THE CONSTITUTIONAL LIMITATIONS ON STATE-COURT JURISDICTION: A HISTORICAL-INTERPRETATIVE REEXAMINATION OF THE FULL FAITH AND CREDIT AND DUE PROCESS CLAUSES (PART ONE)*

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I. INTRODUCTION

Students of contemporary American Civil Procedure are taught that the due process clause of the fourteenth amendment constitutes the principal limitation upon the authority of state courts to adjudicate disputes involving nonresident defendants.1 The full faith and credit clause, Article IV, section 1, of the Constitution, today plays a subordinate role in restricting state-court jurisdiction: a judgment rendered by a state-court without jurisdiction violates the due process clause and is, therefore, invalid in the state of rendition; such a judgment is also not entitled to full faith and credit in a sister state.2 However, a judgment by a state court with jurisdiction satisfies the requirements of due process and is valid in the state of rendition; such a judgment is generally also entitled to full faith and credit in a sister state.3 The Supreme Court's decision in Pennoyer v. Neff4 has played a central

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2. See F. JAMES & G. HAZARD, supra note 1, at § 12.13; R. LEFLAR, supra note 1, at § 19; R. WEINTRAUB, supra note 1, at 69.

3. Id. See F. JAMES & G. HAZARD, supra note 1, at § 12.13.

4. 95 U.S. 714 (1878).
role in establishing this way of looking at the constitutional limits on state authority.\(^5\)

It is well known that *Pennoyer* was the first case to suggest that the due process clause of the fourteenth amendment limits the reach of state-court jurisdiction.\(^6\) Although the specific “territorial” rules of jurisdiction applied in *Pennoyer* have gradually eroded, especially after the Supreme Court’s decision in *International Shoe Co. v. Washington*,\(^7\) the primacy of the due process clause as a limit on state-court authority has remained intact since the Court’s original decision in 1978.\(^8\) *Pennoyer*’s “physical power” approach to jurisdiction has also been widely criticized by modern commentators, while the more flexible “minimum contacts” test of *International Shoe* has received general approval.\(^9\) However, there has been no reappraisal of *Pennoyer*’s basic premise that the jurisdictional limits imposed under the due process and full faith and credit clauses are, or should be, identical. Perhaps the obvious convenience of equating the constitutional tests available on direct attack of a judgment with those available on collateral attack has obscured the need to focus closely upon this issue.

It seems timely to undertake a historical inquiry into the doctrinal underpinnings of *Pennoyer* now. After many years of silence, the Supreme Court recently began the difficult task of applying the “minimum contacts” analysis of *International Shoe* to cases other than those involving in personam jurisdiction.\(^10\) In


\(^6\) F. James & G. Hazard, supra note 1, at § 12.13. It is also well known that the suggestion in *Pennoyer* was dictum. See, e.g., Kurland, *The Supreme Court. The Due Process Clause and the In Personam Jurisdiction of State Courts From Pennoyer to Denckla: A Review*, 25 U. Chi. L. Rev. 569, 570-73 (1958).

\(^7\) See Hazard, supra note 5, at 241-42.

\(^8\) 326 U.S. 310 (1945).


\(^10\) The principal components of a jurisdictional theory strong enough to displace *Pennoyer* are to be found in the “minimum contacts” approach of *International Shoe Co. v. Washington*. But no such theory has yet been constructed out of those components. The reasons why *International Shoe* has not been thus developed seem to be three. First, the minimum-contacts approach was itself associated only with in personam jurisdiction and had no apparent relevance to jurisdiction in rem or quasi in rem. A general theory such as *Pennoyer*’s is not displaced by one of merely special application. Second, there seemed to be no satisfactory method of establishing
Shaffer v. Heitner the Court extended the minimum contacts test to quasi in rem jurisdiction and indicated that henceforth "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." If this signifies the development of a "general theory" of state-court jurisdiction to supplant Pennoyer, an investigation of the historical antecedents of the due process and full faith and credit clauses may assist in formulating the correct boundaries of that theory.

This article examines the constitutional limitations on state-court jurisdiction in two parts. Part One investigates the "original meaning" of the full faith and credit clause of Article IV, section 1, of the Constitution. Part Two examines the "original meaning" of the due process clause of the fourteenth amendment. Both Parts One and Two will ultimately be concerned with the application of the respective constitutional provisions to modern problems of state-court jurisdiction; but the historical investigation of the "original meaning" of these clauses will range more widely than this in order to achieve a complete understanding of all of the factors influencing the narrower jurisdictional issue.

Briefly, the general conclusions drawn from the historical materials will be, as follows: (1) In Pennoyer v. Neff the Supreme Court erred in incorporating the jurisdictional standards that had been employed in full faith and credit cases into the due process clause of the fourteenth amendment; (2) in International Shoe v. Washington and its progeny the Court, although fundamentally altering Pennoyer's "territorial" rules of in personam jurisdiction, perpetuated this original doctrinal error; (3) under a proper line of reasoning the Court might establish standards to limit the territorial reach of state-court jurisdiction under the due process clause, but the standards would differ significantly in focus and emphasis from the International Shoe minimum contacts test; and (4) Con-
gress has ample authority under the full faith and credit clause alone to establish nationwide jurisdictional rules to govern the effect of state-court judgments attacked either directly or collaterally.

Before beginning an examination of the full faith and credit clause, a few words about methodology are in order. It should be obvious that no investigation of the “original meaning” of a constitutional provision can be undertaken profitably without first developing a coherent theory of how to interpret a written constitution. Without such a theory it is impossible to distinguish relevant from irrelevant source material, or reliable from unreliable evidence. Furthermore, in order for shared principles of communication to exist between investigator and reader, the interpretive premises of the former must be made explicit. This is important even in a study designed to be descriptive only; but it is of even greater importance when, as here, conclusions are to be drawn from historical materials about the proper modern application of a constitutional provision. Therefore, throughout both parts of this

14. If ever there existed general agreement on the usefulness of employing “original meaning” in contemporary constitutional adjudication, there certainly is no such agreement today. There currently prevails a widespread and spirited debate over what Professor John Hart Ely describes as “interpretivism” and “noninterpretivism,”

... the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.

J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1, 1 (1980). Although it has been an ongoing one, this debate is presently quite intense, probably because it bears directly upon the legitimacy of the most important constitutional issues of our day. Indeed, sometimes it seems as if the ultimate test of a theory of constitutional interpretation in our time is what effect it will have on the continuing validity of Brown v. Board of Education. Useful recent works discussing various aspects of the interpretive problem are: R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961); Bridwell, The Federal Judiciary: America's Recently Liberated Minority, 30 S.C. L. REV. 467 (1979) [hereinafter cited as Liberated Minority]; Bridwell, The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule? 31 S.C. L. REV. 617 (1980); Grey, Do We Have An Unwritten Constitution? 27 STAN. L. REV. 703 (1975); Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978); Bridwell, Book Review, 1978 DUKE L.J. 907; see also R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975). The current debate centers around the recent work of Raoul Berger, which implicates the “voting rights” and “desegregation decisions,” among others. Compare R. BERGER, supra, with Liberated Minority, supra, and J. ELY, supra. Even sympathetic readers have criticized Berger on the grounds that he failed to fit the interpretive principles he employs into a more general, and thus perhaps qualified, theory. Consider, for example, the criticism of Professor Randall Bridwell:
article an attempt will be made to state the underlying principles of interpretation being employed, and thus to justify and clarify the reliance and weight placed upon particular historical data relevant to the meaning and application of the full faith and credit and due process clauses. Most importantly, in the conclusions to both Parts One and Two specific justifications for relying, at least in part, upon the original meaning of the clauses as determinative of their proper modern application will be offered, in an attempt to show how such an approach is superior to the one currently employed under the International Shoe "minimum contacts" test.

II. THE FULL FAITH AND CREDIT CLAUSE: A PRELIMINARY STATEMENT OF THE ISSUES

As stated earlier, whether the judgment of a state court is entitled to full faith and credit in a sister state depends, in part, upon whether the judgment-rendering court had jurisdiction to adjudicate the action. Under the modern view of the full faith and credit clause, this jurisdictional issue is one of constitutional law. As the following discussion will demonstrate, however, this conclusion is almost certainly an incorrect analysis of the original mean-

Surely a distinction must be drawn between things that may be implicit in a particular constitutional provision—such as an evolving congressional regulatory power which includes authority over matters which, though absent in 1789, affect interstate-commerce today—and things expressly excluded from a constitutional provision. Even the ordinary canons of statutory construction would distinguish between the connotations or meaning of a statute, and denotations, that is, instances of its application. Changes can occur in the latter without affecting the former. New instances may be brought within the original meaning of a statute with no offense to the drafters' intent. But to permit judicial enforcement of principles clearly excluded from the original meaning would transcend the judicial acknowledgment of supplementary specificity necessary to make the statute useful and would amount to a judicial challenge to the legislative branch. In overgeneralizing the principles of interpretation he employs to attack the Warren Court's desegregation and reapportionment decisions, Berger invites a demonstration of their limited utility and a resultant weakening of his case. To urge simultaneously the force of the framers' intention as a general guide to constitutional decisionmaking and to attack particular court decisions may cause the validity of the latter to be fought out in the debate about the former. Many will be satisfied that bringing forth limitations of express intention has vindicated the particular cases which Berger seeks to discredit. Thus, a more complex and sophisticated treatment of the variety of problems inherent in constitutional interpretation might have lent more perspective to Berger's assault on the Warren Court revolution.

Bridwell, Book Review, supra, at 914-15 (footnotes omitted).
15. See text accompanying notes 2 & 3 supra.
ing of Article IV, section 1. Rather, the full faith and credit clause itself did not, except as it authorized Congress to legislate on the topic, address questions of jurisdiction. Such questions were left to be resolved by accepted common law, conflict of laws rules of "international" jurisdiction.

In proving this thesis and establishing its significance, it will be necessary to trace the origins of the clause from the early precedents on enforcement of foreign judgments and the terminology of evidence in English law, through the American colonial attempts to deal with enforcement of foreign judgments, the interpretation of the full faith and credit clause of the Articles of Confederation, the history of the full faith and credit clause in the constitutional convention, and the pre-fourteenth amendment state and federal decisions interpreting Article IV, section 1, and its implementing statute. In so wide-ranging an investigation one risks losing sight of the ultimate objective of the inquiry: reappraisal of the equation of due process and full faith and credit jurisdictional standards in Pennoyer v. Neff. Therefore, in order clearly to relate the historical inquiry that follows to this eventual goal and identify the issues to be explored, a preliminary discussion of Pennoyer is necessary.

It is ironic that the case most famous for establishing the due process clause as a limitation on state-court jurisdiction did not involve that clause as a ground of decision. Neither, however, did it involve the full faith and credit clause of the Constitution. Suit was brought in the Circuit Court of the United States for the District of Oregon to recover possession of a tract of land located in Oregon. The plaintiff claimed under a patent issued to him by the United States in 1866. The defendant claimed by virtue of an execution sale made by a local sheriff upon a judgment of an Oregon state court rendered in 1866. The federal suit involved a collateral attack on the validity of the state judgment on the ground that the state court lacked personal jurisdiction over the defendant and had also failed to acquire jurisdiction over the property in question.

These issues were not controlled by the due process clause of the fourteenth amendment, because the fourteenth amendment

17. See § III infra.
18. See § IV(A) infra.
19. See § IV(B) infra.
20. See § V infra.
21. See §§ VI-VII infra.
22. See text accompanying note 9 supra.
23. See Kurland, supra note 6, at 572.
did not exist when the state judgment was rendered; and they could not have been controlled by the full faith and credit clause of the Constitution, which only requires that full faith and credit be given to state-court judgments in other states. Instead, the jurisdictional questions were controlled by the congressional act passed to implement the full faith and credit clause. That act read in pertinent part, as follows: "And the said records and judicial proceedings [of the courts of any state] . . . 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."

The text of this statute seems to implicate only the domestic rules of the judgment-rendering state as determinants of the faith and credit to be given the judgment by other courts "within the United States." As Justice Field acknowledged for the Supreme Court, however, this does not present a complete picture of the factors bearing on whether a judgment will bind the courts of another sovereign; an inquiry into the rendering court's jurisdiction under

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25. The precise language is: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1 (emphasis added). Of course, "in each state" can be read to mean "by every court, state or federal, in each state," thus imposing an obligation directly on federal courts sitting within the several states to give full faith and credit to state judgments. This is a natural reading of the clause, but the history of its development, as we will later examine it, tends to establish that only state courts were intended to be directly obligated by the clause. See also P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and The Federal System 842-43 (2d ed. 1973); Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 743-44 (1976). In any case, the former construction, even if proper, would not have applied to oblige the U.S. Circuit Court to give full faith and credit to the Oregon judgment in Pennoyer, because it would only be required to give such faith and credit to the judicial proceedings of states other than the one in which it was sitting, i.e., to the "judicial proceedings of every other state."

26. Act of May 26, 1790, ch. 11, 1 Stat. 122, as amended by Act of March 27, 1804, ch. 56, 2 Stat. 298 (emphasis supplied); now codified as 28 U.S.C. § 1738 (1976). The language of article IV, section 1, authorizing Congress to implement the full faith and credit clause provides only that the "effect" of "such . . . proceedings" may be prescribed, see U.S. CONST. art. IV, § 1. If this only authorizes Congress to prescribe the effect of state-court judgments in other state courts, some other basis of authority would be required to extend the congressional prescription to "every court within the United States," e.g., to federal courts. See Degnan, supra note 25, at 743-44. It seems likely that one basis of such authority lies in the article III power to establish inferior federal courts and to regulate their jurisdiction. However, article IV, section 1, coupled with the necessary and proper clause of article I, section 8, should probably be read to authorize Congress to declare the effect of state judgments in both state and federal courts, as well as to provide a scheme of direct and collateral attack on state-court judgments, if Congress chooses to do so. See text accompanying note 454 infra. This relatively broad congressional power should be carefully distinguished from the direct effect of the constitutional language, which is much narrower. See note 25 supra; and §§ III-VIII infra.
“international law” rules was also permitted by the statute.\textsuperscript{27} It was these rules of “international law,” and principles of “natural justice,” and “rules of public law” that Field subsequently indicated were to be incorporated into the due process clause of the fourteenth amendment in future cases.\textsuperscript{28} For present purposes, it will suffice to note that a reference to the domestic law of Oregon was apparently all that was necessary in \textit{Pennoyer} to decide the case.

Earlier, Field’s opinion appeared to construe the Oregon Code to forbid the procedure followed by the Oregon court. The opinion stated that

\begin{quote}
[t]he Code of Oregon provides for [constructive service of summons by publication] when an action is brought against a nonresident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, “unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached.” Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. \ldots In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court.\textsuperscript{29}
\end{quote}

If Field’s interpretation was correct, even though it was rendered under the belief that the state statute was attempting to restate “a principle of general, if not universal law,” then it was unnecessary for Field to pursue the discussion further. The established interpretation of the implementing statute of the full faith

\begin{itemize}
\item\textsuperscript{27} See \textit{Pennoyer v. Neff}, 95 U.S. 714, 729-30 (1878).
\item\textsuperscript{28} See \textit{id. at} 730, 733.
\item\textsuperscript{29} \textit{id. at} 720.
\end{itemize}
and credit clause required the federal courts to give the same effect to the Oregon judgment that the Oregon courts would give it. If the Oregon courts would treat the judgment as void under Oregon law, it was unnecessary to pursue either a discussion of what interstate or international rules of jurisdiction would require in a different case, or what due process would require in the future. The fact that Field did pursue such a discussion is, therefore, of great interest in determining whether he properly identified the jurisdictional standards that ought to govern assertions of state-court jurisdiction challenged under the due process clause. For, as we will see, the jurisdictional standards identified as pertinent to due process challenges were identical to the standards that had been used in full faith and credit cases before the ratification of the fourteenth amendment. This unnecessary equation of the due process and full faith and credit jurisdictional standards thus suggests that Field may simply have accomplished an apparently desirable result through main force in Pennoyer.

The description of Pennoyer thus far also confirms the lines of inquiry that the subsequent investigation ought to pursue. If Field’s characterization of non-domestic jurisdictional rules as “international,” and “principles of natural justice,” and “rules of public law” is accurate, a substantial question is raised about the modern view noted earlier that the rules are of constitutional magnitude. If they are not of constitutional magnitude, it is important to determine their source and characteristics precisely, both in evaluating the propriety of their incorporation into the due process clause and in understanding the proper role of the Supreme Court in enforcing the rules under the full faith and credit clause.

Central to this inquiry is the original meaning of the terms “full,” “faith,” and “credit” in Article IV, section 1, itself, as well as

30. It should be noted that there is another plausible way to read the quoted passage. Field may have been construing the Oregon code as adopting international principles of jurisdiction only to the extent of requiring that a nonresident’s property be located within the state before it could be subjected to the authority of the state and to the extent of limiting the effect of the judgment of an in rem proceeding to the property. Under this view, omitted from the state law would be Field’s “international” rule of jurisdiction that property must be attached before judgment, or before service by publication, or at the institution of the suit. See id. at 727. In many respects this reading accords better with Field’s later discussion. The difficulty with it is that there does not appear to have been such an “international” rule governing the timing of attachment before Pennoyer. See generally Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Cleland v. Tavernier, 11 Minn. 126 (1866). If Field was attempting to create such a rule in Pennoyer, it would be equally interesting in assessing his analysis of the relationship between the due process and full faith and credit clauses.


32. See note 16 and accompanying text supra.
the meaning of the same terms in the implementing statute. Likewise, the pivotal part played by the implementing statute in *Pennoyer* suggests that an inquiry into the intended constitutional role of Congress under the full faith and credit clause is also important. Combined with an examination of the role of the Supreme Court and lower federal courts in full faith and credit cases and certain other situations requiring the administration of common law, conflict of law rules, this should provide an adequate foundation for evaluating the respective roles of Congress and the Court in modifying the rules of jurisdiction. It is these issues that the following sections will explore.

III. THE ANTECEDENTS OF FULL FAITH AND CREDIT IN ENGLISH LAW

The original meaning of the full faith and credit clause of the Constitution has its roots in pre-Revolutionary War English decisions governing the enforcement of foreign judgments.33 The interaction between the terms "faith" and "credit" and the method of enforcing a foreign judgment in English law by offering the judgment as evidence of a claim or defense in an action reveals much about the context from which the terms were drawn by the framers of the Articles of Confederation and the Constitution.34 Impor-


34. In understanding the "original meaning" of a constitutional provision, it is critical to understand the context in which the provision was to operate and from which the language of the provision was drawn. This is a fundamental principle of adequate communication. As Professor Reed Dickerson puts it, "[i]n the communication of meaning there are two main elements: (1) the vehicle of communication
tant issues in the following discussion are (a) the extent to which the use of the terms "faith" and "credit" incorporated specific jurisdictional prerequisites, and (b) the extent to which the use of such terms would have connoted that a particular evidentiary effect was being given a judgment, e.g., a "conclusive," as opposed to a "prima facie," or some other, effect.

The issue of what evidentiary effect the terms "faith" and "credit" imported is significant in establishing the general purposes and "original meaning" of the full faith and credit clause. A study of the use of the terms in English law will help set "the maximum limits on what the total communication" of the clauses in the Articles of Confederation and Constitution would have meant to the audience addressed. More specifically, the evidentiary effect required by the terms in the full faith and credit clause of the Constitution will be important in assessing the relative roles of Congress and the Supreme Court in enforcing the clause.

A. Enforcement of Foreign Judgments in English Law

English common law courts originally declined jurisdiction over cases requiring the administration of foreign law. Probably acting under the inconvenience of this inhibition, however, the same courts came to the view that they would enforce foreign judgments in England. The classical doctrine was that the foreign judgment created "a new cause of action, in the nature of a simple contract, suable upon in England." Under this doctrine the earliest decisions refused to reexamine the merits of the case determined and controlled by its author, and (2) the context within which that vehicle operates. No communication is complete without both. Dickerson, supra note 14, at 103. See id. at 103-36.

35. "Single words carry, even into context, an important one-way significance: Their established ranges of connotations set maximum limits on what the total communication can mean to the audience addressed. That they do not fix minimum limits reflects the normal functioning of context." Id. at 63-64.

36. See, e.g., A. Ehrenzweig, A TREATISE ON THE CONFLICT OF LAWS 4-5, 162 (1962); Anton, The Introduction into English Practice of Continental Theories on the Conflict of Laws, 5 INT. & COMP. L.Q. 534, 534-35 (1956); Davies, The Influence of Huber's De Confictu Legum On English Private International Law, 18 Brit. Y.B. INT'L L. 49, 51 (1937); Sack, Conflicts of Laws in the History of English Law, in 3 LAW: A CENTURY OF PROGRESS 342, 378-85 (1937). The law merchant was administered by local mercantile courts and later incorporated into the common law; other cases involving foreign transactions were dealt with by the admiralty. See Davies, supra, at 51; Sack, supra, at 378-81.

37. See A. Ehrenzweig, supra note 36, at 162; Sack, supra note 36, at 381-82. "[T]he doctrine gradually became adopted that foreign cases, at least as a rule, should be left to be determined by foreign courts administering the foreign law applicable to such cases, and that the English courts...should, on proper occasions, give effect to foreign judgments in England." Id. at 384-85.
mined by the foreign judgment; that is, they apparently treated the judgment as conclusive.\textsuperscript{39} The courts would determine only whether or not a tribunal had jurisdiction ("in the international-law sense of the word") to render a judgment.\textsuperscript{40} By the latter part of the eighteenth century, however, about the time of the adoption of the Articles of Confederation, it seems to have become established that a foreign judgment was only to be treated as prima facie evidence of a debt.\textsuperscript{41} The terms "faith" and "credit," especially the latter term, were often used in the decisions to describe the reception and enforcement of the foreign judgments.

References appear as early as the sixteenth century to the enforcement of foreign judgments in English admiralty courts.\textsuperscript{42} Those courts were governed by the civil law, and thus they would execute the judgments of foreign admiralty courts.\textsuperscript{43} For example, in \textit{Jurado v. Gregory}\textsuperscript{44} the Court of King's Bench stated that when a "sentence is obtained in a foreign Admiralty, one may libel for execution thereof here, because all the Courts of Admiralty in Europe are governed by the civil law, and are to be assistant one to another, though the matter were not originally determinable in our Court of Admiralty."\textsuperscript{45}

Although English common law and equity courts would not "execute" the judgments of foreign tribunals, the earliest opinions indicated that the merits of foreign judgments would not be reexamined when those judgments were brought into issue in domestic

\begin{itemize}
\item \textsuperscript{39} See id. at 385.
\item \textsuperscript{40} Id.
\item \textsuperscript{43} See Sack, supra note 36, at 392.
\item \textsuperscript{44} 86 Eng. Rep. 23 (K.B. 1670) (also reported in 82 Eng. Rep. 1191 (French), 83 Eng. Rep. 400, and 84 Eng. Rep. 320). The clearest report seems to be in 86 Eng. Rep. 23. In \textit{Jurado} there was allegedly an agreement breached whereby defendant agreed to receive forty cases of wine aboard a ship. There was a libel in a foreign admiralty court and a sentence that the wine should be received into the ship, but the defendant still refused to receive it. A second libel was then commenced in an English admiralty court to enforce the former sentence. Defendant sought a writ of prohibition from the common-law courts against this suit on the grounds that the contract was "made upon the land." \textit{Id.} "After the Restoration (1660), the admiralty was limited, almost exclusively, to the cognizance of cases that happened on the high sea and are maritime in their nature, and the common-law courts obtained exclusive jurisdiction in England over all other foreign cases." Sack, supra note 36, at 385 (footnotes omitted).
\item \textsuperscript{45} 86 Eng. Rep. at 23. The prohibition was, however, granted, the rule being limited to final or "compleat sentences," and the sentence at issue was only "an award", i.e., interlocutory. \textit{Id.} To like effect see Newland v. Horseman, 23 Eng. Rep. 275 (Ch. 1681).
\end{itemize}
cases. In *Badtolph v. Bamfleld*, the Court of Chancery granted an injunction against proceedings at law in trespass, considering that the matter at issue in the legal proceeding was one of state, "concerning the Justice of another King in Amity with the King of England, and that what was done there [in Iceland] was according to their Law. . . ."47

Decisions as early as 1678 used the term "credit" in conjunction with discussions of foreign judgments, discussions that, at the time, apparently viewed such judgments as conclusive on the merits. In *Cottington v. Gallina*, Mr. Cottington petitioned the Lords in Parliament for relief from a sentence of the delegates in a matrimonial cause declaring him to be married to one Signora Angela Margarita Gallina, a "very lewd" woman. Cottington claimed that at the time he had married her at Turin, Signora Gallina had another husband, who was still alive. Although she had been divorced from this gentleman by the Archbishop of Turin before her marriage to Cottington, the sentence of the Archbishop was alleged to be void. Lord Nottingham stated:

[i]t is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad and give no credit to our sentences.49

Statements of the general rule were often qualified by references indicating that the foreign court had to be of competent jurisdiction; but if this condition was satisfied, English decisions as

46. 23 Eng. Rep. 102 (Ch. 1674) (also reported under the name Bluet v. Bamfleld, 22 Eng. Rep. 778 (Ch. 1674)). In *Badtolph* the king of Denmark had granted the plaintiff's father exclusive trading rights to Iceland. The plaintiff's father assigned the rights to plaintiff, who found the defendants trading in Iceland and seized and condemned their property there according to the laws of Iceland. In 1673 the plaintiff came to London where the defendants sued him in trespass for the seizures. Plaintiff sought an injunction to stay the proceedings at law. 23 Eng. Rep. at 102-03.

