

A HISTORICAL REASSESSMENT OF FULL FAITH AND CREDIT

*Jeffrey M. Schmitt**

INTRODUCTION

The Constitution commands that “Full Faith and Credit shall be given” to state acts, records, and judgments.¹ Although this clause appears to create a self-executing constitutional directive, the very next sentence provides that Congress “may” prescribe the manner in which state acts and judgments “shall be proved, and the Effect thereof.”² Paradoxically, the Full Faith and Credit Clause thus arguably seems to give Congress the power to nullify the command that full faith and credit be given. Any plausible interpretation of the Clause must reconcile this apparent conflict.

The Supreme Court has yet to offer a solution. The Court has held that the first portion of the Clause is a substantive command requiring a state to give conclusive effect to the judgments of other states.³ With regard to state acts, the Court has applied a much weaker rule: a state is required to apply the laws of another state only when it has no interest in the dispute.⁴ However, the Court has not yet ruled on the second portion of the Clause—that is, it has not addressed the contours of Congress’s full faith and credit power.

Although the Court has not yet provided a clear answer, this issue has attracted a great deal of academic interest, largely because of its relevance to the Defense of Marriage Act (“DOMA”),⁵ an act which provides that states need not recognize state acts or judgments regarding same-sex marriages.⁶ Opponents of DOMA have primarily argued that, because the first portion of the Clause is a self-executing substantive command to the states,

* Assistant Professor of Law, Florida Coastal School of Law, J.D., University of Virginia School of Law. I would like to thank Michael Collins, Doug Curran, Thomas Chen, Jason Marques, and Amanda Reid for their comments on earlier drafts of this Article.

¹ U.S. CONST. art. 4, § 1.

² *Id.*

³ *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813).

⁴ The Court has also held that, in certain situations, states must take jurisdiction of sister-state causes of action. *See Hughes v. Fetter*, 341 U.S. 609, 612 (1951). This Article will not address that aspect of the Full Faith and Credit Clause.

⁵ 28 U.S.C. § 1738C (2006).

⁶ *Id.* Of course, DOMA also defines marriage as a union between a man and a woman for purposes of federal laws and regulations and thus prevents the federal government from recognizing same-sex marriages that are valid under state law. *See* 1 U.S.C. § 7 (2006). This Article, however, focuses on DOMA’s provisions regarding the interstate recognition of state marriage laws.

Congress has no power to allow states to provide anything less than full faith and credit.⁷ Under this view, Congress merely has the power to pass legislation that defines, enforces, and expands on the Clause's self-executing directive. In other words, although Congress cannot *weaken* the effect of the Clause, it can *strengthen* it.⁸ This view is often referred to as the "ratchet theory."⁹

A number of other scholars, however, have argued that DOMA is a valid exercise of congressional power under the Full Faith and Credit

⁷ This interpretation was first proposed by Professor Lawrence Tribe. See 142 CONG. REC. 13359, 13360 (1996) [hereinafter Tribe, *Letter*] (letter from Professor Laurence H. Tribe to Sen. Edward Kennedy) ("[T]he congressional power to 'prescribe . . . the effect' of sister-state . . . proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some . . . proceedings . . . shall . . . be entitled to no faith or credit at all!" (first alteration in original)); see also Laurence H. Tribe, *Toward a Less Perfect Union*, N.Y. TIMES, May 26, 1996, at E11 [hereinafter Tribe, *Less Perfect Union*].

⁸ A number of scholars have advanced this view of the Clause. See, e.g., S. 1740 *A Bill to Define and Protect the Institution of Marriage Before the S. Comm. on the Judiciary*, 104th Cong. 46 (1996) [hereinafter *Senate Hearings*] (statement of Cass R. Sunstein and Karl N. Llewellyn) ("[T]he best reading of the text may well be that it gives Congress power to help ensure recognition of sister-state judgments and help ensure the smooth functioning of a federal system, but emphatically not that it authorizes Congress to pick and choose among the judgments that states should be required to recognize."); Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 621 (1997) ("The language of the Full Faith and Credit Clause suggests that Congress' power is subject to a one-way ratchet."); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 21 (1997) ("The grant of power is thus limited by its context: Congress may not exercise its Effects Clause powers in a way that contradicts the self-executing command."); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 965, 1003 (1997) ("Given its language, it is more credible to read the Full Faith and Credit Clause as imposing a mandatory requirement of faith and credit (defined by the Supreme Court), with the Effects Clause authorizing Congress to enact whatever national legislation is needed to refine and implement it. Refine and implement, not undermine or abolish—which means that even federal legislation must be tested against, and shown to be consistent with, the core requirements of full faith and credit."); Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 308 (1998) ("[T]he Full Faith and Credit Clause empowers Congress to increase but not to decrease the full faith and credit due to sister states' judicial proceedings."); Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 134-35 (2011) (arguing that Tribe's interpretation is consistent with Madison's intent); Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 165 (1997) ("In light of the goals of the clause, the current state of law, and the precedent in this area, the conclusion must be that the first sentence of the clause is the floor under which nothing can fall, while the second sentence ensures that a higher level of interstate cohesion can be achieved should the national legislature deem it advisable."); see also Tribe, *Letter*, *supra* note 7; Tribe, *Less Perfect Union*, *supra* note 7.

⁹ This term is also used in discussions of Congress's power under the Fourteenth Amendment, which commentators have often compared to Congress's full faith and credit powers. At least one of the scholars cited above, however, views Congress's full faith and credit powers differently. Specifically, Professor Larry Kramer asserts that Congress can merely define and enforce full faith and credit, not command that states give something more than full faith and credit. Kramer, *supra* note 8, at 2003.

Clause.¹⁰ Essentially, these scholars argue that the Clause's directive to provide full faith and credit operates as a default rule that can be displaced by congressional action.¹¹ According to this view of the Clause, Congress's power is subject to few limitations.

Until recently, most modern scholarship on the Full Faith and Credit Clause thus accepted the premise, found in the Supreme Court's precedent, that the first portion of the Clause provided a substantive command requiring states to give conclusive effect to state judgments and—in certain situations—to state acts. The subject of debate was whether Congress had the power to alter this command.

A growing number of scholars, however, argue that the Supreme Court's modern interpretation of the Full Faith and Credit Clause is unsupported by the Clause's history.¹² According to these scholars, the first portion of the Clause—the command that “Full Faith and Credit shall be given” to state acts and judgments—was originally understood to mean only that such documents were required to be admitted into evidence as conclusive proof that such proceedings took place (i.e., as conclusive proof that the court of another state rendered such a judgment or that the legislature of another state passed such an act).¹³ Under this view, often referred to as the “evidentiary view,” the Clause itself provides no substantive rules that are enforceable by the courts.¹⁴ In other words, without action from Congress,

¹⁰ See, e.g., *Senate Hearings*, *supra* note 8, at 57 (letter from Professor Michael McConnell to Sen. Orrin Hatch); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 938 (2006).

¹¹ See Rosen, *supra* note 10, at 972.

¹² See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1588-89 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1277 (2009); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 3 (1981) [hereinafter Whitten, *Choice of Law*]; Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981) [hereinafter Whitten, *State-Court Jurisdiction*]; see also Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 393 (2005) (“The overwhelming weight of historical research about the Full Faith and Credit Clause confirms [Whitten’s] assessment.”). Until recently, advocates of the ratchet theory had not based their arguments in history; instead, they generally used history only to argue that their interpretation fit within the Framers’ intent. In his recent article, *Madison’s Full Faith and Credit Clause: A Historical Analysis*, Professor Charles M. Yablon argues that Madison intended for the Clause to operate in the manner advocated by the ratchet theory. Yablon, *supra* note 8, at 134-35. While Professor Yablon thus uses a historical approach, he also is interested only in the Framers’ intent—specifically, the intent of James Madison. Professor Yablon thus does not examine the broader question of how the Clause was understood following ratification. *Id.* at 130.

¹³ Whitten, *State-Court Jurisdiction*, *supra* note 12, at 533.

¹⁴ See Sachs, *supra* note 12, at 1206 (“[T]he only self-executing portion of the Clause was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have. The real significance of the Clause was the power it granted to

state courts are free to ignore or otherwise disregard the judgments and acts of other states after admitting them into evidence. These scholars have further argued that, because the Clause provides no substantive rules, Congress has plenary power to prescribe what effect sister-state acts and judgments will have in other states.¹⁵ Under this view, DOMA would thus be a perfectly valid exercise of Congress's power under the Full Faith and Credit Clause. While this view was initially seen as something of an outlier, a growing number of scholars have now accepted that it describes the original meaning of the Clause, even though it is inconsistent with the Court's modern doctrine.¹⁶

This Article defends the Court's modern doctrine by providing the first in-depth response to the evidentiary view's account of how the Full Faith and Credit Clause was originally understood. Moreover, this Article contends that this historical view of Congress's full faith and credit power is superior to the theories advanced in modern debates over DOMA.

During the late eighteenth and early nineteenth centuries, most jurists and commentators believed that the Full Faith and Credit Clause required courts to view other states' judgments not only as evidence of the existence of a judgment, but also as conclusive evidence of all facts and legal determinations made on the record.¹⁷ For example, in a case in which a plaintiff asserted an action based on a money judgment rendered in another state for breach of contract, the judgment stood as conclusive evidence of the breach and of the amount owed. Unlike the evidentiary view, this Article argues that the command given to the states in the Full Faith and Credit Clause was originally understood to be robust and meaningful.

Moreover, the power granted to Congress under the Full Faith and Credit Clause was originally understood to be significantly more limited than the theories of congressional power advanced today. While the eviden-

Congress to specify that effect later." (footnote omitted)); Whitten, *Choice of Law*, *supra* note 12, at 3 ("The evidence will demonstrate that the Full Faith and Credit Clause is a self-executing command to the states which requires only that the courts of a state admit the statutes, records, and judgments of other states into evidence as conclusive proof of their own existence and contents. The clause does not, however, directly require any state to enforce or apply the statutes, records, or judgments of other states. Congress was given the exclusive authority . . . to require the enforcement or application of sister state statutes, records, and judgments . . ."). Professor David E. Engdahl, however, seems to argue instead that the Clause also constitutionalized the prima facie evidence rule. *See generally* Engdahl, *supra* note 12 (providing a detailed history of the Full Faith and Credit Clause).

¹⁵ *See supra* note 14. In practice, the evidentiary view thus offers the same unconstrained view of congressional power as the original defenders of DOMA's constitutionality, who argue that the first portion of the Clause operates as a default rule that may be altered by Congress. *Compare supra* notes 12-14 and accompanying text *with* notes 7-11 and accompanying text.

¹⁶ Professor Yablon is perhaps the only other modern author who challenges the evidentiary view's account of the history in a detailed manner. Professor Yablon, however, looks almost exclusively at the Framers' intent, whereas this Article examines how the Clause was understood in the first several decades following Ratification. *See* Yablon, *supra* note 8.

¹⁷ *See infra* Part I.

tiary view places no clear limits on congressional power, in the decades following ratification, jurists believed that Congress's power was essentially subject to two important limitations: (1) the conclusiveness dictated by the first, self-executing, portion of the Clause; and (2) territorial-based concepts of jurisdiction.¹⁸

Under the first limitation, Congress's power to prescribe the "effect" of state acts and judgments was limited by the constitutional command to provide full faith and credit.¹⁹ Unlike previous interpretations of the Clause, this Article contends that giving "effect" to a judgment or act was thought to mean something different than giving it "full faith and credit."²⁰ Specifically, giving a judgment or an act "full faith and credit" meant viewing it as conclusive evidence, whereas Congress's power to prescribe the "effect" of judgments and acts allowed Congress to create legal rules for *applying* such conclusive evidence. With respect to state judgments, this meant that Congress had the power to create rules regarding issues such as the applicable statute of limitations, the effect of insolvency proceedings, the priority of creditors, and other issues where the forum's law may vary from that of the state that had rendered the decision. But, this power did not enable Congress to allow courts to relitigate issues that had already been determined in a prior judgment. When applied to acts, however, the command to provide "full faith and credit" did not impose a meaningful limitation on congressional power; instead, it merely required a state to view other states' statutes as conclusive evidence of the laws of those states.

The second limitation—territorial-based jurisdictional principles—provided a much more meaningful restriction on Congress's power to prescribe the effect of state acts. Under prevailing concepts of jurisdiction, in most situations state acts were not thought to have had any binding effect outside of the territorial boundaries of that state.²¹ While states often recognized and applied the law of other states, doing so was thought to have been a voluntary act of comity. These jurisdictional limitations on the reach of state acts were believed to have been dictated by basic principles of justice and state sovereignty.²² To avoid violating these principles, Congress was able to give extraterritorial effect to state acts only in civil cases and only with the consent of the parties (though such consent could be implied). Moreover, Congress had no power to alter the common law rule that a

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part II.C.

²⁰ The ratchet theory likewise finds that Congress's power is limited by the constitutional directive to provide full faith and credit. See Chabora, *supra* note 8, at 638. However, rather than ascribing a different meaning to "effect" and "full faith and credit," the ratchet theory holds that Congress can require states to provide more faith and credit than "full" faith and credit (but not less). *Id.* at 607. In contrast, this Article argues that, as originally understood, Congress's power to prescribe the (legal) effect of an act or judgment was unconnected to the amount of faith and credit given.

²¹ See *infra* Part II.B.

²² See *infra* note 175 and accompanying text.

judgment rendered without valid jurisdiction was void.²³ Although these jurisdictional rules were not derived from any specific provision of the Constitution, the Constitution was viewed very differently at this time,²⁴ and basic legal concepts such as jurisdiction were generally thought to supplement and help define Congress's enumerated powers.²⁵

While this early understanding of the Clause, which this Article refers to as the "historical view," is closer to the ratchet theory—that is, the theory that Congress can define, enforce, and expand full faith and credit—than other existing theories, it differs in important ways.²⁶ Most proponents of the ratchet theory argue that Congress has the power to expand the credit given to state acts and judgments, or, in other words, give them conclusive effect in a wider range of situations than the Constitution itself commands. For example, ratchet-theory scholars contend that Congress has unlimited power to create national rules to expand state-court jurisdiction (thus making a wider array of judgments entitled to full faith and credit) and to grant state acts extraterritorial effect.²⁷ Proponents of the evidentiary view likewise see Congress as having the power to increase faith and credit, since they believe that Congress's power is subject to virtually no limitations.²⁸ Because these theories fail to account for the jurisdictional limitations on Congress's ability to expand faith and credit, they envision more expansive congressional power than does the historical view advanced in this Article.

In addition to presenting a new account of the original understanding of the Full Faith and Credit Clause, this Article also argues that this understanding is superior to modern theories of the Clause. Unlike the evidentiary view, this Article's interpretation is consistent with the Court's current full faith and credit jurisprudence, and thus its acceptance would not violate principles of *stare decisis*. Moreover, most originalists now agree that the "original public meaning" of the Constitution should control over what the Framers subjectively intended to accomplish at the Constitutional Convention.²⁹ Because this Article focuses on how the Clause was understood soon after ratification rather than on obscure common law sources or on the sub-

²³ See *infra* note 176 and accompanying text.

²⁴ The Constitution was generally seen as a nonexclusive statement of fundamental principles. See *infra* notes 254-255 and accompanying text.

²⁵ See, e.g., *infra* notes 254-256 and accompanying text.

²⁶ See *infra* Part III.

²⁷ See, e.g., Chabora, *supra* note 8, at 647-48.

²⁸ See Whitten, *Choice of Law*, *supra* note 12, at 3.

²⁹ See, e.g., ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 2-3 (2011) ("Our concern is not directly with the mental states of the framers. Rather, our quest is for the linguistic meaning that the words and phrases of the text had for the public (including farmers, seamstresses, shopkeepers, and even lawyers) in the 1780s.").

jective intent of the Framers,³⁰ it provides strong evidence of original meaning.

This Article also argues that the historical view best fits with the text of the Clause and the structure of Constitution.³¹ While other theories may fit with the constitutional structure when only state judgments are considered, granting Congress expansive power to prescribe the extraterritorial effect of state acts (as both the evidentiary and ratchet theories contemplate doing) would risk undermining the Constitution's federal structure. If Congress had such power, it could essentially act as an arbiter of the federal system on a number of important issues by favoring the laws of one state over those of another. To provide the most striking example, Congress could have used such power to essentially nationalize or abolish slavery. In the constitutional debates over slavery, however, no one would have guessed that the Full Faith and Credit Clause gave Congress such a power. In fact, the inability of Congress to interfere with domestic policy on slavery was a central tenant of the antebellum constitutional order. In sum, such expansive congressional power was not contemplated in the original constitutional structure. Instead, the reach of a state's laws was generally thought to be limited by its borders, and the federal courts (rather than Congress) were given primary responsibility to ensure that the federal system operated effectively.

In addition to defending the original understanding of the Clause, this Article also explores how it would apply to two statutes: (1) DOMA; and (2) a hypothetical law that would require states to give conclusive effect to the judgments and acts of other states regarding same-sex marriages ("reverse DOMA").³² Under the historical view, these statutes would both probably be unconstitutional. Congress lacks the power to alter the conclusiveness of state *judgments* that involve giving legal recognition to a same-sex marriage. Moreover, Congress does not have the power to create rules regarding the extraterritorial effect of state *acts* relating to same-sex marriages. However, the rules provided in DOMA regarding state acts probably match the constitutional rules already provided in the Full Faith and Credit

³⁰ Professor Yablon, who provides the only detailed historical defense of the ratchet view, looks almost exclusively at James Madison's intent. *See generally* Yablon, *supra* note 8. Moreover, Professor Engdahl, one of the major proponents of the evidentiary view, places particular emphasis on sources that antedated Ratification, especially English common law sources that would not have been commonly available. *See* Engdahl, *supra* note 12, at 1595-1606 (detailing the English common law treatment of prior judgments and purported judgments from foreign jurisdictions). Only Whitten and Sachs provide detailed coverage of the time period analyzed in this paper. *See* Sachs, *supra* note 12, at 1231-78 (providing a detailed account of the legislative history of full faith and credit between 1790 and 1822); Whitten, *State-Court Jurisdiction*, *supra* note 12, at 555-99 (providing a detailed account of the judicial history in the Supreme Court, lower federal courts, and state courts in regards to the Clause between 1813 and 1877).

³¹ *See infra* Part IV.

³² *See infra* Part V.

Clause. For this reason, a reverse-DOMA act would also be unconstitutional. Simply put, under the historical view, whether the marriage laws of another state are given extraterritorial effect is left to the discretion of each state. One state cannot create such legal relationships—whether they relate to marriage, slavery, or some other controversial issue—that bind domestic policy in other states, and Congress has no power to allow them to do so.

This Article proceeds in five parts. Part I sketches a brief history of the origins of the Full Faith and Credit Clause and its adoption at the Constitutional Convention. Part II canvasses the significant cases decided under the Clause prior to the Civil War and provides an interpretation of how the Clause was understood during that period. Part III explains the historical view and discuss why it differs from past scholarship. Part IV argues that this historical view is superior to modern interpretations of the Full Faith and Credit Clause. Finally, Part V discusses how the historical view, if adopted, would apply to DOMA and a hypothetical statute requiring a state to give conclusive effect to the same-sex marriages of other states.

I. THE ORIGINS OF THE FULL FAITH AND CREDIT CLAUSE

This Part provides a brief account of the history of the recognition of foreign and state judgments prior to the ratification of the Constitution and concludes with a brief discussion of the debates of the Full Faith and Credit Clause at the Constitutional Convention. Because these topics have been examined elsewhere,³³ this Part does not attempt to provide comprehensive coverage. Moreover, this Article focuses on how the Full Faith and Credit Clause was viewed in the early days of the nation, and therefore any evidence regarding pre-constitutional interpretations of the issue is useful only as background information.³⁴ A brief discussion of this background material, however, will aid in understanding the more detailed historical analysis provided in the following parts.

A. *English Precedent*

English courts ruled on the recognition due to foreign judgments long before the adoption of the Constitution. By the late eighteenth century, it was well established that foreign judgments were not entitled to the conclu-

³³ For more detail, *see generally* Engdahl *supra* note 12; Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957); Sachs, *supra* note 12; Whitten, *State-Court Jurisdiction*, *supra* note 12; Yablon, *supra* note 8.

