their own existence and contents.[95] (There can be no dispute over whether the judgment in State A was rendered for Creditor or not.) The *manner* of proving which documents are actually sister-state records is up to Congress, or, in the absence of congressional action, a question of local common and statutory law. But whether Congress has exercised this power or not, a court is obligated to give sister-state records their appropriate evidentiary effect, as well as any substantive effect to which they are entitled under existing law.[96]

One further piece of evidence may help illustrate this interpretation. A little more than a year before the Convention assembled at Philadelphia, a fourth state statute was passed concerning "faith and credit," this time by Delaware. Yet Delaware's statute had nothing to do with giving effect to sister-state records. Rather, it awarded to the Bank of North America the right to a corporate seal within the state—a seal that would be recognized by courts, or, in Gilbert's words, one "universally known to every Body" without need for sworn testimony.[97] The statute provided that "all Acts heretofore certified under the said Seal, or hereafter to be certified under that or any other

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94. 2 FARRAND, *supra* note 85, at 488.

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

96. *Cf.* Bissell v. Edwards, 5 Day 363, 1812 WL 135, at *4 (Conn. 1812) (Baldwin, J., concurring) ("The constitution . . . provides, that congress *may*, by law, prescribe the manner in which they shall be proved, and the effect thereof. Until congress shall prescribe the mode of proof, they are to be proved to the satisfaction of the court; and perhaps, according to the mode required by the common law, for proving foreign judgments; and when so proved, full faith is to be given to them.").

97. GILBERT, *supra* note 35, at 19.

Seal of the said Corporation, shall have full Faith and Credit in all and every the Courts within this State."[98] This use of "full Faith and Credit" could not have meant "conclusive substantive effect" in the sense today attributed to the Clause in Article IV; the private bank could not write its own laws and authenticate them. But full faith and credit did entitle the bank to recognition that its acts were authentic, that they were its own, and that no other evidence could be admitted to deny them—the same force that the Constitution may well have given the acts, records, and judicial proceedings of the states.

III. THE LEGISLATIVE HISTORY OF FULL FAITH AND CREDIT

A. *The 1790 Act*

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

> *An Act To Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated so as To Take Effect in Every Other State*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United 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.[99]

98. Act of Feb. 2, 1786 § 9 (Del.), *in* LAWS OF THE GENERAL ASSEMBLY, OF THE DELAWARE STATE 9, 10 (Early Am. Imprints, 1st ser., No. 19,600, Wilmington, Del., Jacob A. Killen & Co. 1786).

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

While the authentication provisions were relatively clear, the last sentence of the Act, giving authenticated records and judicial proceedings "such faith and credit . . . as they have by law or usage" in the rendering state, led to decades of confusion. Did it mean that all State A records had the conclusive effect they would have had in State A, and that no plea or argument in defense would be good in State B unless it would have been accepted in State A? Or did it mean only that State A records would have the same evidentiary force—i.e., that they would be equally good evidence of State A's public transactions—as were the original records in their home courts?

Thirty-eight years after the enactment of this provision, a court in New Hampshire summed up the disagreements as follows:

> Some have supposed, that this clause in the constitution declares the effect of the records and judicial proceedings of the several states, when received as evidence in the courts of another state. . . .
>
> Others have been of opinion, that it was not intended, in this clause of the constitution, to declare the legal effect of the records and judicial proceedings of the courts of one state, when used in the courts of another, but to leave the effect to be settled by congress. . . .
>
> Some have been of opinion, that the act of congress does not declare the legal effect of the record, but leaves that to be decided by the court where it is offered in evidence. . . .
>
> Others have thought, that the act of congress does declare the effect of such record. . . .
>
> Some individuals seem to have been of opinion, that the constitution and the act of congress have placed the judgments of the courts of each state, when duly authenticated, on the same ground as domestic judgments are placed in all the other states. . . .
>
> While others have thought, that the judgments of the courts of any state still remain liable to be impeached collaterally, for want of jurisdiction in the courts of any other state. . . .
>
> Indeed, so various have been the opinions expressed, and the different opinions have been stated with so much clearness and ability, that, notwithstanding the various decisions which have been founded upon these provisions in the state courts, and in the supreme court of the United States, whose peculiar province it seems to be to fix the true construction, it is very questionable, whether there is not now quite as much doubt and uncertainty on the

> subject, as there was before it had ever been discussed in a court of justice.[100]

Worse still, the legislative history of the 1790 Act is extremely obscure. The issue was brought before the First Congress by Rep. William Smith of South Carolina,[101] who on February 1 suggested that a bill be drafted to exercise Congress's powers under the Clause.[102] A three-person committee was appointed to draft the bill, presenting it on April 28.[103] This original version is not extant, and the final statute incorporated at least one amendment.[104] Contemporary newspapers largely reprinted the brief accounts later published in the *Annals of Congress*.[105] Moreover, discussion was confined primarily to the House; the bill passed easily in the Senate.[106]

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100. Robinson v. Prescott, 4 N.H. 450, 1828 WL 613, at *2-3 (1828).

101. Smith's interest in the issue was understandable; a commercial attorney and a member of the Middle Temple, he had "opposed the strong debtor-relief measures that the legislature passed in the mid-1780s," and was a Federalist supporter of Hamilton's economic programs. David A. Nichols, *Smith, William Loughton*, *in* AM. NAT'L BIOGRAPHY ONLINE (Feb. 2000), http://www.anb.org/articles/02/02-00296.html.

102. 1 ANNALS OF CONG. 1144.

103. 2 ANNALS OF CONG. 1601. The committee consisted of John Page, George Thatcher, and James Jackson. 1 *id.* at 1144. Thatcher and Jackson both had legal training. *See* Biographical Directory of the U.S. Congress, Jackson, James, (1757 - 1806), http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000017 (last visited May 18, 2007); Biographical Directory of the U.S. Congress, Thatcher, George, (1754 - 1824), http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000141 (last visited May 18, 2007).

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

105. *See, e.g.*, *American Legislation*, VT. J. & UNIVERSAL ADVERTISER, Mar. 3, 1790, at 1; *House of Representatives: April 28*, HERALD OF FREEDOM (Boston), May 7, 1790, at 62; *Proceedings of the Columbian Federal Congress*, MASS. SPY, OR, THE WORCESTER MAG. (Worcester, Mass.), Feb. 18, 1790, at 2.

106. *See* 1 ANNALS OF CONG. at 1005-07. Part of the reason for the sparse record may be the reporter's inattention. *See* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 260 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (Maclay's Journal, May 4, 1790) ("I felt in some degree the effects of the bad Wine We had drank. for I had an head Ach. . . . A great deal of Business was done this day in the Senate in the Way of passing & reading bills but no Debate of any Consequence.").

Despite the paucity of this evidentiary record, however, there is some evidence that the mode of authentication may have attracted more attention than the possible effect given to public records. First, the title of the Act described it as prescribing how records were to be authenticated "*so as* to take effect," seemingly leaving a record's effect where it found it rather than specifically declaring a new rule. Second, at least one contemporary newspaper described Smith as proposing "a bill to describe *the manner of authenticating the records of the several States*, agreeable to the first section of the fourth article of the Constitution."[107] The published Annals of Congress similarly placed his statement under the label "Of Proving Public Records from Other States";[108] subsequent debates were printed under "Authentication of Records"[109] or "Mode of Authenticating Records."[110]

Yet if the last sentence was not prescribing the effect, what was it doing in the Act? The answer may be that it was actually describing the nature of the *authentication*. Other contemporary statutes provide a model for this interpretation. A 1789 statute for the authentication of federal public records, dealing with the same subject as the 1790 Act and passed only a few months beforehand, authorized the Secretary of State to "cause a seal of office to be made for the said department," providing that "all copies of records and papers in the said office,

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107. *Congress. House of Representatives*, PA. MERCURY & UNIVERSAL ADVERTISER (Phila.), Feb. 6, 1790, at 3.

108. 1 ANNALS OF CONG. 1144.

109. 2 *id.* at 1601.

110. 2 *id.* at 1603, 1605. In one mention of the bill, the Annals also leave off the last clause of the title ("so as to take effect in every other State"), but this may be a simple error, as the House Journal for the same day records the full title. *See* 1 H.R. JOUR. 204; 2 ANNALS OF CONG. 1601. Another mention of the bill without reference to "effect" seems more clear; *see* 2 ANNALS OF CONG. 1605 ("A message from the Senate informed the House that they have passed the bill to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated."); *Proceedings of Congress*, PROVIDENCE GAZETTE & COUNTRY J., May 22, 1790, at 2 ("A message was received from the Senate, informing the House, that they have passed the bill prescribing the mode of authenticating the acts, records and proceedings, of the several States.")

Statutory compilations do not provide a clear characterization of the 1790 Act. *Compare* THOMAS HERTY, A DIGEST OF THE LAWS OF THE UNITED STATES OF AMERICA 428 (Balt., W. Pechin 1800) (listing the Act under the heading "Records &c. Authentication of"), *with* 1 THE LAWS OF THE UNITED STATES OF AMERICA 115 (Phila., Richard Folwell 1796) (labeling the last sentence of the 1790 Act in the margin as pertaining to "the effect thereof").

authenticated under the said seal, shall be *evidence equally as the original record or paper*."[111] The word "effect" was occasionally used to refer to this evidentiary equivalence: an 1823 statute sought to provide citizens with copies of land grants, "and to *declare the effect* of such copies," by making it "the duty of the Secretary . . . to cause such copies to be made out and authenticated, under his hand and seal, . . . and such copies, so authenticated, shall be *evidence equally as the original papers*."[112] An 1849 statute concerning public records followed these models, specifying a mode of authenticating copies and then declaring their evidentiary value, and adding that sealed copies of records from a variety of government departments would have the same "force and effect" as copies produced for the State Department.[113]

Congress's next use of the term "faith and credit" after 1790 seems to have taken a similar approach. The Process Act of 1792[114] discussed the records of the federal court of appeals created under the Articles of Confederation,[115] providing as follows:

> [A]ll the records and proceedings of the court of appeals heretofore appointed, previous to the adoption of the present constitution, shall be deposited in the office of the clerk of the supreme court of the United States, who is hereby authorized and directed to give copies of all such records and proceedings, to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said court are by law directed to be given; *which copies shall have like faith and credit as all other proceedings of the said court*.[116]

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

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

113. An Act for Authenticating Certain Records, ch. 61, 9 Stat. 346, 346-47 (1849).

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

115. It is unclear whether the provision refers to the court of appeal for prize cases, *see* ARTS. OF CONFEDERATION art. IX, § 1; *see also* HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787 (1977), or that for disputes between the states, *see* ARTS. OF CONFEDERATION art. IX, § 2, although the former seems more likely.

116. Process Act of 1792, § 12, 1 Stat. at 279.

A substantive reading of this usage of "faith and credit," one that uniformly elevated prize appeals to the level of Supreme Court decisions, would raise interesting questions of congressional power over the judicial system—and of the exact relation between the Union and the Confederation as successor governments. In this context, however, the term "faith and credit" presumably meant that the copies were to be treated as admissible *evidence*, just like other judicial documents authenticated by the Supreme Court's clerk. While the Constitution did not specify what "faith and credit" was due to federal acts, records, and judicial proceedings, federal statutes effectively did: the Process Acts of 1789 and 1792 provided for the authentication by seal of judicial records and proceedings, while acts such as the 1789 statute discussed above did the same for legislative acts and executive records.[117]

Finally, reading the "such faith and credit" of the 1790 Act as an authentication provision has the further benefit of avoiding an interpretation that would have allowed writs of execution to issue on sister-state judgments. Although we do not know much about the original understanding of the 1790 Act, we do know that it was *not* understood to fulfill Madison's hope of providing for the immediate cross-border execution of judgments.[118] Yet the theory on which some early-nineteenth-century commentators supported the conclusive-effect interpretation would have had precisely this effect.