47. 23 Eng. Rep. at 103. The court added that "it was not properly triable here, whether the King of Denmark had Power to make such a Grant." *Id.* See also *Gold v. Canham*, 22 Eng. Rep. 816 (Ch. 1678-1679), *discussed in* Kennedy v. Earl of Cassillis, 36 Eng. Rep. 633, 640 (Ch. 1818) (sentence of the Court at Florence for import customs, "the justice whereof is not examinable here.").


late as the early eighteenth century seemed to speak of the foreign judgment as conclusive on the merits. During this period (the early eighteenth century), however, language began to appear in the decisions questioning the conclusiveness of foreign judgments. In *Dupleix v. DeRoven* the English statute of limitations governing simple contracts was pleaded to an action on a French judgment. The court held that even though the plaintiff had obtained a judgment in France, in England the debt created by the judgment must be considered as a debt by simple contract, as opposed to debt on a record, such as upon the judgment of a domestic court of record. "The plaintiff can maintain no action here, but an *indebitatus assumpsit*, or an *insimul computasset*, &c., so that the statute of limitations is pleadable in this case."52

*Indebitatus assumpsit* would lie only on a simple contract debt or a quasi contractual obligation having the force and effect of a simple contract debt. It would not lie on a specialty. A judgment rendered by a domestic court of record was a specialty. Thus *indebitatus assumpsit* would not lie on such a judgment. However, a judgment of a foreign court was not a specialty, because the foreign court was not considered to be a court of record. Consequently, the foreign court's judgment had only the force and effect of a simple contract and *indebitatus assumpsit* would lie.53

By a parity of reasoning, the judgment of a foreign court was not "conclusive evidence" of a debt, that is, res judicata, and it could therefore be rebutted by other evidence. The authority of the foreign court did not proceed from the same sovereign as that of the domestic courts which were being asked to enforce the judgment. Therefore, the foreign judgment would not be given the effect of "record evidence," a conclusive effect, as would the judgment of domestic courts of record. Rather, it would be given only an effect as "mere evidence" of the debt.54

That this view was not entirely settled, however, is apparent from other decisions during the first half of the eighteenth century.

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50. See Hamilton v. Dutch East India Co., 3 Eng. Rep. 573, 577 (H.L. 1732); Lumley v. Quarry, 87 Eng. Rep. 1061, 1061 (K.B. 1702). Jurisdictional arguments played a prominent part in the appeal in *Hamilton, supra*, and it appears very clearly that the jurisdiction referred to was jurisdiction in the "international," as opposed to "local" or "domestic" sense. But *cf*. Roach v. Garvan, 27 Eng. Rep. 954 (Ch. 1748) (in which the marriage of two minors was alleged to be valid because so declared by a French court of competent jurisdiction; the Lord Chancellor seemed to question whether the declaration had been by a court of proper domestic jurisdiction in France). *Id.* at 955.

51. 23 Eng. Rep. 950 (Ch. 1705).

52. *Id.* at 951.


54. See *id.*; see also text accompanying notes 60, 115 & 289-99 infra.
In *Burroughs v. Jamineau* an injunction was granted against a proceeding at law on a bill of exchange. The plaintiff's acceptance of the bill had previously been vacated by the sentence of a court at Leghorn. The Lord Chancellor declared that the case had been determined by "a proper judicature, that should be binding there"; and that English courts "have always a regard to the sentence of foreign courts." Even though he acknowledged that the judgment would provide a proper defense at law, he refused to dismiss the bill because "a difficulty might arise at law, as the plaintiffs in the action, are not the persons against whom the sentence was given in Leghorn." However, he did clearly indicate that the foreign judgment might either be "pleaded to the action, or given in evidence, as if a seaman brings an assumpsit for wages, the defendant may plead in bar, a sentence of the Admiralty, or give it in evidence upon non assumpsit, because it defeats the promise."

A similar issue provoked extensive discussion of the conclusive nature of foreign judgments in the 1744 decision of *Gage v. Bulkeley*. In *Gage* the sentence of a French Court was pleaded in bar to a bill for an accounting in an English chancery court. The Lord Chancellor made the following query and observations:

> Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority. . . . You cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may an *assumpsit* in nature.

55. 25 Eng. Rep. 235 (Ch. 1726) (also reported in 93 Eng. Rep. 815 (K.B. 1726)).
57. *Id.*
58. *Id.* A different version appears in 93 Eng. Rep. at 815:

> The Chancellor declared, that if he was to try the cause at law, he would allow the plaintiff the benefit of this matter upon the trial. But as other Judges might be of a different opinion, he would not put the plaintiff upon the difficulty and hazard of a trial. And he said he remembered a case which came before him in the Lord Mayor's Court, when he was Recorder of London: where a mariner sued in the Admiralty Court for his wages, and there being a sentence against him there, he afterwards brought his action in the Mayor's Court for the same wages; and his Lordship (as recorder) being doubtful whether he should allow the defendant to give the sentence in the Admiralty Court in evidence upon non assumpsit, asked the opinion of Chief Justice Holt, who said, that whatever defeated the promise, might be given in evidence on non assumpsit, and that the sentence in the Admiralty Court would be good evidence.

*Id.*
of debt upon a simple contract, and give the judgment in
evidence, and have a verdict. So that the distinction
seems to be, where such foreign sentence is used as a plea
to bind the courts here as a judgment, and when it is made
use of in evidence as binding the justice of the case only.60

It was argued that this view was correct as applied to actions at
law, but in equity courts the rule was different, such pleas being permitted.61 Ultimately, this argument was also rejected by the
court.62

The doctrine announced in Gage was confirmed in the impor-
tant case of Walker v. Witter,63 where the entire Court concluded,
with Lord Mansfield, that foreign judgments were grounds of ac-
tion, but were reexaminable.64 The defendant, it was held, could
not plead nul tiel record (the general issue in actions of debt on a
record, such as an action on a judgment of a court of record) to an
action on such a judgment, because a foreign court was not a court
of record.65 “Though the plaintiffs had called the judgment, a rec-
ord, 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.”66 The use of the term
“faith” in this passage seems to import conclusiveness. Moreover,
other similar references to the terms “faith” and “credit” can be
found.

For example, in Galbraith v. Neville,67 Justice Buller, describ-
ing the rule of Walker v. Witter stated that Walker held that a for-

gotten judgment was only to be taken as prima facie correct, just as
would be the case with the judgments of domestic courts not of

60. 27 Eng. Rep. at 824.
61. Id. at 825.
62. Id. at 826-27. The precedential value of the case is somewhat diminished by
the report in 28 Eng. Rep. 563, where the court gave as a reason for refusing the plea
in bar that the French court was one of inferior jurisdiction. Id. at 564.
64. Id. at 4-6.
65. Id. at 4.
66. Id. Walker did not necessarily settle the issue. Lord Keynon subsequently
(case appears as a note in Walker). The Gage-Walker rule prevailed, however. See
id.; Bayley v. Edwards, 36 Eng. Rep. 1029, 1031 (Ch. 1792). Ultimately, however, a
distinction grew up that treated foreign judgments as reexaminable when sued on
affirmatively, but conclusive when relied upon as defenses. See Geyer v. Aguilar,
1795) (Eyre, C.J., dissenting). Today foreign judgments are generally conclusive in
England regardless of how urged. 8 HALSBY’S LAWS OF ENGLAND 460 (4th ed.
1974); A. DICEY & J. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 1018-24
(9th ed. 1973); F. NORTH, CHESHIRE’S PRIVATE INTERNATIONAL LAW 650-51 (9th ed.
1974).
record. Otherwise, they would be given “more credit,” that is “equal force with those of Courts of Record [in England].” This would be impermissible, because a foreign judgment had never been considered as a record and would not, as a result, be given the same obligatory force as a record. It could only be given an effect as prima facie evidence of the justice of a demand in an action of assumpsit, having no more credit than is given to every species of written agreement, viz. that it shall be considered as good till impeached.68

Another such passage appears in the dissent of Lord Chief Justice Eyre in Phillips v. Hunter.69 Chief Justice Eyre drew a distinction between situations in which a party benefiting from a foreign judgment sought to enforce it in an English court and foreign judgments coming into controversy in other ways.70 Judgments sued on affirmatively were reexaminable, while judgments used defensively were conclusive. In describing the effect of judgments used defensively, he stated: “In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us.”71

Taken with the use of the term “credit” in earlier cases apparently treating foreign proceedings as conclusive,72 the above passages may plausibly be read as signifying that “faith” and “credit” signified conclusiveness on the merits when used in discussions of the effects of judgments. For a number of reasons, however, it seems improbable that the terms always meant this to English judges and lawyers. First, in all the above-quoted passages, the terms are modified by other words or clauses. It appears that it is the modifiers that tend to add the element of conclusiveness, rather than the words “faith” and “credit” alone. Thus, certain records are given “implicit faith,”73 English courts of record ought not to give “more credit” to foreign judgments than to those of domestic courts not of record—i.e., they should receive “no more credit” than every species of written agreement74 and “entire faith and credit” should be given to the judgments of foreign courts when they are not sued on affirmatively and they should be considered “conclusive upon us.”75 It seems likely that if “faith” and

68.  Id.
70.  Id. at 622.
72.  See notes 48-49 and accompanying text supra.
73.  See text accompanying note 66 supra (emphasis added).
74.  See text accompanying note 68 supra (emphasis added).
75.  See text accompanying note 71 supra (emphasis added).
“credit” standing alone imported conclusiveness, additional modifiers would not so often have been thought necessary to convey the essential message of the passages. Read in light of their modifiers, therefore, the words “faith” and “credit” seem to have been used as expressions that by themselves connoted no specific weight or conclusiveness.

Second, it does not seem that use of the term “credit” in the early cases treating foreign judgments as conclusive necessitates a different inference. The mere appearance of “credit” in discussions that otherwise implied foreign judgments were binding does not establish to a substantial degree of certainty that the word standing alone would always mean as much. Also, it seems important that the decisions in question were interspersed with others that seemed to treat foreign judgments as “evidence” only. This renders the precedents in question sufficiently unclear that one cannot determine with assurance whether the English courts were actually treating the foreign judgments as res judicata in any given case. If they were not, the discovery of the word “credit” in the context of a discussion of such judgments signifies little or nothing concerning weight or effect.

Finally, it appears from another source in the case law that “faith” and “credit” were words that were used interchangeably to refer to both conclusive and nonconclusive judgments. That source is the remarkable decision of the House of Lords in The Duchess of Kingston’s case. The trial was for bigamy on the part of Elizabeth Chudleigh, who had allegedly married Evelyn Pierpoint, Duke of Kingston, at a time when she was already married to Augustus John Hervey. The marriage to Hervey had taken place in 1744, and in 1768 Elizabeth had instituted a (clearly collusive) suit of jactitation of marriage against Hervey in the Consistory Court of London. The sentence of the Consistory Court was that Elizabeth and Hervey were not married. This judgment was offered as conclusive in her defense at the bigamy trial. The arguments of counsel ranged over the effect of both domestic and foreign judgments and contained many references to the terms

76. See text accompanying notes 57-60 supra.

77. 168 Eng. Rep. 175 (H.L. 1776). The whole colorful story is told in L. MELVILLE, The Trial of the Duchess of Kingston in NOTABLE BRITISH TRIALS (1927) [hereinafter cited as L. MELVILLE], wherein, also, the arguments of counsel described infra, are reported in full. The case is discussed in Nadelmann, supra note 33, at 45-46. Nadelmann recites arguments in the case quoting the language of full faith and credit from earlier decisions in which the common-law courts had given effect to the decisions of the ecclesiastical courts. See id. at 46-48. See also id. at 44-45, where he discusses the full faith and credit language as applied to ecclesiastical decisions.

"faith" and "credit."\(^79\)

Thus Mr. Wallace for the defendant, in arguing that the sentences of ecclesiastical courts were conclusive, quoted language from decisions of the common law courts holding "their proceedings," are entitled to "faith and credit,"\(^80\) stating that "we ought to give credit to their sentences, as they give to the judgments in our Courts,"\(^81\) and "that the temporal Courts must give credit to it until it is reversed."\(^82\) He likewise argued that the common law courts had no right "to look into the cause of that sentence . . . and they must give faith and credit to the sentence,"\(^83\) and, interpreting a case, he stated that "the Court conceived they were to pay that credit which every Court before had done in Westminster Hall, which all Judges in every age had done to the ecclesiastical jurisdiction in cases within their jurisdiction."\(^84\) Significantly, he also argued that the same rules applied to the judgments of foreign courts in cases within their jurisdiction,\(^85\) and that "credit" must be given "to the condemnation of the Court in France"\(^86\) and "faith and credit" to the Admiralty jurisdiction on a question of prize.\(^87\)

Dr. Calvert, also for the defense, argued with respect to the judgments of ecclesiastical courts that "to this time there always has been such credit given to the sentence, that it is taken to be conclusive and be determined between the parties."\(^88\) He also argued that "[i]f danger is to be apprehended from too much credit being given to such sentences, left for improper purposes they might be unduly obtained, there seems to be less danger in questions that arise upon marriage than in any other."\(^89\) In a similar vein, Dr. Wynne argued for the defendant "that there is the utmost wisdom in those resolutions which declare that there is an implicit credit due from all other Courts to the sentences of Courts having the proper jurisdiction over the matter in which the sentence has been pronounced."\(^90\)

\(^{79}.\) See generally L. Melville, supra note 77.
\(^{80}.\) L. Melville, supra note 77, at 79.
\(^{81}.\) Id. at 81.
\(^{82}.\) Id.
\(^{83}.\) Id.
\(^{84}.\) Id. at 85.
\(^{85}.\) Id. at 86.
\(^{86}.\) Id. at 87.
\(^{87}.\) Id.
\(^{88}.\) Id. at 106 (emphasis added).
\(^{89}.\) Id. at 107 (emphasis added).
\(^{90}.\) Id. at 125 (emphasis added). See also id. at 127 (court of incidental jurisdiction will give credit to sentence of court that law and constitution have entrusted with jurisdiction over the entire matter in question).
The Attorney General countered many of the arguments for the defense, including those drawn from cases whose holdings were supposed to have demonstrated the conclusiveness of the ecclesiastical courts' sentences.\textsuperscript{91} One of the important distinctions he drew was that the cases stood at most for the proposition that the judgments bound parties and those in privity with parties.\textsuperscript{92} At one point, in distinguishing a case, he stated:

Here the question was, not whether the sentence shall have credit in respect of the understanding which the spiritual judges have in the rules and course of their own law, but whether a probate, granted, of course, on the oath of the very party charged with the forgery, shall be a full and conclusive bar to the prosecution [for forging a will].\textsuperscript{93}

More important arguments concerning the effect of foreign judgments were made for the prosecution by the Solicitor General. He agreed that judgments in rem by a court having "a peculiar and exclusive jurisdiction over the subject-matter of the cause," such as a judgment of an admiralty court condemning a ship and certain sentences of the ecclesiastical courts, were conclusive and could not "be contested in any other court collaterally and incidentally."\textsuperscript{94} In other cases, however, including those involving foreign judgments, the judgments were not conclusive. Where a foreign court's decision was offered "as an evidence of right," its judgment could only be given effect "so far as it is just." The court requested to give the foreign judgment effect owed "no obedience to the Court which pronounced it, and is equally competent to give the law to the parties." Nevertheless the effect of the foreign judgment was beneficial to the party who obtained it, because "the justice of it is presumed, the truth of the facts on which it proceeded is admitted without proof, and the adverse party is obliged to demonstrate the falsehood or inequity of it."\textsuperscript{95} He continued, citing the case of \textit{Sinclair v. Fraser}, a decision of the House of Lords in 1771, holding a judgment obtained in Jamaica entitled to prima facie evidentiary effect.\textsuperscript{96}

Mr. Dunning, also for the prosecution, argued that the judgments of ecclesiastical courts were entitled to the same "attention and faith" as those of temporal courts, but as courts with concur-

\textsuperscript{91} See id. at 132-40.
\textsuperscript{92} L. Mélville, supra note 77, at 140.
\textsuperscript{93} Id. at 141.
\textsuperscript{94} Id. at 153.
\textsuperscript{95} Id. at 153-54.
\textsuperscript{96} Id. at 154. \textit{Sinclair} was subsequently relied on in Walker v. Witter, 99 Eng. Rep. 1, 4 (K.B. 1778).
rent jurisdiction over the question being disputed, their decisions did not "exclude another decision elsewhere."\textsuperscript{97} Dr. Harris, for the prosecution, stated the general rule "that respect" was due "from the Court in England to the decisions of another" while "comity" was due "to the decisions of all foreign Courts; and it might be more accurate and more strictly true to say in general that one Court in England is bound by the judgments and sentences of another," although he argued that this general rule was subject to an exception when a judgment was procured by fraud.\textsuperscript{98} After reviewing certain case law, he concluded:

From all which nothing farther is to be collected than that a sentence in the Ecclesiastical Court is to have \textit{full} credit given to it as long as it subsists unrepealed; and that it is not to be overturned in the same Court where it was given, or by any other, on account of error and mistake in law or fact; and this is certain law.\textsuperscript{99}

Mr. Wallace, for the defense in rebuttal, attempted to fit the judgments of ecclesiastical courts within the in rem and exclusive jurisdiction exceptions admitted by the prosecution,\textsuperscript{100} and distinguished \textit{Sinclair v. Fraser} and other cases cited by the prosecution as ones in which the judgments were presented for the courts' aid in carrying them into execution, as opposed to being brought into the case collaterally, by way of defense.\textsuperscript{101} He later discussed a suit against Hervey by a creditor who had furnished his wife necessaries on the strength of their marriage. The creditor's suit had failed because of the sentence of the ecclesiastical court: "The sentence of the Ecclesiastical Court had determined the point; the Judge apprehended that the question was closed, and that he was bound to give faith and credit to the sentence."\textsuperscript{102} Interestingly, Dr. Calvert, in rebuttal for the defense, characterized the prosecution's refutation of a defense precedent as one in which "they could not give credit to the reporter," an answer that Calvert deemed "by no means satisfactory."\textsuperscript{103}

These excerpts reveal that as advocate's tools the terms

\begin{itemize}
\item \textsuperscript{97} L. \textsc{Melville}, supra note 77, at 168.
\item \textsuperscript{98} \textit{Id.} at 180-81.
\item \textsuperscript{99} \textit{Id.} at 187 (emphasis added).
\item \textsuperscript{100} \textit{See id.} at 197.
\item \textsuperscript{101} \textit{Id.} at 200-01.
\item \textsuperscript{102} L. \textsc{Melville}, supra note 77, at 214.
\item \textsuperscript{103} \textit{Id.} at 216. Ultimately, Elizabeth Chudleigh's defense was rejected and she was convicted. However, by statute she was entitled to pray the benefit of the Peerage, \textit{i.e.}, exemption from punishment (which, in this case, was burning of the hand by a hot poker). Although she was, by reason of her conviction, not the Duchess of Kingston, it turns out that Augustus John Hervey's brother, the Earl of Bristol, had died sometime past, with the result that his title devolved upon Hervey. Thus Eliz-
“faith” and “credit” were quite flexible. Sometimes, as in the arguments of Mr. Wallace, the context clearly reveals that they were used to signify conclusiveness. Yet Dr. Calvert and Dr. Wynne, also arguing in favor of the conclusiveness of the ecclesiastical court’s judgment, thought it necessary to modify the terms in order to convey the proper message; thus they used expressions like “such credit,” “too much credit,” and “implicit credit.” The attorneys for the prosecution similarly varied in their usage of the terms. The Attorney General appeared to use the term in a conclusive sense, but the context of Mr. Dunning’s and Dr. Harris’ remarks indicate that they believed a modifier, such as “full,” was necessary to convey this meaning. Dr. Calvert’s use of the expression “credit to the reporter” also seems to suggest that the term would be applied broadly to a range of evidentiary situations.

Overall, the arguments excerpted fit the pattern of usage found in the case law. The words “faith” and “credit” seem by these sources to be terms generally employed to signify that some evidentiary effect was being given a judgment, report, etc. Sometimes the context suggests, more or less clearly, that the speaker or author was using the words to import conclusiveness on the merits. At other times it was thought necessary to modify the single terms with a word such as “entire,” “full,” or “implicit.” On the whole, it is possible to say only that the words appear to have been evidentiary terms of art that could be used to cover a range of effects or weights. This conclusion is strongly supported by one final source: Sir Geoffrey Gilbert’s treatise, The Law of Evidence.

B. Gilbert’s Law of Evidence

Professor Nadelmann has described Gilbert’s Law of Evidence as the “first systematic presentation of the subject” and “a classic.” There were numerous printings. Nadelmann observes that Blackstone praised the work in his Commentaries and that abeth was Countess of Bristol and entitled to benefit of Peerage, a result predicted by Lord Mansfield. The lucky are with us always. See id. at 34, 39. See text accompanying notes 79-87, 102 supra. See text accompanying notes 88-90 supra. See text accompanying notes 93 supra. Compare text at notes 97-99. See text accompanying note 103 supra. Nadelmann, supra note 33, at 41. Nadelmann discusses Gilbert’s treatise extensively at 41-44. Id. at 41. 1754 (Dublin), 1756 (London), 1760 (London), 1769 (London), 1777 (London), 1788 (London, Philadelphia), 1791 (London), 1801 (London), and 1805 (London).
"James Wilson recognized it as the leading text in his Lectures on Law at the University of Pennsylvania," and he also cites evidence that the treatise was widely used in the American Colonies soon after its appearance.

References from Gilbert tend to confirm the evidentiary character of the words "faith" and "credit," as well as their use in describing evidence with a range of weight. Gilbert, in describing the necessity of relying on witnesses when we cannot observe events for ourselves, states that even though such evidence is a step removed from demonstration, "there is that Faith and Credit to be given to the Honesty and Integrity of credible and disinterested Witnesses," which allows us to accept their testimony about events as if we had actually seen them ourselves. In discussing copies of records (exemplifications) under seal, he states that they "are of better Credit than any sworn copy" and when exemplifications are "Under the Broad Seal, such Exemplifications are of themselves Records of the greatest Validity, and to which the Jury ought to give Credit, under the Penalty of an Attaint; for there is more Faith due to the most solemn Attestations of Public Authority than any other Transactions whatever." In explaining why matters under seal might be delivered to the jury, he said it was "because these Things that are generally of higher or at least of equal Credit with Matters sworn Viva Voce" would, nevertheless, not be understood so well as oral evidence "where the Jury have Liberty to put what Question they please," so matters under seal were given to the jury "to be seen and considered, that Things of greater Credit may be equally understood with other Matters that carry less Authority." He continued:

But the Chirograph of a Fine, a sworn Copy of any other Writing . . . shall not be delivered to the Jury, for these have no intrinsic Credit in themselves . . . but they have no Credit but what they derive from something else, viz. from the Oath of the Person who attesteth them . . . so that they receive their Credit from some Act in Court, but do not carry it along with them . . . . But Things under Seal are supposed to have an intrinsic Credit. . . . But of Writings that are not under Seal, . . . their Credit must totally arise from some Act in Court, and therefore they can-

111. Id.
112. Id. at 41-42.
114. Id. at 4. The entire passage is quoted in Nadelmann, supra note 33, at 42.
not be put in the Power of the Jury.\textsuperscript{117}

Later he also stated that "the Seal of a Court created by Act of Parliament, is of full Credit."\textsuperscript{118}

From Gilbert, more clearly than any other source, we see that there were significantly different degrees of "faith" and "credit," which were signified by appropriate modifiers. Thus it would be important, in communicating conclusive evidentiary effect on the merits through these terms, at least to employ with them a modifier such as "full". The words "faith" and "credit" alone simply could not assure conclusiveness.