³⁴ In this regard, the debates of the Constitutional Convention are especially unimportant, as the public did not have access to these materials until after the time period discussed in this Article. *See, e.g.*, Nadelmann, *supra* note 33, at 62 (“[T]he *Journal of the Constitutional Convention* was not published before 1819 and . . . Madison’s *Notes of the Debates* were first published in 1840.”).

sive effect given to judgments of domestic courts of record.³⁵ Instead, because foreign courts proceeded under the authority of a different sovereign, their judgments were merely regarded as prima facie evidence. In the context of judgments of debt, for example, foreign judgments were viewed as prima facie evidence that a debt was owed.³⁶ Foreign judgments were entitled to such respect, however, only when rendered by a court of competent jurisdiction.³⁷

Early English cases often used the terms “faith” and “credit.”³⁸ For example, in *Kennedy v. Earl of Cassillis*,³⁹ the court discussed an earlier case which held that “it is against the law of nations not to give *credit* to the judgment and sentences of foreign countries, till they be reversed by law, and according to the form, of those countries wherein they were given.”⁴⁰ In *Walker v. Witter*,⁴¹ while explaining that a foreign judgment was merely prima facie evidence because it was not rendered by a court of record, the court stated: “Though the plaintiffs had called the judgment, a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which *implicit faith* is given by the Courts of Westminster Hall.”⁴² Moreover, in *Phillips v. Hunter*,⁴³ Chief Justice Eyre explained in dissent that, although foreign judgments were merely prima facie evidence in an action to collect the debt, “[i]n all other cases, we give *entire faith and credit* to the sentences of foreign courts, and consider them as conclusive upon us.”⁴⁴

These cases demonstrate that the terms “faith” and “credit” were used in English common law cases in the context of the recognition of foreign judgments well before the adoption of the Constitution. As shown in each

³⁵ See, e.g., Engdahl, *supra* note 12, at 1598. Foreign admiralty judgments, however, were always viewed as conclusive. See, e.g., *id.* at 1597-98.

³⁶ Professor Ralph U. Whitten contends that, under English law, a foreign judgment was initially viewed as conclusive evidence and thus was given the same res judicata effect as judgments from domestic courts of record. Whitten, *State-Court Jurisdiction*, *supra* note 12, at 509-10. He agrees, however, that the prima facie view was adopted in England before the drafting of the Articles of Confederation. *Id.* at 510. Other authors who discuss the English history in great detail, however, state that the prima facie rule had always applied to nonadmiralty judgments. See Engdahl, *supra* note 12, at 1598-99. For purposes of this Article, it is sufficient to state that the prima facie view was accepted at the time of the drafting of the Articles of Confederation.

³⁷ See Whitten, *State-Court Jurisdiction*, *supra* note 12, at 510.

³⁸ In fact, the terms “faith” and “credit” had long been used in England to signify the evidentiary weight and effect to be given to certain instruments and judgments. For example, the command of “full faith” was often given to notarial acts, such that notarized copies were to be viewed the same as originals. See Nadelmann, *supra* note 33, at 47-48.

³⁹ (1818) 36 Eng. Rep. 635 (Ch.).

⁴⁰ *Id.* at 640 (emphasis added) (discussing *Cottington v. Gallina*, (1678) 36 Eng. Rep. 640 (H.L.)).

⁴¹ (1778) 99 Eng. Rep. 1 (K.B.).

⁴² *Id.* at 4 (emphasis added).

⁴³ (1795) 126 Eng. Rep. 618 (C.P.).

⁴⁴ *Id.* at 622 (Eyre, L.C.J., dissenting) (emphasis added).

of the passages quoted above, the terms were often used to signify the type of conclusive effect given to domestic judgments from a court of record.⁴⁵ When courts referred to giving “faith” and “credit” to judgments, they often referred to giving the judgments conclusive effect.⁴⁶ Professor Ralph U. Whitten, the primary proponent of the evidentiary view, even admits that “the use of the modifier ‘full’ with the evidentiary terms ‘faith’ and ‘credit’ might suggest a desire to establish a *res judicata* effect for state judgments

⁴⁵ Although Professor Stephen E. Sachs claims that “[a] copy of a judicial record received ‘faith and credit’ when admitted as evidence equal to the original,” Sachs, *supra* note 12 at 1219, he has cited no relevant authority in support of his assertion. Instead, he cites to a Scottish treatise from 1773 and an admiralty treatise which was published in 1809. *Id.* at 1219 n.72. Professor Sachs notes that the Scottish treatise states that transcripts of court proceedings “bear as full faith or credit as an extract from the record of that court.” *Id.* The usage of the phrase “full faith or credit” here is at best ambiguous, as it could be argued that the author meant that transcripts will have the same conclusive effect as an original. More importantly, though, the usage of the phrase in this source is far afield from the context of a judicial decision deciding how to treat a foreign judgment. The other, post-Ratification source cited by Sachs is equally unhelpful. *See id.* In fact, my research has uncovered no pre-Revolutionary case which states that a court gives a foreign judgment “faith” or “credit” (much less *full* faith and credit) merely by admitting it into evidence.

⁴⁶ Advocates of the evidentiary view have attempted to minimize this evidence in a number of ways, each of which is unconvincing. First, they argue that, because the terms “faith” and “credit” were usually accompanied by modifying words such as “implicit” or “entire” faith and credit, the terms were understood to mean something less than conclusive effect when standing alone. *See* Whitten, *State-Court Jurisdiction*, *supra* note 12, at 515-16. The passage from *Kennedy* quoted above, however, includes no such modifier and yet clearly meant to convey conclusive effect. *See supra* note 40. Moreover, as a matter of logic, the use of such modifiers does not necessarily imply that the terms “faith” and “credit” meant something different when standing alone.

Second, some proponents of the evidentiary view concede that the terms were used to mean that a foreign judicial record must be given conclusive effect. These scholars, however, assert that it was not always clear what it meant to give something conclusive effect. *See* Sachs, *supra* note 12, at 1218 (“[T]he usage could be ambiguous. The uncertainty is not whether the phrase ‘describe[d] anything less than conclusive effect’—which it did not—but rather what the credited evidence was meant to be conclusive of.” (second alteration in original) (footnote omitted)); Whitten, *State-Court Jurisdiction*, *supra* note 12, at 5353 (“[T]he addition of the modifier ‘full’ to the terms ‘faith’ and ‘credit’ can be read as an attempt to require sister-state judgments to be admitted into evidence as conclusive proof of their own existence and that they adjudicated the matters described by the record.”). Analogizing to a notarial certificate, which used the terms to mean merely that the statements therein were actually made by the declarant rather than that they were also true, they suggest that a foreign judgment could be given faith and credit simply by viewing the record as conclusive evidence that a foreign judgment was rendered rather than as conclusive evidence that a debt was owed. *See, e.g.*, Sachs, *supra* note 12, at 1218-19.

While this analogy may be theoretically plausible, it has little historical support. As indicated in the passages quoted above, when the terms “faith” and “credit” were used in the context of the recognition of foreign judgments, “conclusive effect” referred to the substantive legal effect of a judgment from a court of record, not the admissibility of the record. Proponents of the evidentiary view have not identified a single case that actually uses the terms “faith” or “credit” in the manner they suggest, that is, as signifying that a judgment was conclusive proof of its own existence.

in sister states.⁴⁷ Most scholars have found that, at best, the use of the terms at common law was ambiguous.

B. *Colonial Precedent*

Prior to the Revolution, a number of colonies had statutes that provided rules for the recognition of judgments from other colonies. The impetus for these statutes is captured in the preamble to the statute enacted by the Province of Massachusetts Bay in 1774:

Whereas it frequently happens that persons against whom final judgments of court are recovered in the neighbouring governments remove with their effects into this province without having paid or satisfied such judgment, and, upon actions of debt upon such judgments brought in the executive courts in this province, the record of such judgments cannot be removed into the said courts in this province, and it has been made a doubt whether, by law, such judgment[s] can be admitted as sufficient evidence of such judgments, whereby honest creditors are often defrauded of their just demands by negligent and evil-minded debtors[.]⁴⁸

These statutes thus had two interrelated goals: providing for the regular admission of foreign records, and making it easier for creditors to collect on judgments rendered in other colonies.

The colonial statutes can be divided into three categories. First, Maryland passed a statute dictating that copies of foreign records be admitted into evidence and regarded as true copies of the foreign judgment.⁴⁹ Second, Connecticut and South Carolina passed statutes that made the records of other colonies admissible in evidence and provided that such records were sufficient—or *prima facie*—evidence on the merits.⁵⁰ Third, the statute of

⁴⁷ Whitten, *State-Court Jurisdiction*, *supra* note 12, at 541. Whitten ultimately concludes, however, that this language was ambiguous because the more pressing problem at the time of the Clause was enacted was the admissibility of sister state judgments into evidence. *Id.*

⁴⁸ 5 Acts and Resolves of the Province of Massachusetts Bay, 1773-1774, at 323 (1886) [hereinafter Acts and Resolves] (quoted in Nadelmann, *supra* note 33, at 40).

⁴⁹ The Maryland statute provided that the exemplification of a foreign record, “under the Seal of the Courts where the said Judgment was given, or was recorded, shall be a sufficient Evidence to prove the same.” Act of June 3, 1715, *reprinted in* ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF MARYLAND, FROM 1612, TO 1715, No. 85 (London, John Baskett 1723) (quoted in Nadelmann, *supra* note 33, at 39).

⁵⁰ The statute of the Province of Connecticut provided that judgments from other colonies “shall have a due respect in the several courts of this jurisdiction, . . . and shall be accounted good evidence for the party, until better evidence or other just cause appear to alter or make the same void.” Verdict, 1659 Connecticut Acts and Laws (1650) (quoted in Nadelmann, *supra* note 33, at 38-39). This statute thus went beyond merely making foreign judgments admissible by providing that such judgments were “good evidence” and would control unless “better evidence” were presented. Moreover, the South Carolina statute provided that judgments from other colonies “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*.” Act of August 20, 1731, No. 552, § 40, *reprinted in*

the Province of Massachusetts Bay, passed in 1774, gave judgments from other colonies conclusive effect on the merits.⁵¹ When the Articles of Confederation were drafted in 1776, there were thus a number of different approaches to the issue of inter-colony recognition of judgments.

C. *The Articles of Confederation*

The Articles of Confederation contain a provision nearly identical to the first sentence of the Full Faith and Credit Clause of the Constitution.⁵² Article IV states: “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.”⁵³ Unfortunately, the drafting history of the Clause provides little insight into the Framers’ intent.⁵⁴

PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 123, 129 (photo. reprint 1981) (1790) (quoted in Nadelmann, *supra* note 33, at 39). By providing that a judgment from another colony should be regarded as if the witnesses had proven the facts by live testimony, the South Carolina law dictated that some effect should be given to the judgment on the merits. *See id.* But *see* Whitten, *State-Court Jurisdiction*, *supra* note 12, at 533 (arguing that the Connecticut and South Carolina statutes, like the Maryland statute, provided only for admissibility as true copies of judgment and did not give foreign judgments any weight on the merits).

⁵¹ This statute provided that a creditor who obtained a judgment of debt in a another colony could bring suit upon such judgment in Massachusetts and that the judgment would “have the same effect and operation, as if the original judgment and proceedings had been rendered and had in the [Massachusetts] court where such action of debt shall be brought and depending.” Acts and Resolves, *supra* note 48, at 323.

⁵² One major difference, however, is that the provision in the Articles did not extend full faith and credit to state statutes; instead, it was limited to judicial acts.

⁵³ ARTICLES OF CONFEDERATION, art. IV.

⁵⁴ The version of the Clause originally proposed out of committee provided:

Full faith and credit shall be given in each of these states, to the records, acts and judicial proceedings of the courts and magistrates of every other State. . . . 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 judgment 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[.]

9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 895 (Worthington Chauncey Ford ed., 1907) (quoted in Nadelmann, *supra* note 33, at 35). An amendment was also proposed which would have added the following language: “and provided the party against whom such judgment may have been obtained, had notice in fact of the service of the original writ upon which such judgment shall be founded[.]” *Id.* (quoted in Nadelmann, *supra* note 33, at 36). The bonding and notice provisions, however, were voted down by a substantial majority.

With no surviving record of any substantive debate, this drafting history provides few clues as to congressional intent, as Congress may have viewed the bonding and notice provisions as unnecessary or impractical. As more fully addressed below, Congress probably assumed that the notice provision was unnecessary because it was already a fundamental principle of law. *See infra* notes 254-255 and accompanying text. Moreover, the language explicitly authorizing “an Action in Debt” may have been viewed

The few cases decided under the Articles of Confederation also fail to provide a clear interpretation. In the first case to address the issue, *Jenkins v. Putnam*,⁵⁵ the South Carolina Supreme Court held that the Articles gave foreign-state judgments conclusive effect in other states.⁵⁶ The court stated that it was

bound by the sentence of the Court of Admiralty in North-Carolina, until reversed by some competent authority, and . . . obliged to give due faith and credit to all its proceedings. The act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it.⁵⁷

Two years later, in *Kibbe v. Kibbe*,⁵⁸ the Connecticut Supreme Court held that a Connecticut court could not maintain an action on a Massachusetts judgment when the Massachusetts court had lacked jurisdiction over the defendant when it rendered the judgment.⁵⁹ After so concluding, the court stated:

as unnecessary because foreign judgments had long been procedurally treated as an action in debt, even if the judgment was only considered prima facie evidence of debt. *See* Engdahl, *supra* note 12, at 1610. *But see* Sachs, *supra* note 12, at 1226 (viewing the “Action in Debt” language as an unsuccessful attempt to give foreign-state judgments conclusive effect). Perhaps the most that can be said is that the proponents of the bonding and notice provisions viewed the Full Faith and Credit Clause of the Articles as accomplishing more than the evidentiary view would suggest, since such provisions would have made little sense if the command to give full faith and credit merely authorized the admission of foreign-state records as evidence in the courts of another state.

However, some proponents of the evidentiary view have made much of a report made by a committee of the Continental Congress on the implementation and possible improvement of the Articles. *See* Engdahl, *supra* note 12, at 1610-11; Sachs, *supra* note 12, at 1224. The committee’s report, dated August 22, 1781, states that there was a need for “declaring the method of exemplifying records” and “declaring . . . the operation of the Acts and judicial proceedings of the Courts of one State contravening those of the States in which they are asserted.” 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 894 (Gaillard Hunt ed., 1912) (quoted in Engdahl, *supra* note 12, at 1610-11). This report, however, which was written four years after the passage of the full faith and credit provision of the Articles, merely states that clarification was needed regarding the way in which foreign-state judgments were to be admitted into evidence and the effect of such admission. The report likely only meant that the full faith and credit provision of the Articles was difficult to interpret.

⁵⁵ 1 S.C.L. (1 Bay) 8 (S.C. Ct. C.P. 1784) (per curiam).

⁵⁶ *Id.*

⁵⁷ *Id.* It has been argued that the court’s decision in *Jenkins* was dictum because, even at common law, decisions of foreign admiralty courts were deemed to have conclusive effect. *See* Whitten, *Choice of Law*, *supra* note 12, at 29 n.137. However, the court clearly stated that it believed the Articles compelled the same result as common law admiralty principles, and thus its interpretation of the Articles is more properly described as an alternative holding. *See Jenkins*, 1 S.C.L. (1 Bay) 8. Whether the court’s statement was dictum or a holding, however, is of little consequence; the important point is that the court clearly stated that it believed the Articles required states to give conclusive effect to the judgments of other states.

⁵⁸ 1 Kirby 119 (Conn. 1786) (per curiam).

⁵⁹ *Id.* at 126.

But full credence ought to be given to judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process, and have or might have had a fair trial of the cause; all which, with the original cause of action, ought to appear by the plaintiff's declaration in action of debt on such judgment.⁶⁰

This language, though somewhat ambiguous, seems to suggest that conclusive effect would have been given to the Massachusetts judgment if jurisdiction had been proper.

Next, in *James v. Allen*,⁶¹ the Pennsylvania Court of Common Pleas rendered a decision that could be interpreted to support either interpretation of the Article's Full Faith and Credit Clause. The court held that a decision of a New Jersey court discharging a debtor from imprisonment based on his insolvency did not discharge him from his debt in Pennsylvania.⁶² The court explained that the decision of the New Jersey court did not discharge the debtor from his obligations because the decision had "no connection with the merits of the cause, and cannot with any propriety be called the judgment of the [c]ourt in that action."⁶³ The court then stated that the Full Faith and Credit Clause of the Articles did not provide for the execution of a judgment of one state in another, but rather was "chiefly intended to oblige each State to receive the records of another as *full evidence* of such Acts and judicial proceedings."⁶⁴ This language is somewhat ambiguous. The court may have meant that the Clause provides only for the admissibility of foreign-state records as "full evidence" of the existence of a judgment. Alternatively, the court could have meant that foreign-state records constituted "full evidence" of the facts and conclusions reached by the court on the record.⁶⁵

Finally, in *Phelps v. Holker*,⁶⁶ a Pennsylvania court held that a Massachusetts default judgment was not conclusive evidence in a suit brought in Pennsylvania where jurisdiction in Massachusetts had been obtained by "the mere attachment of a blanket, *reputed* to be [the defendant's] property."⁶⁷ The court explained that the Massachusetts judgment was "a proceeding *in rem*, and ought not certainly to be extended further than the property attached."⁶⁸ In other words, since the defendant had not personally appeared in Massachusetts, any judgment rendered there could apply only to his

⁶⁰ *Id.*

⁶¹ 1 U.S. (1 Dall.) 188 (Pa. Ct. C.P. Phila. Cnty. 1786).

⁶² *Id.* at 191-92.

⁶³ *Id.* at 191. The court further explained that the New Jersey decision was "local in its nature, and local in its terms" and that state bankruptcy laws were not understood to apply outside of the state. *Id.*

⁶⁴ *Id.* at 191-92 (emphasis added).

⁶⁵ Proponents of the evidentiary view have not discussed this ambiguity. See, e.g., Whitten, *State-Court Jurisdiction*, *supra* note 12, at 538-39.

⁶⁶ 1 U.S. (1 Dall.) 261 (Pa. 1788) (per curiam).

⁶⁷ *Id.* at 262.

⁶⁸ *Id.* at 264.

property located in that state: in this case, a fictional blanket.⁶⁹ The court thus held that “*in the present action* the Judgment obtained in *Massachusetts* cannot be considered as conclusive evidence of the debt, and, therefore, the Defendant ought still to be at liberty to controvert and deny it.”⁷⁰ The court, however, expressed no view as to the weight due to the judgment of another state obtained pursuant to valid jurisdiction.⁷¹

Court decisions rendered under the Articles of Confederation thus did not provide a clear interpretation of its Full Faith and Credit Clause.⁷² The effect to be given to a judgment from another state was squarely confronted only in *Jenkins*, and, because *Jenkins* was an admiralty case, its conclusions are arguably dicta.⁷³ When the issue was taken up at the Constitutional Convention, therefore, delegates may have held conflicting views of the meaning of the Article’s Full Faith and Credit Clause. Moreover, many delegates may not have even recognized the ambiguity latent in the Clause, since the state court decisions were not explicitly in disagreement (or even logically inconsistent).

⁶⁹ The attachment of a blanket or similar item was a common legal fiction used to obtain jurisdiction, and was permissible under Massachusetts law. See Engdahl, *supra* note 12, at 1617.

⁷⁰ *Phelps*, 1 U.S. (1 Dall.) at 264 (McKean, C.J.) (emphasis added).

⁷¹ Supporters of the evidentiary view have found that cases such as *Phelps* support their position only by ignoring this key aspect of the decision. See, e.g., Engdahl, *supra* note 12, at 1617-18.