A number of commentators understood the Act as giving the records of each state the technical status of "records" in every state; i.e., turning a State A judgment into a domestic judgment in State B's courts. Thus Nathan Dane argued in 1824 that every sister-state judgment "must be either as a foreign judgment, or as a domestic one"; there could be no middle ground, as "any middle ground taken, must be a source of endless distinctions and controversy; nor does there seem to be any colour for such middle ground in the words or spirit of the

117. *See id*. § 1, 1 Stat. at 275-76; An Act To Regulate Processes in the Courts of the United States, ch. 21, § 1, 1 Stat. 93, 93 (1789); An Act To Provide for the Safe-Keeping of the Acts, Records, and Seal of the United States, and for Other Purposes, ch. 14, 1 Stat. 68, 68 (1789). One might say that this function is now performed by FED. R. CIV. P. 44(a)(1).

118. This very idea was considered a *reductio* by opponents of the conclusive-effect reading. *See, e.g.*, Phelps v. Holker, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (opinion of Rush, J.)

constitution, or act of congress."[119] Since sister-state judgments were not foreign, Dane claimed, they must be domestic; Q.E.D. Likewise, an 1802 treatise mentioned the 1790 Act in a discussion of the locality of actions; debt or *scire facias* on a judgment were local actions at common law, because they could only be brought in the court where the record was located, or in a superior court that might order the record sent in.[120] But "[b]y the constitution and laws of the United States, judgments in *one state* are no longer *local*, as they respect the courts in *another state*";[121] rather, the "production of the original record is dispensed with," and "the action is now transitory," capable of being raised anywhere.[122]

While the symmetry of such views is appealing, it must also have been incorrect. No matter what one thinks of the 1790 Act, it created a third category of judgments which fit neither the "domestic" nor "foreign" boxes of the English common law. This was because England was a unitary jurisdiction, in which domestic judgments from the central royal courts would enable writs of execution to issue. Yet if a State A judgment were truly a domestic judgment of State B in the English sense, there would be no need to bring an action of debt; the plaintiff could simply move straight to a *scire facias* or execution.[123] To create a category of judgments that were treated differently from foreign judgments of France or Jamaica, yet were not available for immediate execution, was to create a third kind of judgment that was neither domestic nor foreign—the effect of which, both substantive and evidentiary, was yet to be determined.[124]

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119. 5 Nathan Dane, A General Abridgment and Digest of American Law, with Occasional Notes and Comments 217 (Boston, Cummings, Hilliard & Co. 1824).

120. American Precedents of Declarations 31 (Benoni Perham ed., Boston, Barnard B. Macanulty 1802).

121. *Id.*

122. *Id.* at 32.

123. *Cf.* Baker v. Gen. Motors Corp., 522 U.S. 222, 241 (1998) (Scalia, J., concurring in judgment) (noting that the Constitution "did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*. No execution can issue upon such judgments without a new suit in the tribunals of other States." (quoting Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462-63 (1873))).

124. As Whitten notes, a judgment could have a conclusive effect without itself serving as a ground for a writ of execution. *See* Whitten, *supra* note 4, at 284-85. Yet under the theory of domestic judgments employed by these

B. *The 1804 Act*

1. *Intervening Developments*

The thirteen years between the 1790 Act and Congress's next consideration of its full faith and credit powers saw a number of significant developments in the state and lower federal courts. These decisions can be grouped into three categories: those concerning the general background law of recognition of judgments, those concerning the manner of authentication under the Act, and those concerning the effect of sister-state judgments. Together, they show that confusion about the Act emerged relatively quickly, as did radically divergent understandings of Congress's power under the Effects Clause.

The first category of court decisions discussed foreign records and judgments on the basis of general principles of international law. In 1795, a Connecticut court admitted into evidence certain notarial certificates from the West Indies; although they were not fully "of record," the court stated, "faith and credence is by the universal consent of all nations given to the attestations of a notary public."[125] Similarly, the Connecticut Supreme Court of Errors in 1802 held valid a confiscation of property by Vermont on the grounds that it was "the act[] of a legislature and of a court of a foreign state, and, as such, to be respected."[126]

Courts recognized that the Full Faith and Credit Clause had force on this question, but did not always clarify how much. The Pennsylvania Supreme Court noted that "[w]e are bound to consider the judgments of a court to be right and just," but that "this rule holds in a much stronger degree by the laws of the union, when the judicial proceedings of the court of a sister state come before us."[127] South Carolina's constitutional court, in receiving a Virginia judgment into evidence, noted that it "was fair and regular to presume that the record and judgment were agreeable to the laws and the usual course of proceedings in that state," and also that "they were bound to give due

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commentators, that possibility would be ignored: if sister-state records were domestic for the purposes of a debt action, they would also be domestic for the purposes of execution.

125. Spegail v. Perkins, 2 Root 274, 1795 WL 309, at *2 (Conn. Super. Ct. 1795).

126. Baldwin v. Kellogg, 1 Day 4, 1802 WL 306, at *2 (Conn. 1802).

127. Nixon v. Young, 2 Yeates 156, 1796 WL 810, at *5 (Pa. 1796).

faith and credit to them, and the more especially as the exemplification of the judgment appears to be in due form."[128]

A second question arose over the treatment of documents that had not been authenticated in the manner prescribed by Congress. Some cases held that the 1790 Act merely offered an additional statutory process, and did not abolish "such modes of authentication as were used here before it passed";[129] others held that the Act's mode of authentication was exclusive,[130] in light of arguments that "full faith is to be given to the records of another state, and Congress [has] the power to ascertain the manner of giving it etc."[131]

A third question, and the most important for this inquiry, concerned the meaning of the grant of "such faith and credit" in the 1790 Act. In one of the first cases to discuss the matter, *Armstrong v. Carson's Executors*,[132] the defendants had pleaded *nil debet* to an action on a judgment from New Jersey. The plaintiffs argued that the courts of New Jersey would not have accepted any other plea than *nul tiel record*, and Jared Ingersoll, the defendant's counsel, "declined arguing the point for the defendant, thinking it clearly against him."[133] Justice Wilson, on circuit, agreed:

> If the plea would be bad in the Courts of New Jersey, it is bad here: for, whatever doubts there might be on the words of the Constitution, the act of Congress effectually removes them; declaring

128. Mathew Coleman v. The Guardian of a Free Negro Named Ben, 2 S.C.L. (2 Bay) 485, 1803 WL 259, at *1 (Const. App. 1803); *see also* Pettit v. Seaman, 2 Root 178, 1795 WL 266, at *2 (Conn. Super. Ct. 1795) ("The person of the petitioner being attached . . . gave jurisdiction to the courts of this state . . . Yet the plaintiff by this acquired no greater rights . . . than he would have had, had he prosecuted the action in the state of New York. *Besides*, by the Constitution . . . full faith and credence is to be given, by each state to the laws, records and judicial proceedings of the other states; we are therefore bound to respect the laws and judicial proceedings of the state of New York.")

129. Ellmore v. Mills, 2 N.C. 359, 1796 WL 281, at *1 (N.C. Super. L. & Eq. 1796); *see also* Pepoon v. Jenkins, 2 Johns. Cas. 119, 119 (N.Y. 1800) ("[I]t remains with the court to decide upon the sufficiency of the evidence.").

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

131. *Adams*, 1 Del. Cas. at 243 (argument of counsel).

132. 2 U.S. (2 Dall.) 302 (C.C.D. Pa. 1794).

133. *Id.* at 303. (reporter's headnote).

> in direct terms, that the record shall have the same effect in this Court, as in the Court from which it was taken.[134]

While some courts favored Wilson's interpretation,[135] it was not unanimously shared. Some courts explicitly argued that Congress had not yet exercised its power under the Effects Clause. Thus, in *Wright v. Tower*, Justice Rush of Pennsylvania's Supreme Court distinguished between the "faith and credit of a record, and the effect or operation of a record"; the Constitution had made sister-state records legal evidence in other states, but had given to Congress the power to decide on their legal effect. The current statute, he argued, by granting the "same faith and credit" to a sister-state record, had made it "as completely legal evidence of the existence and correctness of such record, out of the state, as it would be in the state."[136]

Likewise, in *Hammon v. Smith*, South Carolina's constitutional court rejected *Armstrong*'s doctrine in a three-way vote.[137] Justice Grimke argued that the Constitution did not require that a sister-state judgment be "the foundation of the suit"; the Clause

> only declares, that [the record] shall be received with full faith and credit; . . . evidently meaning to draw a distinction between the effect it would have, as evidence of such a debt, and the recovery thereof

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134. *Id.* (Wilson, J.). Indeed, Wilson was among those who had had "doubts" on the meaning of the self-executing sentence; see *supra* text accompanying note 94.

135. *See, e.g.*, Banks v. Greenleaf, 2 F. Cas. 756 (C.C.D. Va. 1799) (No. 959) (Washington, Circuit Justice); King v. Van Glider, 1 D. Chip. 59, 1797 WL 603 (Vt. 1797) (opinion of Chipman, C.J.) ("In cases to which [the 1790 Act] extends, I consider that we are bound to admit copies authenticated in the mode therein prescribed, and to allow the judgments their full effect, yet, they may be admitted on other proof of their authenticity; but, unless the record be authenticated agreeably to that act, the judgment will be considered as having the effect of a foreign judgment only."

Pennsylvania's supreme court was unclear on the subject. *See, e.g.*, Baker v. Field, 2 Yeates 532 (Pa. 1800) ("To make a record conclusive evidence, and to give it 'such faith and credit in every other court of the *United States*, as it has by law or usage in the courts of the state, from whence such record is taken,' it must be authenticated according to the act of the Union; but . . . the usual certificates may be received as prima facie evidence *of the record*, and may be shown to the jury." (emphasis added)).

136. 1 Browne app. 1, 10-12 (Pa. 1801); *see also* Whitten, *supra* note 4, at 306-11 (describing Rush's argument in great detail).

137. 3 S.C.L. (1 Brev.) 110, 1802 WL 520 (Const. App. 1802).

> [in court], and that of its being full and unequivocal proof of the debt. [138]

By contrast, Justice Johnson, who would later dissent in *Mills*, did not enter the dispute between conclusive and prima facie effect. Instead, he argued that the evidentiary effect was separate from the question of the proper plea; *nul tiel record* could only be applied to domestic judgments, and was inapplicable to mere exemplifications of records. The plaintiffs would receive "all the benefit intended to be secured by the constitution, by giving an exemplification in evidence, under the plea of *nil debet*";[139] were sister-state judgments treated as the sort of domestic judgments appropriate for *nul tiel record*, "the next step would be to decide that a [writ of execution on] a judgment in a sister State, might be maintained in this State."[140]

Armstrong was also rejected by Justice James Kent and a majority of his colleagues on the New York Supreme Court in 1803.[141] Their decision is worth discussing in detail, as it provides one of the best examples of the nature of the debates. In 1803, Kent wrote in *Hitchcock v. Aicken* that "[i]t 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."[142] The constitution had "evidently distinguished between giving *full faith and credit*, and the giving effect to the records of another state"; thus, "until congress have declared by law what that effect shall be, the records of different states are left precisely in the situation they were in under the articles of confederation," which did not prescribe the effect of judgments.[143]

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138. *Id.* at *3 (opinion of Grimke, J.).

139. *Id.* at *3 (opinion of Johnson, J.).

140. *Id.* Johnson and Grimke were each joined by another justice, while Justice Brevard dissented on grounds similar to those of *Armstrong*. *See id.* (Brevard, J., dissenting) (noting that foreign judgments are merely *prima facie* evidence of the debt, but that "surely, this is not the footing on which the solemn judgments, and judicial proceedings of the courts of law of the several States, united under the same general government, and constituting the nation, are placed in relation to each other").

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

142. 1 Cai. R. 460 (1803) (opinion of Kent, J.)