C. Conclusions

The context in which the terms "faith" and "credit" appeared in English law would surely have influenced a careful draftsman in the American Colonies. As observed, Gilbert's \textit{Law of Evidence} was widely known. \textit{The Duchess of Kingston's Case} was a "cause celebre."\textsuperscript{119} The arguments of counsel occurred approximately eighteen months before the Continental Congress added the full faith and credit clause to the Articles of Confederation.\textsuperscript{120} The "sensational affair" was probably followed closely everywhere and reports of the trial, "printed in 1776, must have reached the colonies in due course."\textsuperscript{121} Lord Mansfield's opinion in \textit{Walker v. Witte}, decided after the full faith and credit clause of the Articles of Confederation had been drafted, nevertheless exerted influence in the arguments over the interpretation of that provision,\textsuperscript{122} and thus was probably known to the framers of the Constitution. More importantly, the common law jurisprudence shared between England and the American Colonies would have made the problem of enforceability of the judicial proceedings of one sovereign in the

\begin{footnotes}
\textsuperscript{117} G. Gilbert, \textit{supra} note 113, at 18-19.

\begin{quote}
\begin{itemize}
\item Accusations upon torture, are not to be reputed as testimonies. For torture is to be used as means of conjecture, and light, in the further examination, and search of truth: and what is in that case confessed, tendeth to the ease of him that is tortured; not to the enforcing of the torturers and therefore ought not to have the credit of a sufficient testimony. . . .
\item In a controversy of fact, the judge being to give no more credit to one, than to the other, if there be no other arguments, must give credit to a third; or to a third and fourth; or more; for else the question is undecided.
\end{itemize}
\end{quote}
\textit{Id.} at 122.
\textsuperscript{119} Nadelmann, \textit{supra} note 33, at 44-56.
\textsuperscript{120} \textit{See id.}
\textsuperscript{121} Nadelmann, \textit{supra} note 33, at 46 (citations omitted).
\textsuperscript{122} \textit{See id.} at 49-53; \textit{see also} text accompanying note 182 \textit{infra.}
courts of another apparent to lawyers in the colonies. The likelihood is that the terminology peculiar to that problem would also have been familiar to American lawyers and used by them in the English mode.

For these reasons the English usage of "faith" and "credit" must certainly have played a part in the drafting of the full faith and credit clauses of both the Articles of Confederation and the Constitution. The most significant point for the purposes of this article is that the terms alone, or with modifiers, seemed to carry no jurisdictional significance whatever. From the materials examined it is possible to conclude that the words "faith" and "credit" could be used to signify that a judgment ought to receive a res judicata effect in a subsequent court proceeding, although the probability is that to convey this much meaning the terms at least required a modifier, such as "full." However, nowhere does it appear that the words, even with modifiers, incorporated any jurisdictional standards. Statements of jurisdictional conditions were always separated from statements of faith, credit, or effect. Furthermore, the words "faith" and "credit" were apparently never, in any context, employed to incorporate jurisdictional principles. Thus, the outer limits of the meaning of "faith" and "credit", or the phrase "full faith and credit" in English law simply would not have been broad enough to encompass rules of jurisdiction.

It remains to add to this context by examining colonial statutory attempts to deal with the problem of judgments taken from sister colonies and the purposes and interpretation of the full faith and credit clause of the Articles of Confederation. Conceivably, the context could have been altered significantly by peculiar difficulties present in the colonies. In addition, the general purposes of the clause in the Articles of Confederation could signify an intention to deal with the problems of sister-colony judgments at a jurisdictional level, as well as to prescribe that they should have a conclusive effect if otherwise (i.e., jurisdictionally) sound.

IV. THE ANTECEDENTS OF FULL FAITH AND CREDIT IN THE AMERICAN COLONIES AND UNDER THE ARTICLES OF CONFEDERATION

The full faith and credit clause of the Articles of Confederation is found in the last paragraph of Article IV, an article open-
ing with the statement of design, "[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union."126 Appearing prior to the full faith and credit clause in Article IV were a privileges and immunities clause, a clause providing for free ingress and egress by the people of each state to and from any other state, a clause guaranteeing to the people of each state the same privileges of trade and commerce as the inhabitants of a state, and an extradition clause.127 Article IV concluded: "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."128

The full faith and credit clause was not in the draft of the Articles of Confederation approved by the Continental Congress on August 20, 1776.129 After the original draft had been discussed in the states and amendments had been suggested, the Congress, on November 10, 1777, appointed a committee of three members to consider proposals for additional Articles.130 This committee, composed of Richard Law of Connecticut, Richard Henry Lee of Virginia, and James Duane of New York, reported seven additional articles, including the full faith and credit clause.131 The clause as it finally appeared in the Articles was adopted on November 12, 1777, "without any change and, it would seem, without debate."132 However, an amendment was proposed to add the following:

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 action shall be brought, to answer on damages to the adverse party, in case the original judgment should be afterwards revised and set aside, and provided the party against whom such judgment may have been obtained, had notice in fact of the service of the original writ upon which such judgment shall be founded.133

Nadelmann, supra note 33, at 34-53; Radin, supra note 33, at 2-7; Sumner—History, supra note 33, at 228-30.
126. Arts. of Confed. art. IV.
127. Id. See Nadelmann, supra note 33, at 34-35; Radin, supra note 33, at 2-3.
128. Id. See Nadelmann, supra note 33, at 35; Radin, supra note 33, at 3-3; Sumner—History, supra note 33, at 229.
129. See Nadelmann, supra note 33, at 35; Radin, supra note 33, at 4; Sumner—History, supra note 33, at 229.
130. See Nadelmann, supra note 33, at 35; Radin, supra note 33, at 4; Sumner—History, supra note 33, at 229-30.
131. Nadelmann, supra note 33, at 35; Radin, supra note 33, at 4; Sumner—History, supra note 33, at 229-30.
132. Nadelmann, supra note 33, at 35. See also Radin, supra note 33, at 5.
133. As quoted in Radin, supra note 33, at 5. See also Nadelmann, supra note 33, at 35-36.
The motion to add the amendment was defeated, all three committee members voting against it.\textsuperscript{134}

Why was the full faith and credit clause, as adopted, so readily agreed upon by the delegates? Why was the provision for an action of debt, with its bonding and notice requirements, defeated? The evidence is scant. Professor Radin has suggested that “the idea of full faith and credit, so far as the judicial decisions are concerned, meant little more than that an action of debt will lie in every state on the judgment of another state.”\textsuperscript{135} Thus, he concludes that “[i]t must have been the provisions about sureties and damage that caused the motion to fail.”\textsuperscript{136} Radin, however, concedes that it is “quite possible” that the motion failed because “its provisions seemed unnecessary” or “because it was felt that each state should make its own provision to protect those who, whether residents or domiciliaries, attempted to enforce the judgment of another state and found that judgment pulled from under them afterwards.”\textsuperscript{137} He does not, apparently, believe that the action of debt provision might have carried a requirement that greater effect be given to a sister-state judgment than did the simple requirement of full faith and credit, thus producing the motion’s rejection, or that the notice requirement of the provision could have contributed to the motion’s defeat.\textsuperscript{138}

It is probably correct that the provision for an action of debt on a judgment would have been deemed unnecessary. The method of enforcing a foreign judgment in English law through an independent action on the judgment was well established and would likely have been taken for granted. That this was the reason for the rejection of the motion, however, is not clear. Overall, the motion’s defeat throws little light on whether the expression “full faith and credit” signified that a conclusive effect on the merits was to be given the judgments of sister states and/or that a requirement of jurisdiction in the rendering court was subsumed in the terminology of the clause adopted. The entire motion, including the notice provision, could have been rejected because the delegates viewed conclusive effect, or jurisdiction, or both to have been incorporated in the clause already adopted. Alternatively, they might have felt

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{134} Nadelmann, supra note 33, at 36; Radin, supra note 33, at 5. See also M. Jensen, The Articles of Confederation 182 (1940).
\item \textsuperscript{135} Radin, supra note 33, at 6.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} See id. at 6-7. Although Radin compliments the framers of the motion for their foresight, he does not argue that this requirement, in itself, could have contributed to the motion’s failure.
\end{enumerate}
\end{footnotesize}
that both questions should be left to the authority of the enforcing state to determine, as was the practice in English law when the judgments of foreign countries were enforced, reading the phrase "full faith and credit" not to foreclose either inquiry, but reading the entire action-of-debt requirement as endangering the states' autonomy on these matters in some way. Or the notice provision alone might have been deemed too substantial a departure from the existing territorial rules of jurisdiction, which controlled the reception of foreign judgments. From our examination of the usage of "faith" and "credit" in English law, we know it is possible that the combination of the modifier "full" with the words "faith" and "credit" could have been designed to insure that a conclusive effect on the merits would be given to sister-state judgments; but no similar conclusion can be drawn about jurisdictional requirements from the use of the modifier, because, as we also saw, the English usage did not incorporate jurisdictional standards no matter how the terms were modified.

However, before concluding either that a conclusive effect on the merits was intended by the phrase "full faith and credit," or that jurisdictional standards were excluded from the phrase, it is important to examine the additional sources of context that may have contributed to the meaning of the Articles of Confederation clause. These sources are basically two. First, there were, prior to the Articles, several statutory attempts to deal with the enforceability of the judgments of one colony in another. These attempts seem particularly important in understanding the full faith and credit clause of the Articles. Given the omission of the clause from the original draft of the Articles, the opportunity of the states to propose additional articles, and the speed with which the committee returned the seven new articles, it seems likely that the proposal for Article IV originated in one of the states. Thus the problems encountered and dealt with by the states before the Con-

139. Note that in light of the materials examined later in this article, tending to establish that jurisdictional rules were left untouched by the full faith and credit clauses of both the Articles of Confederation and the Constitution (except as Congress was authorized to modify them under the latter clause), the notice provision would, on its face, have been a major modification of the ordinary rules dictating when one sovereign's judicial acts would be treated as valid by other sovereigns. This being so, the notice provision might well have produced the rejection of the motion.

140. Professor Radin observed that the speed with which the committee reported the additional articles meant that they "obviously must have been before the Congress for some time." Id. at 4. Professor Nadelmann indicates that the "question dealt with by the [full faith and credit] clause was not novel and it certainly was familiar to the lawyers among the delegates," but he also concludes that "nothing suggests . . . the proposal originated with one of the delegates." Nadelmann,
federation may provide some clue as to the overall purposes of the full faith and credit provision.

The second source is the few court decisions construing the full faith and credit clause of the Articles after its adoption. Although these decisions cannot conclusively establish the meaning intended to be communicated by the framers of the clause, they can reveal the understanding of the clause's command by the judges of the several states. This understanding is significant, for the state judges comprised the "audience" to whom the framers of the clause were communicating. Assuming that the framers selected language appropriate to transmit their meaning, the understanding of this audience may reveal much about the content of the message sent. Moreover, these decisions constitute part of the context from which the framers of the full faith and credit clause of the Constitution drew the terminology of Article IV, section 1.

A. The Colonial Experience

The earliest attempt to deal with colonial judgments seems to have been that of the Confederation of New England colonies. In 1644 the Commissioners of the United Colonies meeting at Hartford asked what the effect of a judgment of the courts of one colony should have in another. On September 9, 1644, the Commissioners recommended that a colony's judgments should have due respect in the courts of other colonies and be considered good evidence for the plaintiff until better evidence was presented or some other cause appeared to alter or void the judgment. Subsequently, Connecticut enacted a law implementing the Commissioners' recommendation.

supra note 33, at 36. "The proposal could have come directly from one of the states. . . ." Id.
141. See Nadelmann, supra note 33, at 38.
142. Id.
143. Id.
144. Ordered that any verdict or sentence of any court within the colonies, presented under authentic testimony, shall have a due respect in the several courts of this jurisdiction, where there may be occasion to make use thereof, and shall be accounted good evidence for the party, until better evidence or other just cause appear to alter or make the same void. And that in such case the issuing of the cause in question be resipled for some convenient time, that the court may be advised with, where the verdict or sentence first passed. Provided . . . that this order shall be accounted valid and improved only for the advantage of such as live within some of the confederate colonies; and where the verdict in courts of this colony may receive reciprocal respect by a like order established by the general court of that colony.

As quoted in id. at 38-39, citing the codification of 1659, Connecticut Acts and Laws, 1650. Id. at 39 n.28. Nadelmann found no evidence that any of the other colonies passed corresponding legislation at the time. Id. at 39.
It is interesting that both the recommendation and the Connecticut implementing law addressed the problem of colonial judgments as one of evidence. Both provided that sister-colony judgments would be "good evidence" only until "better evidence" or "other just cause" appeared to "alter or make the same void." This at best treated sister-colony judgments as only rebuttable evidence. However, it is not clear that even their effect "on the merits" was being prescribed. The requirement that the judgment be "accounted good evidence for the party until better evidence or other just cause appear to alter or make the same void" could simply mean that the judgment was to be good and sufficient evidence of its own existence until other evidence was presented to the contrary. Perhaps the term "void" was intended, in part, to refer to jurisdictional defects in the rendering court.

By a law passed in 1715, Maryland also dealt with the problem of colonial judgments as one of evidence. The law provided, in part, "That all Debts or Records, whether by Judgment, Recognizance, Deed enrolled, and upon Record, the Exemplification thereof, under the Seal of the Courts where the said Judgment was given, or was recorded, shall be a sufficient Evidence to prove the same." Significantly, the judgment as evidence is described as "sufficient" not "conclusive," but it is described as "sufficient" only "to prove the same," seeming to refer only to an effect as proof of its own existence. Jurisdiction of the rendering court was not dealt with.

145. Id. at 39 n.30. Act of June 3, 1715, No. 85, repealed by Ch. 20 of the laws of 1729. The Act was entitled, "An Act, Providing what shall be good Evidence to prove Foreign and other Debts; and to prevent Vexatious and Unnecessary Suits at Law; and Pleading Discounts in Bar."

146. Id. Discussed by Nadelmann, supra note 33, at 39.

147. The quoted passage appears at the beginning of the act, which runs on two pages farther. The third paragraph of the act provided:

And to the end that no honest Debtor, who hath not fled from the Place or County where he contracted his Debt, nor wilfully absconded himself, or fled from Justice, shall be surprised by unnecessary and vexatious Suits at Law; Be it Enacted . . . That no Person whatsoever, residing or trading in or to this Province, . . . shall, for any sum . . . sue and implead such Debtor . . . in any Court of Record within this Province, unless he shall first demand or require the same of such Debtor . . . at the Habituation or Place of Residence of the said Debtor in the County where he shall dwell . . . And if the Debtor be not at home to be spoke with, then such Demandant shall leave a Note . . . what time, and to whom the same shall be paid; and if thereupon the same not be paid accordingly, then it shall and may be lawful for such Creditor to sue . . . his Debtor . . . But in case any Person or Persons shall sue . . . his Debtor . . . without making Demand . . . and the Debtor plead, that the Debt was never demanded; by such Plea, the Debtor shall be taken to admit the Plaintiff's Declaration to be good, and shall only put the Demand in Issue; which Issue, if the Plaintiff do not joyn, the Plaintiff shall be taken to have made no Demand, and shall only have Judgment
In 1731, South Carolina treated proof of foreign judgments in a like fashion. A section of a South Carolina Act dealing with "Proof of Deeds beyond the Seas as Evidence," also dealt with "exemplifications of records" and "other specialties," providing, as follows:

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

Again, the "exemplifications of records," properly authenticated, would be deemed just as "good and sufficient" as if proved orally; but they would not necessarily be considered conclusive. Jurisdiction is not mentioned. The reference to properly authenticated exemplifications being as good "as if the witnesses . . . were produced and proved the same *viva voce*" is reminiscent of the discussion of the same matters in Gilbert's *Law of Evidence*.

However, it is not clear that this statute prescribes any evidentiary effect for the judgment on the merits; "good and sufficient in law" for his Damages, and shall lose all his own Costs; and if the Plaintiff joyn in Issue . . . and if it be found against him, that the Plaintiff shall lose his own Costs, and pay Costs of such Tryal to the Defendant; yet the said Plaintiff shall have Judgment to recover his Debt or Damages for which he sues, and for so much thereof as appears due upon Balance.

Act of June 3, 1715, No. 85, repealed by Ch. 20 of the laws of 1729 (Md.). The omission to treat jurisdiction appears all the more startling after reading this elaborate provision, aiming, superficially at least, toward protecting debtors from vexatious suits through imposition of a cost penalty!

148. See Act of Assembly, 1731, *Collection of Public Laws*, No. 552, at 123 (Grimke ed. 1790). The Act of Assembly was entitled:

An Act confirming and establishing the ancient and approved Method of Drawing Juries by Ballot in this Province, and for the better Administration of Justice in criminal Causes, and for appointing of Special Courts for the Trial of the Transient Persons, declaring the Power of the Provost Marshal, for allowing the Proof of Deed beyond the Seas as Evidence, and for repealing the several Acts of the General Assembly therein mentioned.

Id.


150. See text accompanying notes 115-118 *supra*.
could simply mean "good and sufficient" evidence of its own existence, leaving effect on the merits to be prescribed by rules outside the statute.

Finally, the problem of foreign judgments arose in Massachusetts in 1774, shortly before the Continental Congress met. A bill was introduced "to enable persons to bring and maintain actions of debt upon judgments obtained in the courts of law in other governments." By March 9, 1774, the bill had been enacted and given the Governor's consent. The Act was entitled, "An Act to enable persons to bring forward and maintain actions of debt in the executive courts within the Province, upon judgments recovered in the neighboring governments, and upon judgments recovered before Justices of the Peace in this Province." Significantly, courts of "neighboring governments" are treated like courts not of record within Massachusetts, i.e., justices-of-the-peace courts. This may indicate that the Massachusetts legislature perceived the problem of sister-colony judgments as if they were the same as those of foreign courts, which, as the examination of English law has demonstrated, were also not treated as courts of record.

The Massachusetts statute was unusual in spelling out precisely the doubts that gave rise to its enactment; specially authorizing an action of debt upon a sister-colony judgment; and providing the specific effect that the sister-colony judgment should be given in the Massachusetts courts. The concern of the Act was to prevent "honest creditors" from being defrauded by persons against whom judgments were recovered in another colony. The fear was that judgment-debtors would move to Massachusetts with their property to escape execution of the judgments by their creditors, there being doubt whether the sister-colony "judgments can be admitted as sufficient evidence of such judgments" in Massachusetts courts. This concern was addressed by authorizing the creditor to bring an action of debt upon the sister-colony judgment in Massachusetts. In this action a "true copy of the record and proceedings" of the sister-colony might, upon proper authentication under the sister-colony's rules, be admitted into evidence. As admitted, the sister-colony judgment would then constitute "as

151. Nadelmann, supra note 33, at 37.
152. Id.
153. Id.
154. Id.
155. See text accompanying notes 51-54, & 68 supra.
156. Nadelmann, supra note 33, at 40.
157. Id.
good and sufficient evidence of such judgment, and have the same
effect and operation, as if the original judgment and proceedings
had been rendered and had in the court where such action of debt
shall be brought and depending.” The effect of the record as evi-
dence of the existence of the judgment and its effect as evidence
on the merits are thus separated, indicating that a distinction be-
tween the two types of effect would have been drawn at the time.

Viewing these statutes as a whole, what can be said about the
general problem they were addressing? There seem to be several
possibilities. First, sister-colony judgments may have been per-
ceived generally as “foreign” judgments under governing common
law principles in the same sense that, for example, the judgment of
a court of France would have been viewed in England. The stat-
utes may, therefore, have been attempts to convert these debts by
simple contract into debts of record.159

The Massachusetts statute is consistent with this theory; that
act authorized an action of debt on the foreign judgment and pre-
scribed an effect for it equivalent to that of a Massachusetts do-
mestic judgment, presumably a res judicata effect. An action of
debt would lie on a record,160 and the judgments of non-foreign
courts of record were treated as conclusive on the merits.161 How-
ever, the Massachusetts statute, in stating the problem that gave
rise to its enactment, seems to be concerned primarily with
problems of admissibility and authentication,162 and the other co-
lonial statutes are wholly inconsistent with this theory.

The Connecticut statute, while requiring that “due respect” be
given sister-colony judgments prescribed at the most only that
they be admitted as rebuttable evidence.163 The Maryland statute,
while not as clear, seems also to be concerned only with a require-
ment that exemplifications of records from other colonies be ad-
mitted and considered as “sufficient” evidence “of the same.”164
Like the Connecticut statute, this could refer to an effect as rebut-
table evidence on the merits or to an effect of the judgment as

158. Id.
159. Blackstone classified a debt of record as “a sum of money, which appears to
be due by the evidence of a court of record.” 2 W. BLACKSTONE, COMMENTARIES ON
THE LAWS OF ENGLAND 465 (Cooley ed. 1884). Such debts were contracts “of the
highest nature, being established by the sentence of a court of judicature.” Id.
Debts by simple contract, on the other hand, were ones “where the contract upon
which the obligation arises is neither ascertained by matter of record, nor yet by
deed or special instrument, but by mere oral evidence, the most simple of any.” Id.
160. See J. KOFFLER & A. REPPY, supra note 33, at 278.
161. Id. at 360-61; see note 160 supra.
162. See Nadelmann, supra note 33, at 40-41, 43-44.
163. See text accompanying notes 142-44 supra.
164. See text accompanying note 146 supra.
proof of its own existence, but seems to refer only to the latter. The South Carolina statute was likewise (ambiguously) concerned that “exemplifications of records” from other colonies would be deemed “good and sufficient in law” in South Carolina courts, “as if the witnesses to the same were produced and proved the same viva voce.”

Second, the statutes might have been designed to assure that sister-colony judgments were treated at least as well as foreign judgments. In English law foreign judgments, properly authenticated, were admissible as prima facie evidence of a debt. The doubt arising in the colonies may have concerned the sovereign status of the colonies vis-a-vis each other, that is, whether the law of nations required the courts of one “subordinate” government to receive the judgments of another in evidence, or instead to treat them as the judgments of “inferior” courts, not entitled to any evidentiary effect. Whether this was truly the problem is speculative, but the theory seems consistent with all the statutes.

Third, the statutes may have been attempts to codify and thus make mandatory the traditional common law principles governing the enforcement of foreign judgments as those principles were understood at the time by each colony, perhaps in the hope that other colonies would follow suit. Independent sovereigns could not be compelled to enforce the judgments of other sovereigns, but each sovereign would ordinarily do so as a matter of its own self-interest in cases where the judgment-rendering sovereign was acting within its jurisdiction. Otherwise the enforcing sovereign’s own judgments might not be enforced by other nations. Such, at any rate, was the fear expressed by the English courts, as observed earlier, and the Connecticut statute seems expressly framed to achieve reciprocity.

Fourth, with the exception of the Massachusetts act, the statutes could have been directed only at making sister-colony judgments admissible evidence of their own existence and contents, at

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165. See text accompanying note 149 supra.
166. Nadelmann, supra note 33, at 43. Professor Nadelmann, in discussing Gilbert’s treatise, The Law of Evidence, observes that Gilbert cited a case involving the reception of a foreign judgment as support for his statement of the faith and credit due to exemplifications. The case held an exemplification of a record with the seal of the court should be admitted, but that the jury did not have to give credit to it under penalty of attainder. Id. G. Gilbert, supra note 113, at 14. See notes 51-66 and accompanying text supra.
167. See note 62 supra. There was at the time slight support in English law for treating the judgments of inferior foreign courts as entitled to less effect than ordinary foreign courts, but not for treating them as having no effect. Id.
168. See text accompanying note 49 supra.
least until some better evidence was presented that they did not exist. The Maryland statute appears most strongly to be aimed at achieving this limited purpose, but the Connecticut and South Carolina statutes might also have been intended to do no more than this. Massachusetts itself drew a clear distinction between the effect of a judgment as proof of its own existence and its effect as proof on the merits.

Of all the possibilities, it seems to be most probable that, with the exception of the Massachusetts Act, the statutes were directed merely at making sister-colony judgments sufficient evidence of their own existence and contents, but not directed at requiring any particular effect on the merits. The Massachusetts statute demonstrates that a distinction would have been drawn between admissibility of a judgment as proof of its own existence and admissibility as proof on the merits. It seems unlikely, therefore, that an effect on the merits would be prescribed unless it were done as precisely as the Massachusetts statute attempted to do it. Likewise, the general problem that seems to have concerned the enacting colonies was one of admissibility per se, not one of effect or, for that matter, of jurisdiction. With this as the paramount concern, it seems unlikely that most of the statutes were intended to prescribe a specific effect on the merits. Significantly, however, even if the statutes are read as attempts to prescribe some sort of effect on the merits, none but the Massachusetts statute attempted to prescribe a res judicata effect.

Given these additions to the context of the Articles of Confederation, therefore, it appears much less likely that the full faith and credit clause of Article IV was designed to require an evidentiary effect "on the merits" to be given to sister-state judgments or to incorporate jurisdictional rules. The 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. This is consistent with the general concern of the colonies for the admissibility of such judgments and the probable limited effect as proof that most of the colonial statutes were designed to prescribe for them. Moreover, it seems unlikely that the framers of the Articles would have chosen the highly flexible terms "faith" and "credit" to do the work of declaring any precise effect on the merits, whether it was a res judicata effect or a prima facie evidentiary effect. Our examination of the use of these terms in English law reveals that they covered far too wide a range of evidentiary effects to be reliable indicators of some precise weight. Combined with a modifier such as "full," we saw
that they could be used to describe a conclusive effect on the merits; but even then one would expect the careful draftsmen to avoid them for this purpose, as the draftsmen of the colonial statutes did.