⁷² Most scholars of the Clause’s history have agreed with this assessment. See Nadelmann, *supra* note 33, at 53 (“These few decisions [relating to the Clause] are insufficient to support any specific construction of the Full Faith and Credit Clause in the Articles.”); Whitten, *State-Court Jurisdiction*, *supra* note 12, at 540-41 (agreeing with Professor Kurt Nadelmann); Yablon, *supra* note 8, at 129, 141-44 (noting an inconsistency among scholars in interpreting “full faith and credit” and finding that “[t]he litigation engendered by the Articles’ clause reflects all these differing points of view”). But see Engdahl, *supra* note 12, at 1587 (“[C]ourt decisions under the Articles of Confederation had construed that phrase as mandating only admissibility and evidentiary sufficiency.”).

⁷³ The courts’ decisions in *Phelps* and *Kibbe* also seem to be inconsistent with the evidentiary view. While proponents of the evidentiary view have cited them as support since they do not give conclusive effect to state judgments, see Engdahl, *supra* note 12, at 1615-18, the courts only reached such a result by finding that the court which rendered the judgment lacked jurisdiction. See *Phelps*, 1 U.S. (1 Dall.) at 262; *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. 1786) (per curiam). If the courts had believed that the Articles commanded only that the decisions be admitted into evidence, they would have had no need to inquire into the jurisdiction of the rendering court to hold that the defendant could challenge the judgment. In other words, if the courts had adhered to the evidentiary view, then it is unclear why they relied on a lack of jurisdiction in the rendering state instead of simply saying that the Full Faith and Credit Clause of the Articles always allowed defendants to attack a state judgment.

For the same reasons, these cases could be read to support the conclusive effect view of the Full Faith and Credit Clause. The court in *Phelps* found that the Massachusetts judgment was admissible, but, since obtained without jurisdiction, was not conclusive on the merits. *Phelps*, 1 U.S. (1 Dall.) at 264. Although the decision does not logically compel as much, it seems to suggest that, had jurisdiction been valid, conclusive effect would have been given to the Massachusetts judgment.

D. *The Constitutional Convention*

The existing record of the Constitutional Convention does little to reveal how the Framers understood the Full Faith and Credit Clause. One early proposal would have explicitly made the judgments and acts of one state “binding in every other State.”⁷⁴ This language, however, was ultimately replaced with the more ambiguous language we are familiar with today. Although there is little record of the substantive issues discussed by the Framers,⁷⁵ at least one Framers objected to the Clause on the grounds that the grant of power to Congress to prescribe the effect of state acts threatened to usurp the powers of the states.⁷⁶ Perhaps the most that can be said is that the Framers expressed no uniform view of what they thought the Clause would (or should) accomplish.⁷⁷ The records of the Convention, however, would not be published until well after the time period discussed in this Article, and thus those who first interpreted the Clause were not privy to the Framers’ subjective intentions.

E. *The 1790 Act*

Soon after Ratification, Congress exercised its power under the Full Faith and Credit Clause by passing the following Act:

⁷⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (Max Farrand ed., 1911).

⁷⁵ The majority of the existing record consists of proposals for amendments, with no discussion of the reasons given for their proposal. *See generally id.*

⁷⁶ *Id.* at 488-89.

⁷⁷ Professor Yablon argues that the Framers intentionally chose ambiguous language because they wished to create a dynamic rule that Congress could alter when needed. Yablon, *supra* note 8, at 193. Thus, in his view, rather than clearly define Congress’s power and the constitutional obligations placed on the states, the Framers chose to give the states a vague directive that Congress could define and enforce as the situation warrants. *Id.* at 132. The scope of Professor Yablon’s article, however, limits his ability to prove this claim. Professor Yablon is primarily concerned only with how Madison understood the Clause. While he provides excellent evidence of how Madison hoped the Clause (and interstate relations in general) would operate, he gives little indication of the views of the other Framers. He thus fails to consider the very real possibility that the more ambiguous language was ultimately chosen because the Framers could not agree on a more clear and explicit provision.

Although a detailed discussion is beyond the scope of this Article, my own view is that the Framers likely had different ideas of exactly what the Clause meant. The language of the Articles of Confederation was probably used only because it was easy to agree upon. Moreover, in the second sentence of the Clause, the Framers probably agreed that Congress should play some role in creating rules for the interstate recognition of acts and judgments. But the lack of significant debate, when combined with the vague and open-ended language agreed upon, indicates that most of the Framers either did not have clear ideas of what Congress’s powers would entail, or, at the very least, did not bother to express these ideas to their colleagues.

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.⁷⁸

While the Act clearly prescribed the means by which state records and judgments were to be authenticated, its language is otherwise ambiguous. Borrowing from the language of the Constitution, the Act provides that state judgments “shall have such faith and credit” as they would have had in the state which rendered the decision. As will be more fully explored below, it is unclear how the import of this language differs, if at all, from the constitutional command that states give “full faith and credit.” Moreover, the statute does not prescribe any effect for state acts, and thus the recognition of state acts was controlled only by the Constitution.

II. THE BASIS OF THE HISTORICAL VIEW: INTERPRETATIONS OF THE FULL FAITH AND CREDIT CLAUSE: 1787-1861

This Part provides the basis for the historical view of the Full Faith and Credit Clause. As is demonstrated below, in the decades following ratification, courts and commentators believed that the Clause made state acts and judgments conclusive evidence of the matters stated therein. While Congress had the power to prescribe the legal effect of this conclusive evidence, it did not have the power to reopen matters found in the record of state judgments. And although Congress could prescribe the effect that state acts would have in other states, this power was thought to have been limited by traditional, territorial-based principles of jurisdiction.

The historical view, however, was not formed overnight. Before the Supreme Court intervened in 1813, there was a healthy debate among state and lower federal courts regarding the meaning of the Full Faith and Credit Clause. Most jurists, however, found that the Clause required states to give conclusive effect to the judgments of other states when rendered pursuant to valid jurisdiction. After the Supreme Court’s decision in *Mills v. Duryee*⁷⁹

⁷⁸ Act of May 26, 1790, ch. 11, 1 Stat. 122 (1790) (codified as amended at 28 U.S.C. § 1738 (2006)) (third emphasis added).

⁷⁹ 11 U.S. (7 Cranch) 481 (1813).

in 1813, this conclusive effect rule became universally accepted. Although many jurists and commentators did not discuss whether this rule was derived from the Constitution or the 1790 Act, when such a distinction was made, most courts found that it was a constitutional command. In fact, despite its popularity among modern commentators, very few nineteenth century jurists advocated anything similar to the evidentiary view. Because the Full Faith and Credit Clause engendered little public debate or correspondence between important historical figures, the surviving historical evidence primarily consists of court cases, congressional records, and legal treatises.

A. *Court Cases*

1. 1787-1813

In the period from 1787 to 1813, an overwhelming majority of courts found that a judgment from a court of another state, when rendered pursuant to valid jurisdiction, was a conclusive determination of any issues addressed in that judgment.⁸⁰ Because the constitutional command to provide “full faith and credit” was similar to the language of the 1790 Act, however, some decisions did not indicate whether their rulings were derived from the Constitution or the Act.⁸¹

Most courts that did distinguish the Clause from the 1790 Act found that the rule derived from the Constitution, and the Act was often seen as a restatement or clarification of that rule.⁸² While many of these cases provide

⁸⁰ My research has revealed only two cases which held otherwise: *Peck v. Williamson*, 19 F. Cas. 85 (C.C.D.N.C. 1813) (No. 10,896) and *Hitchcock v. Aicken*, 1 Cai. 460 (N.Y. Sup. Ct. 1803), both of which are discussed in more detail below. All of the other cases cited in this Section found that state judgments were conclusive or would have been so if the rendering court would have had jurisdiction.

⁸¹ See, e.g., *Short v. Wilkinson*, 22 F. Cas. 15 (C.C.D.C. 1811) (No. 12,810) (per curiam); *Coleman v. Guardian of Negro Ben*, 2 S.C.L. (2 Bay) 485 (S.C. Sup. Ct. 1803).

⁸² See, e.g., *Banks v. Greenleaf*, 2 F. Cas. 756, 759 (C.C.D. Va. 1799) (No. 959) (Washington, J.) (“What effect, then, has the 1st section of the 4th article of the constitution upon this subject? . . . Full faith must be given. Therefore you cannot question the validity of the judgment.”); *Armstrong v. Carson’s Ex’rs*, 1 F. Cas. 1140, 1140 (C.C.D. Pa. 1794) (No. 543) (Wilson, J.) (holding that the Act and Clause provided the same rules by stating that, “whatever doubts there might be on the words of the Constitution, the act of Congress effectually removes them”); *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 424 (1808) (“To give such faith and credit to the records abroad, as they would have at home, is certainly giving them ‘full faith and credit.’”); *Bissell v. Briggs*, 9 Mass. (9 Tyng) 462, 466 (1813) (“[B]y the express words of the constitution, all the effect is given to judgments rendered in any of the *United States*, which they can have, by securing to them full faith and credit, so that they cannot be contradicted, or the truth of them denied.”); *Bartlet v. Knight*, 1 Mass. (1 Will.) 401, 409 (1805) (Sedgwick, J.) (“[T]he section of the article of the constitution already mentioned declares that ‘full faith and credit shall be given in each state to the public acts, records, and judicial proceedings, of every other state.’ The precise extent of this ‘faith and credit’ it is not necessary to define, in order to decide the present case; thus much, however, it seems to me is necessarily implied, that the courts of the other states shall

little justification for their holdings, several opinions contain detailed expositions of the meaning of the Full Faith and Credit Clause. Moreover, although each of these cases held that the Constitution made judgments conclusive in other states, they did not all share the same interpretation of Congress's full faith and credit powers.⁸³

The first detailed exposition of the conclusive view is found in Judge Livingston's⁸⁴ opinion in *Hitchcock v. Aicken*.⁸⁵ He stated:

It is difficult to make choice of language more apt to render a domestic judgment as binding here, as if it had been obtained in one of our own courts. What other signification, so natural or obvious, can be affixed to the terms, "*full faith and credit*," as that, when the existence of these judgments is once established, (to ascertain, which required no constitutional provision,) they *shall* be received as containing the whole truth and right between the parties, and that the matters, or points settled by them shall not be drawn into dispute elsewhere.⁸⁶

never be charged with collusion, corruption, or a *mere* error of judgment."); *Curtis v. Gibbs*, 2 N.J.L. 399, 402 (N.J. 1805) (stating that "[b]y the first member of the section under consideration, I consider that the framers of the constitution intended a general declaration, that the records and proceedings of the courts of the several States in the Union should be treated with great respect" and rejecting the view that "*full faith and credit*," only mean[s] that the records and proceedings shall be evidence of the fact of the existence of the records and proceedings"); *Hitchcock v. Aicken*, 1 Cai. 460, 470 (N.Y. Sup. Ct. 1803) (Livingston J., dissenting) (stating that the 1790 Act removed any ambiguity in the Article); *Hammon v. Smith*, 3 S.C.L. (1 Brev.) 110, 112 (S.C. Const. Ct. App. 1802) ("*[T]he constitution and law . . . intended to give the same validity and effect to authenticated copies of the judicial proceedings of the courts of the several United States, out of that State where such proceedings are had, as the original proceedings are entitled to, in the same court where the same are of record . . .*" (emphasis added)).

⁸³ My interpretation of these cases, and the subsequent cases discussed below, as relying on the Constitution is not shared by the proponents of the evidentiary view. See Engdahl, *supra* note 12, at 1637-39 (asserting that some judges who found that judgments were entitled to conclusive weight had done so under the 1790 Act); Sachs, *supra* note 12, at 1637-39 (same); Whitten, *State-Court Jurisdiction*, *supra* note 12, at 550-60 (same). While it is difficult to explain exactly why this is so, the reasons for this Article's departure from prior scholarship are explored in detail *infra* Part III.B.

⁸⁴ Judge Livingston later served as an Associate Justice of the Supreme Court from 1807 to 1823. Michael B. Dougan, *Henry Brockholst Livingston*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* (Kermit L. Hall ed., 2d ed. 2005).

⁸⁵ 1 Cai. 460 (N.Y. Sup. Ct. 1803). As will be discussed in more detail below, Judge Livingston's position was not shared by a majority of the court. See Whitten, *State-Court Jurisdiction*, *supra* note 12, at 562 n.274. The majority held that judgments from other states were examinable in certain situations. *Hitchcock*, 1 Cai. At 465.

However, Judge Livingston was not the first to hold that state judgments were conclusive. See *Hitchcock*, 1 Cai. at 465 (discussing *Armstrong v. Carson's Executors*, wherein the Circuit Court for the District of Pennsylvania found that a state judgment was conclusive); *Peck v. Williamson*, 19 F. Cas. 85 (C.C.D.N.C. 1813) (No. 10,896) (discussing Judge Washington's 1799 decision in *Banks v. Greenleaf*, giving conclusive status to state judgments). The majority in *Hitchcock* actually broke new ground by holding that state judgments were examinable. See Sachs, *supra* note 12, at 1241-44 (explaining that *Hitchcock* was one of the earlier cases to break with the precedent set in *Armstrong* as to a state judgment's conclusiveness). The uniformity of prior opinion may help explain why Judge Livingston was the first to provide a detailed account of the conclusive view of the Full Faith and Credit Clause.

⁸⁶ *Hitchcock*, 1 Cai. at 468-69.

Judge Livingston explained that a judgment which is “open to litigation” is not given faith and credit, because “to give full faith and credit to a record, cannot consist with not believing it ourselves, or permitting others to make averments against it.”⁸⁷ He stated:

When we give credence to an instrument we do not barely believe in its being, or existence, but assent to its contents; so 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.⁸⁸

Judge Livingston thus concluded that “by giving full faith and credit to a judgment, we not only agree that such judgment has been rendered, (which depends altogether on the proof of that fact,) but that we believe it to be just, and that the matter in dispute was properly decided.”⁸⁹ He ultimately held that “the constitution of the *United States*, and the reasonableness of the thing, constrain me to regard [the judgment] as conclusive of every matter determined by it, between the parties to the record.”⁹⁰

Judge Livingston also provided an account of Congress’s power under the Full Faith and Credit Clause. He stated:

[M]y opinion is drawn from the constitution, and is altogether independent of this act; for it is not clear that congress had anything 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, 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, and, perhaps, this is the true intent of the act, which substantially says, that such proof (after prescribing its nature) shall be as good evidence *abroad*, of the existence of the judgment, as the record itself is *at home*. Instead, then, of expecting congress to settle the effect of domestic judgments, we must not look further than the constitution itself, which will be found sufficiently explicit.⁹¹

⁸⁷ *Id.* at 469.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 473. Similarly, in *Bartlet v. Knight*, 1 Mass. (1 Will.) 401 (1805), Judge Sedgwick stated that, under the first sentence of the Full Faith and Credit Clause, judgments from other states are made “incontrovertible and conclusive evidence of their own existence, and of all the facts expressed in them.” 1 Mass. (1 Will.) at 409. Under his view, the Constitution commanded “that the courts of the other states shall never be charged with collusion, corruption, or a *mere* error of judgment.” *Id.* Judge Sedgwick explained that this implied “that wherever there has been a trial in another state, the judgment will be conclusive; and, perhaps, it may not be going too far to say that if there be personal notice to the defendant, and on his part no disability, that the [default] judgment shall be binding upon him.” *Id.* at 409-10.

⁹¹ *Hitchcock*, 1 Cai. at 471.

Judge Livingston thus believed that Congress was merely given the power to prescribe rules to determine what type of evidence was necessary to prove the existence of a judgment. Under this view, the legal effect of the judgment, once proven, was determined solely by the Constitution.⁹²

In two separate opinions—*Banks v. Greenleaf*⁹³ and *Green v. Sarmiento*⁹⁴—Justice Bushrod Washington also held that the Constitution rendered state judgments conclusive; however, he provided a drastically different view of congressional power, a view that has not been recognized by modern scholars.⁹⁵ According to Justice Washington, the Full Faith and Credit Clause has “three distinct objectives: First, to declare, that full faith and credit shall be given in each state, to the records, [etc.] of every other state; secondly, the manner of authenticating such records, [etc.]; and thirdly, their effect when so authenticated.”⁹⁶ In *Banks*, Justice Washington held that the first object—the constitutional command to provide full faith and credit to state judgments—meant that a court “cannot question the validity of the judgment” of another state.⁹⁷ His views on this issue were thus identical to those of Judge Livingston. Justice Washington later explained in *Green* that this rule “is declared and established by the constitution itself, and was to receive no aid, nor was it susceptible of any qualification, by the legislature of the United States.”⁹⁸

⁹² In *Bissell v. Briggs*, the Supreme Judicial Court of Massachusetts expressed views that were nearly identical to those of Judge Livingston. 9 Mass. (9 Tyng) 462 (1813) (Parsons, C.J.). The court in *Bissell* held that “by the express words of the constitution, all the effect is given to judgments rendered in any of the *United States*, which they can have, by securing to them full faith and credit, so that they cannot be contradicted, or the truth of them denied.” *Id.* at 467. In other words, the court held that “judgments rendered in any other of the *United States* are not, when produced here as the foundation of actions, to be considered as foreign judgments, the merits of which are to be inquired into.” *Id.* at 469. Like Judge Livingston, the court in *Bissell* also stated that Congress had no power to alter this rule; instead, “the future effect which Congress was to give relates to the authentication, the mode of which is to be prescribed.” *Id.* at 467.

⁹³ 2 F. Cas. 756 (C.C.D. Va. 1799) (No. 959).

⁹⁴ 10 F. Cas. 1117 (C.C.D. Pa. 1810) (No. 5,760).

⁹⁵ Proponents of the evidentiary view have argued that Justice Washington’s opinion in *Green* supports their position, see Whitten, *Choice of Law*, *supra* note 12, at 41-43; however, they do so only by ignoring his decision in *Banks*.

⁹⁶ *Green*, 10 F. Cas. at 1118.

⁹⁷ *Banks*, 2 F. Cas. 759. Justice Washington reiterated this view in *Green* by stating “that the constitution intended something more, than merely to recognize [the] established rule of law” that foreign judgments were prima facie evidence. *Green*, 10 F. Cas. at 1118.

⁹⁸ *Green*, 10 F. Cas. at 1118. He further explained that:

[C]ongress had no authority to declare, that full faith and credit should be given to such public acts and records, as a matter of evidence; because the supreme law of the land, had already pronounced upon that subject; and a similar declaration, by this subordinate body, would have been idle, if not mischievous. If this sentence [of the 1790 Act] meant to qualify and restrain the credit, to which such evidence is entitled under the constitution, by referring it to the rule of the state laws and usages; then such intention would be a palpable violation of the constitution, which gives to such evidence, full faith and credit.

In *Green*, Justice Washington defined Congress's power to prescribe the "effect" of state judgments as the power "to regulate the degree of force to be given to such" judgments.⁹⁹ In exercising this power, Congress had the ability "to declare the judgments of the courts of one state, conclusive in every other, and even to clothe them with a still more extended force and effect."¹⁰⁰ According to Justice Washington, Congress also had "the power to limit the effect of such judicial proceedings," because "if the constitution or the law, had declared generally, that the judgments in one state, should be conclusive in every other; very embarrassing questions would have arisen, as to the degree to which they were conclusive."¹⁰¹ For instance, he explained that, while some states viewed *in rem* decisions as having a conclusive effect only on property located in the rendering state, other states viewed such judgments as effective against all property owned by the defendant.¹⁰² In sum, Justice Washington held that Congress's power to prescribe the "effect" of a state judgment allowed Congress to specify whether, and under what circumstances, a state judgment was *legally* conclusive.¹⁰³

In *Banks* and *Green*, Justice Washington thus distinguished the constitutional obligation to provide "full faith and credit" from Congress's power to prescribe the "effect" of state court judgments. He held that the Constitution required courts to regard the judgments of other states as valid and controlling on issues that were decided on the merits.¹⁰⁴ Congress, however, had the power to declare the *legal* effect of accepting the judgment as conclusive, such as whether the law of the court that rendered the judgment or that of the forum should control, whether the judgment should be viewed as domestic for issues like merger or statutes of limitations, the effect of foreign bankruptcy laws, or, arguably, whether the court could question if the rendering court had valid jurisdiction.¹⁰⁵

The facts of *Green* highlight the distinction between legal effect and full faith and credit. In *Green*, the plaintiff brought an action for debt in the District of Pennsylvania based on a judgment obtained in New York.¹⁰⁶ The defendant argued that, after the New York judgment had been entered, his debt had been discharged in a bankruptcy in Teneriffe, an island subject to

Id. at 1119.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1118.