143. *Id.*; *see also id.* (opinion of Radcliff, J.) ("The full faith and credit, intended by the constitution, cannot be interpreted to mean their legal effect, for

Moreover, he interpreted the 1790 Act to "leave[] the question as to the *effect* of such records precisely where it found it": requiring "full assent to the proceedings contained in the record, as matters of evidence and fact, but not as absolutely barring the door against any examination of the regularity of the proceedings, and the justice of the judgment."[144]

Two justices dissented, and Justice Henry Livingston, in particular, argued strenuously for the conclusive effect of a sister-state judgment. Livingston based his argument, however, on the Constitution rather than on the 1790 Act, arguing that the former provided on its own for conclusive effect.[145] This position, however, forced him into a strained reading of the effects power:

> [M]y opinion is drawn from the constitution, and is altogether independent of this 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. The effect could as easily be settled by the constitution, as referred to congress. I am, therefore, inclined to think, that the " *effect*," spoken of in the 4th article, refers to the proof to be prescribed by congress,

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otherwise, the subsequent provision that congress may prescribe the *effect* would be senseless and nugatory."); *id.* (opinion of Lewis, C.J.) ("For, where is the use of congress prescribing, by general laws, the effect of such judgments, or the proof of them, which is the same thing . . . if by *full faith and credit* absolute verity is intended."). Justice Radcliffe emphasized that the question of evidentiary force and legal effect were distinct. *See id.* (opinion of Radcliffe, J.) ("When a judgment, or recovery in our own courts, is pleaded, it is alleged as a fact, the record of which cannot be denied, and is conclusive of the fact . . . : but its legal effect, or operation, on the rights of the parties, is still to be considered, and frequently may form a distinct question.")

144. *Id.* (opinion of Kent, J.); *see also id.* (opinion of Radcliffe, J.) ("When so authenticated, they are entitled to full faith credit; but they are to 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."). Kent's *Commentaries*, published long after *Hitchcock*, would not take this view, but would merely restate the Supreme Court's subsequent holdings in *Mills v. Duryee* and *Hampton v. McConnel*. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 243-44 (N.Y., O. Halstead 1826).

145. *Id.* (Livingston, J., dissenting) ("To introduce a distinction between domestic and foreign judgments . . . must have been their intention; otherwise, they would have been silent . . . ."); *see also id.* (Thompson, J., dissenting) ("The framers of this constitution, doubtless, well understood the light in which foreign judgments were viewed in courts of justice, and must have intended, by this article, to place the states upon a different footing with respect to each other than that on which they stood in relation to foreign nations . . . .").

> that being its immediate antecedent. They were first to say how these judgments were to be proved, and then declare the effect of such proof . . . ."[146]

If the constitutional "full faith and credit" meant conclusive effect, what was left for Congress to declare? Livingston's constitutional position required him to argue that the effects power referred only to the effect of the *authentication*, and not the effect of a record or judicial proceeding itself.[147] Of course, Livingston did not at the time have access to the notes of the Convention debates, which had not yet been published, to see the actual nature of Morris's original proposal and amendment (which clearly viewed "effect" as going to more than the effect of the seal). But *The Federalist* had also mentioned the possibility of providing for the execution of judgments of one state in another,[148] as had state court decisions.[149] And it is worth noting that Livingston's interpretation of the Clause led him to read the "such faith and credit" provisions of the 1790 Act exactly as the *Hitchcock* majority did, as providing for the full evidentiary equivalence of an authenticated copy with the original:

> [A]nd, perhaps, this is the true intent of the [1790 Act], which substantially says, that such proof (after prescribing its nature) shall

146. *Id.* (Livingston, J., dissenting).

147. *Cf.* 5 DANE, *supra* note 119, at 217 ("The effect of what? Of the record that is before declared by the constitution to be entitled to full faith and credit, when found to be a record. The effect thereof then applies to the proof . . . ."). *But see* Corwin, *supra* note 24, at 374 (1933) (describing it as "clear[]" that "the word 'effect' is construed as referring to the effect of the records when authenticated, not to the effect of the authentication"). Justice Story would later take a similar position to Livingston's in his *Commentaries on the Constitution*, *see* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1306-07, at 181-82 (Boston, Hilliard, Gray & Co. 1833), but this was not his position as of 1805, see JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS 296 (Salem, Mass., Barnard B. Macanulty 1805) (discussing the distinction between evidence and effect, and noting that "[t]he act of Congress seems to provide for the evidence only").

148. *See supra* text accompanying notes 92-93.

149. *See, e.g.*, Farley v. Shippen, Wythe 254, 1794 WL 329, at *10 n.*e* (Va. Ch. 1794) (noting that, although removal across state borders might defeat a writ of execution, the Effects Clause seemed "to shew that provision for such cases as these, among others, was intended to be made").

> be as good evidence *abroad*, of the existence of the judgment, as the record itself is *at home*.[150]

One further difficulty in which Livingston's strong constitutional interpretation involved him was the question of judgments rendered without personal service; he noted that "in some instances, mischief may result from making this rule universal, or from too rigid an adherence to it; particularly when the proceedings are by foreign attachment, or without a personal summons or arrest of the defendant."[151] Livingston recognized that on his account, the words of the Constitution, fairly interpreted, would apply to *ex parte* determinations as well: "Sitting here '*jus dicere et non jus dare*,' it would be a sufficient answer to all complaints of this kind to say, '*ita lex scripta est*' . . . ."[152] At the same time, however, he suggested that the court may possess the power, "in extraordinary cases" to declare particular judgments "as exceptions to the general law, and as not contemplated by the constitution"; such intervention, he argued, "would be a better course than to render null and void one of its most important and salutary provisions."[153]

2. *Congressional Action*

When Congress returned to the Full Faith and Credit Clause in 1803-1804, it did not respond to any of the controversy surrounding its previous enactment. Rather, the 1804 Act merely extended the older statute to cover executive records and office books in addition to judicial records,[154] and to include with the public records of the states

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150. *Hitchcock*, 1 Cai. R. 460 (Livingston, J., dissenting); *but see id.* (Thompson, J., dissenting) ("If nothing more was intended than to declare the manner of authenticating such records and proceedings, this part of the act is useless; nay, worse, it is mischievous, being calculated to mislead.").

151. *Id.* (Livingston, J., dissenting).

152. *Id.*

153. *Id.* Justice Kent would have none of this. *See id.* (opinion of Kent, J.) ("[I]f we may question the binding force of the proceeding or judgment in one case, we may in another; for, the act of congress has no exceptions, and must receive a uniform construction.").

154. The act reads in full as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any

those of territories and possessions (such as the recently-approved Louisiana Purchase).[155] Rep. Joseph Nicholson, a Maryland lawyer and future judge, asked the House on November 1, 1803, to appoint a committee to inquire "whether any additional are necessary to be made to the act" of 1790.[156] The next day, he presented a draft bill,[157] which

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

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

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

155. See Scott A. Taylor, *Enforcement of Tribal Court Tax Judgments Outside of Indian Country: The Ways and Means*, 34 N.M. L. REV. 336, 352 (2004).

156. 13 ANNALS OF CONG. 554. The committee was composed of Nicholson, Thomas Griffin of Virginia (who was at the time also a justice of oyer and terminer in his home state), and James Holland of North Carolina, a former justice of the peace. *See* Biographical Directory of the U.S. Congress, Griffin, Thomas, (1773 - 1837), http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000467 (last visited Jan. 30, 2008); Biographical Directory of the U.S. Congress, Holland, James, (1754 - 1823),

was debated on November 25 and sent back to a larger committee for redrafting "after considerable discussion, developing much diversity of opinion."[158] More than two months later, on February 7, Nicholson presented an amended bill that varied only slightly from its original text.[159] The measure sat dormant until March 23, when the House debated it briefly and passed it without amendment; it then quickly passed the Senate and was signed into law four days later.[160]

What caused the dissension that sent the bill back to committee? Not the amendments themselves, which differed from the original in only three substantive respects. The amended measure applied not only to "records" (a term of art), but also to sealed and certified exemplifications of everyday "office books" kept in public offices;[161] it contained slightly more complicated mechanisms of authentication; and it applied to "countries subject to the jurisdiction of the United States" as well as organized territories. Coming on the heels of the Louisiana Purchase, this may have been an important addition—but it was unlikely to have generated "much diversity of opinion."[162] What could generate controversy, however, was the extent to which the 1790 Act had prescribed the effect of judicial records in other states. And not only did Congress fail to clarify its use of "such faith and credit" in the 1790 Act, it repeated the ambiguous language:

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

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http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000718 (last visited Jan. 30, 2008).

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

158. *See* 13 ANNALS OF CONG. 625; *see also* 4 H.R. JOUR. 436, 440, 446, 459.

159. 13 ANNALS OF CONG. 979; *see* A Bill Supplementary to the Act, Entitled, "An Act To Prescribe the Mode in Which the Public Acts, Records and Judicial Proceedings in Each State, Shall Be Authenticated so as To Take Effect in Every Other State," 8th Cong. (Feb. 7, 1804).

160. 4 H.R. JOUR. 681-82; 3 S. JOUR. 402-04.

161. The issue of "office copies" of court records had arisen in *Jenkins v. Kinsley*, 3 Johns. Cas. 2d 474 (N.Y. 1794), and had been resolved in favor of admitting them on common law grounds. *See also* GILBERT, *supra* note 35, at 23-24 (discussing office copies).

162. *See* Nadelmann, *supra* note 22, at 61.

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

Why would Congress have relied on language that was already confusing the courts? Perhaps it was unaware of the controversy (though the "diversity of opinion" may prove otherwise); perhaps the majority thought the courts would eventually come around to their own preferred outcome; or perhaps no single clarification had the votes to succeed, leaving Nicholson's amended bill in much the same place as the original.

Yet the 1804 statute does offer some reason to question a strong substantive interpretation of the 1790 Act. For example, what would it mean for exemplifications of office books to be given the same substantive effect in sister states as in their home state? Given that the states presumably differed in the sorts of questions that could be answered by executive records—and that such records and office books were far more likely than judicial judgments to be created ex parte and without notice to affected parties—it is difficult to believe that Congress would have lightly given them conclusive effect throughout the Union.

Moreover, while the 1804 Act lives on as 28 U.S.C. § 1739, our modern statutes currently accord to federal executive records much less than what a substantive interpretation of the 1804 Act would have achieved for state records. Consider 28 U.S.C. § 1733, which provides in part:

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> (b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.[163]

One might think it useless to enact a formal statute making government records evidence of the transactions they were meant to record, or making copies of such records evidence equally with the originals—especially if they have already been "[p]roperly authenticated." Surely the common law and common sense would do as much. Yet 28 U.S.C. § 1733 is only one of a number of provisions

163. 28 U.S.C. § 1733.

addressing the evidentiary value of a copied federal record;[164] and if it is sensible for us to have such rules on the books today, it was far more important to have such rules at the time of the Founding, when technological limitations, let alone jurisdictional boundaries, placed a far greater premium on admissibility.

C. *The 1806-1808 Bills*

1. *Intervening Developments*

Not long after the new statute became law, the controversy over the 1790 Act deepened. In June 1804, a North Carolina court adopted the conclusive interpretation of *Armstrong v. Carson's Executors*,[165] as did New Jersey's Justice Pennington in an 1805 concurrence.[166] Yet the latter case demonstrated some of the complexities of a conclusive-effect interpretation.

The other justices in New Jersey joined Pennington solely on the ground (which was not reported as having been raised by counsel) that the original judgment had been rendered by foreign attachment without personal service. Without any argument on the subject, Pennington wrote that "I am not ready to say, nor do I believe, that a judgment founded on a foreign attachment would be conclusive evidence of a

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164. *See id.* § 1734 (empowering courts to enter an order reciting the substance of a lost or destroyed court record, and providing that "[s]uch order, subject to intervening rights of third persons, shall have the same effect as the original record"); *id.* § 1736 ("Extracts from the Journals of the Senate and the House of Representatives, and from the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or the Clerk of the House of Representatives shall be received in evidence with the same effect as the originals would have."); *id.* § 1740 ("Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals."); *id.* § 1744 ("Copies of letters patent or of any records, books, papers, or drawings belonging to the United States Patent and Trademark Office and relating to patents, authenticated under the seal of the [PTO] and certified by the Under Secretary of Commerce for Intellectual Property and Director of the [PTO], . . . shall be admissible in evidence with the same effect as the originals.").