Not only does this limited reading of the full faith and credit command of the Articles comport best with the context provided by the English use of the terms "faith" and "credit" and the colonial statutes, it also affords a plausible explanation for the rejection by the Continental Congress of the motion to add an action of debt provision to the clause. It may have been feared that, if adopted, the provision would have been susceptible of an interpretation which would require a greater evidentiary effect to be given to sister-state judgments than was provided for foreign judgments under common law principles. An action of debt would lie on the judgment of a domestic court of record, and the judgment would constitute conclusive evidence of the debt; it would also lie on a foreign judgment, but it would only be treated as a simple contract debt and the judgment would therefore constitute only prima facie evidence. Which was intended by the motion? If the states wished to preserve their status as independent sovereigns vis-a-vis each other, this would have been an undesirable ambiguity. Even more undesirable under this supposition would be the notice requirement of the rejected provision, which was a radical departure from the international, territorial rules of jurisdiction.

On the other hand, under the limited reading of the clause suggested above, the primary concern motivating the draftsmen of the colonial statutes could be dealt with while preserving the sovereign prerogatives of the states under the common law rules governing the enforcement of foreign judgments. The combined effect of Article IV and these common law rules would be, as follows: by force of Article IV, a state judgment rendered with jurisdiction in the "international sense" would have to be admitted into evidence in a sister-state as full proof of its own existence and of the matters described in the record as adjudicated by it; by force of the common law rules the judgment would be relevant to prove or defeat the underlying claim upon which the action was brought. It would be sufficient, in itself, to satisfy the plaintiff's burden of going forward with evidence on the claim, and if unrebutted, it would also satisfy the plaintiff's burden of persuasion. If offered on behalf of the defendant, it would, in itself, satisfy the defendant's burden of going forward with evidence in defense of a suit on the claim. When offered defensively, it might also be considered conclusive evidence on the defendant's behalf (depending upon whether the view of the later English cases prevailed or not).
Given the use of the terms "faith" and "credit" in English law it is, of course, still possible to read the full faith and credit clause of the Articles as requiring a specific evidentiary effect on the merits (because of the modifier "full," a conclusive effect) and as incorporating jurisdictional rules. Although the above evidence seems persuasive, it is of itself far from "conclusive" on the clause's meaning. Additional context is, however, provided by the decisions interpreting Article IV.

B. CASES INTERPRETING THE FULL FAITH AND CREDIT CLAUSE OF THE ARTICLES OF CONFEDERATION

There are only five reported decisions interpreting the full faith and credit clauses of the Articles of Confederation. The earliest of these, Jenkins v. Putnam,169 was decided in 1784. The suit, brought in a South Carolina court, was an action of trover for slaves. A privateer fitted out in North Carolina had landed on Edisto Island during the Revolutionary War while the island was still under English authority. The crew took away a number of slaves belonging to the plaintiff and transported them to Washington, North Carolina, where they were condemned in a court of admiralty and sold as the property of the enemies of the United States. The plaintiff argued that the taking was unauthorized by the rules of war or the laws of nations and thus that the judgment of the admiralty court did not legalize the seizure. The defendant relied in part on the full faith and credit clause of the Articles of Confederation as providing conclusive effect on the merits to the admiralty judgment. He argued that by the "act of confederation" the judicial proceedings of one state were to have "due faith" given them in other states. Thus the proceedings of a court of "competent jurisdiction" were not to be questioned in the courts of other states, because this was the case even between independent nations, and the reasoning applicable to independent nations was even stronger between "friendly associated states, bound by a solemn agreement, to give faith and credit to the proceedings in the courts of justice of each other."170 The South Carolina Court agreed with the defendant, stating that it was "bound by common law rules; and its decisions must be squared by those principles only."171 The Articles of Confederation were observed to be "conclusive" in binding the court to the sentence of the admiralty tribunal and in obliging South Carolina "to give due faith and credit to

169. 1 S.C.L. 3, 1 Bay 8 (1784).
170. Id. at 3-4, 1 Bay at 9-10.
171. Id. at 4, 1 Bay at 10.
all its proceedings” until they were reversed by some competent authority.172 The court added that if there had been no condemnation in a court of competent jurisdiction, the entire case would have been open for a full investigation, “agreeable to the principles of the common law.”173

It is tempting to read this language as expressing an understanding that the Articles of Confederation mandated a res judicata effect to the North Carolina judgment. The language is, however, consistent with another reading. The court stated that it was bound only by “common law principles.” What did those principles provide in a case like Jenkins? There is good reason to believe that, because the judgment in question was one from an admiralty court, it would have been treated as conclusive under common law rules, even when other “foreign” judgments would have been given only prima facie evidentiary effect. We have seen that judgments in rem by admiralty courts were viewed as conclusive and not contestable “collaterally” or “incidentally” in other courts.174 More generally, there was a view that, used defensively, all foreign judgments were conclusive.175 Thus the South Carolina court may have seen the judgment as entitled to be received in evidence by force of the Articles of Confederation, but to be treated as conclusive by the command of the “laws of nations” or “common law principles.”

The next decisions appear in 1786. Kibbe v. Kibbe176 was an action of debt brought in a Connecticut court on the judgment of a county court in Massachusetts. The defendant pleaded in abatement that the only “notice or summons” given him was a copy of the original writ left at his home in Connecticut and that at the time the action was brought he was an inhabitant of Connecticut. The plaintiff contended that, in addition to leaving a copy of the writ at the defendant’s home, the sheriff had attached a handkerchief belonging to the defendant in Massachusetts, which was all agreeable to Massachusetts law. The court refused to entertain an action on the judgment, on the ground that the Massachusetts court had no jurisdiction of the cause, as the defendant was an inhabitant of Connecticut “at the time of the pretended service of the writ.”177 The court added that “full credence” ought to be given to

172. Id.
173. Id.
174. Compare text accompanying notes 94-95, & 100 supra with text accompanying notes 41-46 supra.
175. See text accompanying notes 69-71, & 101 supra.
176. Kirby 119 (Conn. 1786).
177. Id. at 125-26.
judgments of the state courts whenever both parties were within the jurisdiction of the judgment-rendering court at the time the action was commenced, were served with process, and might, therefore, have had a "fair trial of the cause."\textsuperscript{178}

It is impossible to tell what the court believed "full credence" to entail. Either a conclusive or a prima facie evidentiary effect on the merits or some lesser effect is consistent with the phrase. As in \textit{Jenkins v. Putnam}, jurisdiction was stated to be a necessary prerequisite to any effect, and here it appeared more clearly that "territorial" jurisdiction, or jurisdiction in the "international law sense," was meant. There was, however, no indication that the jurisdictional standards were thought to be incorporated into the command of "full faith and credit," as opposed to being standards that operated independently of that command.

In \textit{James v. Allen}\textsuperscript{179} suit was brought in the Court of Common Pleas of Philadelphia County, Pennsylvania. Plaintiffs had originally sued the defendant in New Jersey for the recovery of a balance due on accounts between them. Judgment was recovered in the New Jersey action, and a writ of execution was issued on the judgment but returned unsatisfied. Meanwhile, the defendant was arrested for the same debt in Pennsylvania and gave bail. Upon his return to New Jersey, he was arrested for the unsatisfied debt against him and ultimately discharged from arrest by the insolvency law of New Jersey. He then moved in the Pennsylvania action to reopen a default judgment that had been entered against him in the interim, in order to plead the New Jersey discharge. On the defendant's behalf, it was contended that both the law of nations (conflict of laws principles) and the full faith and credit clause of the Articles of Confederation made the New Jersey discharge binding in the courts of Pennsylvania.\textsuperscript{180} In contending that the Articles of Confederation clause made the New Jersey discharge binding in Pennsylvania, counsel argued that "if a judgment, or other judicial proceeding in New Jersey, had not been evidence before, this provision . . . would have made it so" and "if

\textsuperscript{178} \textit{Id.} at 126. Judge Dyer added "[t]hat the original action was upon a covenant real, and locally annexed where the lands lie; and the judgment being by default, this court never could take cognizance of or examine into the justice of the cause; therefore, cannot enforce the judgment on which this action is brought." \textit{Id.}

This seems most sensibly read as a statement (1) that the Connecticut courts have no jurisdiction to enforce or question a judgment in rem involving land located in another state and (2) that in the absence of appearance by the defendant in the original suit no valid judgment in personam could be rendered by the Massachusetts court against a nonresident not personally served within the state.

\textsuperscript{179} 1 Dall. 188 (Pa. 1786).

\textsuperscript{180} \textit{Id.}
it was only *prima facie* evidence before, this would render it con-
clusive.” Counsel further analogized the New Jersey judgment to those of the “courts in Westminster Hall” whose judgments Lord Mansfield had stated in *Walker v. Witter* were conclusive in other English courts. Attorneys for the plaintiffs responded that, with the exception of courts of admiralty whose decrees were conclusive because based upon the law of nations, foreign judgments were only *prima facie* evidence of a debt. In any event, they argued, the New Jersey law was not intended to extinguish the debt, but only to discharge the person of the debtor from arrest in New Jersey.

The courts agreed with this latter argument, holding that the New Jersey law had no binding effect in Pennsylvania. Although the court conceded that the judgment of a foreign court which either established a demand against a defendant or dis-
charged him from one, would be given “a binding force” in Penn-
sylvania, and even that “the laws of foreign countries, where no suits have been instituted, would, in some cases, be taken notice of here”, it disagreed that the Articles of Confederation required a res judicata effect to be given to sister-state judgments. In the court’s view, the Articles would not bear a res judicata construc-
tion, because that would mean “executions might issue in one state upon the judgments given another”; rather, the full faith and credit clause of the Articles was “chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings.”

The court was clearly wrong in supposing that execution of sis-
ter-state judgments would follow from a command to give them conclusive effect on their merits. As *Jenkins v. Putnam* and *Kibbe v. Kibbe* illustrate, the form of an action of debt, with the responsi-
ability of a jurisdictional inquiry open, among others, would still have been the accepted mode of enforcing such a judgment. Nev-
ertheless, it is significant that the court in *James v. Allen*, as one member of the framers’ audience, read the message of Article IV not only as requiring less than a res judicata effect to judgments of neighboring states, but also as requiring merely that the judg-

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181. *Id.* at 189.
182. *Id.* See note 63 *supra*.
183. 1 Dall. at 189.
184. *Id.* at 190.
185. *Id.* “[W]here such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties, at the time of making them.” *Id.*
186. *Id.*
187. *Id.* (emphasis added).
ments be received as conclusive evidence of the existence of sister-state judicial proceedings and what they adjudicated—i.e., "as full evidence of such . . . judicial proceedings."

In the subsequent case of Miller v. Hall\(^\text{188}\) the Supreme Court of Pennsylvania was faced with the effect to be given a discharge of the defendant, a citizen of Maryland, under the insolvency law of Maryland. Unlike the New Jersey law in James v. Allen, this law was construed "as a general bankrupt law, made for general purpose, and equally advantageous to all his creditors."\(^\text{189}\) Counsel for the defendant relied, in part on the full faith and credit clause of the Articles of Confederation.\(^\text{190}\) The court considered both "the principles of the law of nations, and the reciprocal obligation of the states under the Articles of Confederation," but appeared to be influenced more by the former. The court stated that because the act was a general bankruptcy law, it ought to be regarded in all other "countries," and enjoy the weight that it "naturally derives" from, expediency, justice and humanity. "For, mutual convenience, policy, the consent of nations and the general principles of justice, form a code which pervades all nations, and must be everywhere acknowledged and pursued."\(^\text{191}\)

Finally, in Phelps v. Holker\(^\text{192}\) the Supreme Court of Pennsylvania considered a case of foreign attachment, in which a blanket belonging to the defendant was attached in Massachusetts and judgment entered by default after no appearance. An action of debt was commenced in Pennsylvania on the judgment, and the question was thus whether the judgment was conclusive evidence of the debt. The attorney for the plaintiff argued that, while foreign judgments were only prima facie evidence of the debt, the Massachusetts judgment could not be considered foreign because of the Articles of Confederation clause.\(^\text{193}\) Defendant contended that the judgments of one state "are not made obligatory upon the courts of another, by the Articles of Confederation; which only provide, that, in matters of evidence, mutual faith and credit shall be given to the records, acts and judicial proceedings of the states."\(^\text{194}\) Even if such judgments were generally not to be considered foreign judg-

\(^{188}\) 1 Dall. 229 (Pa. 1788).
\(^{189}\) Id. at 231. In fact, the court observed that the defendant had been obliged by the law to transfer all his assets for the benefit of his creditors, and thus to "take his person" in Pennsylvania would be to compel him to perform an impossibility, \textit{i.e.}, to pay a debt after being deprived of every means of payment. \textit{See} \textit{id}.
\(^{190}\) 1 Dall. at 231.
\(^{191}\) Id. at 232. (emphasis added).
\(^{192}\) 1 Dall. 261 (Pa. 1788).
\(^{193}\) Id.
\(^{194}\) Id. at 261.
ments, however, an exception must necessarily exist when a judgment was "obtained by the process of foreign attachment." In reply, the plaintiff's counsel maintained that the framers of the Articles of Confederation must have been aware that foreign judgments were received as prima facie evidence, while domestic judgments were conclusive on the merits. Therefore, they must have intended that the states be placed "upon a different footing with respect to each other than with respect to foreign nations."

He further argued that if a judgment from a sister-state was intended to have no greater "force or validity" than the judgment of a foreign country, it would "have been absurd to say that 'full faith and credit shall be given.'"

The court held, without extended discussion by any of the justices, that a judgment obtained in foreign attachment was not conclusive evidence, but was reexaminable. The significant point is that the judgment was conceded to have no evidentiary effect, for it was apparent that the Massachusetts court had no territorial jurisdiction to render a judgment in personam against the defendant. Although at least two of the justices recognized that by the Massachusetts attachment statute (and perhaps more general principles), a judgment in rem extended no further than the property attached, none pursued this fact to its logical conclusion: that a judgment in a proceeding commenced by foreign attachment ought to be valueless for any other purpose than the disposition of the property seized. If the full faith and credit clause of the Articles of Confederation had incorporated international rules of jurisdiction, surely this would have been the result, no matter what effect a judgment rendered with jurisdiction "in personam" would have had.

Overall, one must agree with Professor Nadelmann that these decisions are not sufficient, in themselves, to support any specific construction of the full faith and credit clause of the Articles. Although the decisions are consistent with an interpretation of the

195. Id.
196. Id. Otherwise, "if they did not mean to make any alteration in the system already established, between independent and unconnected countries, they would either have been totally silent, or they would have qualified the terms of the articles, so as to have met their object fully and unequivocally." Id.
197. Id. at 262.
198. Id. at 264.
199. Id. at 261 (where defendant's counsel argued there had been no notice of the action at all).
200. See Nadelmann, supra note 33, at 53; see also Page, supra note 33, at 300. A good deal more is sometimes claimed for the decisions. See Childs, supra note 33, at 43-44; Sumner—History, supra note 33, at 230; Sumner—Judicial Proceedings, supra note 33, at 442 n.6.
clause as intended to require only reception of sister-state judgments as sufficient evidence that the judicial proceedings they embody took place and adjudicated the matters described in the record, they do not establish this meaning with certainty. The arguments of counsel, while often more articulate on both sides of the "effect" issue than the court opinions, must be viewed with skepticism because of the advocate's context in which they appear. The arguments do, however, illustrate the prevalence of a general awareness of the significant issues of both law and terminology that would have been involved in drafting the full faith and credit clause of the Constitution.

Only the South Carolina and Connecticut decisions adverted to jurisdiction. Those cases made it plain that jurisdiction in the international sense was a prerequisite to any effect whatsoever being given a judgment, but they did not indicate that jurisdictional standards were incorporated into the full faith and credit command, any more than did the previously examined materials from English law. The Pennsylvania court in *Phelps v. Holker* acted for all the world as if there were no such thing as rules of territorial jurisdiction, and this in the face of a pretty clear jurisdictional argument from the defendant's counsel. Perhaps that decision can be justified on the grounds that all counsel asked for was that a conclusive evidentiary effect not be given the Massachusetts judgment; therefore, the court gave it a rebuttable effect.

C. SUMMARY OF THE PRE-CONSTITUTIONAL PERIOD

On the whole, the history of the colonial and confederation period tends toward a limited meaning of the full faith and credit clause of the Articles of Confederation. Although 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 in sister states, the general problems concerning the colonies before the Articles seems to have been one of reception per se of sister-colony judgments as evidence. More importantly, it seems unlikely that the draftsmen of the Articles would have been willing to prescribe a conclusive effect on the merits for sister state judgments, given their general desire to preserve state autonomy. The context provided by the colonial statutes, which seem concerned with admissibility per se of sister-colony judgments, and the rejection by the Continental Congress of the motion to add a provision for an action of debt to Article IV, seem to confirm this. Furthermore, despite the fact that the phrase "full faith and credit" could have been used to prescribe a conclusive effect on the merits
for sister-state judgments, it seems unlikely that a careful draftsman would so use it, given the range of evidentiary weights such expressions could cover. "Full faith and credit" seems more likely to have been employed to prescribe a more limited conclusive effect. This is somewhat confirmed by the few decisions interpreting the full faith and credit provision of the Articles, which are consistent with the view that the clause was understood only to require reception of sister-state judgments as conclusive evidence that the proceedings they embodied occurred and adjudicated the matters described in the record. Concededly, however, this meaning is not certainly established by the case law.

The significant factor so far as jurisdiction is concerned is that none of the materials examined indicate that jurisdictional rules were incorporated in the command of the clause. The language of the clause does not suggest such an incorporation; the colonial statutes evidence little, if any, concern with the matter; and the cases, to the extent that they discuss jurisdiction at all, do not hold or fairly imply incorporation. Nor does it seem plausible to argue that jurisdiction was inherent in the notion of a "judicial proceeding," so that jurisdictional rules might have been incorporated through that phrase. A court might well have jurisdiction under its own domestic rules, but not jurisdiction in the international sense, and thus in every realistic way be capable of maintaining "judicial proceedings." In any case, no such interpretation of the phrase "judicial proceedings" was suggested in the cases. On the contrary, if Phelps v. Holker is read as an accurate reflection of the judicial attitude about the effect of rules of jurisdiction, it does not appear that a narrowing of the jurisdictional basis of the suit would necessarily have any consequence for the use of a judgment as "good" (if only rebuttable) evidence in a sister state.

V. THE FRAMING OF THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION

As it finally appears in the Constitution, Article IV, section 1, states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and

201. Indeed, in English law competence by English conflict of laws rules was all that was required for enforcement of a foreign judgment. Internal or domestic competence of the judgment-rendering court was immaterial. See 8 Halsbury's Laws of England 479 (4th ed. 1974); see also A. Dicey & J. Morris, supra note 65, at 987, 1019; P. North, Cheshire's Private International Law 632-33, 652 (8th ed. 1974).
Several similarities and differences between this clause and the full faith and credit clause of the Articles of Confederation are immediately apparent. The language, "Full Faith and Credit," is identical to the language in the Articles, as is the mandatory "shall be given." The Articles of Confederation, however, required full faith and credit only to "the records, acts and judicial proceedings of the courts and magistrates of every other state," while the Constitution includes "public acts" within its command and omits the limiting phrase, "of the courts and magistrates of every other state." A second sentence is added to the Constitution authorizing Congress to "prescribe the manner" of proving the public acts, records, and judicial proceedings and to declare their effect.

Given the context in English law, the colonial experience, and the Articles of Confederation from which the constitutional language was drawn, but without yet examining the debates in the Constitutional Convention, what conclusions might one reach about the purpose of the clause in the Constitution? The retention of the phrase "full faith and credit" seems designed to achieve the same results as the identical language in the Articles of Confederation. As we have seen, however, what these results were are not absolutely clear. The modifier "full" may have been designed to require that conclusive effect be given to sister-state judgments on the merits, but this is contradicted by the context of the colonial experience, which reveals primarily a concern with admissibility per se of judgments of sister colonies into evidence and little concern with establishing a res judicata effect for such judgments; to a lesser extent it is also contradicted by the decisions interpreting the full faith and credit clause of the Articles, which tend slightly toward a meaning requiring only that sister-state judgments be admitted as conclusive proof that the judicial proceedings they embodied occurred and that the issues described in the record were adjudicated.

Of what significance is the inclusion of "public acts" within the full faith and credit requirement, and what meaning is signified by the conferral of a power on Congress to provide the manner of proof and to declare the effect of public acts, records, and judicial proceedings? If the modifier "full" is read to mean that a res judi-

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202. U.S. Const. art. IV, § 1. See 2 M. Farrand, The Records of the Federal Convention of 1787 661 (1911). Discussions of the framing of the full faith and credit clause in the Constitutional Convention appear in Cook, supra note 33, at 422-25; Costigan, supra note 33, at 472-75; Nadelmann, supra note 33, at 53-59; Radin, supra note 33, at 7-11; Ross, supra note 33, at 145-47; Sumner—History, supra note 33, at 230-41.
cata effect must be given to sister-state judgments, then the same
reading is logically necessary regarding public acts; but what does
it mean to require that a res judicata or conclusive effect on the
merits be given to a sister-state statute? It is implausible to sup-
pose that this would require the forum state to enforce a sister-
state's law whenever that law is in the form of a statute and is ar-
gued to control by one of the parties to a dispute.\textsuperscript{203} It is more
plausibly read as a command that the sister-state's statute, per-
haps authenticated as prescribed by Congress, be admitted as con-
clusive evidence of the law of the sister-state.

The latter reading seems to comport also with the power con-
ferred on Congress to declare the effect that a statute should have
in other states "by general laws"; but note that this would only
mean the statutes of other states must be received in evidence as
conclusive proof of their existence and contents, not that they
would necessarily have to be given controlling effect in a dispute in
the absence of a congressional directive to do so. The same mean-
ning would logically have to apply to judicial proceedings: that is,
the judgments of sister-states would have to be admitted as con-
clusive evidence that the judicial proceedings they embodied oc-
curred and that the matters described in the record were
adjudicated, but they would not necessarily have to be given a res
judicata effect in the absence of a congressional command to do so.

This is the natural reading of the language of the full faith and
credit clause, and it generally agrees with the context of English
law, the colonial statutes, and the interpretation of the similar pro-
vision in the Articles of Confederation. It makes sense that the
colonial concern for admissibility of sister-state judgments should
carry over into the framing of both the Articles of Confederation
and the Constitution. The concern to unify a divided nation de-
manded centralized control of important problems such as com-
merce and travel. The framers of the Articles of Confederation had
attempted to deal with several of these problems in Article IV,\textsuperscript{204}
but the Articles suffered generally from the lack of a central au-
thority to insure compliance by the states and uniform interpreta-
tion of their provisions.\textsuperscript{205} This defect would be removed in the
Constitution, with the advent of a Supreme Court with appellate
authority over the state judicial systems in cases arising under the
Constitution and laws of the United States.

\textsuperscript{203} See Nadelmann, \textit{supra} note 33, at 73 n.189.
\textsuperscript{204} In this regard it is important to note that Article IV, § 2, of the Constitution
contained a privileges and immunities clause, an extradition clause, and a clause
dealing with fugitive slaves.
\textsuperscript{205} See Sumner—\textit{History}, \textit{supra} note 33, at 230.
Furthermore, it also makes sense that "public acts" would be included in the constitutional clause and that Congress would be given central authority to provide for a uniform manner of authentication and effect. Under the influence, in part at least, of Lord Mansfield, English courts had by the late nineteenth century begun to overcome their reluctance to entertain actions requiring the administration of foreign law. Problems of conflict of laws were, therefore, more prominent in Anglo-American jurisprudence at the time the Constitutional Convention met than they had been before. The potential difficulties of proving sister-state statutes would probably have been apparent to the framers from the colonial experience, though it might not have been obvious how conflict of laws problems should be resolved in individual cases. Consequently, a decision to require such statutes to be received into evidence, while leaving to another day the particularization by Congress of general conflict rules to determine when they had to be applied by sister states, would have had evident merit. The clause was thus made mandatory and self-executing on matters of admissibility, and conclusive effect was prescribed on matters of "existence" and "content" through use of the modifier "full," but all authentication and important conflict of laws questions, including jurisdictional ones, were reserved for the later determination by the national legislature.