¹⁰¹ *Id.* at 1119.

¹⁰² *Id.*

¹⁰³ Justice Washington ultimately held that Congress had exercised this power by making the judgments of another state have the same force or effect as domestic judgments. *Id.* at 1120.

¹⁰⁴ *Green*, 10 F. Cas. at 1118.

¹⁰⁵ *Id.* But see Engdahl, *supra* note 12, at 1641-42 (arguing that Justice Washington believed Congress had complete authority to determine how judgments would be treated in other states); Sachs, *supra* note 12, at 1266 (stating that Justice Washington believed the Constitution made state judgments conclusive in all circumstances).

¹⁰⁶ *Green*, 10 F. Cas. at 1117.

the laws of Spain.¹⁰⁷ The court determined that, if the New York judgment was conclusive and not subject to examination (or, in other words, treated as a domestic judgment), the original contractual debt would have merged into the judgment (and thus would have been nondischargeable).¹⁰⁸ As a result, if the judgment was conclusive, the defendant's bankruptcy would not have been a defense to the plaintiff's action. However, if the New York judgment was not conclusive, the defendant's contractual debt would not have merged with the judgment and would have been discharged in bankruptcy. The outcome of the case therefore depended on what legal effect would be given to the New York judgment.

Under Justice Washington's approach, the constitutional command to provide full faith and credit prohibited the district court of Pennsylvania from inquiring into the validity of the New York court's determination that the defendant owed under the contract.¹⁰⁹ The Constitution was silent, however, as to the legal effect of the New York court's determination, that is, whether the defendant's debt under the contract had merged into the judgment,¹¹⁰ thus making the defendant's subsequent bankruptcy ineffectual. The court held that Congress had prescribed the legal effect of the New York judgment by commanding that it be treated as a domestic judgment in the 1790 Act.¹¹¹ As a result, the court held that the contractual debt had merged into the New York judgment, making the bankruptcy proceedings in Tenerife ineffectual.¹¹² If the judgment had instead legally operated only as evidence of debt, no merger would have occurred.¹¹³

Although most courts held that state judgments were conclusive, Judge Kent and Chief Justice Marshall (while riding circuit) disagreed and held that state judgments were merely *prima facie* evidence in the courts of other

¹⁰⁷ *Id.* at 1117-18.

¹⁰⁸ *Id.* at 1118.

¹⁰⁹ *Id.* at 1120.

¹¹⁰ *Id.* at 1119-20.

¹¹¹ *Id.*

¹¹² *Green*, 10 F. Cas. at 1120.

¹¹³ Justice Washington's views were also shared by Judge Radcliff of the New York Court of Appeals. In *Hitchcock v. Aicken*, Judge Radcliff stated that, under the Constitution, "[w]hen a judgment . . . is pleaded, it is alleged as a fact, the record of which cannot be denied, and is conclusive of the fact, and it is, accordingly, the subject of a peculiar mode of trial; but its legal effect, or operations on the rights of the parties, is still to be considered, and frequently may form a distinct question." 1 Cai. 460, 476 (N.Y. Sup. Ct. 1803) (Radcliff, J., concurring). Judge Radcliff further stated that "[t]he Constitution itself declares that *full* faith and credit shall be given to such proceedings. This imports *absolute verity*. It cannot be increased in degree, and Congress had not the power to diminish the credit." *Id.* (emphasis added). He also explained that "[t]he full faith and credit, intended by the Constitution, cannot be interpreted to mean their legal effect, for otherwise the subsequent provision that Congress may prescribe the *effect* would be senseless and nugatory." *Id.* at 475-76 (emphasis added). Judge Radcliff thus argued that, because the Constitution provided that the facts found in a foreign-state judgment were conclusive, Congress had no power to allow a court to examine them. Instead, Congress had the power only to prescribe the legal effect of a foreign-state judgment.

states.¹¹⁴ In *Hitchcock v. Aicken*¹¹⁵ and *Taylor v. Bryden*,¹¹⁶ Kent, one of the most respected state judges in the country and author of the highly influential *Commentaries on American Law*,¹¹⁷ argued that the constitutional command to provide full faith and credit essentially constitutionalized the prima facie rule that was applicable to foreign judgments.¹¹⁸ Kent explained that, under the Full Faith and Credit Clause, “[w]e are bound to give the judgment faith and credit, and this faith and credit was considered by the State courts, while sitting under the government of the articles of confederation, as requiring full assent to the proceedings contained in the record, as matters of evidence and fact.”¹¹⁹ Accordingly, he stated “that matters proper for jury determination, which appear from the record to have been fairly submitted to them, cannot be overhauled.”¹²⁰

Unlike the judges who found that state judgments were conclusive, Kent stated that the Full Faith and Credit Clause did not “absolutely bar[] the door against any examination of the regularity of the proceedings, and the justice of the judgment.”¹²¹ This ground of attack, however, was not so broad as to render full faith and credit meaningless. For a court to reexamine the merits of a decision, the defendant had the burden to show that the judgment was procured by irregular or unfair means, or, in other words,

¹¹⁴ Although other scholars have placed the court’s decision in *Bartlet v. Knight* into this camp as well, see, e.g., James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 176 n.26 (2004), a majority of the court did not so hold. *Bartlet v. Knight*, 1 Mass. (1 Will.) 401, 405-06 (1805) (Sewall, J., concurring). In *Bartlet*, the plaintiff brought an action for debt based on a New Hampshire judgment, and the defendant alleged that the promissory note which formed the basis of the judgment was void because, under the laws of Massachusetts, he was a minor when it was formed. *Id.* at 401-02. The defendant thus did not allege that the factual basis of the New Hampshire judgment was incorrect (i.e., that he did not owe money under the contract); instead, he argued that the judgment was legally unenforceable under the laws of Massachusetts. *Id.* at 402-03. The defendant also alleged that he had no notice of the suit and had never submitted to the jurisdiction of New Hampshire. *Id.* at 407-08.

Each judge in *Bartlet*, writing separately, concluded that the New Hampshire judgment was not conclusive as to the action for debt. *Id.* at 405, 407-08, 410. Due to the posture of the case, however, such a conclusion did not imply that state judgments were not conclusive as to the merits adjudicated. Judge Sewall’s opinion would perhaps support such conclusion. The opinion of Judge Sedgwick, however, clearly would not. He found that although state judgments were conclusive under the Full Faith and Credit Clause, a defendant could attack a judgment if it had been rendered without jurisdiction (a ground recognized in numerous other cases) or if the defendant had suffered from a legal disability at the time a default judgment was rendered. See *id.* at 410 (Sedgwick, J., concurring). It is unclear which of these opinions Judge Thacher shared.

¹¹⁵ 1 Cai. 460 (N.Y. Sup. Ct. 1803).

¹¹⁶ 8 Johns. 173 (N.Y. Sup. Ct. 1811).

¹¹⁷ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halsted 1826).

¹¹⁸ *Taylor*, 8 Johns. at 178-79; *Hitchcock*, 1 Cai. at 483 (Kent, J., concurring).

¹¹⁹ *Hitchcock*, 1 Cai. at 480 (Kent, J., concurring) (emphasis added).

¹²⁰ *Id.* at 483 (emphasis added).

¹²¹ *Id.* at 480.

improper procedures.¹²² This exception thus did not grant defendants *carte blanche* to reargue the evidence in every case. As Judge Kent explained, “[t]o try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent.”¹²³ As examples of judgments that could be attacked by a defendant, Judge Kent mentioned proceedings such as a discharge of debt by state insolvency proceedings or a default judgment rendered without jurisdiction.¹²⁴

Kent’s view of Congress’s full faith and credit power, however, is difficult to decipher. He stated:

The act of Congress does not declare the record shall have the same *effect*, but only the same *faith and credit*, and there is a manifest and essential difference between the one mode of expression and the other. If, therefore, . . . there were doubts on the words of the Constitution, these doubts, so far from being removed, are rather increased by the law. The language of the Constitution is, at least, as cogent and comprehensive, if not more so, than the language of the law.¹²⁵

From this passage, it is clear Kent thought that giving “effect” to a judgment meant something different than giving it “faith and credit.” Because he thought “faith and credit” referred to the evidentiary weight to be given to a judgment,¹²⁶ the “effect” of a judgment must have meant something else. Although Kent does not say as much (and thus this conclusion is somewhat conjectural), I believe he thought the ability to prescribe the “effect” of a judgment was the power to specify when a judgment would be seen as conclusive. In other words, while the command to provide full faith and credit dictated that a judgment would carry conclusive evidentiary weight with regard to matters litigated on the merits, Congress could state when a defendant could attack “the regularity of the proceedings, and the justice of the judgment.”¹²⁷ Nothing in Kent’s opinion, however, suggests

¹²² *Taylor*, 8 Johns. at 177.

¹²³ *Id.*

¹²⁴ Moreover, in his COMMENTARIES ON AMERICAN LAW, Judge Kent stated: “All judgments rendered any where against a party who had no notice of the proceeding, are rendered in violation of the first principles of justice, and are null and void.” 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 109 (New York, O. Halsted, 2d ed. 1832). He further stated that “[t]here is no doubt of the rule, that the allegation that a foreign judgment was obtained by fraud is admissible, and, if true, it will destroy its effect.” *Id.*

¹²⁵ *Hitchcock v. Aiken*, 1 Cai. 460, 481 (N.Y. Sup. 1803) (Kent, J., concurring) (emphasis added). Kent’s conclusions regarding the interstate recognition of judgments, as described above, were thus understood to derive from the Constitution, since he thought that the 1790 Act did nothing but restate the rule found in the Full Faith and Credit Clause. *See id.* at 480-81.

¹²⁶ *See id.* at 481 (“It is pretty evident that the Constitution meant nothing more by full faith and credit, than what respected the evidence of such proceedings.”).

¹²⁷ *Id.* at 480.

that he believed Congress had the power to allow states to give anything less than “full assent to the proceedings contained in the record, as matters of evidence and fact.”¹²⁸

Conceptually, Kent’s views were thus not much different than those of Justice Washington. Both jurists thought judgments were conclusive evidence of any issues reached on the merits when the proceedings were regular.¹²⁹ Moreover, both jurists thought a judgment rendered without jurisdiction was void and thus did not carry such conclusive weight.¹³⁰ Unlike Justice Washington, however, Judge Kent thought that, in the absence of congressional action to the contrary, defendants could otherwise attack the justice or regularity of the manner in which the judgment was rendered.¹³¹

Although his opinion was much more cursory, Chief Justice Marshall expressed similar views in *Peck v. Williamson*.¹³² The plaintiff in *Peck* brought an action in the District of North Carolina to recover on a judgment of debt rendered in Massachusetts.¹³³ While the plaintiff argued that the court should treat the Massachusetts judgment as a domestic judgment, the defendant argued that the judgment was merely prima facie evidence of debt which could be rebutted by testimony.¹³⁴ Chief Justice Marshall stated that it was “very clear that the constitution makes a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in another.”¹³⁵ Although Chief Justice Marshall did not provide a definition of faith and credit, he explained that, “[u]nless congress had prescribed [a judgment’s] effect, it should be allowed only such as it possesses on common-law principles.”¹³⁶ He held that, because the 1790 Act used the same language as the Constitution, Congress had not yet prescribed the effect of state court judgments.¹³⁷ He explained that, “[t]o suppose that they have 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.”¹³⁸ Applying common law principles, the court ultimately held that the defendant could introduce testimony impeaching the judgment.¹³⁹ Chief Justice Marshall recognized that it was “very

¹²⁸ *Id.*

¹²⁹ Compare *Green v. Sarmiento*, 10 F. Cas. 1117, 1119 (C.C.D. Pa. 1810) (No. 5,760) with *Hitchcock*, 1 Cai. at 481 (Kent, J., concurring).

¹³⁰ Compare *Green*, 10 F. Cas. at 1118-19 with *Taylor v. Bryden*, 8 Johns. 173, 178 (N.Y. Sup. Ct. 1811).

¹³¹ See *Hitchcock*, 1 Cai. at 480-81 (Kent, J., concurring).

¹³² 19 F. Cas. 85 (C.C.D.N.C. 1813) (No. 10,896).

¹³³ *Id.* at 85.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Peck*, 19 F. Cas. at 85.

¹³⁹ *Id.*

doubtful, however, whether this opinion would receive the sanction of the supreme court.¹⁴⁰

Three distinct views of the Full Faith and Credit Clause thus emerged in the first two decades following ratification. Judge Livingston and Justice Washington both believed that the Constitution required states to view judgments rendered in other states as conclusive evidence in future litigation.¹⁴¹ However, while Judge Livingston thought that the Clause made judgments binding in all respects and merely empowered Congress to prescribe what evidence was required to prove that a judgment had been rendered,¹⁴² Justice Washington believed that Congress had the power to declare what *legal* effect such determinations would have in other states (or, in other words, what law would apply to the conclusive determinations made in the record).¹⁴³ In a third interpretation, Judge Kent believed that the Clause constitutionalized the common law rule that judgments were *prima facie* evidence as a baseline and empowered Congress to determine which grounds of attack could be raised against a state judgment (i.e., fraud, lack of jurisdiction, etc.).¹⁴⁴ Most courts that ruled on the meaning of the Full Faith and Credit Clause accepted the premise of these first two views—that state judgments were conclusive evidence;¹⁴⁵ however, there was no clear majority of opinion regarding Congress’s Full Faith and Credit Powers.¹⁴⁶

2. The Supreme Court’s Opinion in *Mills v. Duryee*

In 1813, the Supreme Court finally ruled on the meaning of the Full Faith and Credit Clause in *Mills v. Duryee*.¹⁴⁷ The facts of *Mills* are relatively straightforward: the plaintiff brought an action in the District of Columbia on a judgment of debt obtained in New York.¹⁴⁸ The defendant pleaded *nil debet*, a plea which denied the existence of the debt rather than any flaw

¹⁴⁰ *Id.* Three other cases were decided between 1810 (when *Green* was decided) and 1813. In *Short v. Wilkinson*, the court held that a Kentucky judgment would have the same effect in the District of Columbia as it would have had in a court in Kentucky. 22 F. Cas. 15, 15-16 (C.C.D.C. 1811) (No. 12,810). However, the court does not indicate whether it relied on the Constitution or the 1790 in reaching its decision. In *Montford v. Hunt*, Justice Washington held that the rules of the Full Faith and Credit Clause and Act apply to federal courts. 17 F. Cas. 616, 617 (C.C.D. Pa. 1811) (No. 9,725). Finally, Judge Kent reiterated the views he had expressed in *Hitchcock* in *Taylor v. Bryden*. *Taylor v. Bryden*, 8 Johns. 173, 178-79 (N.Y. Sup. Ct. 1811).

¹⁴¹ See *Green v. Sarmiento*, 10 F. Cas. 1117, 1118, 1120 (C.C.D. Pa. 1810) (No. 5,760); *Hitchcock v. Aicken*, 1 Cai. 460, 468-69 (N.Y. Sup. Ct. 1803) (Livingston, J., concurring).

¹⁴² *Hitchcock*, 1 Cai. at 468-70 (Livingston, J., concurring).

¹⁴³ *Green*, 10 F. Cas. at 1118.

¹⁴⁴ See *Hitchcock*, 1 Cai. at 479-80 (Kent, J., concurring).

¹⁴⁵ See *supra* note 129.

¹⁴⁶ See *supra* Part II.A.1.

¹⁴⁷ 11 U.S. (7 Cranch) 481 (1813).

¹⁴⁸ *Id.* at 483.

in the New York proceedings.¹⁴⁹ The Court in *Mills* held that, under the Full Faith and Credit Clause and 1790 Act, this plea was legally insufficient.¹⁵⁰

Justice Story, in his opinion for the Court, stated that, in the 1790 Full Faith and Credit Act, Congress had declared that state judgments were entitled to “faith and credit of evidence of the highest nature, viz. *record evidence*.”¹⁵¹ He explained that “[i]f it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*[;] and when congress gave the effect of a record to the judgment it gave all the collateral consequences.”¹⁵² Justice Story thus held that, in the 1790 Act, Congress had “declared the *effect* of the record by declaring” that it should be given the same effect as a domestic judgment.¹⁵³ Justice Story explained:

Were the construction contended for by the Plaintiff in error to prevail, that judgments of the state Courts ought to be considered *prima facie* evidence only, this *clause in the constitution* would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest however that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.¹⁵⁴

By stating that Congress had the power to give conclusive effect to state judgments, the Court clearly rejected Judge Livingston’s interpretation of the Clause; however, the Court’s opinion could be read as consistent with the views of either Judge Kent (and Chief Justice Marshall) or Justice Washington. To align the opinion with Justice Washington’s interpretation, the first two sentences of the above paragraph could be read to imply that the Constitution itself provides that judgments are more than *prima facie* evidence,¹⁵⁵ and the remainder could be seen to say that Congress has prescribed the legal effect of judgments by giving them the same effect as a domestic judgment. Following Judge Kent’s view, however, the Court’s opinion could also be read to say that the 1790 Act—and not the Constitution—made state judgments conclusive rather than *prima facie* evidence.

Justice Johnson was the only justice to write separately. He stated that, “by receiving the record of the state Court properly authenticated as *conclu-*

¹⁴⁹ *Id.*

¹⁵⁰ The Court narrowly defined the issue before it as “whether *nil debet* is a good plea to an action of debt brought in the Courts of this district on a judgment rendered in a Court of record of the state of New York, one of the *United States*.” *Id.*

¹⁵¹ *Id.* at 483-84.

¹⁵² *Id.* at 484. The plea of *nul tiel record* disputed the legitimacy of the record rather than the merits of the case.

¹⁵³ *Mills*, 11 U.S. (7 Cranch) at 484.

¹⁵⁴ *Id.* at 485 (second emphasis added).

¹⁵⁵ It could be argued that, if Justice Story were referring only to the 1790 Act, he would have said that such a construction would render the Act, rather than the Constitution, illusory. *But see* Engdahl, *supra* note 12, at 1649 (stating that *Mills* was decided solely under the 1790 Act).

sive evidence of the debt, full effect is given to the constitution and the law.”¹⁵⁶ Because Justice Johnson did not distinguish between the Constitution and the 1790 Act, his opinion also could be read as consistent with any of the views of congressional power described above.¹⁵⁷

3. Post-*Mills* Decisions: 1813-1861

After *Mills*, courts consistently held that judgments from other states with proper jurisdiction were conclusive evidence in the same manner as a domestic judgment. In other words, these courts held that issues decided on the record could not be controverted in subsequent litigation.¹⁵⁸ Like Justice Johnson’s dissent in *Mills*, however, most of these decisions did not specify whether their rulings derived directly from the Constitution or exclusively from the 1790 Act,¹⁵⁹ and thus they did not stake out a clear position on

¹⁵⁶ *Mills*, 11 U.S. (7 Cranch) at 486 (Johnson, J., dissenting) (emphasis added).

¹⁵⁷ Justice Johnson’s opinion will be discussed in more detail *infra* Part III.B. Briefly, he dissented on the ground that he feared the Court’s ruling could force states to give conclusive effect to judgments rendered without valid jurisdiction. *Mills*, 11 U.S. (7 Cranch) at 486 (Johnson, J., dissenting).

¹⁵⁸ See, e.g., *Hampton v. M’Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818) (holding that, under *Mills*, a “judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced”); *Lincoln v. Tower*, 15 F. Cas. 544, 548 (C.C.D. Ill. 1841) (No. 8,355) (“[W]e think that the facts material to the case, and which appear in the record, can not [sic] be controverted.”); *Lucas v. Bank of Darien*, 2 Stew. 280, 315 (Ala. 1830) (Collier, J., concurring) (stating that, barring a showing of fraud or want of jurisdiction, a court is “bound by the authority of that case [*Mills*] to consider a judgment fairly and regularly obtained in another State, as full and conclusive evidence of the matter adjudicated”); see also *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175 (1850) (interpreting *Mills* as holding “that a judgment, where the defendant had been served with process, concluded such defendant from pleading *nil debet* when sued in another State on the record, and consequently from going behind the judgment and reexamining the original cause of action” and noting that *Mills* “has since been followed as the binding and proper construction of the act of 1790”).