165. Wade v. Wade, Cam. & Nor. 486, 1 N.C. 601 (Super. L. & Eq. 1804).

166. Curtis v. Gibbs, 2 N.J.L. (1 Penning.) 399, 1805 WL 553 (1805) (opinion of Pennington, J.).

debt in the courts of Pennsylvania," for such judgments "do not . . . constitute such records as full faith and credit ought to be given them."[167] Presumably the very existence of the sister-state judgment implied that sister-state law permitted such proceedings; yet Pennington did not require much convincing before carving out an exception from an otherwise conclusive effect.

The most significant development, however, took place in Massachusetts, whose Supreme Judicial Court in *Bartlet v. Knight* unanimously rejected the conclusive interpretation in favor of an equivalent-evidence reading.[168] The defendant Abraham Knight had been accused of defaulting on a promissory note; he did not appear when sued in New Hampshire, and a default judgment issued against him. When the plaintiff tried to enforce his judgment in Massachusetts, Knight argued that he should not be bound by the judgment, as he had always been a Massachusetts resident, he had never been given notice of the New Hampshire suit, and he had at the time of signing the note been only fourteen years old. Counsel in the case confined their arguments to the meaning of the Act, with the plaintiff arguing that the judgment "would be absolutely incontrovertible evidence of a debt" in New Hampshire, and the defendant arguing that the record was only "incontrovertible evidence of every thing that appeared by the record, *viz.*, that the judgment was recovered, by and against the parties named, for the sum and for the cause of action expressed," etc.[169]

The first opinion in the case was delivered by Justice Thatcher, who had been a member of the three-man committee that drafted the 1790 Act in the House.[170] Thatcher stated that "the constitution of the *United States* and the act of congress, which have been cited, do not admit of the construction contended for"; as the note itself would have been void under Massachusetts law if executed locally, the same defenses would be available to a sister-state judgment founded on the note.[171] Thus, even if the record were taken as conclusive evidence of

167. *Id.* at *6.

168. 1 Mass. 401, 1805 WL 581 (1805). According to the reporter, the court had taken a different position "some years since" in the unreported case of *Noble v. Gold*, but none of the justices seemed concerned by the precedent. *See id.* at 410.

169. *Id.* at 403-04.

170. *See supra* note 103.

171. *Id.* at 404-05 (opinion of Thatcher, J.).

the proceedings in New Hampshire, it did not carry conclusive effect in sister states.

Justice Sewall agreed, describing the authenticated New Hampshire proceedings as "having, *as evidence of a public record*, the same faith and credit with us, as it would have in New Hampshire."[172] However, it could not have the same substantive effect. Because the action of debt on a judgment was founded on a theory of an implied promise to pay, and because the record revealed facts (particularly Knight's minority) that would vitiate such a promise, "a judgment liable to these objections, must be determined to be no just or legal consideration, from which a promise or debt of the party, nominally charged by it, ought to be implied or inferred."[173]

The final opinion in the case was delivered by Justice Sedgwick, who, like Thatcher, had been a member of the First Congress when the 1790 Act was written.[174] He noted that "the effect of records, &c., [as well] as their mode of authentication, is, by the constitution, within the authority of congress." However, "[w]hat the effect shall be is not declared by the statute." Rather, the 1790 Act provided only "that they shall be incontrovertible and conclusive evidence of their own existence, and of all the facts expressed in them. The *act*, however, stops short of declaring what shall be their effect; and congress have wisely left this to the judicial department."[175]

Sedgwick's opinion also gives some insight into the understanding of what it may have meant for a judgment to be *prima facie* evidence. Justice Kent had argued in *Hitchcock* that a defendant could still "impeach the justice" of a sister-state judgment, and "show [it] to have been irregularly or unduly granted"; while "matters proper for jury determination, which appear from the record to have been fairly submitted to them, cannot be overhauled," the 1790 Act did not "bar[] the door against any examination of the regularity of the proceedings, and the justice of the judgment."[176] This was the general standard for

172. *Id.* at 407 (opinion of Sewall, J.).

173. *Id.* at 407-08.

174. *See* Nadelmann, *supra* note 22, at 64.

175. *Bartlet*, 1 Mass. at 409.

176. *Hitchcock v. Aicken*, 1 Cai. R. 460 (N.Y. 1803) (opinion of Kent, J.). Kent would later argue that "the defendant must *impeach* the judgment, by showing, affirmatively, that it was unjust, by being irregularly or unfairly procured"; rather than "granting a new trial . . . upon every question of fact," something must be shown to have been *procedurally* wrong or unfair in the initial judgment. Taylor v. Bryden, 8 Johns. 173 (N.Y. 1811) (Kent, J.).

the enforcement of the judgments of inferior courts not of record, to which sister-state judgments could be analogized.[177] The defendant's counsel in *Bartlet* therefore argued that it was "competent to the defendant to show that such judgment was unduly or irregularly obtained."[178] Sedgwick, too, wrote that among other things, "the courts of the other states shall never be charged with collusion, corruption, or a *mere* error of judgment."[179] Where, however, the proceedings had in some way been fundamentally unfair—as when the judgment was rendered without personal notice to the defendant—the common law presumption in favor of foreign judgments would be rebutted. He noted that "many of the states, of which *this* [i.e., Massachusetts] is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him."[180] Sedgwick was under no illusions, therefore, that a judgment without service or notice would be always and everywhere invalid; as a Massachusetts judge, he would be obliged to enforce his own state's statutes. Rather, the lack of personal notice was sufficient to rebut *prima facie* evidence of a judgment's reliability,[181] and no law required according the proceedings of sister states anything more than that.

2. *Congressional Action*

Congress returned to the topic of full faith and credit soon after the decision in *Bartlet*. To have different rules applied by the largest commercial jurisdictions in the country was intolerable; and on January 22, 1806, Barnabas Bidwell—a representative from Massachusetts—spoke of "the necessity of uniformity in certain judicial proceedings of the States." He then proposed that a committee "consider whether any, . . . further provision ought to be made by law for prescribing the manner in which the public acts, records, and judicial proceedings of the respective States shall be proved, and the effect thereof."[182] A committee was appointed, and a month later, on February 26, Bidwell

177. *See, e.g.*, Cole v. Driskell, 1 Blackf. 16, 1818 WL 1144, at *1 (Ind. 1818).

178. *Bartlet*, 1 Mass. at 404.

179. *Id.* at 409.

180. *Id.* at 410.

181. *Cf.* Smith v. Rhoades, 1 Day 168, 1803 WL 539 (Conn. 1803) (finding that a lack of personal service could be cured by notice and appearance).

182. 15 Annals of Cong. 372.

presented a bill "[p]rescribing the effect, in each state, of the records of judgments and decrees of the courts of record of every other state."[183]

Bidwell's proposal was notable in three respects. First, it applied exclusively to the judgments or decrees of courts of record, ignoring the judgments of inferior courts, such as those held by justices of the peace, whose proceedings were not given the same degree of respect. Second, it applied explicitly to both the judgments of the common law courts and to the decrees of equity courts; unlike the "action of debt" amendment that had been proposed for the Articles of Confederation, Bidwell's bill would give conclusive effect to the "debt *or right*" established in the rendering state's judgment,[184] thereby expanding the range of judgments that could be enforced. Again, the theory on which foreign money judgments had been enforced was that the judgment created an implied promise to pay; such a theory would not extend to adjudications of rights other than money damages, such as divorces.[185]

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

> Sec. 1. *BE it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That in any action at law or suit in chancery, in a court of any state, on a judgment or decree of a court of record of any other state, or in which such judgment or decree is given in evidence, the record of the said judgment or decree, exemplified and proved in the manner prescribed in the [1790 Act], shall be *conclusive* evidence of the debt or right therein adjudged or decreed, against any party thereto, who appeared, or was personally served with legal notice to appear, in the action or suit, wherein the said judgment or decree was rendered or passed; but against a party, who neither appeared, nor was personally served with legal notice to appear, it shall be *prima facie* evidence only:
>
> *Provided always*, that nothing herein contained shall operate to prevent any party from pleading, or giving in evidence, a reversal, release or satisfaction of such judgment or decree, or any other cause of defence in law or equity, accruing after the said judgment or decree.

Id.

184. *Id.*

185. *Cf.* Jackson v. Jackson, 1 Johns. 424 (N.Y. 1806) (holding illegitimate a Vermont divorce of New York domiciliaries). Vermont, like Nevada in more recent times, appears to have been the divorce capital of this era. *See, e.g.*, Barber v. Root, 10 Mass. 260 (1813) (describing Vermont's laws, which allowed citizens of other states to obtain divorces there, as "an annoyance to the neighboring states, injurious to the morals and habits of their people, and . . . to be reprobated in the strongest terms, and . . . counteracted by legislative provisions in the offended states").

Third, and most important, Bidwell's proposal would have made authenticated judgments and decrees "*conclusive* evidence of the debt or right therein adjudged or decreed," but only against "any party thereto, who appeared, or was personally served with legal notice to appear, in the action or suit." Against parties "who neither appeared, nor [were] personally served with legal notice to appear," such judgments were to be considered "*prima facie* evidence only."[186] Perhaps Bidwell thought that his proposal merely declared existing law, and that the New York and Massachusetts decisions were erroneous; but note that neither New York, Massachusetts, nor any other jurisdiction had adopted Bidwell's rule precisely. In particular, the courts had considered the lack of personal service as effectively *rebutting* the prima facie effect of a foreign judgment, not as merely reducing that effect from conclusive to prima facie. This was in accordance with the common law of international relations, as expressed in *Buchanan v. Rucker*.[187] (The bill also took the word "conclusive" quite seriously, adding as a proviso what some courts had merely assumed—that "nothing herein contained shall operate to prevent any party from pleading . . . a reversal, release or satisfaction of such judgment or decree, or any other cause of defence in law or equity, accruing after the said judgment or decree.")[188]

Bidwell's measure enjoyed some early success. It was debated in the Committee of the Whole on March 24, and taken up by the House on April 11, when "[a] debate of considerable length arose on this bill."[189] A motion was made by George Washington Campbell of Tennessee to postpone it indefinitely, which failed,[190] and amendments were made at the clerk's table, the contents of which are not preserved.[191] The next day, after a brief debate,[192] the bill passed the House on April 12 by a margin of 67 to 18.[193]

Despite its lopsided House margin, however, the bill was lost in the Senate. It was first referred to a committee of Joseph Anderson of Tennessee, Samuel Mitchill of New York, and Israel Smith of Vermont,

186. H.R. 46.

187. *See supra* note 49 and accompanying text.

188. H.R. 46.

189. 15 Annals of Cong. 1010.

190. *Id.*

191. 5 H.R. Jour. 380.

192. 15 Annals of Cong. 1017.

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

who proposed amendments to it on April 16; the next day, it failed on majority vote.[194] While the *Annals* do not record the content of the committee's amendments, nor the nature of the Senate's concerns, it is worth noting that Anderson represented a rural Western state. The House delegations from Tennessee and Kentucky had been generally opposed to the measure; of the nine House representatives from these states in the Ninth Congress, four had spoken or voted against the bill, and none had voted in favor.[195] (The tensions between the interests of Eastern commercial creditors and Western rural debtors would become even more explicit in the debates ten years later.)

The bill's supporters in the House tried again in the next session. This time, Evan Alexander of North Carolina took the lead, requesting a committee on January 2, 1807, to which he and Bidwell (among others) were appointed.[196] The committee reported a bill on January 19, which contained only minor differences from the 1806 version: the new bill gave judgments conclusive effect only if the defendant were served "within the state" where the judgment was rendered.[197] The draft was referred to the Committee of the Whole, where it died,[198] and was not brought up again before the end of the Ninth Congress.

Alexander made one more attempt at the close of the Tenth Congress. In December 1808, he sought a committee and proposed a third bill "[p]rescribing the effect of records of judgments and decrees of courts of one state in another state."[199] The dissension in the courts had continued in the interim; in May 1808, a Tennessee court had rejected the *Armstrong* conclusive-effect interpretation,[200] and that November, a

194. 15 ANNALS OF CONG. 236, 240, 242.