In the interim, the states themselves would have to resolve these problems. They would do so under the law of nations, as they had theretofore, simply because that law contained the set of rules regulating the authority of independent sovereigns to deal with particular subjects, and the states retained their status as independent sovereigns except to the extent that they had delegated it to the national government. Such a delegation had taken place regarding conflict of laws rules and their subset of jurisdictional doctrines in the full faith and credit clause, but it had been a delegation made to the national legislature. If Congress failed to act, then under the Constitution, all the states would be obliged to do would be to admit sister-state statutes and judgments into evidence when authenticated as provided by the forum state's law

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206. See Anton, supra note 36, at 534-41; Davies, supra note 36, at 57; Sack, supra note 36, at 389-98.
207. Recall that a Pennsylvania court had, in 1786, observed that "the laws of foreign countries . . . would, in some cases, be taken notice of here." See James v. Allen, 1 Dall. 188, 191 (Pa. 1786); see also note 185 and accompanying text supra.
208. See Sumner—History, supra note 33, at 230; Rheinstein, supra note 16, at 816; note 252 infra.
209. See Nadelmann, supra note 33, at 77.
and treat them as conclusive proof of their existence and contents. Presumably, the states would follow the traditional international conflict of laws rules in determining when to enforce a sister-state judgment or statute.\footnote{210}

With this view of the full faith and credit clause, one should contrast an alternative reading: the clause was not simply a directive to admit sister-state statutes and judgments into evidence, subject to a (yet-to-be-defined here) supervisory power in the Supreme Court and to the legislative authority of Congress; it was a command that \textit{incorporated} appropriate parts of the law of nations into the constitutional text, with the power conferred on Congress (and perhaps the Supreme Court) to modify the rules so incorporated from time to time.\footnote{211} This reading is not only textually “unnatural,” it also does not fit as well with the preconstitutional context examined earlier. Nevertheless, it is a plausible reading of the clause.\footnote{212}

At this point, however, it is proper to ask what difference it would make if one reading rather than another were adopted. The law of nations as interpreted in English decisions required only a prima facie evidentiary effect to be given to most foreign judgments at the time the Constitution was adopted, but not even this effect was required if a judgment was rendered without proper “territorial” jurisdiction. What would have changed if this jurisdictional doctrine had been incorporated in the full faith and credit clause, rather than being left to operate independently of the clause as a common law doctrine? Similarly, would incorporation by the Constitution of conflict of laws doctrines determining when one government's statutory law applied to a dispute rather than another's have significantly varied the distribution of constitutional authority between the states themselves, between the state

\footnote{210. It is important to recognize that this description may not be framed in terms entirely understandable to contemporary readers, because it is a characterization of how the framers would have viewed the operation of the parallel obligations of the states under the full faith and credit clause and the law of nations. The framers would not have looked at the law of nations as if there could be great differences in its doctrines between governments. Professor Rheinstein was surely correct in arguing that the modern positivist notion that law must be the command of some particular sovereign has obscured from our view how the framers of the Constitution would have thought of the law of nations: as a body of rules having their source in some convictions, traditions, or customs which are common to the peoples and courts of more than one sovereign. \textit{See} Rheinstein, \textit{supra} note 16, at 813-14.\textit{ See also id. at 814-17; § VII(D) infra.}

\footnote{211. This is essentially the view taken by Professors Crosskey and Rheinstein. 1 \textit{Crosskey} \textit{supra} note 16, at 541-57; Rheinstein, \textit{supra} note 16, at 781-96.}

\footnote{212. \textit{See} 1 \textit{Crosskey}, \textit{supra} note 16, at 541-57; Rheinstein, \textit{supra} note 16, at 781-96.}
and federal governments, or between the three branches of the federal government?

As demonstrated by the subsequent discussion in this and later sections, it makes no difference which position is correct when one is assessing the relative authority of the Supreme Court and Congress to make major modifications of jurisdictional and other conflict of laws doctrines. In either case the authority of those bodies is the same, by virtue of the separation of powers between the court and Congress in Article IV, section 1, to declare the effect of public acts, records, and judicial proceedings.\footnote{213} However, it is important not to fall into the trap of concluding that the Court has greater authority to modify the rules of international jurisdiction because of their common law character; and it is also important to recognize that the nonconstitutional nature of the rules does make a difference in one respect. As later demonstrated, the Supreme Court exercised authority in full faith and credit cases to enforce the international rules of jurisdiction against the states, as did the lower federal courts in cases within their jurisdiction.\footnote{214} The reason that the Court was able to do this was that Congress early-on exercised its authority under Article IV, section 1, to declare the effect that state judgments were to have in sister-states. Consequently, full faith and credit cases were appealed from the state courts to the Supreme Court on the theory that the state court had denied the statutorily prescribed effect under the implementing statute to the judgment of a sister-state. Once a case had been properly appealed on such a ground, the Court's legitimate authority extended to the enforcement of the rules of territorial jurisdiction against the states concerned in the case. As we will see, however, had Congress not exercised its authority to declare the effect that state-court judgments should have in other states, the Supreme Court would not have had jurisdiction to review full

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213. In the conclusion to Part One of this article, I will argue that the Court has no authority under Article IV, § 1, to make major modifications in the territorial rules of jurisdiction. This is so because of the special function confided to Congress in that Article. See § VII infra. Conversely, in Part Two of this article, I will argue that the general principles of due process of law incorporated in the fourteenth amendment give the Court authority to impose certain kinds of territorial restrictions upon the reach of state-court process that are different from the common-law territorial rules that should be enforced by the Court in full faith and credit cases, although it did not give the Court authority to incorporate those same territorial rules into the due process clause in Pennoyer v. Neff, or to adopt the "minimum contacts" test of International Shoe Co. v. Washington. See Part Two, § VI. Curious as this may appear to the reader at the present time, I believe it will later appear to be greatly more coherent than the accepted contemporary view of the Court's authority over the evolution of jurisdictional doctrine.

214. See § VII(D) infra, especially note 439 and accompanying text.
faith and credit cases appealed from state courts in which the only
ground for rejecting a sister-state's judgment was lack of jurisdiction
in the "international sense" to render the judgment. A full
understanding of these points requires an examination of the pro-
ceedings in the constitutional convention and subsequent events.

Of the four plans presented in the Constitutional Convention,
two contained full faith and credit clauses. The "Pinkney Plan,"
presented to the Convention on May 29, 1787,215 contained the fol-
lowing clause in its Article 13: "Full faith shall be given in each
State to the acts of the Legislature & to the records & judicial Pro-
ceedings of the Courts & Magistrates of every State."216 The "Ham-
ilton Plan"217 contained the following Article IX, section 5: "The
citizens of each State shall be entitled to the rights privileges and
immunities of citizens in every other State; and full faith and
credit shall be given in each State to the public acts, records and
judicial proceedings of another."218 Neither the "Virginia Plan"
or the "New Jersey Plan" contained such provisions.219 Two
cryptic references to the clause appear in the records of the Com-
mitee of Detail,220 which was delegated the task of preparing a
draft of the Constitution between July 26 and August 6. On the
latter date, the Committee presented its Report to the Convention;
the Report contained an Article XVI, which was identical to the
"Pinkney Plan."221

On August 29, Article XVI was taken up for discussion.222 Mr.
Williamson, of North Carolina, moved to substitute the words of
the Articles of Confederation for Article XVI, because he "did not

215. 3 M. FARRAND, supra note 202, at 595.
216. Id. at 601. This followed an article containing privileges and immunities
and extradition provisions.
217. Id. at 617.
218. Id. at 629. The "Hamilton Plan" was "not formally before the Convention in
any way," but was presented by Hamilton in a speech of June 18, 1787, as a "sketch
of a plan of government . . . 'meant only to give a more correct view of his ideas,
and to suggest the amendments which he should probably propose to the plan of
Mr. R. in the proper stages of its future discussion.'" Id. at 617. Nevertheless, sev-
eral of the delegates made copies of the plan. Id.
219. Ross, supra note 33, at 146. See 3 M. FARRAND, supra note 202, at 593-94, 611-
16.
220. 2 M. FARRAND, supra note 202, at 135, 173-74. The references are, "Mutual
Intercourse—Community of Privileges—Surrender of Criminals—Faith to Proceed-
ings &c.," id. at 135; in an outline of the "Pinkney Plan" found among James Wil-
son's papers, id. at 134 n.3; and, "Full Faith & Credit &c.," id. at 174; in a draft also
found in Wilson's papers, id. at 163 n.17. The latter reference, however, appears in
an emendation in John Rutledge's handwriting, following a privileges and immuni-
ties clause and an extradition clause. Id. at 173-74.
221. Id. at 134, 188. Again, this article immediately followed articles containing
privileges and immunities and extradition clauses. Id. at 188.
222. Id. at 447 (Madison's notes).
understand precisely the meaning of the article." 223 James Wilson, of Pennsylvania, and William Johnson, of Connecticut, "supposed the meaning to be that Judgments in one State should be the ground of actions in other States, & that acts of Legislatures should be included, for the sake of Acts of insolvency &c." 224 The explanation by Wilson and Johnson was not challenged, and it does not appear conclusively whether they conceived of the clause as "incorporating" conflict of laws principles that would regulate when such a statute would operate extraterritorially. The fact that they viewed sister-state judgments only as "grounds of action," however, would tend to indicate that conclusive effect on the merits was not being prescribed for judgments.

After the Wilson-Johnson explanation, Charles Pinkney of South Carolina moved to commit Article XVI with a proposition to "establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange." 225 Nathaniel Ghorum of Massachusetts, agreed with Pinkney. 226 Madison accepted the Pinkney motion, adding that he "wished the Legislature might be authorized to provide for the execution of Judgments in other States, under such regulations as might be expedient," believing "that this might be safely done and

223. Id. The word "not" in the quoted clause was inserted by Madison after the publication of the Journal of the Convention in 1819, apparently in order to conform his notes to the Journal. 1 M. FARRAND, supra note 202, at xvi. There seems to be no reason to question the accuracy of this particular change. Cf. id. at xvi-xix (discussing the effects of Madison's changes on the reliability of his notes).

224. 2 M. FARRAND, supra note 202, at 447. Wilson's and Johnson's position immediately reminds one of the decisions of the Pennsylvania courts in James v. Allen and Miller v. Hall under the Articles of Confederation, both decisions involved sister-state "acts of insolvency," but the cases treated the respective statutes differently based on the apparent intraterritorial nature of the New Jersey Act, which was not enforced, and the "general" nature of the Maryland Act, which was enforced. See text accompanying notes 179-91 supra.

225. 2 M. FARRAND, supra note 202, at 447. Professor Crosskey cites Pinkney's motion and the later motion of Governeur Morris to commit a proposition, which, among other things, limited the acts of legislatures to "public acts," as evidence of intent to eliminate the private acts of the state legislatures from the obligation of the clause. He also cites a phrase crossed out in Madison's notes within the Wilson-Johnson explanation, "as they may sometimes serve the like purposes as act." This phrase was supplanted by, "for the sake of Acts of insolvency &c." Crosskey concludes that Madison was about to write, "as they m[ight] sometimes serve the like purpose as act[s of courts]," and from the whole evidence concludes that private bankruptcy acts gave rise to the immediate concern ultimately leading to the "public acts" limitation. 1 W. CROSSKEY, supra note 16, at 543-45. This seems logical in context, but it offers no support for Crosskey's later conclusion that the full faith and credit clause incorporated international conflict of laws principles. See id. at 549-50.

226. 2 M. FARRAND, supra note 202, at 447.
was justified by the nature of the Union." 227 This brought a sharp response from Edmund Randolph, who stated that "there was no instance of one nation executing judgments of the Courts of another nation," 228 and moved to substitute the following proposition:

Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done. 229

Randolph's concern about one state executing the judgments of another is similar to the concern expressed by the Pennsylvania courts that the Articles of Confederation should not be given a construction that would allow executions to issue in one state upon the judgments of another. 230 His intent was to provide that judgments, statutes, etc. be received in "evidence" as full proof of their "existence," but be given a binding effect only when within the state's authority as understood in the law of nations. This clearly appears from that portion of his substitute provision, which limited the operation of state judgments, et cetera, to "all cases to which [they] may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done." This reference looks very much like an expanded version of the "in cases where they apply" language of Section 34 of the Judiciary Act of 1789, 231 which, as we will later see, was a shorthand conflict of laws reference. 232 Randolph's language is clearly also a conflicts reference, which would have implicated the existing rules of the law of nations—i.e., international conflict of laws rules—pertaining to an individual sovereign's right to control matters with its local law. 233

227. Id. at 448.
228. Id.
229. Id.
230. See text accompanying note 187 supra; see also the opinion of Justice Rush, in Phelps v. Holker, 1 Dall. 261, 264 (Pa. 1788), stating: "If this judgment were as conclusive as the plaintiff contends, might he not issue an execution at once?" Phelps is discussed in the text at notes 192-99 supra.
231. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92, which read: "The laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." The existing version of the statute is codified in 28 U.S.C. § 1652 (1976).
232. See text accompanying notes 415-24 infra.
233. During the colonial period it was common to use the word "jurisdiction" to
If the language of the Committee's Article XVI, or for that matter the language of the full faith and credit clause of the Articles of Confederation, had truly incorporated these same principles, Randolph would likely not have seen the need for a more specific provision. In any case, Article XVI, Pinkney's motion, and Randolph's motion were all committed, along with the following motion of Governeur Morris: "Full faith ought to be given in each State to the public acts, records, and judicial proceedings of every other State; and the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings."\(^{234}\)

The committee appointed to consider all the propositions was composed of John Rutledge, of South Carolina, and Randolph, Gorham, Wilson, and Johnson.\(^{235}\) It reported the following substitute Article XVI on September 1, 1787:

Full faith and credit ought to be given in each State to the public acts, records, and Judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which Judgments obtained in one State, shall have in another.\(^{236}\)

The words "and credit" are thus added in this draft, probably to conform to the clause in the Articles of Confederation. "Ought" is substituted for "shall," as in the Morris proposition; also as in Morris' motion "public" acts only are entitled to full faith and credit, and Congress is authorized to prescribe the manner of proving public acts, records, and proceedings, but it is only authorized to declare the effect of judgments.

When the Committee's report was taken up on September 3, 1787, the following debate ensued:

Mr. Govr. Morris moved to amend the Report concerning the respect to be paid to Acts, Records &c. of one State, in other States... by striking out "judgments obtained in one state shall have in another" and to insert the word "thereof" after the word "effect."

Col. Mason favored the motion, particularly if the "effect" was to be restrained to judgments & Judicial proceedings.

Mr. Wilson remarked, that if the Legislature were not allowed to declare the effect the provision would amount to refer to a general authority to govern as well as to the scope of judicial authority. D. Robertson, Admiralty and Federalism 136 (1970).\(^{234}\)

\(^{234}\) Id. \(^{235}\) Id. \(^{236}\) Id. at 485 (Madison's notes).
nothing more than what now takes place among all Independent Nations.

Docr. Johnson thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State.

Mr. Randolph considered it as strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers. He was for not going farther than the Report, which enables the Legislature to provide for the effect of Judgments.


On motion of Mr. Madison, "ought to" was struck out, and "shall" inserted; and "shall" between "Legislature" & "by general laws" struck out, and "may" inserted, nem: con:

On the question to agree to the report as amended viz "Full faith & credit shall be given in each State to the public acts, records & judicial proceedings of every other State, and the Legislature may by general laws prescribe the manner in which such acts records & proceedings shall be proved, and the effect thereof" Agreed to witht. a count of Sts.237

What meaning can be gathered from this final debate on the full faith and credit clause? Wilson's remark that unless Congress were permitted to declare the effect of public acts, records, and judicial proceedings, "the provision would amount to nothing more than what . . . takes place among all Independent Nations" is ambiguous. It could mean that Wilson read the clause as incorporating conflict of laws and jurisdictional principles; or it could mean that he saw it as no more than a requirement that public acts, records, and judicial proceedings be admitted into evidence as conclusive proof of their existence and contents unless Congress prescribed the effect to be given them, leaving any greater effect to be determined by common-law principles. It might even refer to the permissive "ought," which had been substituted for "shall" by the committee.238

The remarks of Johnson and Randolph establish that Congress was, through the Morris motion, being given general conflict of laws authority over state statutes, records, and judgments. Ran-

237. Id. at 488-89 (Madison's notes). The clause as it appears in the Constitution was not significantly changed by the Committee on Style. See id. at 601.

238. See Nadelmann, supra note 32, at 71.
dolph, in particular, objected to this as creating a danger that the national government might usurp all the powers of the states. Again, this is ambiguous. He might have meant that in the absence of the Morris provision, the states would be entirely free to determine when they would apply the statutes of sister-states—free even to the extent of rejecting an application that would be proper under the “law of nations.” Or he might simply have been expressing the fear that Congress would go further than traditional conflict of laws rules in binding the states to apply sister-state statutes, thus usurping the sovereignty of the states to remain as independent governments vis-a-vis each other under the law of nations as then understood.

The substitution of “shall” for “ought” was not, so far as the records indicate, debated. It conformed the language of the Constitution to that of the Articles of Confederation, and it certainly appears that it was designed to make the full faith and credit requirement mandatory and self-executing. Given the self-executing character of the language, which was applicable to public acts, records, and judicial proceedings, it seems inconceivable that the clause was somehow intended to prescribe a conclusive effect on the merits to judgments and statutes. Those delegates who had objected to a power in Congress to declare the effects of state statutes would certainly have objected to Madison’s motion if this had been its understood meaning. Indeed, as noted at the beginning of this chapter, it is not even clear what “conclusive” effect to a statute would signify. Similarly, those who were concerned about one state having to execute the judgments of another would surely have expressed concern at a clause that effectively required the same thing, just as the Pennsylvania courts did under the Articles of Confederation when an identical interpretation was suggested to them.

The most sensible reading of the language in the full context of the debates and other materials examined is, therefore, that sister-state statutes, records and judgments must be admitted into evidence as full proof of their existence and contents, but that no more particular effect is commanded for them, the latter being left to Congress to prescribe when and if it so chose. In other words, the term “full” was not used as it might have been, to import a conclusive evidentiary effect on the merits of judgments. Until Congress acted, the states would apply sister-state statutes and enforce their judgments in accord with the rules they had theretofore followed, international conflict of laws rules; but there is no

239. See id. at 72-73.
evidence that such rules were incorporated into the clause by the language used. The standard usage of the terms employed, together with the limits imposed by the context we have previously examined simply do not permit such an inference to be drawn.

This reading is confirmed by Madison himself, in his remarks on the full faith and credit clause in The Federalist:

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.240

The essential language of the full faith and credit clauses of the Constitution and the Articles of Confederation, so far as conclusive effect and incorporation of conflict of laws and jurisdictional principles is concerned, 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. Indeed, the concern of the delegates to the Constitutional Convention seemed to focus almost entirely on the powers of Congress, suggesting that any important encroachments on state prerogatives would come from that quarter of the clause which authorized the national legislature to declare the effect of state legislation and judgments in other states.

It seems incorrect, therefore, to read the full faith and credit command, as Professor Nadelmann has, to require that conclusive effect be given to judgments of sister-states,241 but that sister-state statutes must only be applied “if the interest of the forum is not adversely affected.”242 Nor is it correct to argue, as Professor Crosskey did, that the full faith and credit clause incorporates in-

240. The Federalist No. 42 (Madison) at 287 (Cooke ed. 1961).
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international conflict of laws rules. Both Nadelmann and Crosskey interpret the debates in the Constitutional Convention and the other contextual materials differently than this article. Perhaps of more significance, however, is their understanding of events subsequent to the formation of the Constitution. In particular, both writers misinterpret the purposes of the Act of 1790, passed to implement the full faith and credit clause.

VI. THE IMPLEMENTING STATUTE

Congress acted promptly to exercise its authority under Article IV, section 1. On February 1, 1790, in the First Congress, second session, it was moved that a committee be appointed to bring in a bill to implement the full faith and credit clause. Such a committee was appointed and on April 28, 1790, returned a bill "to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated." With an amendment, this bill was enacted on May 26, 1790. The statute entitled, "An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other State," was as follows:

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.

Reading this statute in the context previously examined, what

244. Nadelmann places emphasis on Wilson's remarks when the clause contained the term "ought," rather than "shall," arguing that the change sanctioned a conclusive effect for judgments. Compare Nadelmann, supra note 33, at 71 with 1 W. CROSSKEY, supra note 16, at 541-57.
245. See Nadelmann, supra note 33, at 60.
246. Id. Professor Nadelmann observes that the text of the bill is not available, perhaps because some of the records were lost when the British burned the Capital in 1814. Id. at 60 n.124.
247. Id. at 60. The text of the amendment is likewise unavailable. Id.
248. Act of May 26, 1790, ch. 11, 1 Stat. 122.
conclusions can be drawn about its purpose, and what light does it throw upon the meaning of the full faith and credit clause of the Constitution? First, it should be noted that the original bill was concerned only with authentication of public acts, records, and judicial proceedings. The title of the Act stated its purpose to be authentication of public acts, records, and judicial proceedings "so as to take effect in every other state." The latter phrasing might mean that the intent of the Act is to declare the effect of public acts, records and judicial proceedings, but it is consistent with a lesser purpose: provision for authentication so that the public acts, records, and proceedings might be given effect by some set of rules outside the statute. This would have to be so with regard to public acts, because, while their mode of authentication was prescribed along with records and judicial proceedings, the statute did not in any way attempt to declare their effect. The only passage in the statute that can be read as an attempt to declare the effect of anything is the last sentence, which required with regard to state records and judicial proceedings that "such faith and credit" be given them as they have by "law or usage" in the courts of the state from which they were taken. Was the intent in using the expression "such faith and credit" to declare the effect of judgments, or is the expression consistent with some other purpose? Was this expression designed to require a res judicata effect to be given to state judgments in sister-states when they had such an effect domestically?

At first reading, it seems illogical to suppose that this portion of the statute could have any other purpose than a requirement that a res judicata effect be given sister-state judgments when they would receive this effect in the rendering state. It certainly seems to be a declaration of some sort of effect, because the Constitution only authorizes Congress to do two things regarding judgments, prescribe the manner of their proof and prescribe their effect. Congress had clearly prescribed their manner of proof in the first sentence of the act; therefore, it must have intended to prescribe their effect through the phrase "such faith and credit" in the last sentence. Moreover, we have seen that the terms "faith" and "credit," while terms of evidence, could be used to describe various effects that evidence ought to receive, from conclusive to lesser effects. Although the probability is that the Constitution uses the phrase "full faith and credit" to express only the requirement that state statutes, records, and judgments be admitted into evidence in other states without prescribing an effect on the merits for them, it

249. See text accompanying note 246 supra.
is nevertheless true that the terms in the statute could have been utilized differently, as their context suggests to the modern reader they were. In addition, it should be noted that a requirement of admissibility logically implies some effect as evidence, if only an effect as conclusive proof of existence and content. Thus the Constitution, while not commanding that a res judicata effect be given to state judgments, must be read as requiring that some effect be given them. If this much is signified by the words “full faith and credit” in the Constitution then the reference “such faith and credit” in the statute can be read sensibly as an attempt to prescribe the effect of judgments on the merits. The omission of public acts from the “such faith and credit” requirement fits with this reading, because Congress certainly would not have wanted to require the states to apply a sister-state statute to a dispute any time the sister-state would deem it controlling.

In contrast with this reading, one should consider another possible meaning of the phrase “such faith and credit.” Under this view it is illogical to suppose that Congress meant to prescribe the effect of state judgments in the Act of 1790. The Constitution had already used the expression “full faith and credit” to deal primarily with a problem of admissibility. The draftsmen of the statute would not have been so careless as to use the phrase “such faith and credit” to deal primarily or exclusively with a problem of effect, because this would be to use the words “faith” and “credit” in a sense different than they were used in the Constitution. Rather, the intent of the last sentence of the statute was only to require that state judgments be admitted into evidence to the same extent, only, and no further, that they would be admitted in the rendering state.

Why would such a requirement seem important to the First Congress? Recall that Massachusetts had enacted a statute in 1774 to deal with the problem of sister-colony judgments and judgments of inferior courts of Massachusetts, thus seeming to assume that the judgments of both would be treated as those of “inferior courts” in the absence of statutory treatment and not admitted into evidence. Perhaps the First Congress possessed the opposite concern that there would be within the states certain courts of “inferior jurisdiction,” such as justice-of-the-peace courts, whose judgments would not have been admitted into evidence in another

250. See text accompanying notes 151-54 supra; see also text accompanying notes 166-67 supra. Note that George Thatcher, of Massachusetts, was a member of the committee charged with the responsibility of drafting the implementing statute. Nadelmann, supra note 33, at 60.
court of the same state. The danger would be that the unadulterated language of the Constitution might be read as a command that such judgments be admitted into evidence in a sister-state and thus be given effect as conclusive proof of their existence and contents, whereas they would be inadmissible and, therefore, would receive no effect at all in the rendering state. To avoid this single problem the statute was drafted in the language of the Constitution, and the message intended was that "full faith and credit" did not require a sister-state to admit records and judicial proceedings inadmissible in the rendering state. The omission of public acts from the statute's last sentence is consistent with this reading, because there would have been no such problem of domestic admissibility with public acts. Statutes were introduced into evidence only when foreign law was being proved; domestic statutes do not have to be proved to domestic courts; therefore, no similar problem of public acts inadmissible in the enacting state would have been possible.\textsuperscript{251} Note also that this reading does not necessarily imply that Congress was acting unconstitutionally in attempting to modify or dilute the full faith and credit command. The power to declare effect was simply being utilized to say that not even the "some effect" implicit in admissibility per se of a judgment or record was required where such records and judgments were inadmissible domestically.\textsuperscript{252} Conceivably, the statute might

\textsuperscript{251} See, e.g., R. Weintraub, supra note 1, at 61-63.