¹⁵⁹ See, e.g., *Elliot v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828); *Lincoln*, 15 F. Cas. at 548; *Whitaker v. Bramson*, 29 F. Cas. 947 (C.C.S.D.N.Y. 1840 [approximate date]) (No. 17,206); *Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 295-96 (C.C.D. Conn. 1837 [approximate date]) (No. 17,206); *Wilson v. Graham*, 30 F. Cas. 125, 126 (C.C.E.D. Pa. 1821) (No. 17,804); *Field v. Gibbs*, 9 F. Cas. 15, 16 (C.C.D.N.J. 1815) (No. 4,766); *Sarchet v. Gen. Isaac Davis*, 21 F. Cas. 484, 485 (E.D. Pa. 1838) (No. 12,357); *Lucas*, 2 Stew. at 308-13; *Hunt v. Mayfield*, 2 Stew. 124 (Ala. 1829); *Moore v. Paxton*, 17 F. Cas. 698, 698 (Ark. Super. Ct. 1827) (No. 9,772a) (per curiam); *Dearing v. Bank of Charleston*, 5 Ga. 497 (1848); *Bimeler v. Dawson*, 5 Ill. (4 Scam.) 536, 540-41 (1843); *Holt v. Alloway*, 2 Blackf. 108 (Ind. 1827); *Cole v. Driskell*, 1 Blackf. 16, 17 n.1 (Ind. 1818); *Davis v. Connelly’s Ex’rs*, 43 Ky. (4 B. Mon.) 136, 137-38 (1843); *Fletcher v. Ferrel*, 39 Ky. (9 Dana) 372, 376-78 (1840); *Bank of U.S. v. Merchs. Bank of Balt.*, 7 Gill 415, 431-32 (Md. 1848); *Gleason v. Dodd*, 45 Mass. (4 Met.) 333, 335 (1842); *M’Rae v. Mattoon*, 30 Mass. (13 Pick.) 53, 57-58 (1832); *Hutchison v. Patrick*, 3 Mo. 65, 66-67 (1831); *Bradshaw v. Heath*, 13 Wend. 407 (N.Y. Sup. Ct. 1835); *Shumway v. Stillman*, 4 Cow. 292, 295-96 (N.Y. Sup. Ct. 1825); *Andrews v. Montgomery*, 19 Johns. 162, 163-65 (N.Y. Sup. Ct. 1821); *Steel v. Smith & Serg.* 447, 449 (Pa. 1844); *Moore v. Spackman*, 12 Serg. & Rawle 287, 289 (Pa. 1825); *Benton v. Burgot*, 10 Serg. & Rawle 240, 242-43 (Pa. 1823); *Newcomb v. Peck*, 17

congressional power. Because the self-executing portion of the Full Faith and Credit Clause and the 1790 Act were seen as perfectly consistent with one another, courts usually did not see any reason to distinguish between them.

A number of decisions, however, explicitly stated that the Full Faith and Credit Clause itself, and not just the 1790 Act, mandated that state judgments be viewed as conclusive. In *Aldrich v. Kinney*,¹⁶⁰ for example, the Supreme Court of Errors of Connecticut stated:

The judgment of a court in a sister state, is not to be placed on the footing of a foreign judgment, but has all the validity, provided, *by the constitution of the United States*. . . . *By the above terms of the constitution*, complete and plenary provision was made, giving to judgments *duly* rendered in either state, conclusive and unimpeachable validity, in all the states. If by the expression, “full faith and credit,” it was only intended, to place the judgments *duly* rendered in the respective states, on the same foundation with foreign judgments, where the common law had placed them, the enactment would be idle, and beneath the valuable instrument containing it. From the political connexion between the states, and the principles of courtesy, and mutual confidence, applicable to the friendly relation subsisting between them, it is reasonable to infer, that more respect was intended to be paid to the adjudications of their courts, than to those of foreign nations.¹⁶¹

A number of other decisions explicitly stated that the Constitution required that, where a court’s jurisdictional power is properly exercised, state judgments be viewed as conclusive.¹⁶²

Vt. 302, 308-09 (1845); Fullerton v. Horton, 11 Vt. 425, 426 (1839); Bellows v. Ingham, 2 Vt. 575, 576-77 (1830).

I have included in this category decisions that treated the Clause and Act as identical by, for example, stating that “the constitution and laws of the United States” give conclusive effect to judgments. *See, e.g., Sarchet*, 21 F. Cas. at 485. While such decisions are ambiguous, they arguably support the conclusion that courts viewed the Constitution as providing conclusive effect; otherwise such courts likely would have merely said that the Act gave conclusive effect. Because such courts did not seem to consider the issue, however, I have classified them as ambiguous.

¹⁶⁰ 4 Conn. 380 (1822).

¹⁶¹ *Id.* at 382-83 (first emphasis added).

¹⁶² *See, e.g., Delano v. Jopling*, 11 Ky. (1 Litt.) 117, 119 (1822) (“This being the judgment of a sister state, by the Constitution of the United States, and the decision of this court thereupon, in the case of *Rogers v. Coleman and wife*, Hard. 413, it is entitled to the same credence here, as it would be in the state from whence it came”); *Hall v. Williams*, 10 Me. 278, 291 (1833) (“All that is now required of us, is to determine whether the proceedings in the Superior Court of *Georgia*, were so irregular as not to be entitled to that full faith and credit, contemplated in the fourth article of the Constitution of the *United States*. We think they come fairly within that provision, and that the judgment, being properly authenticated, is to have full faith and credit given to it in the courts of this State.”); *Wernwag v. Pawling*, 5 G. & J. 500, 507 (Md. 1833) (“The object of this article of the constitution, was to give to such judgments, full faith and credit; that is, to attribute to them, positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated.”); *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 240 (1828) (“By the constitution, such a judgment is to have the same effect it would have in the State where it was rendered; that is, it is to conclude as to every thing over which the court which rendered it had jurisdiction.”); *Starbuck v. Murray*, 5 Wend. 148, 154-55 (N.Y. Sup. Ct. 1830) (criticizing pre-*Mills* cases which found that state judgments were

Using reasoning strikingly similar that employed by the modern evidentiary view, however, one court explicitly stated that the rule announced in *Mills* derived solely from the 1790 Act. In *Thurber v. Blackbourne*,¹⁶³ the Supreme Court of New Hampshire stated:

The constitution of the *United States* expressly 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. This is evident not only from the indefinite manner in which they are spoken of in this article as evidence, but from the express authority given by this article to congress to direct the manner in which they should be authenticated, and the effect thereof. This provision would have been nugatory and absurd if the constitution itself had either prescribed the form of the authentication of the record or declared its effect as evidence.¹⁶⁴

The court in *Thurber* thus ultimately found that the 1790 Act (and not the Constitution) required courts to treat the judgments of other states in the same manner as domestic judgments.¹⁶⁵ This view, however, was clearly in the minority, as my research has located no other court that adopted it.

After *Mills*, the Supreme Court also discussed the meaning of the Full Faith and Credit Clause and the 1790 Act in a number of decisions. Like most of the state and lower court decisions, however, the Court did not clearly distinguish between the 1790 Act and the Constitution,¹⁶⁶ and thus it is difficult to draw any conclusions from these opinions regarding the meaning of the Full Faith and Credit Clause.

In sum, after *Mills*, courts consistently held that judgments from other states were entitled to the same respect as a domestic judgment. Most courts, including the Supreme Court, did not clearly indicate whether this rule derived from the Full Faith and Credit Clause or the 1790 Act. Of the courts that did make such a distinction, however, the overwhelming majority thought that the rule derived from the Constitution itself. Although, after *Mills*, courts had no need to discuss the extent of Congress's power under the Full Faith and Credit Clause, presumably, like Justice Washington,

merely prima facie evidence as giving "very little effect" to the Full Faith and Credit Clause); *Spencer v. Brockway*, 1 Ohio 259, 261 (1824) (per curiam) ("But it appears to us, that the provision in the constitution extends farther, and embraces the effect, as well as the admissibility of the record. Such a provision would seem to be of but little use, if it merely required the record to be acknowledged and received in evidence, and left its operation as it stood at common law."); *Evans v. Tatem*, 9 Serg. & Rawle 252, 260 (Pa. 1823) ("The construction of this article of the constitution has been settled by repeated decisions in various courts of various states, as well as in the courts of the *United States*. A judgment in one state, is conclusive in all other states, provided it was rendered by a court having competent jurisdiction.").

¹⁶³ 1 N.H. 242 (1818).

¹⁶⁴ *Id.* at 243-44.

¹⁶⁵ *Id.*

¹⁶⁶ See *Elliot v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828) (holding that, where a court has jurisdiction, its judgment is binding in every other court, but citing neither the Constitution nor the 1790 Act for this proposition); *Hampton v. M'Connell*, 16 U.S. (3 Wheat.) 234, 235 (1818) (finding no distinction between the instant case and *Mills*).

those jurists who thought the Constitution itself made state judgments conclusive did not believe that Congress had the power to alter the self-executing command to provide full faith and credit.

B. *The Jurisdictional Rule*

Although the record of a judgment from another state was ordinarily regarded as conclusive with respect to the issues resolved therein, courts were seemingly unanimous in finding that a state judgment rendered without valid jurisdiction was not entitled to such respect.¹⁶⁷ In fact, Justice Johnson dissented in *Mills* because he feared the Court's decision could be understood as requiring states to accept judgments rendered without jurisdiction.¹⁶⁸ Subsequent decisions, however, including those of the Supreme Court, did not interpret *Mills* as conflicting with the settled rule that judgments rendered without jurisdiction were void.¹⁶⁹ Moreover, courts reasoned

¹⁶⁷ Such decisions were reached under the Articles of Confederation, prior to *Mills*, and after *Mills*. For examples of decisions that were reached under the Articles of Confederation, see *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. 1786) (per curiam); *Phelps v. Holker*, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (per curiam). For examples of these decisions reached prior to *Mills*, see *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 425 (1808) (“[W]hen the fundamental principles and notions of a trial have been only colorably observed; and the defendant has been condemned unheard, . . . it would be too rigid and unjust to say that such cases were contemplated by the constitution, and by the act of congress.”); *Bissell v. Briggs*, 9 Mass. (9 Tyng) 462, 467 (1813) (“Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry; and if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment.”); *Barlet v. Knight*, 1 Mass. (1 Tyng) 401, 407-08 (1805) (Sewall, J., concurring) (“Upon the principles as well of natural justice as of the common law, a judgment liable to these [jurisdictional] objections, must be determined to be no just or legal consideration”); compare *Curtis v. Gibbs*, 2 N.J.L. 399, 406 (N.J. 1805) (holding that a judgment found on a foreign attachment is not conclusive evidence of a debt); *Hitchcock v. Aicken*, 1 Cai. 460, 473 (N.Y. Sup. Ct. 1803) (Livingston, J., concurring) (“A sentence thus obtained, in defiance of the maxim *audi alteram partem*, deserves not the name of a judgment”). Finally, for examples of decisions reached after *Mills*, see *Aldrich v. Kinney*, 4 Conn. 380, 383 (1822) (“[W]here the defendant neither appeared, nor had legal notice to appear, a judgment against him is invalid, and ought not to be enforced.”); *Chew v. Randolph*, 1 Miss. (1 Walker) 1, 4-6 (1818) (per curiam) (holding that a judgment premised on in rem jurisdiction improper notice is inadmissible in the court of another state); *Thurber*, 1 N.H. at 246 (“Judgments of the courts of record of one state, rendered without notice or appearance of the defendant, when sued in the courts of another state, are therefore not affected by the statute of 1790, but remain as at common law, mere nullities”); *Borden v. Fitch*, 15 Johns. 121, 141 (N.Y. Sup. Ct. 1818) (“The want of jurisdiction makes [a judgment] utterly void, and unavailable for any purpose.”). See also Whitten, *State-Court Jurisdiction*, *supra* note 12, at 571 (“Most of the state courts that considered the matter . . . agreed . . . that an inquiry into the judgment-rendering court’s jurisdiction would be permissible”).

¹⁶⁸ *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486-87 (1813) (Johnson, J., dissenting).

¹⁶⁹ See, e.g., *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175 (1850); *M’Elmoyle v. Cohen*, 38 U.S. (13 Peters) 312, 326 (1839); *Elliot*, 26 U.S. (1 Pet.) at 340 (“Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But, if it act without

that this “jurisdictional rule,” as I shall call it, was consistent with the Full Faith and Credit Clause and 1790 Act because those instruments applied only to “duly rendered” or “valid” judgments.¹⁷⁰

This jurisdictional rule was not understood to have derived from any explicit constitutional provision.¹⁷¹ Instead, as Justice Johnson asserted in his dissent in *Mills*, the jurisdictional rule was derived from “eternal principles of justice” and territorial-based notions of state sovereignty.¹⁷² The Supreme Court of Connecticut, for example, held in *Aldrich v. Kinney* that “[a] more preposterous proposition cannot be advanced, one more contrary to reason and justice; more injurious to the absolute rights of man, or to fundamental principle; than that a person shall be invincibly bound, by a judgment, obtained against him, without notice.”¹⁷³ Moreover, as Justice

authority, its judgments and orders are regarded as nullities.”); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 232 (1827); *M’Connel*, 16 U.S. (3 Wheat.) at 235; *Picquet v. Swan*, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11,134) (“Where jurisdiction is given by any act of congress, this court may use the appropriate state process to enforce it. But the state laws can confer no authority on this court to extend its jurisdiction over persons or property, whom it could not otherwise reach.”). These cases found *Mills* consistent with such precedent by holding that, because there was no dispute regarding the original court’s jurisdiction in *Mills*, the Court did not consider the issue.

¹⁷⁰ See, e.g., *D’Arcy*, 52 U.S. (11 How.) at 176 (“Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the State where made. . . . [W]e concur with the various decisions made by State courts, holding that Congress did not intend to embrace judicial records of this description”); *Lucas v. Bank of Darien*, 2 Stew. 280, 311 (Ala. 1830) (“[A] judgment of a Court of competent jurisdiction is valid, and binding in every other Court, until reversed, or otherwise vacated.”); *Aldrich*, 4 Conn. at 382 (“By the above terms of the constitution, complete and plenary provision was made, giving to judgments *duly* rendered in either state, conclusive and unimpeachable validity, in all the states.”); *Hall v. Williams*, 10 Me. 278, 284 (1833) (“[T]he judicial proceedings of courts in the several States are not entitled . . . to this faith and credit in other States, unless the court had jurisdiction of the subject matter of adjudication; as where the defendant had been a party to the suit by an actual appearance and defence, or at least, by having been duly served with process, when within the jurisdiction of the court which rendered the judgment.”).

¹⁷¹ See, e.g., *Bissell*, 9 Mass. (9 Tyng) at 467 (“[N]either our own statute, nor the federal constitution, nor the act of Congress, had any intention of enlarging, restraining, or in any manner operating upon, the jurisdiction of the legislatures, or of the courts of any of the *United States*.”).

¹⁷² *Mills*, 11 U.S. (7 Cranch) at 486; see also, e.g., *Borden*, 15 Johns. at 141 (holding that giving effect to a judgment rendered without jurisdiction would “be contrary to the first principles of justice”); Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 573, 578 (2007) (arguing that jurisdictional concepts were seen as fundamental legal principles based on natural rights and fairness); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 185 (2004) (citing Justice Johnson’s assertion in *Mills* that jurisdiction can only be exercised over those within territorial limits).

¹⁷³ *Aldrich*, 4 Conn. at 386; see also, e.g., *Bradshaw v. Heath*, 13 Wend. 407, 418 (N.Y. Sup. Ct. 1835) (“To bind a defendant personally by judgment, where he was never summoned or had notice of the proceedings, would be contrary to the first principles of justice.”); *Starbuck v. Murray*, 5 Wend. 148, 156-57 (N.Y. Sup. Ct. 1830) (“This doctrine does not depend merely on the authority of adjudged cases; it has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without

Story asserted in *Flower v. Parker*:¹⁷⁴ “[T]he principle 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.”¹⁷⁵ Because the jurisdictional rule was seen as a basic precept of justice and state sovereignty, courts also asserted that Congress had no power to alter the prevailing, territorial-based, jurisdictional rules.¹⁷⁶

Territorial-based concepts of jurisdiction were also understood to apply to state acts.¹⁷⁷ In other words, courts asserted that no state had the power to make laws that applied beyond its territorial reach, unless the other state consented to such laws by extending comity. For example, the Supreme Court noted in *Ogden v. Saunders*:¹⁷⁸

[W]hen . . . the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.¹⁷⁹

Again, these jurisdictional rules were not understood to have derived from any specific provision of the Constitution; instead, they were seen as necessary incidents of state sovereignty and basic principles of justice.

the opportunity of making a defence, or to have his property taken from him by a judicial sentence without the privilege of shewing, if he can, the claim against him to be unfounded.”)

¹⁷⁴ 9 F. Cas. 323 (C.C.D. Mass. 1823) (No. 4,891).

¹⁷⁵ *Id.* at 324-25; *see also, e.g.*, *Lincoln v. Tower*, 15 F. Cas. 544, 546 (C.C.D. Ill. 1841) (No. 8,355) (“[I]f, upon the face of such record, a want of jurisdiction appears, it cannot be received as evidence. It does not bind the defendant, nor can it conclude his rights. The laws of every empire have force only within its own limits.”); *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134) (“[N]o sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions.”); *Steel v. Smith*, 7 Watts. & Serg. 447, 448 (Pa. 1844) (“Jurisdiction of the person or property of an alien is founded on its presence or *situs* within the territory. Without this presence or *situs*, an exercise of jurisdiction is an act of usurpation.”).

¹⁷⁶ *See Lincoln*, 15 F. Cas. at 546 (Opinion by McLean, J. while riding circuit) (“It will not be contended by any one, that the constitution or law enlarges the jurisdiction of the state court. The power to do this is not conferred on the federal government.”); *Steel*, 7 Watts. & Serg. at 451 (“Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty”)

¹⁷⁷ *See, e.g.*, Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 1000-01 (2006); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289 (1992).

¹⁷⁸ 25 U.S. (12 Wheat.) 213 (1827).

¹⁷⁹ *Id.* at 369; *see also Dearing v. Bank of Charleston*, 5 Ga. 497, 511 (1848) (“By the comity of States, the laws of each State are respected in foreign States, unless they are prejudicial to their national rights, or to the rights of their subjects. But not, if they are so prejudicial. The independence of every State requires that all other States should concede to it, the right of protecting its own citizens and their rights, and of enforcing obedience to their own laws.”)

C. *Legal Treatises*

Not surprisingly, prominent early nineteenth century legal treatises likewise stated that the Full Faith and Credit Clause and the 1790 Act made judgments from other states, when rendered pursuant to valid jurisdiction, conclusive evidence of the matters found in the record. And, while many treatises did not discuss Congress's full faith and credit powers, those that did so asserted that Congress's powers were subject to important limitations.

1. *Justice Story's Commentaries on the Constitution of the United States*

The most detailed discussion of this issue is found in the *Commentaries on the Constitution of the United States*, written by Justice Story, the author of the Court's opinion in *Mills*.¹⁸⁰ Justice Story explained that, under the common law prior to the Revolution, "the judgments of one colony were deemed re-examinable in another, not only as to the jurisdiction of the court, which pronounced them; but also as to the merits of the controversy."¹⁸¹ He stated that "[t]he reasonable construction of the article of the confederation on this subject is, that it was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them."¹⁸² Justice Story thus thought that the provision in the Articles of Confederation, which was substantially similar to the first portion of the Clause in the Constitution, made issues decided on the merits conclusive in future proceedings in other states.

Justice Story also stated that the constitutional directive to provide full faith and credit dictated that "the judgment [of another state] shall be conclusive, as to the merits" decided therein.¹⁸³ He concluded that, since the Framers were well aware that foreign judgments were given prima facie effect, the Full Faith and Credit Clause must have been meant to give greater effect to the judgments of other states.¹⁸⁴ He explained:

It is hardly conceivable, that so much solicitude should have been exhibited to introduce, as between confederated states, much less between states united under the same national government, a clause merely affirmative of an established rule of law, and not denied to the humblest, or most distant foreign nation. It was hardly supposable, that the states would deal

¹⁸⁰ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1297-1307 (Boston, Hilliard, Gray, & Co. 1833).