195. 15 *id*. at 1010, 1017.

196. 16 ANNALS OF CONG. 245.

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

198. 16 ANNALS OF CONG. 359.

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

200. Wilson v. Robertson, 1 Tenn. 266, 1808 WL 164, at *2 (Super. L. & Eq. 1808) ("According to the opinion in Dallas, a judgment from another state should have the same effect, and be in the same situation here as in the State in which it was rendered. Upon that principle it were useless to bring suit upon it at all; for execution might issue upon it where it was obtained . . . . The true rule seems to be, that as a matter of evidence, we are bound by the Constitution and act of Congress to consider it a record of the judgment, being authenticated as the act prescribes; but the manner of effectuating or obtaining execution of the judgment is left to the laws of the State where suit is brought upon it.").

South Carolina court had stated that the 1790 Act "does not declare what effect such authenticated proceedings shall have, as it might have done under the authority of the constitution."[201]

Alexander's 1808 bill contained some differences from its previous incarnations. First, it applied whenever judgments were given in evidence "either as the ground or foundation of such action or suit as aforesaid, or otherwise"[202]—i.e., beyond actions directly enforcing a prior judgment, to those involving the judgment in a collateral or incidental way. Second, it took a more expansive view of the conclusiveness of sister-state judgments, holding them to be "conclusive evidence of the debt, *damages*, right *or thing* therein adjudged."[203] Third, it relaxed the in-state service requirement, imposing conclusive effect whenever the party in the initial action "appeared or was personally served with process, or had legal notice to appear."[204] Yet this bill also died quickly; it was referred to the Committee of the Whole and never brought up again while the House was in session.[205]

D. The 1812 Bill

The next attempt at a bill was in 1812. In the interim, the conclusive-effect position had strengthened in the courts; Kentucky had adopted the interpretation in 1809, as did Virginia.[206] Justice Washington, who had cited *Armstrong* approvingly on circuit ten years earlier,[207] did so again in the 1810 case of *Green v. Sarmiento*,[208] as did

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201. Flourenoy v. Durke, 4 S.C.L. (2 Brev.) 256, 1808 WL 271, at *1 (Const. App. 1808).

202. *Id.*

203. *Id.* (emphasis added).

204. *Id.*

205. 19 ANNALS OF CONG. 898.

206. Garland v. Tucker, 4 Ky. (1 Bibb) 361, 1809 WL 739 (1809); Lassly v. Fontaine, 14 Va. (4 Hen. & M.) 146, 1809 WL 639 (1809) (Tucker, J.).

207. *See* Banks v. Greenleaf, 2 F. Cas. 756 (C.C.D. Va. 1799) (No. 959).

208. 10 F. Cas. 1117 (C.C.D. Pa. 1810) (No. 5760). His explanation of the doctrine, however, was somewhat strained; he noted that it would be "idle, if not mischievous," for Congress to reduce the credit accorded to sister-state judgments based on "the rule of the state laws and usages"; yet he also praised the 1790 Act for giving "only such credit, as they possess in the state where they were rendered." *Id.* at 1119-20. Moreover, while Washington declined to reach the question of whether judgments would be conclusive even in the absence of personal notice, he stated that "if they should be so found,

the Circuit Court of the District of Columbia in *Short v. Wilkinson*.[209] Not all were convinced, however: in 1811, an American edition of Isaac Espinasse's treatise on pleading stated flatly that "[i]t is certain that the public acts, records and judicial proceedings so authenticated are evidence; but *the effect thereof not being declared by congress*, a diversity of opinion has prevailed in the different states."[210]

This attempt, however, would be as short-lived as the others. On January 10, 1812, James Milnor of Pennsylvania sought a committee to "report whether any, and what, amendments are necessary" to the 1790 Act.[211] Milnor, Langdon Cheves of South Carolina, and Lyman Law of Connecticut were appointed to the committee. After considering amendments to what it called "the laws respecting the authentication of records, &c., of one State in the courts of another," the committee on March 23 "reported against the expediency of making any amendments in said act or acts."[212]

E. The 1813-1814 Bill

1. Intervening Developments

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

> [u]pon this general question (of the effect of sister-state judgments) the opinions of legal characters in the United States have been very much divided. So much has been said upon the subject that, at the

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then I can only say, that the act of congress was not passed with sufficient consideration." *Id*. at 1120.

209. 22 F. Cas. 15 (C.C.D.C. 1811) (No. 12,810).

210. 2 ISAAC ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 443 (N.Y., Gould, Banks & Gould 3d London ed. corr. 1811) (emphasis added).

211. 23 ANNALS OF CONG. 719.

212. 24 *id*. at 1232; *see also House of Representatives*, N.Y. COM. ADVERTISER, Mar. 26, 1812, at 3 ("Mr. Milnor, of the committee who were appointed to enquire what alterations are necessary in the act respecting the authentication of the public acts, records, &c. of one state in another, reported that it is not expedient at present to make any alterations—ordered to lie on the table . . . ."). The full content of the report is unfortunately not preserved in the *Annals*, *American State Papers*, or the *U.S. Congressional Serial Set*.

> present day, a man may with more propriety be said to adopt the opinion of another than to form one for himself.[213]

That March, the Supreme Court would rule in *Mills v. Duryee*,[214] a decision today regarded as having settled the issue. Yet the question first came before Chief Justice Marshall, sitting on circuit in *Peck v. Williamson* in November 1812.[215] *Peck* concerned the effect of a Massachusetts judgment in the Circuit Court for the District of North Carolina. Marshall began with an analysis of the constitutional clause, stating that he found it "very clear that the constitution makes a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in the other."[216] Thus, unless Congress had exercised its power, the judgment should be "allowed only such [effect] as it possesses on common-law principles."[217] He then turned his attention to the 1790 Act, stating that "[i]n our opinion Congress have not prescribed its effect." The 1790 Act only accorded state records "such faith and credit" as they had in their home states, and to suppose that Congress used this language to prescribe substantive effect "is to believe that they use the words 'faith and credit' in a sense different from that which they have in the clause of the constitution upon which they were legislating."[218] Thus, the Massachusetts judgment was entitled only to prima facie effect. Marshall announced these positions despite his awareness that most of his Supreme Court colleagues—who had already decided related cases on circuit—would disagree with him, and that he would soon be overruled. Although *Mills* was at that point already on the Supreme Court's docket,[219] Marshall noted that "this very important question has not yet been decided in this court, nor in the supreme court of the

213. Winchester v. Evans, 3 Tenn. (Cooke) 420 (1813).

214. 11 U.S. (7 Cranch) 481 (1813).

215. 19 F. Cas. 85 (C.C.D.N.C. 1812) (No. 10,896). Nadelmann notes that some editions provide an erroneous date of 1813. Nadelmann, *supra* note 22, at 65 n. 157. Marshall did not dissent in *Mills* despite his contrary opinion, *see id.* at 68, and had *Mills* been decided first, we might never have known Marshall's own position.

216. *Id.* at 85.

217. *Id.*

218. *Id.*

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

United States," and thus the court felt "at liberty to pronounce that opinion which our own judgment dictates."[220]

The opinion in *Mills*, concerning the appropriate plea to an action on a sister-state judgment, was handed down four months later.[221] Joseph Story, writing for the majority, noted the possibility that "the act provides only for the admission of such records as *evidence*, but does not declare the *effect* of such evidence when admitted."[222] (Though he did not mention it, this was the interpretation Story himself had favored in an 1805 treatise, where he stated that "[t]he act of Congress seems to provide for the evidence only."[223]) But Story reasoned that if a New York record would have in New York "the faith and credit of evidence of the highest nature, viz. *record evidence*," it must, under the 1790 Act, have "the same faith and credit in every other Court."[224] Likewise, if *nil debet* would have been an inadmissible plea in New York, it could not

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

221. 11 U.S. (7 Cranch) 481 (1813). Also decided in March was *Bissell v. Briggs*, 9 Mass. 462 (1813), in which the Supreme Judicial Court in Massachusetts reversed its earlier holding in *Bartlet v. Knight* and adopted an intermediate position whereby sister-state judgments were neither fully foreign nor fully domestic. Chief Justice Parsons repeated Livingston's position that the effects power refers only to the effect of the authentication, as the self-executing sentence of the Clause itself gives judgments "all the effect . . . which they can have"; yet he argued that the "jurisdiction of the court rendering it is open to inquiry," even if it would not have been in the state of origin. *Id.* at 467. Justice Sewall wrote a spirited dissent, noting that his colleagues in the *Bartlet* majority (Thatcher and Sedgwick) had been absent for the argument and decision of the case—indeed, had they been present, the three of them could have formed a majority for reaffirming *Bartlet*. *See id.* at 470 (Sewall, J., dissenting). Sewall also sharply criticized Parsons' intermediate position, arguing that "[t]o inquire of the jurisdiction of a supreme or superior court, from which a judgment is certified," is to deny the decision "*the effect* to which [it] would be entitled" in the rendering state. *Id.* at 474. Moreover, a sister-state judgment might have misapplied the law of the enforcing state, or might have been based on laws contrary to public policy; and the prima facie standard allowed such judgments to be revisited. *Id.* at 476-77. Finally, he noted that in the case at bar, the defendants were officers of Massachusetts, who were sued in trespass while visiting New Hampshire for official acts *done in Massachusetts*, with their plea of their offices in defense rejected on demurrer. *Id.* at 477-78.

222. *Mills*, 11 U.S. at 484.

223. Story, A Selection of Pleadings in Civil Actions, *supra* note 147, at 296.

224. *Mills*, 11 U.S. at 484.

be pleaded elsewhere.[225] Leaving the judgments as *prima facie* evidence only would render "this clause in the constitution . . . utterly unimportant and illusory," as the common law "would give such judgments precisely the same effect." The Constitution, however, had given Congress power "to give a conclusive effect to such judgments," as it had done in the 1790 Act.[226]

Justice Johnson wrote the sole dissent, adopting the same position he had eleven years earlier in *Hammon v. Smith*.[227] He accepted that "by receiving the record of the state Court properly authenticated as conclusive evidence of the debt," the Constitution and the 1790 Act had been satisfied, "[f]or *faith* and *credit* are terms strictly applicable to evidence."[228] Yet there was no warrant in the Clause or the Act to go beyond evidence and require the same forms of pleading; the "such faith and credit" language did not incorporate the rendering state's law of judgments. *Nul tiel record* required an examination of the original record, and unlike *nil debet* allowed no objection that the judgment was rendered in violation of common jurisdictional principles. Johnson worried in particular that if *nul tiel record* must be pleaded even in cases without personal service, "it would be difficult to find a method by which the enforcing of such a judgment could be avoided."[229]

2. *Congressional Action*

A few months after *Mills v. Duryee*, Congress responded with its most detailed attempt to rewrite the Full Faith and Credit statute yet.

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225. *Id.*

226. *Id.* at 485.

227. 3 S.C.L. (1 Brev.) 110, 1802 WL 520 (Const. App. 1802).

228. *Id.* at 486 (Johnson, J., dissenting).

229. *Id.* The issue of personal service was mentioned in passing by Story, who noted that the defendant "had full notice of the suit," and its shadow hung over the proceedings. As the record of the case reveals (but the reporter does not), the original judgment in New York—as in *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850)—had been against both Mills and a co-defendant, Eliphalet Frazer, who had not been found in the jurisdiction and had not been served with process. The plaintiff's subsequent action in the District of Columbia was filed against both defendants, even though Frazer had still never been served. *See* Transcript of Record at 1-3, *Mills*, 11 U.S. (7 Cranch) 481 (1813) (No. 536), *reprinted in* Appellate Case Files of the Supreme Court of the United States, 1792-1831, National Archives Microfilm Publication No. 214 (1962) [hereinafter Appellate Case Files], roll 22.