\textsuperscript{252} Note that Professor Crosskey interpreted "records" in the Constitution and statute to mean "judicial precedents." See 1 W. Crosskey, supra note 16, at 554. Under his reading the Congress was prescribing uniform national effect with regard to judicial precedents; but was making the precaution that precedents would not have effect in sister states until they were given effect domestically. It is possible to read the term "records" in the Constitution and the statute this way; but given the context previously examined in English law, the colonies, and under the Articles of Confederation, it seems more likely that the word "records" was being employed in the sense it would have been in evidence law, and, therefore, it seems more plausible to read the full faith and credit clause and the implementing statute as making no reference to judicial precedents. The latter reading, however, produces a difficulty. What governed the admissibility of judicial precedents, if the full faith and credit clause did not command it, and would Congress have been able to declare the effect of such precedents in sister states?

The answer to these questions lies in the different methods used at the time to prove foreign statutes as opposed to foreign "common law." Because statutes and judgments were proved by authenticated copies while common-law rules were proved by parol evidence, no problem of authentication arose with the latter. See, e.g., J. Story, Commentaries on the Conflict of Laws 530 (Arno ed. 1972) (original ed. 1834). Moreover, no problem of admissibility of precedents arose at all. Id.

Note, however, that this explanation means that no power was conferred on Congress to declare the "effect" of the common-law rules of one state in another. This seems insensible until it is realized that the framers were concerned primarily with problems of admissibility and authentication in the full faith and credit clause and only secondarily with problems of effect. It was disputed whether Congress
even be justified as an exercise of the power of declaring the manner of proof: in cases where no manner of proof was acceptable to produce admissibility in the rendering state, the manner in which records and judgments “shall be proved or admitted” under the first sentence of the Act was qualified in the second sentence to provide for no admissibility.253

Interestingly, a dispute arose between 1790 and 1813 over a difference in meaning similar to that described above. The earliest reported decision on the matter occurred in the federal case of Armstrong v. Carson254 in 1794. The suit was an action of debt upon a judgment obtained in a New Jersey state court, to which the defendants pleaded nil debet. The issue was whether this plea was permissible. The plaintiff contended that under the Act of Congress the only question was “whether the courts of New Jersey would sustain any other plea than nulli record, if the present action had been brought there.”255 Ingersoll, counsel for the defendant, declined to argue the point, “thinking it clearly against him.”256 James Wilson, then a Justice of the United States Supreme Court sitting as a Circuit Justice, held for the plaintiff, stating that if the plea would be bad in New Jersey, it was bad in the United States Circuit Court. The judgment of the court rested explicitly upon the Act of Congress, rather than the Constitution.257

Justice Washington expressed the same view of the Act of 1790

should have the power to declare the effect of statutes at all. See text accompanying note 237 supra. Moreover, it was probably inconceivable to the framers that conflicts questions on common-law matters could be resolved in any other way than the traditional one under accepted conflict of laws rules. Common-law principles were of two sorts, “general” and “local.” See text accompanying notes 406-07 infra. When “general” law was involved, the courts of the forum state would make an independent determination of the meaning of the law. See text accompanying notes 420-21 infra. Where “local” rules were involved, the conflict of laws rules governing when those local rules applied might have been thought so inevitable that it was unnecessary to provide power in Congress to change them.

Alternative explanations for the omission are also possible. The framers might have viewed the common law as a uniform corpus juris. Compare note 210 supra. Or they might simply have overlooked the problem altogether.

253. Under the reading suggested in this paragraph, a record of proceedings in one state, rendered with jurisdiction and admissible in evidence in the rendering state, would still constitute complete and conclusive evidence of what had transpired in the case. The proceedings simply would not be entitled to a res judicata effect; the judgment could, as “evidence of the debt,” be rebutted with other evidence on the merits.

254. 1 F. Cas. 1140 (C.C.D. Penn. 1794) (No. 543).

255. Id.

256. Id. It should be noted that Ingersoll was also counsel for the creditor in James v. Allen and for the debtor in Miller v. Hall, the two Pennsylvania cases involving, respectively, the insolvency laws of New Jersey and Maryland.

257. Id.
An action of debt was brought in the Circuit Court of Pennsylvania on a New York judgment. The defendant pleaded *nil debet*, bankruptcy in 1801, and a certificate of discharge in the island of Teneriffe, under the law of Spain. The question was whether the original contract was merged in the New York judgment, so that even if the contract had been originally made at Teneriffe and the bankruptcy and discharge there otherwise effective, they would now afford no bar to the plaintiff's action. Plaintiff argued this would be so even if the judgment constituted only prima facie evidence of the debt, but would certainly be so if the judgment was conclusive; and it had to be deemed conclusive under the Constitution and Act of 1790. In deciding this question in favor of the plaintiff, Justice Washington clearly determined that the judgment was to be considered conclusive because of the Act of 1790, but not under the Constitution.

Washington listed the objects of Article IV, section 1 to be three: (a) to declare that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; (b) to provide for the manner of authenticating such acts, records, and proceedings; and (c) to provide for their effect when so authenticated. The first object had been declared and established by the Constitution itself, but the second and third objects were referred to the Congress. It was, therefore, the intention of the Constitution “to invest congress with the power to declare the judgments of the courts of one state, conclusive in every other.” This made sense, because the framers were aware that by “the general comity of nations” and under English law a foreign judgment would be a ground of action and “prima facie evidence of its own correctness”; therefore, it was “highly probable” that the Constitution intended something more than the recognition of these established rules, which would have allowed at least as much “faith and credit” to sister-state judgments as to foreign judgments.

258. 10 F. Cas. 1117 (C.C.D. Penn. 1810) (No. 5,780).
259. *Id.* Justice Washington’s opinion did not deny that the contract might be merged in the judgment even if it was only entitled to prima facie effect, but because he considered the judgment conclusive, it was unnecessary to decide this question. *Id.* at 1118.
260. *Id.* at 1118-19. This is emphasized, because Professor Nadelmann concluded that Washington “held the judgment conclusive under the Full Faith and Credit clause of the Constitution.” Nadelmann, *supra* note 33, at 66. As we shall see, this is a clear misreading of Washington’s opinion.
261. 10 F. Cas. at 1118.
262. *Id.*
263. *Id.*
It was more natural that the Constitution considered the judgments of the several states as domestic, but Washington clearly conceived that this was so because of the power conferred upon Congress, rather than the direct operations of the constitutional requirement of full faith and credit. As he stated, the change in language from the Articles of Confederation demonstrated this since the Articles provided no more than that full faith and credit should be given to the judicial proceedings of the states, while the Constitution added that Congress might declare the effect of such proceedings.

In considering how the Congress had executed the authority conferred, he argued that "the will of the people, expressed in the constitution... remained unfulfilled, until congress should have made provision, respecting the two objects which that section had referred to them; and the title [of the Act of 1790] declares in explicit terms, the determination of that body to act upon both." Significantly, in analyzing the meaning of the "such faith and credit" language in the statute, he stated that Congress "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." In fact, he said, if the "constitution or the law, had declared generally" that the judgments of one state should be conclusive in every other state, "very embarrassing questions would have arisen, as to the degree to which they were conclusive."

Chief Justice Marshall gave a contrary opinion of the statute's

264. Id.
265. Id.
266. Id. at 1118-19.
267. Id. at 1119.
268. Id. (emphasis added). Washington here was responding to an argument that the second sentence of the statute meant only that "full faith and credit shall be given to the record... as evidence, that such proceedings were had, and such judgment rendered, as the record imports." Id.
269. Id. See generally Short v. Wilkinson, 22 F. Cas. 15 (C.C.D.C. 1811) (No. 12,810); Montford v. Hunt, 17 F. Cas. 616 (C.C.D. Penn. 1811) (No. 9,725); Banks v. Greenleaf, 2 F. Cas. 756 (C.C.D. Va. 1799) (No. 959).

Professor Nadelmann described the case of Bastable v. Wilson, 2 F. Cas. 1012 (C.C.D.C. 1803) (No. 1,097), as one in which Judge Cranch "held... that nil debet was no plea to an action of debt on a judgment from another state." See Nadelmann, supra note 33, at 65. This is true, but the case also held that the plea of nul tiel record was improper, because the defendant moved to interpose the plea when the case was called for trial without showing any excuse for his failure to plead it before. The plea of nil debet was interposed after this refusal. 2 F. Cas. at 1012.
meaning in *Peck v. Williamson*. The action was one of debt on a Massachusetts judgment brought in the United States Circuit Court for the District of North Carolina. The plaintiff contended that the judgment was conclusive, while the defendant argued that it was only prima facie evidence of a debt liable to be rebutted by other testimony. To Marshall it appeared "very clear" that the Constitution made "a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in another."  

With respect to the former, the constitution is peremptory that it must have full faith and credit; with respect to the latter, it provides that Congress may prescribe the effect thereof. Unless Congress had prescribed its effect, it should be allowed only such as it possesses on common-law principles. In our opinion Congress have not prescribed its effect. To 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.  

There was also a great divergence of opinion among the state courts upon the meaning of the statute. Kentucky held that the Constitution and Act of 1790 required sister-state judgments to be treated as domestic ones; but courts in New York, Pennsylvania, and South Carolina held sister-state judgments enti-
tled to only prima facie effect, construing the implementing statute as not intended to declare the effect of judgments. In Massachusetts and New Jersey the judges were divided on the question.

In *Bartlet v. Knight* the Supreme Judicial Court of Massachusetts held unanimously that neither the Constitution nor the Act of 1790 precluded the defendant from offering certain pleas in bar on the merits to an action on a New Hampshire judgment. The defendant had argued that the Act did not declare the effect of sister-state judgments. Rather, he contended, it only prescribed the mode of their authentication. By declaring them entitled to "such faith and credit" as they would have in the rendering state, it merely made them "incontrovertible evidence of every thing that appeared by the record, viz., that the judgment was recovered, by and against the parties named, for the sum and for the cause of action expressed; in the manner stated, i.e. whether upon default or trial," etc. In every other respect they were only prima facie evidence.

Justice Thatcher, who had been a member of the congressional committee charged with the responsibility of drafting the implementing statute, stated that the Constitution and the statute did not require a conclusive effect to be given to the New Hampshire judgment, as the plaintiff had contended. Justice Sedgwick, who had been a member of the House of Representatives in the First Congress, agreed: the Act of 1790 did not declare the effect of judgments; it merely provided, through the "such faith and credit" language, "that they shall be incontrovertible and conclusive evidence of their own existence, and of all the facts ex-

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276. See generally Hammon v. Smith, 2 S.C.L. (1 Brev.) 52 (1802) (action of debt on a North Carolina judgment, to which defendant pleas *nulli tali record*; plea held improper under authority of *Walker v. Witter*, full faith and credit clause does not require otherwise; Brevard, J., dissents on grounds that act of Congress requires same effect to be given as in state where judgment rendered).

277. 1 Mass. 401 (1805).
278. Id. at 401-02.
279. Id. at 404.
280. Nadelmann, *supra* note 33, at 64.
281. 1 Mass. at 404-05.
pressed in them. Subsequently, in *Bissell v. Briggs*, the same court declared that the Constitution and Act of 1790 required conclusive effect to be given sister-state judgments rendered with jurisdiction; however, Justice Sewall, who had been a member of the court that decided *Bartlett v. Knight*, dissented; and Justices Sedgwick and Thatcher did not participate in the decision of the case.

In New Jersey the Supreme Court of Judicature held that a plea of nil debet was good to an action on a Pennsylvania judgment obtained in a proceeding by foreign attachment. Justice Pennington reached this result by concluding that Congress had declared the effect of sister-state judgments in the implementing statute; but Chief Justice Kirkpatrick and Justice Rossell concurred on the ground that a judgment obtained by foreign attachment was reexaminable at common law, reserving decision on the conclusiveness that sister-state judgments were entitled to receive generally.

In 1813 the Supreme Court of the United States, in the case of *Mills v. Duryee*, resolved the dispute over the interpretation of the implementing statute. An action of debt had been brought in the United States Circuit Court for the District of Columbia on the judgment of a New York state court. The defendant pleaded *nil debet*, and the issue in the case was the sufficiency of this plea. Francis Scott Key argued for the defendant that the Constitution and the Act of 1790 were confined in their operation to evidence only.

Thus, he argued, *nul tiel record* could not be the proper plea, because

there are no means of procuring and inspecting the original record (which is essential under such an issue); and the constitution and law, not having provided for this, it

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283. 1 Mass. at 409.
284. 9 Mass 462 (1813).
285. Id. at 466-67.
286. Id. at 470.
288. Id. at 377-84.
289. Id. at 384.
290. 11 U.S. 302, 7 Cranch 481 (1813). It should be noted that the Act of 1790 was supplemented in 1804. See Act of Mar. 27, 1804, ch. 56, 2 Stat. 298. The Supplementary Act however, did not directly affect the controversy described in the text. See Nadelmann, *supra* note 33, at 61.
291. 11 U.S. 302, 7 Cranch 481 (1813). The plea was adjudged bad before the Circuit Court on a general demurrer, and the case was brought before the Supreme Court on a Writ of Error to revise this determination. Id.
292. Id. at 302, 7 Cranch at 481-82.
must be presumed, did not intend it. The record in this case is not the original; it is certified and authenticated as a copy; and therefore, unless entitled to more faith and credit here than in New York, it could not be offered to the court upon the plea of nul tiel record, for under that issue, this record, even in New York, would not be admitted. The original must be produced and inspected.

Plaintiff's counsel admitted that a record authenticated pursuant to the Act of 1790 was to have the effect of evidence only; but he contended that it was "evidence of the highest nature, viz., record evidence," and thus conclusive.

Justice Story delivered the opinion of the Court. He agreed completely with the plaintiff's argument in the case, thus the judgment of the circuit court was affirmed. Toward the end of his opinion, however, Story added:

Were the construction contended for by the [defendant] 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.

Justice Johnson dissented, on the grounds that:

[a] judgment of an independent unconnected jurisdiction is what the law calls a foreign judgment, and it is everywhere acknowledged, that nil debet is the proper plea to such a judgment. Nul tiel record is the proper plea only when the judgment derives its origin from the same source of power with the court before which the action on the former judgment is instituted. . . .

If a different decision were necessary, to give effect to the first section of the fourth article of the constitution, and the act of 26th May 1790, I should not hesitate to yield to that necessity. But no such necessity exists; for by receiving the record of the state court, properly authenticated, as conclusive evidence of the debt, full effect is given to the constitution and the law. And such appears,

293. Id. at 302, 7 Cranch at 482.
294. Id.
295. See id. at 303-04, 7 Cranch at 483-85.
296. 11 U.S. at 304, 7 Cranch at 485 (emphasis supplied).
from the terms made use of by the legislature, to have been their idea of the course to be pursued, in the prosecution of the suit upon such a judgment. For faith and credit are terms strictly applicable to evidence. 297

What did Johnson mean by “conclusive evidence of the debt”? Did he mean a conclusive effect on the merits should be given to the judgment, but that nil debet should remain the proper plea otherwise, because the implementing statute only partially elevated state judgments above the status of foreign judgments vis-a-vis other states? Or did he mean that the judgment should be considered conclusive evidence only of its own existence and contents? Johnson stated that his dissent was prompted by a fear that if nul tiel record were the only permissible plea to a “foreign” judgment, it would be impossible to refuse enforcement of a judgment obtained by foreign attachment, but which far exceeded the amount of the property attached. 298 Further, Johnson feared that if nul tiel record was the only acceptable plea to a sister-state judgment, the party opposing it could not raise questions of “international” jurisdiction, because the matters which could be introduced to defeat the judgment under such a plea were limited. Whereas under the plea of nil debet, a broader range of defenses might be urged to defeat the judgment. 299

Thus Johnson’s dissent is consistent with a conclusive-effect-on-the-merits interpretation of the statute. That is, it can be read as directed only at the effect that the implementing statute should have on a narrow issue of pleading practice. As such, it is consistent with the majority’s view that the statute foreclosed the ability

297. Id. at 304-05, 7 Cranch at 485-86.
298. Id. at 304-05, 7 Cranch at 486-87.
299. Nil debet was the proper general issue in actions of debt on a simple contract. J. KOFFLER & A. REPPY, supra note 53, at 500. As such “the Courts gave a very broad construction to it, permitting Defenses which went to show the non-existence of the debt.” Id. at 501. As we have seen, a foreign judgment was treated as a debt on a simple contract. See text accompanying notes 65-71, and note 159 supra. Nul tiel record was the proper general issue in actions of debt based on a record. J. KOFFLER & A. REPPY, supra note 53, at 504. However, matters which could be set up in defense on such a plea were narrowly limited.

“Nul Tiel Record” sets up the Defense either: (1) that there is no such Record at all in existence, or (2) a Variance, the Record being Different from that declared on by the Plaintiff, or (3) that the Judgment is Void on the Face of the Record. All other Defenses must be Specially Plead. Id. at 505 (footnotes omitted). A jurisdictional defect might not appear on the face of the record and thus render the judgment void on its face. See the discussion of the cases dealing with the issue of whether jurisdictional recitals on the face of the record could be challenged in § VII infra. Thus Johnson’s focus about what the permissible pleas to a sister-state judgment were seem to have been well-grounded at the time that he wrote.
of a party to relitigate the merits of a case adjudicated in a sister state, when the sister state would not permit such relitigation.

What was the correct meaning of the implementing statute? The question is not entirely free from doubt, but the probability is that Congress never intended to do more than declare that an authenticated judgment would be admissible in evidence to the same extent, but no farther, than it would be admissible in the rendering state. It was not intended that a res judicata effect be given to it in other states, if it would be given such an effect in the rendering state. In the first place, the framers of the statute would not likely have been so careless as to use the words “faith” and “credit” in a sense different than they were used in the Constitution; and it is reasonably clear that the Constitution did not use them to command any effect more precise than conclusive proof of existence and contents. Furthermore, the statute was interpreted as not prescribing a res judicata effect by at least two of the men who had a hand in drafting and passing it.\textsuperscript{300} Perhaps most devastating, however, is Justice Johnson’s argument based upon jurisdiction. It is inconceivable that the men who drafted the implementing statute would have failed to notice that, in prescribing an effect in sister-states identical to that which would be given by the judgment-rendering state, they might be obliterating the rules which regulated the sovereign jurisdiction of the states vis-a-vis each other. Jurisdiction would, under this interpretation, depend solely on the domestic rules of the state where the judgment originated. This, under the conceptions of sovereignty then prevalent, would have turned matters on their head.\textsuperscript{301}

Of course, it is possible that Congress might have wished to make the effect of a state judgment depend in part upon domestic rules of jurisdiction, contrary to the usual practice between nations. It is even possible that Congress might have desired to modify or abolish certain of the rules of “international” jurisdiction operating between the states. What is unthinkable is that Congress would attempt to do one or both things through use of the terms “faith” and “credit” in the statute. Yet this could have been the consequence of the interpretation in Mills. Domestic jurisdic-

\textsuperscript{300} See text accompanying notes 279-82 \textit{supra}; see also Nadelmann, \textit{supra} note 33, at 65, describing an unidentified “eminent lawyer” who believed the act to be only evidentiary.

\textsuperscript{301} See, e.g., Rose v. Himley, 8 U.S. 143, 160, 4 Cranch 240, 268 (1808), holding that while courts of foreign nations were the exclusive judges of their jurisdiction under their own municipal rules, the courts of other nations could examine whether a foreign court had exercised jurisdiction consistent with the law of nations and, if it had not, could disregard its judgment.
tion must, at least, be inquired into under the decision, for if a judgment is void, say, for lack of subject matter jurisdiction under the law of the rendering state, it would have to be treated as void elsewhere.\textsuperscript{302} Moreover, under the statute as construed by a majority of the Court, there was severe danger that domestic rules of jurisdiction would be the only ones entitled to consideration; a state court could well have rendered a judgment in excess of international rules of jurisdiction that it would nevertheless have considered valid under its own domestic rules; and the statute could have been read as permitting an inquiry \textit{only} into domestic validity. Even the state courts agreeing with the construction in \textit{Mills} had felt compelled to address this question. The view generally expressed in the state courts was that neither the Constitution nor the Act of Congress had addressed jurisdictional questions, leaving them to be resolved under the law of nations as before the Constitution.\textsuperscript{303}

Yet this view is hardly more plausible than the view that Congress would try to use the expression “such faith and credit” to actively \textit{incorporate} domestic or international rules of jurisdiction. To argue that Congress would provide for a specific effect to be given to state judgments without addressing jurisdictional problems ignores the role of the legislative branch under Article IV, section 1. Recall that the self-executing portion of the full faith and credit clause was framed generally. In all probability this was because the precise resolution of complicated conflict of laws

\textsuperscript{302} This is true under the statute today. \textit{See R. Weintraub, supra} note 1, at 66-67.

\textsuperscript{303} For example, in Bissell v. Briggs, 9 Mass. 461, 466-67 (1813), the Supreme Judicial Court of Massachusetts felt the necessity of commenting upon the jurisdictional problem when it reversed its position on the meaning of the implementing statute and concluded that it required a res judicata effect to be given to sister-state judgments:

\begin{quote}

But neither . . . 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 \textit{United States}. The jurisdiction remains as it was before; and the public acts, records, and judicial proceedings, contemplated, and to which full faith and credit are to be given, are such as were within the jurisdiction of the state whence they shall be taken. 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.
\end{quote}

\textit{Id. See also} Smith v. Rhoades, 1 Day 168, 169 (Conn. 1803); Rogers v. Coleman, 3 Ky. (Hard.) 422, 424-25 (1808); Curtis v. Gibbs, 2 N.J.L, 399, 405-06 (N.J. 1805); Fenton v. Garlick, 8 Johns. 194, 197-98 (N.Y. Sup. Ct. 1811); Taylor v. Bryden, 8 Johns. 173, 177-78 (N.Y. Sup. Ct. 1811); Robinson v. Ward, 8 Johns. 88, 90-91 (N.Y. Sup. Ct. 1811); Kilburn v. Woodworth, 5 Johns. 37, 39-40 (N.Y. Sup. Ct. 1809); Betts v. Death, Add. 265, 266 (Pa. 1795).
problems, including jurisdictional ones, was too much to work out in the constitutional text at the time it was framed. Thus this work was left to Congress, along with the details of how authentication should be accomplished. It is likely that Congress would rapidly address authentication problems, as several states had done before the Constitution; but it is less likely that Congress would address conflicts problems without additional experience under the constitutional scheme. Furthermore, it is implausible to believe that Congress would declare the effect that judgments were to receive without simultaneously addressing jurisdictional issues for at least two additional reasons. First, there would have existed a great danger that partial legislative resolution of the problem would have produced a misconception of the statute: courts might believe jurisdictional problems were being addressed when they were not, especially in light of the reference to domestic jurisdiction that would clearly be made by the statute under this meaning. Second, even if Congress had adopted this method of proceeding, it would not have used the terms “faith” and “credit” to perform the task of declaring effect. As we have seen those terms would not adequately communicate the message desired by Congress, at least not without, again, presenting substantial danger of misconception. The probability seems, therefore, to be that the First Congress would not have addressed the question of the effect to be given judgments of sister states without working out at the same time the jurisdictional issues entwined with the effect problem.

Fortunately, it is less important to determine the “correct” meaning of the Act of 1790 than it is to learn what lessons we can from the dispute over its interpretation for the meaning of the Constitution and the jurisdictional issue that is central to this article.\(^{304}\) In this regard, it should be noted that the core of the dispute was not over the meaning of the Constitution. It was generally conceded that the Constitution's command was only a limited “evidentiary” one; the question was whether the words “faith” and “credit” were being used by Congress in a sense different than they had been used in the Constitution.\(^{305}\) Thus the general char-

\(^{304}\) Even if the statute was wrongly interpreted in \textit{Mills}, the holding of that case ought not to be reversed by the Supreme Court. It is obviously desirable that a res judicata effect be required of sister-state judgments rendered by a court with jurisdiction. Indeed, the English courts came to this conclusion regarding foreign judgments without the aid of a statute. \textit{See} authorities cited in note 66 \textit{supra}. Furthermore, under well-settled principles of stare decisis, abandonment of the interpretation of the statute established in \textit{Mills} would be improper. \textit{See} \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 77-78 (1938).

\(^{305}\) Joseph Story himself later extrajudicially expressed the view that the Con-
acter of the dispute confirms what had previously been theorized about the full faith and credit clause: the clause required of its own force only that sister-state judgments be admitted into evidence in other states as full proof that the judicial proceedings they embodied took place and adjudicated the matters described in the record; but it did not require that a res judicata effect be given to them. As it pertains to jurisdiction, this meant that international conflict of laws rules, including their jurisdictional components, were not incorporated into the constitutional command through use of the language, “full faith and credit,” although Congress was given plenary authority to legislate on this topic.  