¹⁸¹ *Id.* § 1302.

¹⁸² *Id.*

¹⁸³ *Id.* § 1303.

¹⁸⁴ *Id.* §§ 1301-02.

less favourably with each other on such a subject, where they could not but have a common interest, than with foreigners.¹⁸⁵

Justice Story further asserted that giving conclusive weight to state judgments fits well with the purpose and structure of the Constitution.¹⁸⁶ Because the Constitution contemplated a commercially integrated union between the states,

it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one state, should be open to litigation again and again, as often as either of the parties, or their privies, should choose to remove from one jurisdiction to another.¹⁸⁷

He continued: “The evils of introducing a general system of re-examination of the judicial proceedings of other states, whose connexions are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases.”¹⁸⁸ Justice Story thus concluded that the Framers

intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals; but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the state, where they originated.¹⁸⁹

Justice Story’s explanation of Congress’s power under the Full Faith and Credit Clause to prescribe “the effect thereof,” however, is more difficult to decipher. He noted:

Some learned judges have thought, that the word “thereof” had reference to the proof, or authentication; so as to read, “and to prescribe the effect of such proof, or authentication.” Others have thought, that it referred to the antecedent words, “acts, records, and proceedings;” so as to read, “and to prescribe the effect of such acts, records, and proceedings.”¹⁹⁰

Story asserted that “[t]he former seems now to be considered the sounder interpretation” because “otherwise the power to declare the effect would be wholly senseless; or congress could possess the power to repeal, or vary the

¹⁸⁵ *Id.* § 1303.

¹⁸⁶ STORY, *supra* note 180, § 1303.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* § 1304.

¹⁸⁹ *Id.* Justice Story’s views are consistent with those found in his earlier work. See JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS 4 (Salem, Barnard B. Macanulty 1805) (stating that a defendant could plead only those defenses that would be valid in the court which rendered the judgment).

¹⁹⁰ STORY, *supra* note 180, § 1306.

full faith and credit given.”¹⁹¹ He ultimately concluded, however, that “it is not, practically speaking, of much importance, which interpretation prevails; since each admits the competency of congress to declare the effect of judgments, when duly authenticated; so always, that full faith and credit are given to them.”¹⁹²

While Story’s account of congressional power is somewhat ambiguous, his statements seem to be consistent with the interpretations of congressional power advanced in the case law.¹⁹³ In the above-quoted passages, Story appears to be drawing a distinction between the following two views of congressional power: (1) Congress has the power to prescribe the legal effect of offering sufficient proof of a state judgment (e.g., whether the preclusion laws of the forum or the rendering court should apply, or which state’s statute of limitations would control); and (2) Congress has complete power to determine how judgments will be treated in other states, including whether, and to what extent, they may be reexamined on the merits. If this interpretation is correct, then Story’s argument that “[t]he former seems now [in 1833] to be considered the sounder interpretation”¹⁹⁴ was fully supported by the cases.

Consistent with the case law discussed above, Story also asserted:

[The Full Faith and Credit Clause] does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it; or the right of the state itself to exercise authority over the persons, or the subject matter. The constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory.¹⁹⁵

Story thus stated that jurisdictional rules limit the operation of the Full Faith and Credit Clause and Congress’s power under it.

Not only were the *Commentaries* widely read, but they also provide insight into Story’s opinion in *Mills*. While *Mills* holds that conclusive effect must be given to state judgments,¹⁹⁶ it is unclear whether this holding was derived from the 1790 Act, the Constitution, or both. The fact that Story emphatically stated that the command arose from the Constitution in his

¹⁹¹ *Id.* §§ 1306-07

¹⁹² *Id.* § 1307.

¹⁹³ Some scholars have interpreted Justice Story as saying that Congress only had the power to create rules regarding the proof needed to admit a judgment into evidence. *See, e.g.*, Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 133 & n.89 (1995). The last sentence quoted above, however, refutes such an interpretation. If Justice Story thought Congress was granted no substantive power under the Clause, he would not have said that “each [interpretation] admits the competency of congress to declare the effect of judgments, when duly authenticated.” STORY, *supra* note 180, § 1307.

¹⁹⁴ STORY, *supra* note 180, § 1307.

¹⁹⁵ *Id.*; *see also* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 601-09 (Boston, Hilliard, Gray, & Co. 1834).

¹⁹⁶ *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813).

Commentaries on the Constitution is compelling evidence that *Mills* relied on both the 1790 Act and the Constitution.¹⁹⁷

2. Other Treatises

Although no other treatise provides as much detail as Story's *Commentaries*, a number of other early nineteenth century treatises discuss the meaning of the Full Faith and Credit Clause and the 1790 Act.

a. State Acts

Unlike the cases, some treatises discuss in some detail how the Clause applied to state acts. In his highly influential *Commentaries on American Law*, Chancellor Kent (the same New York jurist whose opinions are discussed above) stated that, "if a statute . . . was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow."¹⁹⁸ He explained:

[W]hile . . . acts valid by the law of the place where they arise, are valid every where, . . . this principle relates only to civil acts founded on the volition of the parties, and not to such as proceed from the sovereign power. The force of the latter cannot be permitted to operate beyond the limits of the territory, without affecting the necessary independence of nations.¹⁹⁹

Kent thus believed that giving full faith and credit to a state act meant giving it force only within its legitimate sphere of authority. Ordinarily, this sphere of authority was the territorial bounds of the state. For example, full faith and credit did not require New York to recognize a divorce of two of its domiciliaries performed in Vermont, even if the divorce was proper under Vermont law. Kent also stated, however, that civil acts could have extraterritorial force when their application was "founded on the volition of

¹⁹⁷ Proponents of the evidentiary view are unable to square their interpretation of Justice Story's opinion in *Mills* (which they believe held that the requirement to give conclusive effect to state judgments derived solely from the 1790 Act) with the views Story expressed in the COMMENTARIES ON THE CONSTITUTION. See, e.g., Engdahl, *supra* note 12, at 1588 n.10. Proponents of the evidentiary view are thus forced to argue that Story changed his mind after writing *Mills* and advanced a new (and incorrect) view in the COMMENTARIES ON THE CONSTITUTION. *Id.* at 1652-53. As these scholars acknowledge, however, Story himself never recognized any such inconsistency. See *id.* at 1652-54. While it certainly is possible that Justice Story nevertheless changed his position on the issue, it seems more likely that the evidentiary view's interpretation of *Mills* is incorrect.

¹⁹⁸ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 100 (New York, O. Halsted 1827).

¹⁹⁹ *Id.*

the parties, and . . . proceed[ed] from the sovereign power” of the state.²⁰⁰ For example, states could pass legislation that imposed requirements or terms on contracts, so long as those contracts were formed within the boundaries of that state.²⁰¹

Prominent antebellum southern constitutional theorist Thomas R. R. Cobb also discussed this issue in *An Inquiry into the Law of Negro Slavery in the United States of America*. Quoting heavily from Justice Washington and Justice Story’s interpretations of congressional power, Cobb stated that Congress had the power to give conclusive effect to state judgments.²⁰² Cobb asserted, however, that “Congress can give no effect to a judgment in another State, which it did not have under the laws of the State where rendered.”²⁰³ For example, he explained that while an *in rem* state judgment had extraterritorial effect with respect to property which was removed from its territorial jurisdiction, an *in rem* judgment could have no effect on property that had always been located outside the state.²⁰⁴ Cobb thus stated that, with respect to state acts,

[i]t is not within the power of Congress to extend their effect over persons or property to which they did not apply *proprio vigore* [of their own force], but it is within the competency of Congress to declare their effect and extend their protection over such persons and property wherever found within the limits of the United States.²⁰⁵

Cobb ultimately concluded that Congress could not make the laws of one state have force over the citizens of another state when such citizens were not within that state’s territorial reach.²⁰⁶ For example, Congress could not pass a law making the gradual emancipation acts of Pennsylvania have effect in South Carolina.²⁰⁷ Cobb therefore believed that Congress’s full faith and credit powers were limited by the jurisdictional principle.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 79-80.

²⁰² THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* §§ 205-212 (Philadelphia, T. & J. W. Johnson & Co. 1858).

²⁰³ *Id.* § 212.

²⁰⁴ *Id.*

²⁰⁵ *Id.* § 213.

²⁰⁶ *Id.*

²⁰⁷ However, Cobb thought that Congress could give extraterritorial effect to state laws that validly applied at one point within the state’s jurisdiction. For example, according to Cobb, Congress could enact a law which applied South Carolina’s slavery laws to a citizen of South Carolina who was traveling through Massachusetts with his slaves. It appears, however, that Cobb may have been stretching the constitutional doctrine to find that Congress could make northern states extend comity to southern slave holders on the issue of sojourning slaves. For a discussion of the centrality of slavery issues to southern constitutional theory in the antebellum period, see, e.g., Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 *LAW & HIST. REV.* 797 (2011) (discussing the constitutionality of the Fugitive Slave Act); see also PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981) (discussing conflict of laws issues regarding slave states and free states).

Similarly, in their treatise, *Select Decisions of American Courts*, Judge J.I. Clark Hare and H.B. Wallace stated that “although the operation of a judgment as evidence, may extend indefinitely, its effect as a remedy, cannot reach beyond the boundaries of the sovereignty in which it had its origin, or the jurisdiction of the court by which it is pronounced.”²⁰⁸ Although the authors did not discuss state acts, presumably the same rules would apply.

b. State Judgments

Nineteenth century treatises uniformly found that, under *Mills*, state judgments were required to be given the same effect that they would be given in the state which rendered the decision. Although not all commentators discussed whether this rule derived from the Constitution or exclusively from the 1790 Act,²⁰⁹ those who did so overwhelming found that the rule was dictated by the Full Faith and Credit Clause.²¹⁰ In fact, my research has

²⁰⁸ 2 J. I. CLARK HARE & H. B. WALLACE, *AMERICAN LEADING CASES: BEING SELECT DECISIONS OF AMERICAN COURTS* 818 (Philadelphia, T. & J. W. Johnson & Co., 4th ed. 1857).

²⁰⁹ See, e.g., S. M. PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE* 253 n.a (New York, Gould, Banks, & Gould 1816); 1 THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE* 205 n.1 (London, J. & W. T. Clarke, 2d. ed. 1833).

²¹⁰ See, e.g., 1 JOSEPH BREVARD, *AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA*, 317 n.* (Charleston, John Hoff 1814) (stating that, to treat the judgments of another state the same as foreign judgments would give such judgments “the force and effect of contradicting the constitution by forbidding the courts of other states from giving *full faith and credit* to the records, [etc.] of any state where the proceedings were had”); JOHN BRISTED, *AMERICA AND HER RESOURCES* 195 (London, Henry Colburn 1818) (stating that “a scrupulous conformity” to the Full Faith and Credit Clause would result in courts “receiving the judicial proceedings of each state in every other state, as equally binding with those of its own”); ALEXANDER JAMES DALLAS, *THE OPINION OF JUDGE COOPER ON THE EFFECT OF A SENTENCE OF A FOREIGN COURT OF ADMIRALTY* 24 (Philadelphia, P. Byrne 1810) (criticizing *Bartlet* for finding that “a judgment rendered in one State not conclusive in another” “notwithstanding the full faith and credit prescribed by the constitution of the United States”); 5 NATHAN DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 216 (Boston, Cummings, Hilliard & Co. 1824) (stating that cases which held that state judgments were conclusive “best conform to the spirit and letter of the constitution, and act of congress”); TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* § 409 (Boston, Little, Brown, & Co. 1867) (“The judgment itself has ‘faith and credit’ as a legal and final determination of the right in controversy, unless it is open to further proceedings under the law by which it was authorized. To this extent, ‘faith and credit’ is the ‘effect thereof’ and ‘credit’ and ‘effect’ are identical. But if these terms are identical, then ‘full faith and credit’ must include all ‘the effect’ it has where it was made; and this by constitutional right.” (footnote omitted)); HARE & WALLACE, *supra* note 208, at 817-18 (stating that giving “full faith and credit” for a judicial decision means “admitting its truth and conclusiveness” and that “[T]he view taken by Story . . . that the judgments of other states would be entitled to full faith and credit under the provisions of the Constitution, apart from the legislative action of Congress, is obviously sound”); EDWARD D. MANSFIELD, *THE POLITICAL GRAMMAR OF THE UNITED STATES* § 398 (New York, Harper & Bros. 1834) (“The *full faith and credit* mentioned in the Constitution was inserted to place the judgments of the different states upon a different footing from those of foreign nations. The latter were already *prima*

revealed only one treatise which stated that the conclusiveness of state judgments derived only from the 1790 Act and not the Constitution.²¹¹

Hare and Wallace, for example, provide exceptionally detailed coverage of the Full Faith and Credit Clause in their treatise, *Select Decisions of American Courts*.²¹² They explain:

[T]he effect of a judgment and the faith and credit due to it, are in some respects different things, the one relating solely to the right, while the other extends also to the remedy. It is certainly possible to give full faith and credit to a judicial decision, that is, admit its truth and conclusiveness, and yet limit, or even deny the means of establishing its existence or rendering it effectual.²¹³

The authors thus stated that Congress's power to prescribe the effect of state judgments is the power to provide means for enforcing state judgments and rendering them effectual, such as, for example, specifying the priority of multiple claims to the assets of an insolvent debtor.²¹⁴ They explained that making rules on such issues "takes nothing from the faith and credit due to the judgment, or the right of the person in whose favor it was pronounced, . . . and simply regulates the remedy by which the right is vindicated, or redress afforded for its violation."²¹⁵

D. *Early Nineteenth Century Use of the Term "Full Faith and Credit"*

Prior scholarship has examined at length how the terms "faith" and "credit" were understood in English common law.²¹⁶ Presumably, these

facie evidence; the former then must be *conclusive*.""); WILLIAM MUNFORD, GENERAL INDEX TO THE VIRGINIA LAW AUTHORITIES 457 (Richmond, John Warrock 1819) ("A patent for land, granted by a sister state, is one of those public acts, to which every other state is bound to give full faith and credit, under the constitution of the United States; therefore, the validity of such patent cannot be collaterally drawn in question, in the courts of any other state"); CALVIN TOWNSEND, ANALYSIS OF CIVIL GOVERNMENT 243-44 (New York, American Book Co. 1868) (asserting that state judgments are conclusive while analyzing only the Constitution).

²¹¹ See ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 257 (Albany, Wm. & A. Gould & Co. Law Booksellers 1831) ("The constitution, in conformity with a principle of the common law, founded in comity, secures the *admissibility* of such records as evidence, but leaves it to congress to prescribe, first, the *tests* of their genuineness, and second, their *legal effect* as evidence. Congress have exercised this power; and, in regard to the latter branch of it, have made the authenticated exemplification of a record out of its proper state equivalent to the record in its proper state.").

²¹² HARE & WALLACE, *supra* note 208, at 790-818.

²¹³ *Id.* at 817.

²¹⁴ *Id.* at 818-19.

²¹⁵ *Id.* at 819.

²¹⁶ See, e.g., Engdahl, *supra* note 12, at 1595-1606 (arguing that the English common law treatment of prior judgments has been oversimplified); Whitten, *State-Court Jurisdiction*, *supra* note 12, at 508-23 (discussing the original meaning of "faith" and "credit" in English common law).

scholars believe that the technical legal meaning of the words, based on English precedent and treatises, informs how the Full Faith and Credit Clause should be understood.²¹⁷ However, the manner in which the terms were used in the United States in the early nineteenth century has received little attention. Because this Article merely seeks to discover how the Clause was understood in the first several decades after Ratification, the meaning attributed to the phrase “full faith and credit” in other contexts at that time is more relevant than any obscure legal meaning at common law, especially since most nineteenth century Americans (including lawyers) were probably unaware of such common law meaning.²¹⁸

Although a complete and systematic analysis of the term’s use is beyond the scope of this Article, my research has found that, in other contexts, giving “full faith and credit” to something meant viewing it as absolutely true and indisputable.²¹⁹ Admitting a state judgment into evidence and then allowing an inquiry into the merits simply would not have comported with this definition.

E. *Federalist No. 42*

The only discussion of the Full Faith and Credit Clause in the Federalist Papers is found in Federalist No. 42, where James Madison wrote:

The power of prescribing by general laws the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The 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.²²⁰

²¹⁷ The legal meaning of the terms was actually quite ambiguous at common law, as some proponents of the evidentiary view have acknowledged. *See supra* note 38-47 and accompanying text.

²¹⁸ How the phrase was understood around the time of Ratification also probably best comports with the original “public meaning” of the Clause, and thus is likely more important to those who find significance in the original meaning of the Constitution.

²¹⁹ *See, e.g.*, 4 ADAM ANDERSON, AN HISTORICAL AND CHRONOLOGICAL DEDUCTION OF THE ORIGIN OF COMMERCE, FROM THE EARLIEST ACCOUNTS 421 (London, J. White 1801); WILLIAM GRAYDON, AN ABRIDGEMENT OF THE LAWS OF THE UNITED STATES 192 (Harrisburgh, John Wyeth 1803); JOSHUA MONTEFIORE, A COMMERCIAL DICTIONARY: CONTAINING THE PRESENT STATE OF MERCANTILE LAW (London, T. Gillet 1803); 2 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE 394 (Washington, D.C., Samuel H. Smith 1805); NOAH WEBSTER, JR., MISCELLANEOUS PAPERS ON POLITICAL AND COMMERCIAL SUBJECTS 108 (New York, E. Belden & Co. 1802).

²²⁰ THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961).

While proponents of the evidentiary view have made much of this passage,²²¹ it provides very weak evidence of how the Full Faith and Credit Clause was actually understood. Federalist No. 42 clearly indicates that Congress's power under the Full Faith and Credit Clause was significant; however, it tells us little of the nature of Congress's power or why Madison thought it was important.

Those who place importance on this passage do so by stressing Madison's comments on the clause from the Articles of Confederation—that its meaning was “extremely indeterminate, and can be of little importance under any interpretation which it will bear.”²²² This statement, of course, is extremely ambiguous. Madison may have simply meant that the Full Faith and Credit Clause of the Articles was unimportant because it was not being properly enforced or because the courts could not provide a consistent interpretation.

Alternatively, perhaps Madison believed that the important issue addressed by the Clause was Congress's ability to prescribe a uniform method for admitting state judgments into evidence (something that the Articles did not address), and that the weight to be given to state judgments—whether they were seen as conclusive or *prima facie* evidence—was of little practical importance.²²³ Madison may have thought there was little practical difference between a constitutional clause that made state judgments *prima facie* evidence and one that made judgments conclusive.²²⁴ This is because, at the time, most judgments of debt were default judgments, and thus the merits of the case were usually uncontested.²²⁵ Even when a dispute existed, it was often difficult for a defendant to rebut the *prima facie* evidence rule.²²⁶

²²¹ See, e.g., Whitten, *State-Court Jurisdiction*, supra note 12, at 554 (“The essential language of the full faith and credit clauses of the Constitution and the Articles of Confederation . . . is identical; it is ‘Full faith and credit shall be given.’ If this language was ‘indeterminate’ and ‘of little importance under any interpretation which it will bear,’ it is highly unlikely that it could have imported conclusive evidentiary effect on the merits or incorporated jurisdictional or other conflict of laws rules.” (citing THE FEDERALIST NO. 42, supra note 220)).

²²² THE FEDERALIST NO. 42, supra note 220; see, e.g., Whitten, *State-Court Jurisdiction*, supra note 12, at 554; Yablon, supra note 8, at 146 & n.91.

²²³ Yablon, supra note 8, at 146 & n.91 (“Madison believed that neither a *prima facie* nor a conclusive rule of deference were particularly effective in enforcing debt obligations.”).

²²⁴ *Id.* at 146 & n.91 (“[E]ven under the evidentiary interpretation of the clause, proof of the existence of the prior judgment was enough to establish a *prima facie* case. For debtors who defaulted or had no defense on the merits, the difference was indeed of ‘little importance.’”).