On December 13, Bartlett Yancey of North Carolina asked that the Committee on the Judiciary "inquire into the expediency of amending the laws of the United States, as to the *effect* which a judgment of record of one State shall have, when offered as evidence in a suit in another State."[230] A bill was accordingly reported on February 3, 1814,[231] by Charles Jared Ingersoll of Pennsylvania, whose father had

230. 26 ANNALS OF CONG. 791.

231. 26 *id*. at 1228. The bill read in full as follows:

> *To prescribe the mode of authenticating the public acts, records, and judicial proceedings of the several states, and for declaring the effect of certain judicial proceedings.*
>
> *Be it enacted by the senate and house of representatives of the United States of America in congress assembled*, That the original or transcripts of the public acts of the legislatures of any state shall be authenticated by having affixed thereto the seal of the state, accompanied by the certificate of the officer entrusted by law with the custody of such public acts: that the records and judicial proceedings of the courts of any state shall be authenticated so as to be admitted in evidence in the courts of any other state, by having the seal of the court, if any there be, affixed to such record or judicial proceeding, or a transcript thereof, accompanied by the certificate of the clerk of such court, or of the officer entrusted by law with the custody of such records or judicial proceedings, with a certificate of a judge or justice of the court, as the case may be, that the said attestation is in due form.
>
> Sec. 2. *Be it further enacted*, That in all cases where a suit or action is brought in any court within the United States on a judgment or decree rendered or pronounced in a court of some state, other than the one where such second suit or action is brought, and it appears from the record or transcript authenticated as aforesaid, that the defendant or defendants had personal notice of the first suit or action, by the service of process or otherwise, the judgment or decree shall be considered as conclusive evidence of the right of the plaintiff or plaintiffs of the debt, duty, or thing expressed in such decree or judgment: but the person or persons so sued may nevertheless take advantage, in the regular way, of any satisfaction of such judgment or decree after the rendition or pronouncing thereof; and may also take advantage, in the proper way, of any good matter in bar of of [sic.] such decree or judgment, of which he, she, or they had been deprived of the use by the fraud of the adverse party or parties: *Provided*, The truth of such matter, with the fact of the fraud, be verified by the oath or solemn affirmation of the person or persons sued, or one or more of them before filing such defence.
>
> Sec. 3. *Be it further enacted*, That in all cases where a suit or action is brought in any court within the United States, on a judgment or decree rendered or pronounced in a court of some state,

declined to argue for the evidentiary interpretation in *Armstrong v. Carson's Executors*. The younger Ingersoll had expressed his own strong views on the Clause in an 1808 tract on American commerce; amidst harsh criticism of the respect given to foreign prize courts (and to British precedents), he noted that "[e]ven our state courts, *notwithstanding the imperative injunction of the constitution*, have refused conclusive operation to each other's judgments."[232]

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

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> other than the one where such second suit or action is brought, and it appears, from the record or transcript authenticated as aforesaid, that the defendant or defendants had not personal notice of such suit or action, the judgment or decree shall be considered as prima facia [sic.] evidence of the right of the plaintiff or plaintiffs to the debt, duty, or thing expressed in such decree or judgment, and a judgment or decree shall be forthwith entered or pronounced therefor, unless the person or persons so sued sets forth in due course of law good matter in bar of the original suit or action, or in satisfaction or avoidance of the judgment or decree, verified in either instance by the oath or solemn affirmation of the defendant, or some one of the defendants where there are several, before the filing of such defence: *Provided always*, That persons sued as heirs, executors, administrators, or otherwise, in right of others, shall not be compelled to verify their defence as aforesaid, but by the oath or affirmation of some third person interested, or by their own affidavit to the best of their knowledge and belief.
>
> Sec. 4. *Be it further enacted*, That the rights, powers, and privileges of executors and administrators, or others legally entrusted with the administration of the estates of deceased persons, in any of the United States, vested by law and the proper judicial tribunal, shall be in every other state as valid and effectual, to all intents and purposes, as in the state where vested or granted; and the record or judicial proceeding by which such powers are vested, or a transcript thereof, shall be authenticated in the manner prescribed herein in relation to other records and judicial proceedings, and be in like manner received as evidence.
>
> Sec. 5. *And be it further enacted*, That this act shall be considered as repealing so much of any other preceding act as contravenes the provisions of this act.

H.R. 45, 13th Cong., 2d Sess. (1814).

232. Charles Jared Ingersoll, A View of the Rights and Wrongs, Power and Policy, of the United States of America 62 (Phila., O. & A. Conrad 1808) (emphasis added).

authenticated *so as to be admitted in evidence* in the courts of any other state,"[233] and the effect such records and proceedings would have once admitted. Ingersoll's bill would have made sister-state judgments conclusive as to the "debt, duty, or thing" they concerned, so long as the defendant "had personal notice of the first suit or action, by the service of process or otherwise."[234]

More importantly, the Ingersoll bill heightened the force given to judgments rendered without personal service. The latter were to be "prima faci[e] evidence," but the presumption they created could be rebutted only if "the person or persons so sued sets forth in due course of law good matter in bar of the original suit or action, or in satisfaction or avoidance of the judgment or decree, verified in either instance by the oath or solemn affirmation of the defendant . . . before the filing of such defence."[235] Such a provision was unusual, given the common law's testimonial disqualification of parties for interest; it also gives the impression that Ingersoll's strong interpretation of the Clause made him reluctant to relax the force of judgments, even those rendered without notice.[236]

Finally, the bill contained an additional provision that gave a new sense of the power of the Effects Clause to reshape the relationships among states. Its fourth section declared that persons declared in one

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233. H.R. 45, § 1.

234. *Id.* § 2. They also provided explicitly that fraud in procuring the original judgment would be a legitimate defense.

235. *Id.* § 3.

236. How was this relaxed effect for judgments without personal service consistent with Ingersoll's personal views? As an advocate, his father had championed the enforcement of judgments even when personal service or actual notice was absent. *See* Phelps v. Holker, 1 U.S. (1 Dall.) 261, 263 (Pa. 1788) (argument of counsel) ("[T]here can be no difference between a judgment in a Foreign attachment, and one obtained in any other species of action . . . ."). Yet the younger Ingersoll's bill did not treat judgments without personal service as conclusive; rather, he seemed to envision some range of freedom outside the self-executing constitutional requirement. Even this relaxed effect for such judgments creates some discomfort for modern audiences, who have learned that such service is unlawful under the Due Process Clause, as in *Pennoyer v. Neff*, 95 U.S. 714 (1877). But Congress did not assume a judgment would always be set aside in the absence of personal service; the cases and bills discussed here show judgments rendered without personal service were thought to be potentially enforceable. This could have occurred even in federal cases, as the bills were to apply to "*any* court within the United States," H.R. 45 §§ 2-3, and there is no indication in the debates that such enforcement would have violated due process.

state to be executors or administrators of a decedent's estate would have equal "rights, powers, and privileges" in all states. This provision clearly extended beyond asserting the evidentiary value of sister-state judgments, instead expanding their substantive effect: it would have entitled courts of one state to endow private persons with legal powers in other states. It also went beyond the contemporary understanding of the 1790 Act, let alone the self-executing force of the Full Faith and Credit Clause: in 1803, the Supreme Court had refused effect in the District of Columbia to letters of administration granted in Maryland,[237] and a number of state courts had done similarly,[238] even in the face of claims based on the Clause.[239]

But the measure's detailed drafting did not ensure it a warm reception. After the bill was reported out of committee, it was assigned to the Committee of the Whole, where it was never brought up for debate. A defeated Ingersoll withdrew the measure on April 14.[240] No

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

238. *See, e.g.*, Riley v. Riley, 3 Day 74, 1808 WL 87 (Conn. 1808); Reynold's Ex'rs v. Torrance, 4 S.C.L. (2 Brev.) 59, 1806 WL 327 (1806); *see also Riley*, 1808 WL 87, at *2 (argument of counsel) (citing cases from Massachusetts, New York, North Carolina, and Pennsylvania). *But see* Stephens's Ex'rs v. Smart's Ex'rs, 4 N.C. 83, 1814 WL 147 (1814) ("[T]he probate and letters testamentary issued in South-Carolina, are sufficient to enable the plaintiff to sue here.").

239. *See id.* at *8 (argument of counsel) (citing the Clause).

240. 27 ANNALS OF CONG. 2022. Contemporaneously, but without apparent awareness of the debates in the House, Senator Outerbridge Horsey of Delaware delivered an address on the appointment and removal powers of the President in which he expressed a belief that Congress had not yet exercised the power to prescribe the effect of state records—and, indeed, that the power could not be as vast as the text had made it seem:

> Indeed there are parts of the constitution which will not bear a literal construction. Take for instance, Art. 4, Sect. 1 . . . . Congress has undertaken to prescribe the manner in which such acts, records and proceedings shall be proved, but they have not undertaken, and probably never will undertake, to prescribe the effect they are to have. What is the true import of the words "full faith and credit," is a question that has puzzled the bar and the bench, and about which a contrariety of opinion exists among the learned in the law. But the word effect, take it literally and it conveys a most extraordinary power to Congress—a power which would swallow up the state sovereignties. An act of the legislature of any one state is a public act, and by this section Congress has the power . . . to declare what *effect* such an act shall have in another state. The legislature of Virginia, for instance, [may] pass an act limiting the rights of suffrage to freeholders; take this section

indication is given of why the bill was lost, but Congress may have had other things on its mind: Washington was burned by the British that August. On October 21, shortly after the start of the third session of Congress, Yancey made another attempt by asking the Judiciary Committee to report a bill,[241] but none was ever produced.

F. The 1817-1818 Bill

1. Intervening Developments

Debate persisted after *Mills* in the courts as well as Congress. In Virginia, the Supreme Court of Appeals in 1814 reiterated the conclusive-effect position, despite the defendant's arguments that the records "should be [only] of as much efficacy to the plaintiff, as if the originals were produced."[242] Yet in New York, the state's high court in *Pawling v. Wilson* reaffirmed its earlier holdings that sister-state judgments were entitled only to prima facie effect—and *Mills* was not even mentioned in the reporter.[243]

Indeed, a new issue had moved to the forefront of the judicial decisions, that of personal service. *Pawling* concerned an action commenced without personal service, which it described as "not even *prima facie* evidence," as the defendant had never received notice.[244] However, in *Field v. Gibbs*, Justice Washington on circuit held that even a claim that personal notice was lacking would not disqualify a judgment, writing that "nothing can be assigned for error, nor can any averment be admitted, which contradicts a record."[245]

> literally, and Congress may declare that such act shall have the same *effect* in Pennsylvania or Massachusetts as it has in Virginia and *vice versa*. An *effect* which I am sure would not be very kindly received either in Pennsylvania or Massachusetts.
>
> *Congress. Senate of the U. States*, DAILY NAT'L INTELLIGENCER (Wash., D.C.), May 5, 1814, at 2.

241. 28 ANNALS OF CONG. 416.

242. Buford v. Buford, 18 Va. (4 Munf.) 241 (1814).

243. 13 Johns. 192 (N.Y. 1816).

244. *Id.*

245. 9 F. Cas. 15 (C.C.D.N.J. 1815) (No. 4766) (Washington, Circuit Justice).

2. *Congressional Action*

The attempt to pass a Full Faith and Credit statute in the Fifteenth Congress provided occasion for the most detailed and extended debates of any such measure. With respect to other Congresses, a researcher is handicapped by the limitations of the extant evidence, and perhaps to a greater extent by the reporters' lack of interest: one report of the proceedings in Congress, in giving a very brief summary of the day's debates, noted unhelpfully that "[t]his is a subject too dry and technical to interest readers generally; but it has afforded all occasion for the display of much legal ability and eloquence."[246] By some stroke of luck, however, the reporter of the *Annals* in the Fifteenth Congress seems to have had a taste for interstate relations.

a. The Nelson Bill

The attempt began on December 11, 1817, when John Canfield Spencer of New York, a former judge advocate general and assistant state attorney general, asked the Judiciary Committee to "to inquire whether any, and if any, what legal provisions are necessary to prescribe the effect which the public acts, records, and judicial proceedings of each State, shall have in the courts of every other State."[247]

Two weeks later, committee chairman Hugh Nelson—a former judge of Virginia's General Court[248]—presented a report that described the committee's interpretation of the existing law. The report is a valuable insight into the contemporary understanding of the Clause and the 1790 Act, and it is worth reprinting in full:

> [U]pon inquiry, it is ascertained that various and contradictory decisions have been made upon the construction of the act of Congress . . . which was passed the 26th May, 1790. In some of the courts it has been decided that the records of judgments coming from other States authenticated in the manner prescribed in the act are upon the same footing as foreign judgments; that they are merely *prima facie* evidence of the debt or demand, which evidence may be inquired into and rebutted by extraneous proof; and, finally, that

246. *Congress*, N.Y. Com. Advertiser, Jan. 12, 1818, at 2.