VII. JURISDICTION AND CONFLICT OF LAWS

Between 1813, the date of the Supreme Court’s decision in Mills v. Duryee, and 1878, the date of the Court’s decision in Pennoyer v. Neff, there were numerous cases in which the Supreme Court and other federal courts exercised independent conflict of laws authority. The cases exercising this authority ranged from full faith and credit decisions, in which the courts would judge the enforceability of a state judgment by “international” common-law rules of jurisdiction and, under the Act of 1790, by domestic rules of jurisdiction as well, to cases in which the states’ “legislative” jurisdiction was confined to matters that were within the scope of its sovereign authority vis-a-vis other states. There were also a great

stitution required, of its own force, that state judgments receive conclusive effect in other states. See 2 J. Story, Commentaries on the Constitution of the United States § 1309 (5th ed. 1891); Nadelmann, supra note 33, at 69-70, citing § 1303 of the 1833 edition. As Professor Nadelmann has observed, however, at the time Story wrote, in 1833, he did not have the benefit of Madison’s notes on the debates in the Constitutional Convention and the Journal of the Convention did not convey a complete picture of what had occurred. Nadelmann, supra note 33, at 70. In any case Story’s conclusions do not square with the evidence or with the opinion of a majority of his contemporaneous judges, including Chief Justice Marshall and Justices Washington and Johnson, although, ironically, Story, through his treatise, probably had greater influence in shaping our modern view of the clause than any of his peers. In this regard, it is important to note than even Story apparently did not believe the Constitution incorporated rules of jurisdiction. After examining the implementing statute and concluding that Congress had intended by its enactment to place sister-state judgments on the same footing as domestic judgments, he added:

But this 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.

2 J. Story, supra, § 1313 at 194 (citing, inter alia, Bissell v. Briggs).

306. In addition to the matters already discussed in the text see note 305 supra. See also Bissell v. Briggs, 9 Mass. 462 (1813), quoted in note 303 supra.
many state cases involving full faith and credit issues. A detailed discussion of all of these decisions would not be fruitful here, but a brief survey of the most important doctrinal developments is important in understanding the proper role of the Supreme Court under the full faith and credit clause. Roughly, this discussion will be divided into the periods 1813-1839, 1840-1850, and 1850-1877, the later date in each period corresponding to the most significant decisions of the Supreme Court on jurisdictional and conflict of laws matters pertaining to the full faith and credit clause. A separate subsection will examine the exercise of conflict of laws authority in federal suits between citizens of different states, an area in which the federal courts acted in a manner analogous to their decisions in full faith and credit matters.


State Decisions

Most of the state courts that considered the matter between 1813 and 1839 agreed with the opinion of the Supreme Judicial Court of Massachusetts in Bissell v. Briggs that an inquiry into the judgment-rendering court's jurisdiction would be permissible under Mills v. Duryee and the Act of 1790.307 The stated doctrine was...
that the statute had elevated the status of sister-state judgments above that of foreign judgments, but not so high as domestic judgments.308 Yet if jurisdiction was open to investigation, what of other questions? Most courts considering the matter treated fraud in the procurement of the judgment as open also.309 Similarly, the conclusion seemed to follow that, if the judgment remained as a foreign judgment for some purposes, it would be treated as a simple contract debt in certain situations and not entitled to all of the attributes it would have either as a domestic judgment or as a judgment in the rendering state.310

the only proper plea; jurisdiction is still open to inquiry, citing, inter alia, Bissell v. Briggs); Andrews v. Montgomery, 19 Johns. 162, 163-64 (N.Y. Sup. Ct. 1821) (debt, not assumpsit, proper form of action on a judgment of a sister state; party against whom rendered may show it fraudulently obtained or rendered by a court without jurisdiction); Borden v. Fitch, 15 Johns. 122, 140-45 (N.Y. Sup. Ct. 1818) (want of jurisdiction may always be set up against a judgment, to bind a defendant by a judgment when he was never personally summoned nor had notice of proceedings would be contrary to the first principles of justice; this applies as well to divorce as to other proceedings. Bissell v. Briggs, inter alia, cited); Pawling v. Willson, 13 Johns. 190, 205-09 (N.Y. Sup. Ct. 1816) (sister-state judgment only prima facie evidence of debt; court ignores Mills); Picket v. Johns, 16 N.C. 113, 118, 120-21, 1 Dev. Eq. 123, 129, 130-32 (1827); Spencer v. Brockway, 1 Ohio 259, 260-62 (1824) (Constitution embraces effect as well as admissibility; conclusion may be different where defendant not served with process or not had opportunity to make defense); Moore v. Spackman, 12 Serg. & Rowl. 287, 290-91 (Pa. 1823); Benton v. Burgot, 10 Serg. & Rowl. 240, 241 (Pa. 1823) (judgment of sister-state conclusive if rendered with jurisdiction; fraud not open to inquiry); Evans v. Tatem, 9 Serg. & Rawl. 252, 258-62 (Pa. 1823); Rathbone v. Terry, 1 R.I. 73, 74-80 (1837); Morton & Co. v. Naylor, 19 S.C.L. 177, 177-80, 1 Hill 439, 440-45 (1833); Miller v. Miller, 17 S.C.L. 113, 113-16, 1 Bail. 242, 244-49 (1829) (framers of Constitution and Act of 1790 could not have intended to require effect to a judgment rendered without jurisdiction); Kelly v. Hooper's Executors, 11 Tenn. 315, 316, 3 Yer. 395, 396 (1832), Earthman's Admin. v. Jones, 10 Tenn. 427, 432-36, 2 Yer. 483, 490 (1831); Moren v. Killibrew, 10 Tenn. 334, 335-41, 2 Yer. 376, 378-84 (1830); Fullerton v. Horton, 11 Vt. 425, 426-27 (1839); St. Albans v. Bush, 4 Vt. 58, 66-68 (1832), Bellows v. Ingham, 2 Vt. 575, 576-78 (1830), Starkweather v. Loomis, 2 Vt. 573, 574 (1830); Hoxie v. Wright, 2 Vt. 263, 266-69 (1828) (citing, inter alia, Bissell v. Briggs).


310. See Bengle v. McClellan, 7 G.&J. 434, 443 (Md. 1836); Cameron v. Wurtz, 15 S.C.L. 105, 106, 4 McCord 278, 279 (1827). (Maryland and South Carolina courts hold that sister-state judgments should be paid as simple contract debts in distributing the assets of an estate); Kelly v. Hooper's Executors, 11 Tenn. 315, 316, 3 Yer. 394, 396 (1832) (Tennessee holds sister-state judgments subject to the law of the forum's statute of limitations). Contra, Morton & Co. v. Naylor, 19 S.C.L. 177, 179-80, 1 Hill 439, 444-45 (1833).
Lower Federal Court Decisions

Discussions of jurisdiction in the lower federal courts between 1813 and 1839 tended to confirm the doctrine of *Bissell v. Briggs*.311 Two issues which began to plague the courts during this period were (a) the question whether jurisdictional facts recited in the record of the judgment-rendering court were conclusive on the enforcing state and (b) the question whether the statute of limitations of the enforcing state could be pleaded in bar to a sister-state judgment. Lower federal decisions gave, initially, a "yes" answer to the first question and a "no" to the second.312

Supreme Court Decisions

The decision in *Mills v. Duryee* was rapidly affirmed by the Supreme Court. In 1818 Chief Justice Marshall, speaking for the Court in *Hampton v. McConnell*,313 stated that the case was "precisely the same . . . as that of *Mills v. Duryee*" and, therefore, that *nul tiel record* should have been pleaded.314 A footnote to the opinion observes that "the question is still open in this court, whether a special plea of fraud might not be pleaded, or a plea to the jurisdiction of the court in which the judgment was obtained, for these might, in some cases, be pleaded in the state court to avoid the judgment."315 Subsequently, in *Mayhew v. Thatcher*316 the Court considered a judgment obtained in a Massachusetts state court by attachment. The defendant had, however, appeared and defended the action, "so that," Marshall stated for the Court, "even supposing there was any objection to the proceeding by attachment, it was cured by the appearance of the defendant, and his litigating the suit."317


312. *See*, e.g., Moore v. Paxton, 17 F. Cas. 698, 698 (Super. Ct. Terr. Ark. 1827) (No. 9772a) (statute of limitations cannot be pleaded to an action of a state judgment); Field v. Gibbs, 9 F. Cas. 15, 16 (C.C.D.N.J. 1815) (No. 4,766) (jurisdictional facts recited in record cannot be contradicted).

313. 16 U.S. 110, 3 Wheat. 234 (1818).

314. *Id.* at 111, 3 Wheat. at 235.

315. *Id.* at 111 n.(a), 3 Wheat. at 235-36 n.(a).

316. 19 U.S. 58, 6 Wheat. 129 (1821).

317. *Id.* at 59, 6 Wheat. at 130.
A clearer statement of jurisdictional doctrine appeared in the 1828 decision of *Elliot v. Peirsol*.\(^{318}\) There the plaintiffs instituted an action of ejectment in the United States Circuit Court for the District of Kentucky. One of the matters at issue was the authority of a county court in Kentucky to order amendment of the certification of a deed under which defendants claimed to show the privy examination and acknowledgment of a feme covert. The circuit court had instructed the jury, on plaintiff's motion, that the county court had no jurisdiction under Kentucky law to make such an order, although the defendant argued a United States Circuit Court had no authority to question the jurisdiction of the county court.\(^{319}\) The Supreme Court affirmed, stating:

We agree, that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the county court could not be questioned, when its proceedings were brought, collaterally, before the circuit court. We know nothing in the organization of the circuit courts of the Union, which can contradictistinguish them from other courts, in this respect.

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 authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them . . . . This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings.\(^{320}\)

Although *Elliot* involved an inquiry into domestic jurisdiction only, its statement of doctrine seems much broader, extending also to interstate or international principles of jurisdiction.

That the latter principles were open to inquiry was seemingly confirmed in *McElmoyle v. Cohen*,\(^{321}\) which also approved the doc-

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319. Id. at 252-55, 1 Pet. at 333-37.
trine of *Bissel v. Briggs* that the Act of 1790 had not elevated the judgment of a sister-state above the status of a foreign judgment in all respects. In *McElmoyle* suit was brought in the United States Circuit Court for the District of Georgia on a judgment of a South Carolina state court. The judges of the circuit court divided over two questions: whether the Georgia statute of limitations could be pleaded to the South Carolina judgment, and whether in the administration of assets in Georgia, the South Carolina judgment should be paid in preference to simple contract debts. The Supreme Court held that the Georgia statute of limitations could be pleaded to the action and that the judgment could only rank as a simple contract debt, thus confirming the doctrine of *Bissell v. Briggs* as it had been applied by most state courts. At one point in its discussion, the Court stated: "It has been well said, 'the constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state.'"1323

Perhaps of more importance than the decisions on jurisdiction was a line of cases dealt with by the Court between 1819 and 1827 involving state insolvency statutes. In *Sturges v. Crowninshield*24 an action of assumpsit was brought in the United States Circuit Court for the District of Massachusetts against the defendant as maker of two promissory notes in New York. Defendant pleaded a discharge under a New York insolvency law enacted after the date of the notes, to which plea the plaintiff demurred. Ultimately, the Supreme Court, per Chief Justice Marshall, held the New York law, insofar as applied to contracts made prior to the passage of the law, invalid as an impairment of the obligation of contracts. Marshall emphasized that the decision was limited to actions brought by a creditor in a court that the legislature enacting the insolvency statute did not have a right to control.

Subsequently, in *Ogden v. Saunders*28 the Court considered

322. *Id.* at 281-83, 13 Pet. at 324-26.
323. *Id.* at 283, 13 Pet. 327. The quotation in the Court's opinion was taken from Story's Commentaries on the Constitution, although the opinion might as well have cited *Bissell v. Briggs*, which Story himself did in his treatise. *See* J. Story, *supra* note 305, § 1313 at 194 n.2.
324. 17 U.S. 70, 4 Wheat. 122 (1819).
325. *Id.* at 70-71, 4 Wheat. at 122.
326. *Id.* at 105, 4 Wheat. 198.
327. The *Sturges* rule was later applied to invalidate the discharge of a debtor under a Louisiana insolvency statute from a debt contracted in South Carolina, even though the statute was passed prior to the time the debt was incurred. *See* McMillan v. McNeill, 17 U.S. 110, 111, 4 Wheat. 209, 212-13 (1819); *see also id.* at 109, 4 Wheat. at 207.
328. 25 U.S. 135, 12 Wheat. 213 (1827).
the constitutionality of the New York insolvency law, which provided for the discharge of a debtor from all his debts upon the assignment of his property to trustees. Saunders, a citizen of Kentucky, sued Ogden, a citizen of Louisiana, in the United States District Court of Louisiana; the suit was in assumpsit on certain bills of exchange, drawn in 1806 at Lexington, Kentucky, upon Ogden, in the city of New York (Ogden then being a citizen of New York) and accepted by him there. Defendant pleaded a certificate of discharge under the New York law. The judgment went for the plaintiff in the lower court and was brought before the Supreme Court by writ of error.329

The Court first held that the power of Congress to establish uniform laws on the subject of bankruptcies was not exclusive and that prospective state bankruptcy laws did not impair the obligation of contracts.330 After it had thus been determined that the discharge was valid in cases where the contract was made between citizens of the state under whose law it was obtained and in whose courts it was pleaded, further argument was heard on two points reserved: whether the discharge would be effective with respect to a contract made with a citizen of another state, or when it was pleaded in the courts of another state or of the United States.331 After this argument, Mr. Justice Johnson announced the judgment of the Court, affirming the judgment of the lower court in plaintiff’s favor.332 In an opinion speaking only for himself, Johnson stated that the discharge could not operate as a bar in the courts of the United States, or of any other state than those where the discharge was obtained. Early in his opinion Johnson wrote:

The question is only partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the constitution which gives the power to the general government to establish tribunals of its own in

329.  Id. at 136, 12 Wheat. at 213-14.
330. Justices Washington, Johnson, Thompson, and Trimble agreed on these points. See id. at 160-172, 12 Wheat. at 253-70 (Washington); id. at 172-85, 12 Wheat. at 271-92 (Johnson); id. at 185-99, 12 Wheat. at 292-313 (Thompson); id. at 199-210, 12 Wheat. at 313-31 (Trimble). Chief Justice Marshall, and Justices Duvall and Story expressed the opinion that whether prospective or retroactive, state bankruptcy laws that discharged the debtor from the obligation of the contract impaired its obligation. Id. at 210-26, 332-57 (Marshall, C.J., with whom Duvall, J., and Story, J., concur, dissenting). Marshall’s opinion, clearly the most powerful of those appearing in the case, is well worth reading in full; it is a classical statement describing custom as a source of law—particularly here the right to contract.
332. See id. at 227, 12 Wheat. at 358. Marshall, Story, and Duvall assented to the judgment of affirmance, while Washington, Thompson, and Trimble dissented; id. at 233-34, 12 Wheat. at 369.
every state, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other states, which the origin of the contract might be supposed to give to each state; and thus, to obviate that conflictus legum, which has employed the pens of Huberus and various others ... 333

Subsequently, he added that states could not subject the citizens of other states to their jurisdiction in order to adjudicate their rights in a bankruptcy proceeding, "[f]or the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them." 334 Finally, he held that when the states, in the exercise of the power to discharge their own citizens, prospectively, in bankruptcy proceedings,

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. 335

Ogden v. Saunders was, as previously indicated, a diversity action in federal court. However, in the companion case of Shaw v. Robbins 336 suit was brought in an Ohio state court on several bills of exchange. At the time of the original transaction, the plaintiff was a citizen of Massachusetts and the defendant was a citizen of New York; the defendant was discharged under the New York law and the highest court of Ohio gave judgment in his favor. On writ of error to the Supreme Court, Mr. Justice Johnson for the Court held that the principles of Ogden v. Saunders applied and required reversal 337 This has prompted Professors von Mehren and Trautman to comment that the force of Justice Johnson's opinion in Ogden was weakened, because this, in effect, meant "his choice-of-

333. Id. at 227, 12 Wheat. at 359.
334. Id. at 232, 12 Wheat. at 367.
335. Id. at 233, 12 Wheat. at 369.
336. Id. at 233-34 n.(a), 12 Wheat. at 369 n.(a).
337. Id.
law rule was equally applicable in the state courts."

If by this they mean to say that Johnson was applying state law in *Shaw*, or that the Supreme Court of the United States did not have the authority to enforce "general" conflict of law rules against the states in a proper case, their view is highly questionable. From the state and federal decisions surveyed thus far, it is possible to agree that there existed a shared body of conflict of laws doctrine between the independent court systems of the several states and the federal government. However, as we will later see, the federal courts in diversity cases and the Supreme Court in all cases properly within its jurisdiction possessed an independent, common law, conflict of laws authority. This authority was constitutionally justifiable under both the doctrine of separation of powers and the principles of federalism. It explains not only *Shaw v. Robbins* and *Ogden v. Saunders*, but also many other decisions in the Supreme Court and lower federal courts, including full faith and credit cases in which the Court enforced international rules of jurisdiction against the states. In fact, it provides one key to understanding the Court's role in enforcing the latter clause. In this regard, it is important to note that all of the cases discussed dealing with state insolvency statutes were within the Court's appellate jurisdiction either on review of lower federal court decisions in diversity cases or because of a claim that the statute violated the contracts clause of the Constitution.

B. 1840-1850: *McElmoyle v. Cohen* to *D'Arcy v. Ketchum*

State Decisions

After 1839 the state courts continued to apply the standard jurisdictional doctrines established in *Bissell v. Briggs* and *McElmoyle v. Cohen*. However, disputes began to arise about...
the extent to which jurisdictional recitals in the record of the judgment-rendering court could be challenged, several courts holding that they were conclusive.\textsuperscript{341} Another court held that in the absence of a recital of jurisdictional facts, a sister-state judgment was prima facie evidence of jurisdiction in the rendering court,\textsuperscript{342} and still others held that even in the presence of jurisdictional recitals, the record would only be prima facie evidence of jurisdiction.\textsuperscript{343}

Also of interest is the decision of the Supreme Court of Georgia in \textit{Dearing v. Bank of Charleston},\textsuperscript{344} which involved an attempt by a nonresident to overturn a decree rendered by a Georgia court in an earlier proceeding, in which the nonresident had been made a party by publication. The court first observed that there was no law in Georgia authorizing a nonresident to be made a party to a suit within the state unless he voluntarily appeared and that "by the general law, and by the comity of States, the citizens of a foreign State, cannot be made a party to a suit in Georgia, so as to be estopped by a judgment against him, without his consent."\textsuperscript{345} The full faith and credit clause did not effect this question, because the Constitution left the jurisdiction of the states where it found it.\textsuperscript{346} Furthermore, even though state courts could bind the parties to an action with their decrees, the judgments were liable to be "im-

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\textsuperscript{341} Welch v. Sykes, 8 Ill. 208, 211. 3 Gilm. 197, 199-200 (1846); Bimeler v. Dawson, 5 Ill. 554, 560, 4 Scam. 536, 541-42 (1843); Miller v. Ewing, 9 Miss. 157, 162, 8 S.&M. 421, 431 (1847); Newcomb v. Peck, 17 Vt. 302 (1845).

\textsuperscript{342} Bank of the United States v. Merchants Bank of Baltimore, 7 Gill 415, 430 (Md. 1848).

\textsuperscript{343} Gleason v. Dodd, 45 Mass. 333, 338 (1842). \textit{See} Bimeler v. Dawson, 5 Ill. 554, 560, 4 Scam. 536, 541-42 (1843), where the court states:

\textit{[W]here the record of a judgment of a court of general jurisdiction shows either that the defendant was personally served with process, or personally appeared to the action, then the record is conclusive, and the defendant is estopped by it, from denying the jurisdiction of the court over his person. . . . []} If the record fails to show affirmatively this mode of service on, or appearance by the defendant, it furnishes at most but \textit{prima facie} proof of the jurisdiction of the court. . . . Where the record shows neither service of process, nor notice to the defendant, nor appearance by him, the judgment is a nullity, when attempted to be enforced in another state, the record not affording even a presumption in favor of the jurisdiction. But if the record shows that there was a service of process, a notice to the defendant, or an appearance for him, not amounting, in either case, to personal notice or appearance, then the presumption from the record is, that the court had jurisdiction, and proceeded in conformity to the laws of the state, and until such presumption is rebutted by the defendant, the judgment is conclusive.

\textit{Id.}

\textsuperscript{344} 5 Ga. 497 (1848).

\textsuperscript{345} \textit{Id.} at 505-06.

\textsuperscript{346} \textit{Id.} at 512-13.
The truth is, that at the door of every temple of the laws in this broad land, stands justice, with her preliminary requirement upon all administrators—"you shall condemn no man unheard." The requirement is as old at least, as magna charta. It is the most precious of all gifts of freedom, that no man be disseised of his property, or deprived of his liberty, or in any way injured, "nisi per legale judicium parium suorum, vel per legem terrae." Now, you cannot bring a foreigner into the Courts of Georgia, to answer to a proceeding against him personally, without his consent. Against it lies an absolute prohibition, founded in the rights of sovereignty, and sanctioned by the usage of the civilized States of the world. If, then, he does not come in voluntarily, served or not, he is no party—he is condemned unheard, and the rights of sovereignty are but political and judicial figments. Whilst, therefore, the jurisdiction over property is conceded, as a necessary attribute of sovereignty, it must be so exercised, as to conclude no one unheard.

This association of the international rules of jurisdiction with what is clearly a due process concept of an opportunity to be heard was qualified by the Georgia court, however. Earlier in its opinion it had stated:

Were there an Act of the Legislature conferring upon the Courts this . . . authority, [to serve a nonresident by publication] it would be the duty of this Court to enforce it, however we might hold it wanting in respect to the sovereignty of other States, and violative of that comity happily now, by the sanction of reason, justice and Christianity, subsisting between the civilized nations of the earth.

This view was typical of that prevailing generally about the characteristics of the international rules of jurisdiction. That is, they were conceived of as rules governing the relations of sovereigns with each other, not as rules limiting the legislative authority of a sovereign to bind its own courts internally. While the failure of the sovereign law-making authority to authorize an extraterritorial assertion of jurisdiction, as in Dearing, might mean that any such assertion would violate a state's due process clause, this was because the courts of the sovereign were bound to follow the procedures prescribed for them by the legislature, rather than making them up on a case by case basis. In the absence of any enacted

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347. Id. at 516.
348. Id.
349. Id. at 511.
rules prescribing how the courts might obtain jurisdiction over a defendant, the courts would have adhered to ordinary common-law modes of asserting and acquiring jurisdiction; however, service of a nonresident by publication was not such an "ordinary" common-law mode, but rather a form that could only be authorized by statute.

Lower Federal Court Decisions

Like the state courts, the lower federal courts continued to grapple with the problem of the effect to be given jurisdictional recitals in the record. They uniformly held that the record could not be contradicted in such cases. Where it did not appear from the record that the judgment-rendering court had jurisdiction, as by a defendant's appearance, the judgment would be rejected.

Supreme Court Decisions

In a number of cases between 1840 and 1850 the Supreme Court relied on the domestic rules of the judgment-rendering state, including jurisdictional rules, to determine the effect a judgment should have, and the Court reaffirmed the ability of the states, under the Act of 1790, to pass statutes of limitation applicable to sister-state judgments. By far the most important decision of the Court was D'Arcy v. Ketchum in 1850. An action was brought against D'Arcy in the United States Circuit Court for the District of Louisiana on the judgment of a New York state court. The New York suit had been brought against four defendants jointly on a bill of exchange; the record did not show that process had been served on any of the defendants, but one of them, George H. Gossip, appeared voluntarily, pleaded the general issue, and gave notice of a set-off. When the case was called for trial, however, Gossip defaulted, and judgment in the action was rendered against both Gossip and D'Arcy under a New York statute providing...

350. Todd v. Crumb, 23 F. Cas. 1350, 1350 (C.C.D. Ohio 1850) (No. 14,073); Westerwell v. Lewis, 29 F. Cas. 794, 795 (C.C.D. Ill. 1841) (No. 17,446); Lincoln v. Tower, 15 F. Cas. 544, 547-48 (C.C.D. Ill. 1841) (No. 8,355).
352. See Williamson v. Berry, 49 U.S. 508, 554-58, 8 How. 495, 540-44 (1850); Stacy v. Thrasher, 47 U.S. 48, 63-64, 6 How. 43, 58-60 (1848); Hickey's Lessee v. Stewart, 44 U.S. 856, 870-71, 3 How. 750, 762-63 (1845); Shriver's Lessee v. Lynn, 43 U.S. 34, 50-51, 2 How. 43, 59-60 (1844). Cf. Webster v. Reid, 52 U.S. 459, 483-84, 11 How. 437, 459-60 (1850) (judgment of territorial court held void for want of personal notice or attachment prior to judgment; difficult to tell whether Court is relying on interpretation of local law or applying general jurisdictional rules).
ing that in a suit against joint debtors, one of the debtors could be subjected to the process of the court to "answer the plaintiff," but if the plaintiff won, the judgment could be executed against all the debtors, even those not brought into court to defend.\textsuperscript{355} The circuit court rendered judgment for plaintiffs, and D'Arcy brought the case before the Supreme Court by a writ of error.