²²⁵ *Id.* at 146 n.91 (“In her study of colonial litigation in New York Supreme Court, Deborah Rosen found that by the 1750s, the default rate in cases in New York County was approximately sixty percent. For other New York counties, it averaged eighty-four percent.” (citing Deborah A. Rosen, *The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691-1760*, 5 LAW & HIST. REV. 213, 230 (1987))).

²²⁶ PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 146 n.91 (2010).

Regardless of what Madison meant to convey in Federalist No. 42, it provides little evidence of how people actually understood the Full Faith and Credit Clause. Although modern commentators often treat the Federalist Papers as a dispassionate exposition of the Framers' intent,²²⁷ they were actually essays published by a few select individuals in an attempt to convince New Yorkers to ratify the Constitution.²²⁸ Because Federalist No. 42 was a persuasive article, Madison had every incentive to minimize the value of the provisions of the Articles of Confederation and exaggerate the importance of the new powers granted to Congress.²²⁹ Moreover, Federalist No. 42 was not widely read outside of New York and thus probably had little influence on how people understood the Full Faith and Credit Clause.²³⁰

F. *Congressional Debates*

Although Congress took up proposals to amend the 1790 Full Faith and Credit Act on several occasions in the early 1800s, these episodes provide little insight into how the Full Faith and Credit Clause was understood at that time.²³¹ In 1806, Congress formed a committee to determine whether further legislation should be enacted given the failure of the courts to provide a uniform interpretation.²³² The committee returned a bill which provided:

[T]he 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.²³³

This bill essentially mirrored the interpretation that had already been accepted by a majority of the judiciary: judgments stood as conclusive evidence of issues decided on the merits, but only so long as the rendering

²²⁷ *Id.* at xi.

²²⁸ *Id.* at 84.

²²⁹ *Id.*

²³⁰ *Id.* In fact, this Author's research has revealed no citation to THE FEDERALIST NO. 42 in any nineteenth century judicial opinion.

²³¹ For a more detailed discussion of Congress's attempts to amend the Act, see generally Sachs, *supra* note 12.

²³² See Sachs, *supra* note 12, at 1253-54. Earlier, in 1804, Congress had "extended the older statute [the Act] to cover executive records and office books in addition to judicial records, and to include the public records of the territories and possessions (such as the recently-approved Louisiana Purchase)." *Id.* at 1246-47 (footnote omitted).

²³³ H.R. 46, 9th Cong. (1st Sess. 1806).

court had valid jurisdiction. However, while the bill passed the House, it could not gain the approval of the Senate.²³⁴ After the Supreme Court's decision in *Mills*, a similar bill was again reported to Congress in 1814, but this bill was never brought up for debate or vote.²³⁵

Congress again considered the issue in 1817. A committee was formed which stated that a bill should be proposed because "Congress has not yet executed the power given by the Constitution" and "so much doubt rests upon the question, that . . . it is highly expedient that Congress should interpose by a law which will produce uniformity in the decisions throughout the Union."²³⁶ In pertinent part, the bill reported by the committee provided that a state-court judgment would "have 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."²³⁷ It further stated that no judgment rendered without appearance or service "shall be deemed conclusive."²³⁸ Although the bill was not a drastic departure from existing law or previous congressional proposals, it was never reported from the Committee of the Whole.²³⁹

²³⁴ 15 ANNALS OF CONG. 242 (1806).

²³⁵ See Sachs, *supra* note 12, at 1262, 1265. The 1814 bill provided that a judgment from another state, if rendered pursuant to proper jurisdiction, "shall be considered as conclusive evidence of the right of the plaintiff or plaintiffs to the debt, duty, or thing expressed in such decree or judgment." H.R. 45, 13th Cong. §§ 1-2 (2d Sess. 1814). If the rendering court had lacked jurisdiction, the judgment would nevertheless stand as prima facie evidence. *Id.* § 3.

²³⁶ 31 ANNALS OF CONG. 500 (1817).

²³⁷ H.R. 17, 15th Cong. § 1 (1st Sess. 1817).

²³⁸ *Id.*

²³⁹ While other scholars have argued otherwise, see Sachs, *supra* note 12, at 1273-74, the debates on the bill also provide little insight into how Congress interpreted the Full Faith and Credit Clause. Thomas Cobb, of Georgia, proposed an amendment that would have made state judgments entitled to no more respect than foreign judgments. *Id.* at 1271. He defended this amendment on the grounds that judgments from rural states may not receive the same treatment as those of commercial states because less judicial formality prevailed. *Id.* Cobb's amendment was voted down, however, after others argued that such an amendment would undermine the commercial credit of the country. *Id.* at 1271, 1273. Moreover, Thomas Williams argued that, under the Supreme Court's interpretation of the Constitution, "the decision of a State Court should be conclusive between the parties, as well in one State as in another." 31 ANNALS OF CONG. 536 (1818).

John Ross also opposed the bill. *Id.* at 564. When discussing its constitutionality, he argued that "[t]he Constitution had given 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, [he] considered as tending to the establishment of a consolidated Government." *Id.* Ross thus adopted the position, advanced by some state court judges prior to *Mills*, that Congress merely had the authority to prescribe how a judgment should be proved. See *supra* notes 89-92 and accompanying text. He also opposed the bill on policy grounds, arguing that it would inure to the benefit of the commercial states because of differences in prevailing judicial practices amongst the states. See 31 ANNALS OF CONG. 564 (1818).

The bill's supporters responded that the bill was necessary to strengthen commercial confidence and bind the states together. *Id.* at 565. Moreover, Joseph Hopkinson stated that, under the Constitution, "Congress was entirely at liberty to act on the subject." *Id.* It is unclear whether Hopkinson merely

In 1820 and 1822, proposals were also made in Congress to inquire into whether an amendment should be passed to clarify the 1790 Act; however, neither proposal was adopted and Congress did not again consider the issue.²⁴⁰

Congress's failed attempts to alter the 1790 Act provide little insight into prevailing views of the Full Faith and Credit Clause of the Constitution. Since none of the proposals was adopted, we cannot assume that a majority of Congress shared any particular view. Moreover, because the proposals largely tracked existing law as interpreted by most courts, the bills proponents' were probably simply attempting to provide clarity and uniformity to existing law. When doing so, the congressmen were probably unconcerned with whether the rules provided in the bills were already constitutional dictates or whether they were merely clarifying the 1790 Act. Of course, to the extent that Congress expressed a broad view of its full faith and credit power, given its obvious incentives to do so, its views may not have been shared outside of Washington.²⁴¹

III. THE HISTORICAL VIEW OF THE FULL FAITH AND CREDIT CLAUSE

A. *The Historical View Defined*

Although there was no single shared understanding of the Full Faith and Credit Clause in the early nineteenth century, a number of conclusions can be drawn from the historical evidence discussed in the previous Parts. First, the predominant view among jurists and commentators was that the Full Faith and Credit Clause itself made state decisions conclusive with regard to determinations reached on the merits of the judgment.²⁴² Moreover, courts universally found that this rule did not apply to judgments that

meant that Congress had the authority to pass the bill or whether he believed that Congress's full faith and credit power was without limits. Regardless, he had obvious incentives to argue for a broad interpretation of congressional power.

Professor Sachs views these debates as evidence that the bill's passage would have changed contemporary practice, meaning that, at that time, the conclusive effect view of the Clause must not have prevailed. Sachs, *supra* note 12, at 1272-73. The statements of two congressmen, however, are much weaker evidence of prevailing legal standards than the cases cited above. Moreover, Cobb and Ross were both opposed to the bill on policy grounds, and thus it is entirely possible that they merely hoped to change existing law. 31 ANNALS OF CONG. 564 (1818); *see also* Sachs, *supra* note 12, at 1271-72. Finally, even though the conclusive effect view of the Clause was the majority view, Congress may have simply wanted to ensure that it was uniformly applied and enforced.

²⁴⁰ *See* Sachs, *supra* note 12, at 1274-76.

²⁴¹ Congress may have been motivated by self-interest to express a broad view of its own constitutional power.

²⁴² *See supra* Part II.

were rendered without jurisdiction.²⁴³ No specific constitutional provision was cited for this jurisdictional rule, however, as it was understood to be a basic principle of justice and a necessary incident of state sovereignty. And despite the recent academic popularity of the evidentiary view, it finds little support in the historical record.²⁴⁴ Perhaps, as a matter of first impression, it would have been a good interpretation of the Clause under English common law. Very few jurists or commentators, however, actually adopted it.

Second, Congress's power to prescribe the effect of state judgments was probably understood by most to be significant, yet subject to important limitations. Prior to *Mills*, a handful of jurists stated that Congress merely had the power to prescribe rules regarding the admissibility of evidence; these judges, however, were always in the minority.²⁴⁵ After *Mills*, virtually everyone agreed that Congress had the power to create at least some substantive rules.²⁴⁶

There is less evidence, however, regarding the exact contours of Congress's power. Because the 1790 Act was consistent with the Full Faith and Credit Clause, most courts had no reason to discuss the issue or otherwise distinguish between the two. The lack of detailed commentary on Congress's power was especially noticeable after the Supreme Court's decision in *Mills*. In fact, my research has revealed no court after *Mills* that stated an opinion—one way or the other—on whether Congress's power was subject to limitations. Prior to *Mills*, however, a number of courts stated (or at least implied) that Congress's power was limited by the self-executing portion of the Full Faith and Credit Clause.²⁴⁷ In other words, they found that, while Congress could prescribe the legal effect to be given to a judgment in another state, it could not re-open matters that were previously litigated on the merits. Presumably, later courts would have adopted the same views if forced to confront the issue.

Third, although courts did not directly confront the meaning of the Full Faith and Credit Clause with respect to state acts, the historical sources provide some guidance. Based on the rules applicable to judgments, to give "full faith and credit" to something meant accepting it as unquestionably true.²⁴⁸ In the context of judgments, which are by definition made in the context of concrete disputes over particular facts, to give full faith and credit meant accepting conclusions about a particular dispute.²⁴⁹ This interpretation of full faith and credit obviously had little application to legislative acts of general applicability—it meant only that such statutes must be admitted

²⁴³ See *supra* note 169 and accompanying text.

²⁴⁴ See *infra* Part IV.

²⁴⁵ See *supra* Part II.A.

²⁴⁶ See *supra* Part II.A.3.

²⁴⁷ See *supra* notes 18-20 and accompanying text.

²⁴⁸ See *supra* note 219 and accompanying text.

²⁴⁹ See *supra* note 105 and accompanying text.

into evidence as the true laws of another state.²⁵⁰ Congress's power to prescribe the effect of state acts was thus not subject to any meaningful limitations that were derived directly from the text of the Full Faith and Credit Clause.

However, while the evidence on this issue is limited, it seems that, under prevailing concepts of jurisdiction and state sovereignty, Congress was not thought to have been given the power to give extraterritorial effect to state acts in most circumstances. These sources suggest that Congress's power to prescribe the effect of state acts was limited to situations in which the parties had agreed (perhaps implicitly or tacitly) to the application of a state's law and the events giving rise to the suit occurred within that state.²⁵¹

The historical view advanced in this Article differs markedly from previous interpretations of the Full Faith and Credit Clause. Under the evidentiary view (which is also said to be based on the Clause's history), the Clause itself commands only that state acts and judgments be admitted into evidence in the courts of other states, and, once admitted, state courts are free to relitigate previously decided issues. The evidentiary view thus vests unlimited power in Congress to declare how state acts and judgments will be applied in other states. Although the ratchet view sees the Clause as making state judgments conclusive in other states, it too gives Congress unlimited power to define and increase (or ratchet-up) the effect given to state acts and judgments, so long as Congress does not try to decrease their effect.

B. *Explaining the Divergence from Prior Scholarship*

This Article's interpretation of the cases differs drastically from how the proponents of the evidentiary view read the historical record. While interpreting much of the same historical evidence, these scholars argue that the conclusiveness of state judgments derived solely from the 1790 Act rather than the Full Faith and Credit Clause. Under the evidentiary view, the Clause itself merely requires state judgments to be admitted into evidence.²⁵²

²⁵⁰ Not all legislative acts at this time, however, were of general applicability. For example, state legislatures passed legislation that often dealt with specific cases in the context of insolvency and divorce decrees. *See, e.g.*, Act effective Jan. 1800, ch. 41, 1799 Md. Laws 281 (releasing a man from debt).

²⁵¹ Although not discussed in the case law, this theory is directly supported by several treatises and by application of the case law regarding state judgments. *See supra* notes 200-09 and accompanying text.

²⁵² *See Whitten, Choice of Law, supra* note 8, at 3 ("The evidence will demonstrate that the Full Faith and Credit Clause is a self-executing command to the states which requires only that the courts of a state admit the statutes, records, and judgments of other states into evidence as conclusive proof of their own existence and contents. The clause does not, however, directly require any state to enforce or

There are a number of possible reasons for the dramatic difference between the evidentiary view and this Article's conclusions. Because it was never a contested issue, most courts did not explicitly discuss Congress's power under the Full Faith and Credit Clause. Thus, in most cases, the only way to determine a court's views on the subject is to ask whether its decision relied on the 1790 Act or the Constitution—a distinction that courts had no incentive to make since the language of each was so similar. We are thus left to parse language that was probably not intended to be analyzed with such a distinction in mind. It should be expected that reasonable minds would come to different conclusions based on such evidence. Where possible, this Article has attempted to document the language that supports its reading of the cases.

Moreover, while proponents of the evidentiary view have been quick to interpret ambiguous opinions as relying solely on the 1790 Act,²⁵³ the prevailing view of the Constitution in the late eighteenth and early nineteenth centuries suggests that the opposite approach is more likely to be accurate. During this time, the Constitution was seen more as a statement of fundamental principles than as an enforceable text (similar in nature to a statute).²⁵⁴ Judicial review of congressional action was extremely limited, and jurists generally restricted review of even state legislation “to the concededly unconstitutional act.”²⁵⁵ Because the Constitution was seen as a statement of basic principles, it is natural that courts would focus on the 1790 Act when looking for specific, concrete, and enforceable rules.²⁵⁶ Moreover, for the same reasons, jurists would have found nothing out of place by attributing the same or similar meaning to the 1790 Act and the Constitution. While this Article has attempted to be careful not to list truly ambiguous cases as relying on either the Constitution or the Act, it would probably be fair to assume that many courts that did not distinguish be-

apply the statutes, records, or judgments of other states. Congress was given the exclusive authority”); *see also* Sachs, *supra* note 12. Engdahl, however, seems to argue instead that the Clause also constitutionalized the prima facie evidence rule. *See generally* Engdahl, *supra* note 8.

²⁵³ As explained above, my research has revealed only one case which explicitly states that its holding derives solely from the 1790 Act and not the Constitution. *See supra* notes 163-165 and accompanying text. Many cases, however, explicitly state that the Constitution itself commands that state judgments be viewed as conclusive. *See supra* notes 160-162 and accompanying text.

²⁵⁴ *See* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7, 91-92 (2004); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 2 (1990).

²⁵⁵ Schmitt, *supra* note 207, at 812-13. It was not until Chief Justice John Marshall began interpreting the Constitution as supreme written law in his decisions on the Contract Clause and the Supremacy Clause that distinctions between ordinary law and the Constitution gradually blurred over time. *See* SNOWISS, *supra* note 255, at 3-4, 6.

²⁵⁶ Similarly, due to the substantial deference given to Congress's interpretation of the Constitution at this time, it is not surprising that courts focused on the more comprehensive and specific language of the 1790 Act.

tween the two believed that the Constitution would independently compel the same results as the 1790 Act.

Finally, Professor David E. Engdahl, one of the major proponents of the evidentiary view, ends his analysis with the Court's decision in *Mills*.²⁵⁷ It is true that Justice Story's opinion in *Mills* is ambiguous and could be read to support the evidentiary view. However, the overwhelming majority of courts that spoke on the issue after *Mills* stated that the rules announced in that decision were dictated by the Full Faith and Credit Clause itself (in addition to the 1790 Act).²⁵⁸ Moreover, Justice Story, the author of *Mills*, also later unambiguously stated that *Mills* rested on both the Constitution and the 1790 Act.²⁵⁹

IV. INTERPRETING THE FULL FAITH AND CREDIT CLAUSE: WHY THE HISTORICAL VIEW IS SUPERIOR TO EXISTING THEORIES

While rediscovering how the Full Faith and Credit Clause was originally understood is intrinsically valuable as a matter of legal history, the historical view is also worthy of serious consideration from the perspective of modern constitutional interpretation. This Part argues that the historical view of the Clause best fits with the Clause's original meaning, the text of the Clause, the structure of the Constitution, and the Framers' intent.

A. *Original Meaning*

Today, most originalists search for the "original public meaning" of the Constitution, or, in other words, how the public would have understood the text at the time of Ratification, rather than the subjective intent of the individual Framers.²⁶⁰ The historical evidence examined in this Article is probably the best available evidence of the Clause's original public meaning. The debates of the Constitutional Convention were not publicly available during Ratification, and the overwhelming majority of Americans would have been ignorant of English common law and legal precedent under the Articles of Confederation. Though imperfect,²⁶¹ the best evidence of

²⁵⁷ Engdahl, *supra* note 12, at 1647-52.

²⁵⁸ See *supra* notes 160-162 and accompanying text.

²⁵⁹ STORY, *supra* note 180, § 1307.

²⁶⁰ See *supra* notes 29-30, 77, and accompanying text. A defense of this strain of originalism is beyond the scope of this Article.

²⁶¹ The interpretation given by jurists and legal scholars is imperfect evidence of "original public meaning" because most Americans did not have the same type of legal background and access to legal sources. However, in the context of the Full Faith and Credit Clause, a highly technical provision regarding the interstate recognition of state acts and judgments, it could be argued that the "original public meaning" at issue is the meaning attributed to the Clause by lawyers. See BENNETT & SOLUM, *supra*

how the Clause was publicly understood at the time of Ratification is thus probably how courts and commentators interpreted it in the following decades, and how the terms were used in other contexts. As explained above, these sources support the historical view of the Clause.

B. *Textual Arguments*

The Full Faith and Credit Clause can be divided into three separate elements: (1) “Full Faith and Credit shall be given”; (2) “Congress may . . . prescribe the Manner in which [State] Acts, Records and Proceedings shall be proved”; and (3) “Congress may . . . prescribe . . . the Effect [of state acts and judgments].”²⁶² The historical view is the only account that can give meaning to each element of the Full Faith and Credit Clause without doing violence to the text.

According to proponents of the evidentiary view, the first element does no more than “require[] state courts to treat the public records of sister states (*once properly authenticated*) as full evidence of their own existence and contents: there can be no dispute before the jury over whether a court in State A really gave judgment for Creditor.”²⁶³ Proponents of the evidentiary view thus assert that the first element of the Clause merely provides that a state judgment, when proven pursuant to congressional legislation, must be deemed to be proven and in existence.²⁶⁴

Proponents of the evidentiary view assert that, under such a reading of the first element of the Clause, it addresses problems which arose at the time of the Founding regarding the admissibility of state judgments.²⁶⁵ During this time, it was often difficult to admit copies of foreign judgments and judgments from other states into evidence due to evidentiary principles such as the best evidence rule.²⁶⁶

This reading of the first element of the Full Faith and Credit Clause, however, makes little sense in light of the second element of the Clause. It is the second element of the Full Faith and Credit Clause—Congress’s power to prescribe the means by which a judgment may be proven—that addresses problems regarding the admissibility of state judgments. In fact, the evidentiary view’s interpretation of the first element of the Clause would give it no meaning distinct from that of the second element. Because the second element already allows Congress to create rules governing when

note 29, at 34-35. Under this interpretation, the conclusions reached in this Article would be especially strong evidence of original meaning.

²⁶² U.S. CONST. art. IV, § 1.

²⁶³ See Sachs, *supra* note 12, at 1230 (emphasis added).

²⁶⁴ See *id.*

²⁶⁵ See *id.* at 1212, 1230.