247. 31 Annals of Cong. 431.

248. *See* Daniel Preston, *Nelson, Hugh*, *in* Am. Nat'l Biography Online (Feb. 2000), http://www.anb.org/articles/03/03-00352.html.

> the original cause of action may be again investigated. In other courts, it has been decided that such records are conclusive evidence of the debt, and cannot be impeached but upon some ground or fact occurring after the rendition of the judgment.
>
> Your committee are of opinion that Congress has not yet executed the power given by the Constitution of prescribing the effect which such records shall have. At all events, so much doubt rests upon the question, that, in the opinion of your committee, it is highly expedient that Congress should interpose by a law which will produce uniformity in the decisions throughout the Union, and which, by the establishment of a fixed and certain rule, will give confidence and security to commercial men in every part of the United States. They have therefore prepared a bill, which is herewith presented.[249]

At least three features of the report are noteworthy. First, *Mills v. Duryee* was not seen by the committee as settling the issue; the report does not even mention the decision, merely describing "the courts" as in disagreement.

Second, the report notably concluded that Congress "*has not yet executed the power . . . of prescribing the effect which such records shall have.*" Remember that this assertion came from the bill's supporters, who in some sense had the strongest reason to argue that the bill merely restated existing rules that errant state courts had misapplied. Indeed, none of those who later spoke against the bill portrayed it as an unnecessary recapitulation of existing law. Neither did the report take the position that the Constitution itself mandated such conclusive effect to sister-state judgments, and that Congress by enacting the bill would be giving effect to this constitutional mandate. Instead, both the bill's supporters and its opponents portrayed the issue as entirely open for congressional action.

Third, the report described the purpose of the bill as not merely to produce "uniformity in the decisions," but to create a "fixed and certain rule" that would "give confidence and security to commercial men in every part of the United States." The report was thus consistent with the expressed purpose of legislation under the Clause, from Madison's remarks at Philadelphia onward, to assist creditors in following their debtors across state lines. This purpose had a substantial impact on the bill's subsequent reception among debtor-state representatives.

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249. 31 ANNALS OF CONG. at 500-01; see also H.R. Doc. No 15-17 (6 U.S. Cong. Serial Set, 1817).

Just as it was accompanied by a much more detailed platform, the bill that Nelson and the committee proposed also differed substantively from its predecessors.[250] Unlike the Ingersoll bill, it was not designed to replace the 1790 Act, only to supplement its provisions. Yet it diverged from what had gone before in the following ways:

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250. The full text read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the record of any final judgment or final decree, in any suit of any court of any state, when authenticated in the manner required by law, shall have the same effect given to it in every court of the United States, and of every other state, as such record would have by law or usage, if used or prosecuted in any other court of the state from which the said record shall be taken: *Provided*, That no such record shall be deemed conclusive against the parties thereto, their heirs, executors, or administrators, or persons claiming under them, or either of them, unless it shall appear on the face of such record, that the party against whom such record shall be alleged, his testator, intestate, ancestor or grantor, had been personally served with process to compel his or their appearance, in the same suit and in the same court, or that such party had actually appeared in the same suit and in the same court, before the rendition of the judgment or the passing of the decree: *And provided further*, That no lien or charge shall be created by any such final judgment or final decree upon any real or personal estate, situated out of the state at the time, where such judgment was rendered or such decree was passed.
>
> Sec. 2. And be it further enacted, that whenever manucaptors or bail, or sureties for the personal appearance of any person in any court of any state, shall produce to a judge or justice of some court of record in any other state, the recognizance of bail, or the copy of a bail piece, or a copy of the instrument by which such manucaptors, bail, or sureties became bound, duly authenticated according to law, it shall be the duty of such judge or justice, to certify upon some part of such recognizance, or copy of a bail piece, or instrument as aforesaid, that the same is duly authenticated according to law; and thereupon to endorse the same with his own proper hand, with the date of doing so; which certificate and endorsement, with the recognizance, or copy of a bail piece, or instrument as aforesaid, shall have the same effect to authorize the said manucaptors, bail or sureties to arrest and take their principal in such other state, and to remove him to such place as shall be proper and necessary for the purpose of surrendering him in their discharge, as the said recognizance, copy of a bail piece, or other instrument as aforesaid might or could have by law or usage in the state where such bail was given.

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

1. *A more sophisticated approach to effect.* Previous bills had assigned certain records conclusive effect without regard to the records' effect in their state of origin (for instance, if a judgment had not yet become final, or if it had been rendered by an inferior court). Instead, the first section of the Nelson bill would have given a record "the same effect . . . as such record would have by law or usage, if used or prosecuted in any other court of the state from which the said record shall be taken."[251]

2. *Lessened effect for judgments rendered without actual notice.* While previous bills had treated judgments with personal service or notice differently from those without, Nelson's bill included stronger enforcement provisions, requiring the fact of service or appearance to "appear on the face of such record." When a judgment was rendered without appearance or service, the bill did not assign it prima facie effect, but rather left the common law as it found it, stating only "[t]hat no such record shall be deemed conclusive."[252]

3. *Limitations on jurisdiction.* The Nelson bill incorporated a rule "[t]hat no lien or charge shall be created . . . upon any real or personal estate, situated out of the state" in which the first judgment was rendered.[253] This anticipated the Court's ruling nearly a century later in *Fall v. Eastin* (1909), in which a state court in Washington awarded to one of the divorcing parties the land they owned jointly in Nebraska.[254] The Supreme Court held that Washington had jurisdiction over the parties *in personam*, but not over the *res* in Nebraska, and thus its decree did not actually change the ownership of that land. Under the Nelson bill, no court would have been bound to give effect to a sister-state judgment purporting to alter the ownership of property outside that state's borders.

4. *Legal powers across borders.* Nelson's proposal built on the Ingersoll bill's substantive provisions by allowing state courts to empower individuals with legal authority beyond their own borders. The second section of Nelson's bill entitled bail bondsmen or manucaptors to pursue a fugitive into other states; after presenting their authorization to a court of the latter state, they would be entitled to apprehend the fugitive and return him to the state of origin. (The provision would have applied to fugitives from both civil arrest and

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251. *Id.* § 1.

252. *Id.*

253. *Id.*

254. 215 U.S. 1 (1909).

criminal prosecution.) This had not been the law previously, and it clearly had not been part of the self-executing force of the Full Faith and Credit Clause itself: indeed, Article IV contained its own mechanism for pursuing fugitives, which depended on the governments of each state to deliver up the accused on the demand of a sister state's executive.[255] Had the Nelson bill been enacted, it would have in some sense merged the body of officialdom of all the states, weakening the legal force of state borders and to some extent altering the nature of state sovereignty. The bill's sponsors thus attributed to Congress a broad power to reshape "Our Federalism"[256] by declaring the effect of state records.

b. The Debates

The debate on the Nelson bill began a week after its introduction, on December 31, 1817. The *Annals* record that "[t]he bill received some amendments, and considerable discussion took place on its details," in which more than ten members took an active role.[257] The subject was not, however, sufficiently enthralling to keep the House's attention for long:

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

255. U.S. CONST. art. IV, § 2, cl. 2. *But see* Respublica v. Gaoler of the City and County of Philadelphia, 2 Yeates 263, 1798 WL 495 (Pa. 1798) (holding, without explanation, that "[i]n the relation in which the several states composing the union, stand to each other, the bail in a suit entered in another state, have a right to seize and take the principal in a sister state, provided it does not interfere with the interests of other persons, who have arrested such principal").

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

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

257. 31 ANNALS OF CONG. 532. The amendments were minor and technical; the amended version is reprinted in *id.* at 534-35.

> merited, moved that the Committee rise; which being agreed to, the Committee rose, reported progress, and obtained leave to sit again. And the House adjourned to Friday next.[258]

Once reconvened on January 2, 1818, the Committee of the Whole turned to more substantive amendments, which revealed the divergent interests of the commercial East and rural West. Thomas Cobb of Georgia argued that sister-state judgments should be "regarded as foreign judgments" only, adding that "the different effects of judgments in the different States, . . . would produce involvement, and frequently injustice,"[259] if they were given conclusive effect. He also noted that the "formality of proceedings" found in commercial centers "did not prevail to any extent in the country, particularly in the southern and western States," which would render the judgments of the latter less enforceable than those of the former.[260] In opposing Cobb's amendment, its sponsor John Spencer argued that the "principal benefit" of the measure was to provide "a confidence and extent to the commercial credit of the country, which it now wanted from the absence of some such provision." This lack of confidence "was a great impediment to the increase of the trade between the Atlantic cities and the western country; the merchant fearing to credit, from apprehended difficulty in the recovery of his debts."[261]

Such regional arguments continued throughout the debates. John Ross of Pennsylvania gave a half hour's speech opposing the bill and detailing a "variety of illustrations and references to the practices prevailing in the different States."[262] He refused to

> enable the New York merchant, when his customer had come there from Kentucky, to spring the trap upon him, compel him to confess judgment, or go to prison for want of bail, and [allow] that judgment . . . the same effect . . . in Kentucky as it would have had in New York.[263]

Similarly, George Poindexter considered the conclusive effect of judgments "radically defective," taking a "legal view of the question" and arguing that the "variance" of the practices among the states

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258. *Id.* at 532.

259. *Id.* at 535.

260. *Id.* at 536.

261. *Id.* at 535-36.

262. *Id.* at 564.

263. *Id.*

"would make the provisions of the amendment unequal in their operation."[264] Spencer, however, "insisted . . . on the effect the bill would have in sustaining commercial confidence, and in strengthening the ties which bind the States together by making their co-operation more harmonious,"[265] repeating the argument that the courts of the several states should be given more than "the same effect which was now allowed to the records of any petty court in the West Indies."[266]

For much of the next week, the Committee of the Whole debated amendments to the bill. Some of the debates were substantive: Henry Baldwin of Pennsylvania (a future justice of the Supreme Court) attempted to limit conclusive effect to judgments rendered "after trial by jury, or a hearing on the merits of the cause,"[267] and an amendment to remove the second section (concerning manucaptors) occupied three days of the House's calendar.[268]

Yet other debates were constitutional in nature. In these constitutional debates, three positions are recorded. Thomas Williams of Connecticut described it as "not only the dictate of reason" but also "conformable to the spirit and almost to the letter of the Constitution, that judgments obtained in one State should not be mere prima facie evidence in another." Rather, citing *Mills*, he argued that "[t]he intention of the Constitution was, . . . and such was the construction formally given to it by the Supreme Court—that the decision of a State Court should be conclusive between the parties, as well in one State as in another."[269] Ross, by contrast, somewhat idiosyncratically argued that the "Constitution had given to Congress the power to declare what should make a record authentic, but not to prescribe its effect in any other State; and any other construction than this, . . . tend[ed] to the establishment of a consolidated Government."[270]

An intermediate position, and the last recorded discussion of the constitutional question, was delivered by Joseph Hopkinson of Pennsylvania. Hopkinson "gave at large, but with position," a "perspicuous" argument that "Congress were entirely at liberty to act

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264. *Id.*

265. *Id.* at 565.

266. *Id.*

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

268. *See id.* at 565, 591, 607.

269. *Id.* at 536.