²⁶⁶ *Id.* at 1212.

a court must admit the judgment of another state into evidence as proof of the judgment, a constitutional provision making judgments proof of their own existence would be wholly unnecessary. This conceptual flaw in the evidentiary view was identified as long ago as 1805, when the Supreme Court of New Jersey forcefully rejected an argument that closely resembles the modern evidentiary view:

And it is contended by the learned counsel for the defendant, that the words, “*full faith and credit*,” only mean that the records and proceedings shall be evidence of the fact of the existence of the records and proceedings. But unfortunately for this construction, a provision is made in the same section, especially pointing out the manner in which this fact of the existence of the records and proceedings may be ascertained—that is, by a law to be passed by Congress. This would form a double provision of the most absurd and unnecessary kind. Surely, after the records and proceedings are proved in a mode pointed out by law, there wants no constitutional provision that they shall be evidence of their own existence.²⁶⁷

In other words, the evidentiary view makes the first element—the command that states provide “full faith and credit”—redundant and meaningless.

Proponents of the evidentiary view could perhaps argue that their interpretation of the first element of the Clause would carry meaning if Congress chose not to exercise its power to prescribe the means of proving state judgments. Paraphrasing the above quote, the evidentiary view could hold that the first element requires state courts to treat the judgments of sister states, *when proven*, as full evidence of their own existence.²⁶⁸ When the issue of authentication is removed, however, the evidentiary view’s interpretation of the first element is a mere tautology: state courts must recognize the existence of proven state judgments. Of course state courts must view state judgments, *once proven*, as in existence; however, it is the “once proven” language that does all of the work. Simply put, the evidentiary view conflates the first and second elements of the Clause. Because the evidentiary view makes the first element of the Full Faith and Credit Clause meaningless, it is not a compelling interpretation of the text.

The ratchet theory does a better job of ascribing meaning to each element of the Full Faith and Credit Clause. The ratchet theory interprets the first element—the command to provide faith and credit—as a requirement that states give conclusive effect to the judgments of other states.²⁶⁹ Under the second element, Congress has the power to state what a party must present to prove the existence of a judgment.²⁷⁰ Finally, in the third element,

²⁶⁷ *Curtis v. Gibbs*, 2 N.J.L. 399, 402 (N.J. 1805).

²⁶⁸ The evidentiary view’s reading of the Clause must allow for some evidentiary rules regarding the admissibility of state court judgments. Otherwise, a state court would be required to regard any submission by a party as conclusive proof of a judgment, even if it was clearly fraudulent or there was otherwise little evidence that a judgment had actually been rendered.

²⁶⁹ See Chabora, *supra* note 8, at 622.

²⁷⁰ *Id.* at 624.

Congress has the power to enact laws to “[r]efine and implement, not undermine or abolish” the substantive rule of full faith and credit.²⁷¹

The ratchet theory, however, is difficult to derive from the text of the Full Faith and Credit Clause. Specifically, nothing in the language of the Clause limits congressional power in the manner advanced by the ratchet theory. Proponents of the ratchet theory assert that the limitations on Congress’s power are derived from the first element of the Clause.²⁷² In other words, they state that Congress has the power to prescribe the “effect” of state acts and judgments so long as it does not use that power to give state acts and judgments something other than “full faith and credit.”²⁷³ Speaking more generally, proponents of the ratchet theory thus essentially argue that because the Constitution mandates a substantive rule and also grants Congress power to legislate in that area, the mandate should be construed to limit Congress’s power.²⁷⁴

Although such a structure could perhaps be possible, it seems like an unnecessarily confusing and complex approach, and thus it should be avoided if another interpretation is available. A comparison to the Fourteenth Amendment illustrates the point. The ratchet theory of the Full Faith and Credit Clause is sometimes compared to Congress’s power to enforce the Fourteenth Amendment.²⁷⁵ The language of the Full Faith and Credit Clause, however, is substantially different. The Fourteenth Amendment explicitly grants Congress the “power to enforce” the terms of the Amendment; whereas the Full Faith and Credit Clause grants Congress the power to prescribe the “effect” of state acts and judgments, without explicit limitation. Unlike the Full Faith and Credit Clause, the text of the Fourteenth Amendment thus explicitly contemplates a limited role for Congress. If the text of the Fourteenth Amendment instead granted Congress the power to prescribe the “effect” of due process, for example, it is not clear that the Court would interpret Congress’s power in the same manner as it does today.

To avoid this difficulty, any theory that seeks to place limitations on Congress’s power under the Full Faith and Credit Clause would have to explain why giving “effect” to a state judgment means something different than giving it “full faith and credit.” In other words, such a theory must explain why the “effect” of a judgment or act does not include its evidentiary weight (i.e., *prima facie*, conclusive, etc.). While the historical view of

²⁷¹ See Kramer, *supra* note 8, at 2003.

²⁷² See, e.g., Chabora, *supra* note 8, at 622.

²⁷³ See *id.*

²⁷⁴ See *id.* at 622-24.

²⁷⁵ *Id.* at 635-39.

the Clause does meaningfully distinguish between “full faith and credit” and “effect”,²⁷⁶ the ratchet theory does not.²⁷⁷

C. *The Purpose of the Full Faith and Credit Clause*

Not only does the historical view fit better with the text of the Full Faith and Credit Clause, but it is also more consistent with the purpose of the Clause and the structure of the Constitution. When drafting the Clause, the Framers were primarily concerned with ensuring that judgments of debt could be enforced across state lines.²⁷⁸ Under the evidentiary view, however, Congress would have the power to give state judgments less than conclusive weight; in fact, Congress would have the ability to say that judgments from other states would be entitled to no weight at all. Given the objectives of the Framers, giving such power to Congress would make little sense.

Moreover, although Congress’s power under the historical view is extremely limited, these limitations would not prevent Congress from passing important legislation to facilitate the interstate recognition of judgments of debt. As explained above, Congress was historically understood to have had the power to give extraterritorial effect to certain civil laws when the parties could be seen as consenting, in part because the exercise of such power would not violate principles of fairness or state sovereignty.²⁷⁹ This power was especially robust with respect to prescribing rules for the interpretation of contracts and the enforcement of judgments based on contractual debt. For example, Congress could pass legislation making state courts apply the law of the state where a contract was formed when enforcing or interpreting a judgment based on contractual debt for issues such as the applicable rate of interest. The historical view of the Clause thus fulfills the purpose of facilitating the enforcement of debt obligations across state lines by creating strict substantive rules for the enforcement of judgments and allowing Con-

²⁷⁶ Under the historical view, “full faith and credit” refers to the evidentiary weight to be given to a judgment or act, whereas the “effect” of the act or judgment refers to the legal consequence of admitting such conclusive evidence.

²⁷⁷ The careful reader may note that, this Article has occasionally stated that Congress’s power is limited by the first portion of the Clause. In doing so, I have only meant to say that Congress cannot give an act or judgment something less than conclusive evidentiary weight. The concepts discussed in this Article are rather dense, and I believe that describing Congress’s power in such a way provides clarification. However, rather than state that Congress’s power is *limited by* the first portion of the Clause, it would be more accurate to say that Congress’s power was not understood to have overlapped with the first element of the Clause.

²⁷⁸ Pamela K. Terry, Comment, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 *FORDHAM L. REV.* 3093, 3134-35 (2012).

²⁷⁹ See *supra* note 251 and accompanying text.

gress to create uniform choice of law rules with respect to the enforcement of contracts.

D. *Arguments Based on Constitutional Structure*

The evidentiary view and ratchet theory each contemplate a previously unrecognized and potentially significant power in Congress to force states to apply the laws of other states. Both theories hold that Congress has the power to give more extraterritorial force to state judgments and acts than is required under the Constitution.²⁸⁰ Taking this position to its extreme, such theories imply that Congress has the power to make the acts and judgments of one state conclusive in other states. For example, Congress would have had the power to make the laws of South Carolina regarding slavery applicable in every state.²⁸¹ With respect to judgments, Congress would have had the power to pass a law that, for example, stated that a judgment recognizing a master-slave relationship must be respected in every other state. Under such a law, slave owners could have obtained judgments in the South regarding the status of their slaves and then permanently brought them into the North, regardless of any local law against slavery. Such a reading of the Clause would thus give Congress expansive power to circumvent local state law on a number of important issues.

Such an interpretation would give Congress far too much power. Granting such power to Congress would essentially allow it to legislate (in an indirect way) in areas where it has no enumerated powers, thus bypassing the careful limitations placed on congressional power in the constitutional structure. To do so, Congress would merely need to give extraterritorial effect to one state's laws. The evidentiary view's interpretation of congressional power would thus not only alter the separation of powers between Congress and the Supreme Court, as its proponents acknowledge, but it would also have the potential to upend the balance of power between the federal government and the states. As recent scholarship has confirmed, the Framers intended for this balance of power to be primarily regulated by the courts, not Congress.²⁸²

Continuing with the example of slavery, the idea that Congress had no power to legislate on the subject of slavery within the states was a central tenant of the antebellum understanding of the Constitution.²⁸³ No one would

²⁸⁰ See, e.g., Whitten, *State-Court Jurisdiction*, supra note 12, at 600 (discussing the evidentiary view); Sachs, supra note 12, at 1206 (same); Engdahl, supra note 12, at 1655 (same).

²⁸¹ See FINKELMAN, supra note 207, at 32 (explaining that an expansive view of full faith and credit could have allowed Congress to force northern states to recognize the master-slave relationship formed in slave states or slave states to recognize freedom gained in transit through free states).

²⁸² See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 165 (2010).

²⁸³ See DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY* 10 (2001).

have thought to argue that the Full Faith and Credit Clause gave Congress the power to make rules regarding the interstate recognition of domestic relationships such as slavery or freedom.²⁸⁴ Such power simply was not contemplated in the constitutional structure.

By viewing jurisdictional constraints as basic limitations on the Full Faith and Credit Clause, including Congress's full faith and credit power, the historical view of the Clause avoids such difficulties. If Congress cannot give extraterritorial effect to most state acts and judgments, then it cannot improperly upset the balance of power between the federal government and the states through the use of its full faith and credit power.

V. MODERN IMPLICATIONS

Not only is the historical view superior to competing interpretations of the Full Faith and Credit Clause as a matter of constitutional theory, but, unlike those interpretations, the historical view also would not require the Supreme Court to reverse longstanding precedent. The Supreme Court has repeatedly held that the Full Faith and Credit Clause requires states to give conclusive effect to the judgments of other states.²⁸⁵ With respect to state acts, the Court has held that the Full Faith and Credit Clause merely prohibits a state from applying its own law when it has no interest in the dispute; unless Congress steps in and creates specific rules under its "effect" power, a state may otherwise decide which law to apply.²⁸⁶ Moreover, in a confusing and somewhat inconsistent line of cases decided in the 1980s, the Supreme Court held that the dormant Commerce Clause prohibits a state from regulating commerce in other states (even if the commerce has an effect in the first state) if such regulations would practically control conduct wholly outside its borders or subject a defendant to inconsistent regulations.²⁸⁷ The

²⁸⁴ Not only was the Full Faith and Credit Clause ignored in discussions of congressional power, but it also was rarely even mentioned in debates over the status of slaves who had travelled in the north. See FINKELMAN, *supra* note 207, at 32-33. For example, in *Lemmon v. People*, a prominent case involving the status of southern slaves travelling through New York, the court asserted that each state had a sovereign right to determine the legal status of people within its borders, and that Congress had no authority to infringe on this right. 20 N.Y. 562, 616 (1860) ("As a sovereign State she may determine and regulate the *status* or social and civil condition of her citizens, and every description of persons within her territory. This power she possesses exclusively; and when she has declared or expressed her will in this respect, no authority or power from without can rightly interfere . . .").

²⁸⁵ See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

²⁸⁶ See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (holding that a state may decide which law to apply so long as such decision "is neither arbitrary nor fundamentally unfair," a test that would be satisfied if the state whose law is applied has a "significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction").

²⁸⁷ See *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579

Court, however, has not yet ruled on whether Congress's full faith and credit power is subject to any limitations.²⁸⁸

If the historical view of the Clause were adopted, Congress's power under the Clause would be limited: Congress would not have the power to alter the conclusive evidentiary weight given to state judgments. In other words, Congress would not be able to allow judgments from a certain state, or regarding a certain issue, to be reopened in another state. Moreover, Congress would not have the power to force states to give extraterritorial effect to the acts of other states, unless it did so only in situations that involved the consent of the parties and did not infringe on principles of state sovereignty.

How the historical view would work in practice is best illustrated by evaluating how it would apply to DOMA, Congress's most well-known and controversial exercise of its full faith and credit power. In relevant part, DOMA provides that a state need not recognize or enforce "any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."²⁸⁹ With respect to the prospective effect of marriages authorized by state statute, as numerous scholars have pointed out, DOMA merely tracks the constitutional doctrine: State A cannot create prospective marriage laws (and thus regulate existing and future legal relationships) within State B, either through a statute or a declaratory judgment.²⁹⁰

(1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982). The academic debate on this line of cases is beyond the scope of this Article. To briefly summarize, a number of scholars have argued that these cases should be seen as relying on basic notions of federalism rather than the dormant Commerce Clause, and thus should be more broadly applied. See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1089 (2009). The Supreme Court, however, has yet to expand their reach beyond commerce. Moreover, other scholars have suggested that the *Edgar* line of cases was incorrectly decided and has been undermined by the Court's decision in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). See Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 MICH. ST. L. REV. 115, 140. In *BMW*, the Court held that although a state court may not impose punitive damages for out-of-state conduct that has effect in other states, a court may impose punitive damages for out-of-state conduct that has effects in the forum state. 517 U.S. at 572-73. Although scholars are not in complete agreement regarding the current doctrine relating to state laws with extraterritorial effects, all scholars seem to agree that "the current doctrine lacks coherence, clear boundaries, and ease of application." Florey, *supra*, at 1112.

²⁸⁸ Any restrictions under the dormant Commerce Clause of course would not apply to congressional action.

²⁸⁹ 28 U.S.C. § 1738C (2006). This Article does not address the provisions of DOMA which relate to federal recognition of same-sex marriage.

²⁹⁰ See, e.g., Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 358 (2005); David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 7, 7-8 (1997); Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 394-95 (2005). A

DOMA's rules are much more problematic, however, when applied to state judgments. DOMA could be interpreted to mean that states need not recognize the judgments or laws of a state which allows for same-sex marriage, even when such judgments and laws operate only within their valid sphere of jurisdiction. As a number of scholars have recognized, DOMA thus attempts to alter the traditional rules that apply to the recognition of sister-state judgments by giving them less weight than similar judgments involving opposite-sex marriage.²⁹¹ Under the historical understanding of the Clause, however, Congress does not have the power to make state judgments anything less than conclusive evidence of the facts provided therein.

Suppose, for example, that a same-sex couple validly married under the laws of New York is involved in a car accident in New York that is caused by the negligence of a driver who is a resident of Texas. A judgment is then rendered against the Texas resident for loss of consortium in New York. When the Texas resident fails to satisfy the New York judgment, the New Yorker seeks recognition of the judgment in a Texas court so that he can collect on the debtor's assets in Texas. Under DOMA, the Texas court arguably need not respect the judgment since it is predicated on a same-sex marriage. Applying the historical view of the Full Faith and Credit Clause, however, Texas cannot look behind the judgment and reevaluate the merits of the case. The New York judgment stands as conclusive evidence that a certain amount is owed.²⁹² The Constitution does not permit Texas to pick and choose which types of sister-state judgments it will respect, even if Congress attempts to authorize it to do so. Consequently, with regard to the interstate recognition of state judgments,²⁹³ DOMA would be unconstitutional under the historical view of the Full Faith and Credit Clause.

similar result was reached in the early nineteenth century with state divorce laws. *See* *Jackson v. Jackson*, 1 Johns. 424, 432-33 (N.Y. Sup. Ct. 1806) (holding that a citizen cannot evade a state's laws by traveling to another state for the purpose of getting a divorce).

²⁹¹ *See, e.g.*, Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 485 (2005).

²⁹² Looking at this hypothetical from another angle, any failure by Texas to enforce the judgment could also violate the command that states give full faith and credit to acts. Texas must give full faith and credit to the laws of New York, meaning that it must recognize that the laws of New York are binding in New York. Under the historical view, because New York law governs the marital status of people living within that state, Texas must apply New York law. Today, however, when a state has an interest in a proceeding, as Texas would in this hypothetical, it may apply its own law when the law of another state would violate its public policy. Whether the public policy exception could apply under the historical view of the Full Faith and Credit Clause is beyond the scope of this Article. For a discussion of the constitutionality of the public policy exception, see Kramer, *supra* note 8 at 1980-92.

²⁹³ DOMA also contains provisions prohibiting the federal government from acknowledging same-sex marriages. 28 U.S.C. § 1738C. While the Full Faith and Credit Clause does not apply to such provisions, they currently face strong constitutional attack under the Equal Protection Clause. U.S. CONST. amend. XIV, § 1.

But what if Congress were to attempt to pass an act under its full faith and credit power that required states to recognize the same-sex marriages of other states—a hypothetical reverse-DOMA? Under the historical view of the Full Faith and Credit Clause, such an act would almost certainly exceed Congress's full faith and credit powers. An act requiring State A to acknowledge and give effect to same-sex marriages performed in State B would allow State B to create prospective legal relationships in State A. Essentially, it would allow one state to create laws which would bind all others, which is exactly the type of infringement on state sovereignty that the jurisdictional rule was meant to prevent.

While this may seem like a bad result to many in the context of same-sex marriage, allowing Congress to apply the policy of one state to the rest of the nation may not always be desirable. Consider the historical example of slavery. In the antebellum period, a slave-holding minority of the country held an inordinate amount of political power in Congress and, under a slight change in circumstances, could have perhaps used such a power to nationalize aspects of slavery.

CONCLUSION

Despite a growing amount of scholarship suggesting otherwise, the prevailing understanding of the Full Faith and Credit Clause in the first several decades following Ratification was that the Clause itself required states to accept the judgments of other states as conclusive.²⁹⁴ The 1790 Full Faith and Credit Act was thought to merely codify this idea and prescribe legal rules for the enforcement of conclusive sister-state judgments.²⁹⁵ Although some courts failed to explicitly distinguish between the Clause and the Act, early nineteenth century methods of constitutional interpretation strongly support the conclusion that courts attributed conclusiveness to the Clause itself.²⁹⁶

Congress's power under the Full Faith and Credit Clause was understood to be limited by the requirement that full faith and credit must be given.²⁹⁷ In other words, Congress did not have the power to alter the conclusiveness of state judgments. Congress's power was also thought to have been restricted by territorial-based conceptions of jurisdiction, which were based on fundamental principles of justice and state sovereignty rather than any explicit constitutional provision.²⁹⁸ With limited exceptions, Congress

²⁹⁴ See *supra* Part II.

²⁹⁵ See *supra* Part II.

²⁹⁶ See *supra* Part II.

²⁹⁷ See *supra* Part III.

²⁹⁸ See *supra* Part III.

thus was not generally thought to have been able to make the laws of one state have force in another state without that state's consent.

This historical view of the Full Faith and Credit Clause is superior to prevailing interpretations of the Clause. The historical view best fits with the constitutional text, in part because, unlike the evidentiary view, it gives meaning to each element of the Clause. Moreover, both the evidentiary view and a broad understanding of the ratchet theory would grant Congress expansive power that could threaten to usurp powers traditionally understood to belong only to the states.

The historical view of the Full Faith and Credit Clause also has the benefit of being largely consistent with the Supreme Court's modern precedent. While acceptance of the evidentiary view would require the reversal of decades of Supreme Court decisions, the historical view would require little, if any, modification to existing doctrine. Moreover, although DOMA is probably inconsistent with the historical view of the Clause, DOMA's most important provisions regarding the interstate recognition of state marriages merely track constitutional rules. Under the Full Faith and Credit Clause, no state can create marriage laws that dictate future legal relationships in another state, and Congress has no power to allow any state to do so.

As stated at the outset of this Article, the Supreme Court has yet to address the apparent conflict between the Constitution's command that states provide full faith and credit and the power granted to Congress to prescribe the effect of state judgments and acts. According to proponents of the evidentiary view, the only solution which finds historical support is to essentially read the command to provide full faith and credit out of the Constitution. This Article argues that a better alternative finds ample support in the historical record.