270. *Id.* at 564.

on the subject"[271]—i.e., that it was neither required to afford conclusive effect nor prohibited from doing so. (Indeed, not even Williams had suggested that the "letter" of the Constitution required conclusive effect.) Hopkins argued that "it was expedient" for Congress to act, "on account of the variety of constructions now given to the law on the subject";[272] he presumably did not see *Mills* as having settled the question. Although some argued that the bill "would put the parties in a worse situation than they were in before," he contended that "the bill would clear up much ambiguity, and, so far as it had effect, would be much more favorable to the party sued than the present practice."[273]

For all its inventiveness, however, the Nelson bill was never able to achieve sufficient political support. After the end of debates on January 8, almost two weeks went by without a mention of the bill. Finally, it was brought up again on January 23, and after being debated "at considerable length," the Committee of the Whole ended its consideration of the measure. John Forsyth of Georgia, an opponent of the bill, sought a vote "to try the principle of the bill, which, having been so largely debated, must by this time be perfectly understood." A "large majority" then voted to postpone the bill indefinitely. The disappointment of the *Annals*' reporter is clear: "So the bill, after so much learning, labor, and ability displayed upon it, was finally rejected."[274]

For the rest of the Fifteenth Congress, no further effort was made to clarify the effect of state records and judicial proceedings, except for one brief episode in the Senate. George Washington Campbell—who had opposed the 1806 bill as a member of the House[275]—asked on April 4 that the Judiciary Committee inquire into whether the existing laws should be extended to the records and judicial proceedings of territories as well as states.[276] The committee duly began its consideration, only to report two days later that this precise step had been taken in 1804 (while Campbell had been a member of the House[277]) and that further legislation on the subject would be "unnecessary and inexpedient."[278]

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271. *Id.* at 565.

272. *Id.*

273. *Id.*

274. *Id.* at 799.

275. *See supra* text accompanying note 190.

276. *Id.* at 228.

277. *See* Biographical Directory of the U.S. Congress, Campbell, George Washington (1769 - 1848),

G. *The 1820 Bill*

Amid the debates over the Nelson bill, the concerns over personal jurisdiction intensified. New York's high court cited *Mills*, but did not rely on it, in *Borden v. Fitch*, where it held that a sister-state judgment against a person "not being within the jurisdiction of the Court, nor having been served with process to appear, nor having appeared to defend the suit, will be absolutely void."[279] Similar results were reached in Mississippi and New Hampshire,[280] with one Mississippi court describing the "much litigated question, as to the conclusiveness of judgments," as remaining "open."[281] In the Supreme Court, meanwhile, Chief Justice Marshall affirmed *Mills* as precedent in *Hampton v. M'Connel*,[282] holding a plea of *nil debet* invalid despite a claim that the defendant may have lacked notice to appear. Yet the degree of judgments' conclusiveness was still uncertain; the reporter Henry Wheaton noted that "the question is still open in this court" as to

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http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000083 (last visited May 18, 2007).

278. *Id.* at 230-31; *see also* S. Doc. 15-154 (Early Am. Imprints, 2d ser., No. 46,242, 1818).

279. 15 Johns. 121 (N.Y. 1818)

280. Chew v. Randolph, 1 Miss. (Walker) 1, 1818 WL 452 (1818); Thurber v. Blackbourne, 1 N.H. 242, 1818 WL 480 (1818). The latter case also discussed the meaning of the Effects Clause, holding that the Constitution "provides for the admissibility of such records as evidence, but does not direct the mode in which they should be authenticated, nor does it declare what shall be the effect of the evidence when admitted." *Thurber*, 1818 WL 480, at *2.

281. Gerault, Adm'x v. Anderson, 1 Miss. (Walker) 30, 1818 WL 456, at *1 (1818); *see also id.* at *2 (comparing the various merits of *Hitchcock*, *Bartlet*, and *Bissel*). Courts in Kentucky and New Jersey delivered opinions adhering to the conclusive-effect position during this period, *see* Cobb v. Thompson, 8 Ky. (1 A.K. Marsh.) 507 (1819); Olden v. Hallet, 5 N.J.L. (2 Southard) 466 (1819), and by the next year the latter courts began to describe the issue as fully settled, *compare* Lanning v. Shute, 5 N.J.L. (2 Southard) 778, 18 WL 1223, at *2 (1820) (Kirkpatrick, C.J.) ("The question . . . has been considered and settled in this court . . . in the case of *Olden v. Hallet*; and since that time, in the same way, in . . . the case of *Hampton v. M'Connel*. This last is conclusive, for, being a constitutional question, it belongs to that court to settle the law, and, having settled it, we are bound by the decision; we have no further discretion upon it."), *with id.* (Southard, J., concurring) ("I concur in the opinion of the court, but I do it under the irresistible weight of authority alone. My judgment is not satisfied.").

282. 16 U.S. (3 Wheat.) 234 (1818).

whether "a special plea of fraud," or "a plea to the jurisdiction of the [rendering] court," might serve to void the judgment.[283]

The failure of the Nelson bill did not dissuade members of the House from attempting once more to clarify the 1790 Act. In the Sixteenth Congress, Joseph Brevard, who had sat on the South Carolina supreme court in *Hammon v. Smith* (and who had adopted the conclusive-effect interpretation in dissent)[284] submitted a resolution on January 10, 1820, asking that the Judiciary Committee inquire into amendments of the 1790 Act. Unusually, however, the resolution contained a preamble stating Brevard's purposes. He noted that "there have been, in the different courts of the several States, various and contradictory adjudications in consequence of the different constructions which have been given to the enacting words above quoted."[285] A bill would provide "greater certainty in the law, and greater uniformity and consistency in the decisions of the courts thereupon."[286] Note that this was written *seven years* after *Mills*, and almost two years after *Hampton v. McConnel*; yet neither of these decisions were cited by Brevard, nor was the law yet considered settled.

Brevard's resolution failed on a one-vote margin, in large part because "form and practice" were opposed to "prefixing preambles to resolutions of inquiry."[287] The next day, Eldred Simkins (also of South Carolina) introduced a resolution on the same topic sans preamble.[288] The resolution passed over opposition, but it died in committee and never came before the House.

H. The 1822 Bill

By 1822, the last jurisdictions to oppose *Mills* had given way; New York overturned *Hitchcock* in 1821,[289] accepting the authority of *Mills*

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283. *Id.* at 235 n.*c*.

284. 3 S.C.L. (1 Brev.) 110, 1802 WL 520, at *3 (Const. App. 1802) (Brevard, J., dissenting).

285. 35 ANNALS OF CONG. 893.

286. *Id.*

287. *Id.*

288. *Id.* at 897.

289. *See Andrews v. Montgomery*, 19 Johns. 162 (N.Y. 1821) ("I consider that Court as paramount, when deciding on an article of the constitution, and an act of Congress passed under its express injunction; and whatever might be my

and of *Hampton*. Accordingly, the last legislative effort to clarify the law was made in the Seventeenth Congress. Even this effort, however, may have reflected an understanding that the 1790 Act concerned the law of evidence, not substantive effect. On January 22, 1822, Hutchins Burton of North Carolina introduced a resolution "to inquire into the expediency of amending the law *making the records and judicial proceedings of the several States, evidence in each particular State*."[290] Six days later, however, on a motion by John Sergeant of Pennsylvania, the committee was discharged from consideration of the resolution, ending without explanation Congress's final attempt to clarify the Act.[291] From 1822 to 1850, I have not found a single mention of the topic in the journals of the House and Senate.

Even in the face of congressional inaction, however, there remained an understanding that Congress possessed the *power* to determine the effect of sister-state records. As the Massachusetts Supreme Judicial Court held a year after the failure of Burton's motion:

> It is perfectly clear that by this article [of the Constitution] nothing was settled but that the acts, &c., authenticated as Congress should prescribe, were to be received as conclusive evidence of the *doings of the tribunals* in which the acts passed. And it is equally clear, that the *effect* of such acts was to be determined by Congress.[292]

Why, then, did Congress stop attempting to exercise this power after 1822? Part of the answer was the growing acceptance of *Mills*; with less dissension in the courts, there was less of a need to clarify the older statute. Another part of the answer was the constitutionalization of the law of personal jurisdiction. Many of the early opinions (especially Livingston's in *Hitchcock* and Sedgwick's in *Bartlet*) had recognized the common practice among the states of service by publication or foreign attachment, even as they expressed distaste for it. As Sedgwick explicitly noted in *Bartlet*, suit without notice might be entirely lawful as a matter of a sister state's domestic law, and would be enforced by that state's own courts; to give a sister-state judgment the same conclusive effect it would have at home necessarily meant

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individual opinion, I should feel it my duty to surrender it to their controlling authority.").

290. 38 *id*. at 757 (emphasis added).

291. *See id*. at 803; *Seventeenth Congress: First Session*, PROVIDENCE GAZETTE, Feb. 6, 1822, at 1.

292. Warren v. Flagg, 19 Mass. (2 Pick.) 448, 1824 WL 1928, at *3 (Mass. 1823) (first emphasis added).

giving respect to the sister state's law of personal jurisdiction. Although *Hampton* had explicitly recognized the absence of personal notice in the record, later courts were unwilling to follow its conclusive-effect interpretation to such a degree; instead, they read into the Clause and the Statute an exception for judgments rendered without notice. This exception was justified on the grounds that a judgment rendered without jurisdiction was null and void,[293] one that would later be incorporated into *D'Arcy v. Ketchum*;[294] but this argument represented an elision between international notions of appropriate jurisdiction and domestic laws on the service of process. (After all, domestic judgments issued without notice were routinely respected by the courts.) By ascribing to the 1790 Act a greater effect than its authors likely intended, the courts had inadvertently created all the problems of a top-down interpretation, founded in broad principles but forced into ad hoc compromise.

IV. CONCLUSION

The grand wording of the Full Faith and Credit Clause, as well as that of its predecessor in the Articles of Confederation, naturally inspired broad assertions of principle. Yet for these clauses to become legally effective, they also required precision and clear understanding. Over the past 200 years, courts have made ever more of the spirit of the Full Faith and Credit Clause and of its implementing statute, but in doing so they have rendered the doctrine less and less coherent. The difficulties faced by the early Congress in fighting against this trend, in deflating inspiring words to dry corners of evidence law, show in part the dangers of this approach. The effort to prescribe the effect of one state's records in another began with the failed amendment to the

293. *See, e.g.*, Flower v. Parker, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823) (No. 4891) (Story, Circuit Justice) ("The judgments of no state courts can bind, conclusively, any persons who are not served with process, or amenable to their jurisdiction . . . . [T]he principal seems universal, and is consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction."); Shumway v. Stillman, 6 Wend. 447 (N.Y. 1831) (identifying two exceptions to the conclusive-effect rule, namely when it appeared "by record that the defendant was not served with process," and when a defendant claimed that he did not appoint the attorney who claimed to represent him); *cf.* Mayhew v. Thatcher, 19 U.S. (6 Wheat.) 129 (1821) (holding an appearance sufficient to cure a lack of personal service for full faith and credit purposes).

294. 52 U.S. (11 How.) 165 (1850).

Articles in 1777 and continued for almost fifty years without real success. (Indeed, in one sense the effort continued until 1861, when the secessionist Confederate Congress debated—and rejected—precisely such an amendment to its own draft constitution.[295])

Yet the history of Congress's inability to exercise its powers under the Full Faith and Credit Clause is more than a narrative of failure. Compared to the cases, the debates show a greater sense of constitutional possibility, an avenue of achieving change through deliberate choice rather than artful evasion or the slow accretion of precedent. In this way, they remain a model for today's legislators, who enjoy no less freedom than their predecessors in the Fifteenth Congress to reshape the structure of our federal system. Today's society may have outgrown the seemingly quaint evidentiary provisions of the Full Faith and Credit Clause, but we retain the ability to move beyond what we inherited.

295. *See* 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA 881. The draft constitution contained an exact copy of the Full Faith and Credit Clause, to which was suggested the following addition: "And upon any judgment or decree rendered in a court of record of any one of the Confederate States upon personal service, an action may be maintained at any time within six years from the rendition of such judgment or decree in the proper court of any other State in which the defendant may reside." The amendment was voted down. *Id.*