Relying on New York decisions for a construction of the above statute, the Court first concluded that the judgment would be considered valid and binding against an absent defendant as prima facie evidence of a debt; therefore, because "D'Arcy's defense was in effect a demurrer to the record evidence, it could not have been made in the courts of New York."\textsuperscript{356} This presented the question of jurisdiction for decision, that is, "whether the New York statute, and the judgment founded on it, bound a citizen of Louisiana not served with process."\textsuperscript{357} As the Court said, this was a "question of great stringency," with far-reaching consequences for the power of the states to render judgments against absent debtors.\textsuperscript{358} The Court considered it to be well-settled that judgments rendered by a tribunal without jurisdiction could be disregarded. It observed that the state courts had uniformly held such judgments void and in so holding had "altogether disregarded, \textit{as inapplicable}, the Constitution and laws of the United States."\textsuperscript{359}

After examining the full faith and credit clause, the Act of 1790, and its previous decision in \textit{Mills v. Duryee}, the Court observed that \textit{Mills} had been followed as the proper construction of the implementing statute in all cases where process was served in the original action, but that, as observed by Justice Johnson at the time, "great embarrassment" would ensue if the same interpretation applied to all other cases.\textsuperscript{360} The Court then added:

In construing the Act of 1790, the law as it stood when the act was passed must enter into that construction; so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence.

\textsuperscript{355} \textit{Id.} at 175-77, 11 How. at 166-67.
\textsuperscript{356} \textit{Id.} at 184, 11 How. at 173-74.
\textsuperscript{357} \textit{Id.} at 184, 11 How. at 174.
\textsuperscript{358} \textit{Id.}
\textsuperscript{359} \textit{Id.} (emphasis added).
\textsuperscript{360} \textit{Id.} at 184-85, 11 How. at 175.
As these judgments, however, were only *prima facie* evidence, and subject to be inquired into by plea when sued on in another State, Congress saw proper to remedy the evil, and to provide that such inquiry and double defence should not be allowed. To this extent, it is declared in the case of *Mills v. Duryee*, Congress has gone in altering the old rule. Nothing more was required.

On the other hand, the international law as it existed among the States in 1790 was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force.

Subject to this established principle, Congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule, which would bind the citizens of one State to the laws of another; as must be the case if the laws of New York bind this defendant in Louisiana. There was no evil in this part of the existing law, and no remedy called for, and in our opinion 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.\(^{361}\)

*D'Arcy* articulated in the Supreme Court what had been clear to the state courts since *Bissell v. Briggs*: neither the Constitution nor the Act of 1790 dealt with jurisdictional rules. Rather, both the framers of the Constitution and the First Congress had left the common-law rules of "international" jurisdiction where they found them, although the Act as interpreted clearly added the requirement that a judgment not be void by local jurisdictional rules of the judgment-rendering state. More importantly, *D'Arcy* established more clearly than any Supreme Court decision before it that the Court had, in cases within its jurisdiction, the authority to enforce the international rules against the states to preserve their sovereign authority vis-a-vis each other. Nevertheless, *D'Arcy* was a diversity action, and Mr. Justice Johnson's opinion in *Ogden v. Saunders* might be thought to establish that diversity cases are "special," due to the power in the national government to insure the harmonious distribution of justice throughout the Union and confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens.\(^{362}\) As we will shortly see, how-

\(^{361}\) *Id.* at 185-86, 11 How. at 175-76.

\(^{362}\) 25 U.S. at 173-79, 12 Wheat. at 273-83. See text accompanying note 334 *supra*. 
ever, the doctrine applied in *D'Arcy*, although it extended to diversity cases and beyond jurisdictional rules, was not so limited.

C. 1850-1877: *D'Arcy v. Ketchum* to *Pennoyer v. Neff*

*State Court Decisions*

Between 1850 and 1877 the state courts continued, uninterrupted, to apply essentially the same jurisdictional doctrine announced in *Bissell v. Briggs*, although disputes continued over the effect which the presence or absence of recitals of jurisdictional facts in the record should have.

Of special interest is the Indiana case of *Beard v. Beard*, decided in 1863. The plaintiff obtained a divorce and judgment for alimony against her husband in 1856. In 1859 she filed an amended complaint against him on the alimony judgment and obtained a writ of attachment and process of garnishment against his property. The husband appeared to the latter action and demurred; his demurrer being overruled, he pleaded that he was a resident of Kansas at the time of the judgment for divorce and alimony, and that no notice except by publication was ever given him, so that he did not have actual notice of the judgment against him until six months after it was rendered. A demurrer was sustained to his answer and judgment entered against him and the garnishee.

The Supreme Court of Indiana noted that the state's divorce statute permitted judgments of divorce and alimony to be rendered upon notice by publication, contrary to the usual practice in nondivorce cases. The court saw the question as "one of power, on the part of the Legislature to authorize such a judgment," observing that judgments authorized upon notice by publication against residents of the state were not void as against the course of the common or civil law. This was important because although

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364. 21 Ind. 321 (1863).
365. *Id.* at 321-22.
366. *See* *id.* at 322-23.
367. 21 Ind. at 323.
368. *Id.* at 324.
the government of Indiana is not absolute, nor is the legislative power omnipotent, yet it is only restrained, in this particular, to the extent that no man shall be deprived of his property, &c., except by due course of law, which is construed to mean a trial according to the course of the common law.

* * * *

But, notwithstanding a State may authorize its Courts to render personal judgment, upon constructive notice against its citizens, it can not, as we think, authorize such a judgment, upon such notice, against a citizen of another State . . . .

Thus, the court concluded that if the husband was a nonresident, the courts of Indiana could render no personal money judgment against him upon notice by publication only, because to do so would be to give the laws of the state an extraterritorial operation. "[T]he judgment in question would have been worthless in Kansas [citing D'Arcy v. Ketchum]. It ought to be here. It was not obtained by due course of law, with right of jury trial."369

Significantly, the court's due process holding was predicated upon the idea that "the law of nations is the law of all tribunals in the society of nations."370 Therefore, the Indiana Supreme Court did not believe it was within the power of the legislature to alter this rule so as to bind Indiana courts to enforce judgments that would be unenforceable in sister states under international rules of jurisdiction. This is contrary to the position of the Supreme Court of Georgia in Dearing v. Bank of Charleston, previously discussed,372 which indicated that the legislative power might bind the courts to enforce a judgment against a nonresident even when it had been rendered contrary to the law of nations, due process notwithstanding.

Supreme Court Decisions373

It was 1873 before the Supreme Court finally got around to de-

369. Id. at 324, 327.
370. Id. at 328.
371. Id. at 327, citing and quoting Chief Justice Marshall's opinion in Rose v. Himely.
372. See text accompanying notes 344-49 supra.
ciding whether jurisdictional facts recited in the record could be contradicted, holding that they could.\footnote{374} Between 1850 and 1877, however, there were a number of significant opinions of the Court on jurisdictional and conflict of laws issues.

In \textit{Lafayette Insurance Co. v. French}\footnote{375} the Court held an Ohio judgment against the insurance company entitled to full faith and credit in Indiana. The judgment had been obtained through service of process on the company's agent in Ohio, under an Ohio statute conditioning the right of the company to do business there upon the company's agent also being deemed an agent to receive service of process.\footnote{376} In speaking of the Act of 1790, the Court said:

\begin{quote}
[T]he doctrine of this court, as well as of the courts of many of the States, is, that this act of Congress was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another.\footnote{377}
\end{quote}

In \textit{Christmas v. Russell},\footnote{378} decided in 1866, the Court struck down as unconstitutional a Mississippi statute which barred suits on sister-state judgments whenever the cause of action upon which the judgment was based would have been barred by any Mississippi statute of limitations at the time of the commencement of the action in the sister state. The Court observed that the statute in question was "not a statute of limitations as known to the law or the decisions of the courts upon that subject,"\footnote{379} but rather "an attempt to give operation to the statute of limitations of that State in all the other States of the Union by denying the efficacy of any judgment recovered in another State against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law."\footnote{380} As such, it conflicted with the right of the plaintiff to enforce his judgment under the Act of 1790 and was, there-

\footnotesize

\begin{verbatim}
458 (1851); Boswell's 
Lessee v. Otis, 50 U.S. 357, 9 How. 336 (1850); Barras v. Bidwell, 2 F. Cas. 906 (C.C.D. La. 1876) (No. 1,039); Paine v. Caldwell, 18 F. Cas. 1006 (D. Me. 1872) (No. 10,674); Tenny v. Townsend, 23 F. Cas. 847 (C.D.S.D.N.Y. 1871) (No. 13,832); Brest v. Smith, 4 F. Cas. 66 (C.C.D. Wisc. 1860) (No. 1,843); Farmer's Loan 
& Trust Co. v. McKinney, 8 F. Cas. 1048 (C.C.D. Mich. 1853). \footnote{374} Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 468-69 (1873). \textit{See also} 
Knowles v. The Gaslight 
& Coke Co., 86 U.S. (19 Wall.) 58, 61-62 (1873). \footnote{375} 59 U.S. (18 How.) 404 (1855). \footnote{376} \textit{Id.} at 406-08. \footnote{377} \textit{Id.} at 406. \footnote{378} 72 U.S. (5 Wall.) 290 (1866). \footnote{379} \textit{Id.} at 300. \footnote{380} \textit{Id.} at 301.
\end{verbatim}
During the same term as *Christmas v. Russell, Green v. Van Buskirk* was decided. In that case, a motion was filed to dismiss a writ of error to the Supreme Court of New York. The issue was whether the case presented a question within section 25 of the Judiciary Act of 1789, governing appeals from the state courts to the Supreme Court. One Bates, a citizen of New York and the owner of certain iron safes located in Chicago, Illinois, had executed and delivered a chattel mortgage to the safes to Van Buskirk and others, also citizens of New York, in New York. Subsequently, Green, a citizen of New York, attached the safes in an Illinois court, and they were ultimately sold pursuant to the judgment of that court. Green's attachment was levied before possession of them had been delivered to Van Buskirk or the mortgage recorded and prior to any notice of the mortgage's existence. Van Buskirk sued Green in the New York state courts and Green pleaded the Illinois judgment in defense. Judgment went for Van Buskirk and Green appealed to the United States Supreme Court.

The issue of appellate jurisdiction turned on whether the New York courts had, by their decision, denied effect to the Illinois judgment. Their ruling had been based upon the proposition that title passed to Van Buskirk by virtue of the mortgage; this, in turn, was based upon a conflict of laws rule that required the law of New York to apply to determine the property's liability to attachment, because New York was the domicile of the owner at the time the conflicting claims to the property originated.

The Supreme Court held that the New York courts had necessarily determined the effect of the Illinois proceedings in Illinois and had further determined this question against the claim set up by the defendant under the Constitution and laws of the United States. Thus the case was properly before the Supreme Court for review under section 25. In 1868, the Court ruled on the merits of the case, holding that the New York law had to give way to the

381. See id. at 302. The Court also held a plea of fraud in procurement of the judgment bad, because it would not be good in the judgment-rendering state. Id. at 303-07. The Court acknowledged that this was contrary to the traditional common-law rules governing foreign judgments, which "remain as a general remark, unchanged to the present time"; but it cited modern English and state decisions to the contrary and ultimately held fraud not to be an open question unless also open in the rendering state. Id. at 304, 304-07.
382. 72 U.S. (5 Wall.) 307 (1866).
384. 72 U.S. (5 Wall.) at 308-09.
385. Id. at 310-11.
386. See id. at 311-14.
law of Illinois, which treated the judgment obtained by attachment as conclusive, because the Act of 1790 required the same effect to be given the judgment by the New York courts. "Any other rule," stated the Court, "would . . . deny to a State the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings." Thus the Court, when confronted with two states each attempting to give extraterritorial effect to their laws, resolved the conflict in favor of the state where the property that was the subject of the suit was physically located.

In 1872 the Court confronted a similar problem in Crapeo v. Kelly. A citizen of Massachusetts, owning a ship then on the high seas bound for New York, but registered in Massachusetts, applied to the Massachusetts courts to receive the benefit of the insolvency laws of that state. Pursuant to state statute, the court transferred all the debtor's property to an assignee in insolvency. Subsequently, a citizen of New York sued the citizen of Massachusetts in a New York court on certain promissory notes and obtained a warrant of attachment against the latter's property. When the ship docked in New York, it was attached under the warrant. The Massachusetts assignee in insolvency then sued the sheriff to determine who had the prior right in the ship. The New York courts held for the sheriff, and the assignee brought the case to the Supreme Court by a writ of error.

The Court held that the ship, while on the high seas, had to be treated as a portion of the territory of Massachusetts, because "[e]xcept for the purposes and to the extent to which these attributes have been transferred to the United States, the State of Massachusetts possesses all the rights and powers of a sovereign state," and the ship would have been so treated if Massachusetts were an independent nation. The court acknowledged, however, that if the ship had been in the port of New York at the time of the transfer to the assignee and subsequently attached there, the New York proceeding would have taken priority.

Green and Crapeo demonstrate clearly that the Court would exercise authority to enforce the international rules of jurisdiction against the states in cases coming to it under section 25 of the Judi-

388. See id. at 146-47.
389. 74 U.S. (7 Wall.) at 148.
390. 83 U.S. (16 Wall.) 610 (1872).
391. Id. at 611-12.
392. Id. at 623.
393. Id. at 624.
394. See id. at 622.
ciary Act of 1789. We will shortly examine the justification for this exercise of authority. For now, it is important to note that appellate jurisdiction was predicated upon a claimed violation of the implementing act in each case, not upon a direct violation of the constitutional requirement of full faith and credit. This is important because the implementing statute as interpreted in Mills required a specific effect on the merits to be given to sister-state judgments. This required enforcement of a judgment rendered with jurisdiction. The Constitution only required admissibility and conclusive effect as proof of existence and content; it required no more specific effect and, therefore, of its own force required no enforcement.

Finally, in Cooper v. Reynolds the Court considered the validity of an attachment proceeding in a Tennessee court, the judgment of the court having come collaterally in issue in an action of ejectment brought in the United States Circuit Court for the Eastern District of Tennessee. One of the objections to the Tennessee proceeding was that the court was without jurisdiction, because by the law of Tennessee an attachment could not be issued in an action for false imprisonment at the beginning of the suit, but had to be issued sometime after the suit commenced. The Court, while conceding that the seizure of the property "is the one essential requisite to jurisdiction," rejected this claim:

It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the State, and that such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction. If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction.

Interestingly, Justice Field dissented from the judgment of the Court, being of the opinion that the Tennessee court never acquired jurisdiction in the original suit.

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395. 77 U.S. (10 Wall.) 308 (1870).
396. Id. at 310-12.
397. Id. at 319.
398. Id. at 320.
399. Id. at 321. Whether Field disagreed with the holding of the Court as to the time of attachment under Tennessee law is not known. He might have disagreed, however, and still been consistent in taking the position he did in Pennoyer v. Neff, for in Pennoyer he observed that a "majority" of the Court were of the opinion that
A complete understanding of the Supreme Court's role in administering the "international" rules of jurisdiction in full faith and credit cases requires a brief survey of the federal practice in diversity cases from 1789 until the mid-nineteenth century. Specifically, the examination concerns what we know today as the doctrine of *Swift v. Tyson*, which is now viewed as having involved an "unconstitutional assumption of powers" by the federal courts in supplanting state common law rules with rules of "federal" common law. With Professor Randall Bridwell, I have elsewhere argued that this modern view of the "Swift doctrine" is erroneous, because it is based upon an incorrect conception of the nature of the common law and of the limits of the federal judicial power in the late eighteenth and early nineteenth centuries. An accurate representation of what the federal courts were doing in this period requires an understanding of at least three factors governing their early decisions: the origins of the common law in custom; the limits upon the judicial power existing due to the constitutional system of separation of powers; and the conceived limits of sovereign authority in the late eighteenth and early nineteenth centuries.

In understanding the early common-law function of the federal courts, it is essential to comprehend that modern notions of legal positivism did not control judicial behavior during the period in question. On the contrary, it was not then conceived that all law was the product of some sovereign source of authority; rather, it was viewed that the common law originated in the autonomous activities of individuals. As "customary law," therefore, the common law was not perceived as the peculiar province of any sovereign's will, though, of course, it was possible for a government to supplant or modify customary rules operating within its territory by legislation. Some rules of the common law were "local," that is, confined in their operation to the particular geographical

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400. 41 U.S. (16 Pet.) 1 (1842).
401. *See* *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938); *see also* *Black & White Taxi Cab Co. v. Brown & Yellow Taxi Cab Co.*, 278 U.S. 518, 532-36 (1928) (Holmes, J., dissenting).
403. *See id.* at 11-33.
404. *Id.* at 13-14, 129; *see also* 1 F. HAYEK, LAW, LEGISLATION AND LIBERTY 28 (1973). *See generally* 1 & 2 F. HAYEK, THE CONSTITUTION OF LIBERTY (1960).
area within a state's borders. Others, however, were "general," or "international," in scope, specifically, the rules of admiralty, commercial law, and conflict of laws. Yet the common law so comprised was not simply a set of rules; it was also a sophisticated process of identification and application of rules and principles that permitted change within the limits of "judicial," as opposed to "legislative," competence.

In the United States the common-law power of the federal courts was limited also by the concept of "jurisdiction of," as opposed to "jurisdiction from," the common law. That is, once subject matter jurisdiction had been granted to those courts by the Constitution and properly enacted statutes, they might administer the common law in all cases falling within that jurisdiction; but the common law in a constitutional system of separation of powers could not be utilized as a grant of authority or jurisdiction—either subject matter jurisdiction or legislative authority. The resulting scheme allowed the federal courts to fulfill the objectives of their grants of subject matter jurisdiction without transgressing either separation of powers or federalism restrictions.

For example, even though the federal courts were granted exclusive subject matter jurisdiction over federal crimes, they refused to enforce a federal common law of crimes, because to do so in our constitutional system of separation of powers would have been to "legislate." However, in admiralty cases, over which they also had exclusive subject matter jurisdiction, they have, from 1789 to the present, always administered a "common law" of admiralty. The distinction between admiralty cases and criminal cases was simply that the "common law of admiralty" was com-

406. Id. at 99-114.
407. See id. at 61-91; see also Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533, 533-47 (1926).
408. See R. Bridwell & R. Whitten, supra note 402, at 4-28.
409. Id. at 31.
410. Id. at 31-33.
411. See id. at 32.
413. See id. at 51-60.
prised of international customary rules which could be administered in cases within the grant of admiralty jurisdiction without legislating—i.e., without "making up" rules of law (and perforce applying them ex post facto to past transactions)—and without violating principles of federalism because admiralty rules were not "local" to the authority of any given sovereign. The power to define crimes against national authority under the Constitution was confined to the legislative branch of the federal government, with the result that judicial administration of common-law crimes would have resulted in (restrospective) lawmaking by the judges.414

Conflict of laws principles were, like admiralty and general commercial law rules, a body of private "international" customary rules.415 They were, however, rules that defined the sovereign authority of governments vis-a-vis each other to control matters with their legislation and other "local" laws (including local customary laws).416 In the federal courts, these rules were made obligatory by section 34 of the Judiciary Act of 1789, the so-called Rules of Decision Act, which read: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."417 However, it is important to recognize that the federal courts stated many times that they would have followed the body of international conflict of laws principles incorporated by the Rules of Decision Act even if the Act had not existed.418

The reason was clear. The principles embodied in the Act were essential to the performance of the function of the federal courts, in cases within the diversity jurisdiction, to protect the expectations of the parties to various transactions.419 In cases gov-

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414. Id. at 35-60. Compare G. Gilmore & G. Black, The Law of Admiralty 45 (2d ed. 1975) ("At the time of the adoption of the Constitution, it probably seemed 'self-evident' that there already was in existence a corpus of maritime law which might . . . have been rejected in the courts of any nation strong enough to make that decision stick, but which certainly needed no expense or implied legislative action on the part of any one nation to make it valid."); D. Robertson, Admiralty and Federalism 138 (1970) ("It is clear that as to maritime matters the prevailing assumption has been that the constitutional grant of admiralty jurisdiction to the federal courts presupposed the existence of an at-large body of substantive principle to be drawn upon in deciding maritime cases.").

415. See R. Bridwell & R. Whitten, supra note 402, at 61.

416. See id. at 61-114.

417. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (emphasis supplied).

418. See R. Bridwell & R. Whitten, supra note 402, at 83 n.94, 110.

419. Id. at 110.
erned by general commercial principles the courts were required to make an independent judgment about what the particular rule of commercial law was that controlled the dispute—independent, that is, of the state courts, because the law in such cases was viewed as common to all states and, therefore, a particular state court's opinion was of no better authority on the meaning of the applicable law than that of any other court, state or federal. In real property cases, state (local) laws applied. Thus adherence to state precedents defining the meaning of those local laws was usually essential to vindicate the expectations of the parties to the case because the parties had presumptively viewed “local,” rather than “general,” rules as controlling their transaction, and the individual state precedents defining that law were the highest authority on the law's meaning. Additionally, application of international conflict rules confined the operation of a sovereign's local law to those situations it was competent under prevailing concepts of sovereignty to control (i.e., to “cases where [it applied]”), preventing its “extraterritorial” operation in other cases. This was also essential to the performance of the federal courts' function in diversity actions to protect the legitimate expectations of the parties, due to the fact that private transactions of the day were undertaken with an awareness of the geographical limits of the various sovereigns' law enforcing competence; but it also performed the important function of protecting the states' “legislative” authority relative to each other.

In full faith and credit cases, the federal courts performed the equally important function of protecting the states' “judicial” authority relative to each other. The concept of “jurisdiction of” as opposed to “jurisdiction from” the common law still controlled; but now the courts, especially the Supreme Court in the exercise of its appellate jurisdiction, enforced international conflict rules primarily to vindicate the judicial authority of the states vis-a-vis each other. Under the Act of 1790 the judgments of one state had to be given conclusive effect on the merits in other states; but this had to be done only if the judgment-rendering state had acted in accord-

420. See id. at 64-97.
421. See id. at 99-114.
422. R. Bridwell & R. Whitten, supra note 402, at 78-87.
423. See id. at 62.
424. Recall Justice Johnson's opinion in *Odgen v. Saunders*, that when the states "pass beyond their own limits... there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States..." 25 U.S. at 233, 12 Wheat. at 369. See also R. Bridwell & R. Whitten, supra note 402, at 73-76, discussing other decisions that articulated rules for protecting the function of federal courts in diversity cases.
ance with the rules of jurisdiction contained in international conflict of laws doctrine, rules that the Constitution and implementing statute had left unaffected. As rules of governmental organization, they fixed the geographical authority of the states until altered by a proper act of legislation. Such an act was prohibited to the Supreme Court, because even if it had been inclined to alter the jurisdictional rules, the express delegation of authority to Congress in Article IV, section 1, implicitly eliminated the power to change the rules from the judiciary's competence.

This did not mean that all "change" or "alteration" in the rules was impossible, only that legislative-like change was impermissible by the courts. For example, we know that the English courts, independent of any statute, ultimately arrived at the conclusion that foreign judgments rendered by a court with international jurisdiction were to be given conclusive effect when sued on in England. This alteration of the early rule that a foreign judgment is only prima facie evidence of a debt was made because of a perceived error in its basis. The early basis was in part the theory of reciprocity, or the fear "that if foreign judgments were not enforced in England, English judgments would not be enforced abroad." The "true principle" was later seen to be the theory of obligation, that is, that the judgment of a court with competent jurisdiction over the defendant imposes a duty or obligation on the defendant that English courts are bound to enforce. Thus a res judicata effect was prescribed to correspond to this corrected view of the doctrine's foundation. Would the Supreme Court, under the early view of its common-law authority, have had power to effectuate a similar change regarding the effect to be given to the judgments of the courts of foreign countries?

The answer is surely yes. The common-law decisional process, as well as the common-law rules of decision, were available to the Court in cases within its jurisdiction. We know that this process contained a principle that permitted the correction of error. Under this principle a misperception of the basis of a doctrine causing it to possess a rule running counter to the doctrine's overall purpose could result in a modification or elimination of the undesirable rule. The result would, of course, have been different with regard to the effect that a judgment of one state should have in another. Had the Act of 1790 not been interpreted as having de-

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425. See note 66 and authorities cited therein supra.
clared the effect of such judgments, the Supreme Court could not have concluded such judgments were entitled to anything but a prima facie evidentiary effect. This is so, because the power to correct this sort of "error" had been exclusively confided to Congress in Article IV, section 1. At the time that the Constitution was formed the sovereign authority of the states was thought to permit one state to give less than res judicata effect to the judgments of another. The full faith and credit clause was framed with this understanding in mind and the principle thus "frozen" until Congress acted or the states individually accepted sister-state judgments as the equivalent of domestic ones. Thus the Court could act as the English courts had with regard to true foreign judgments, but not with regard to state judgments, because its discretion to affect the latter had been modified by the constitutional grant of authority to Congress in Article IV, section 1.

What other sorts of modifications, not involving error, were permitted under the original view of the Court's common-law power? First, we know that the analogical process of applying common-law rules to new cases permitted extension of the rules to new situations that fell within the general scope and purposes of the rules. Just such a process was involved in *Lafayette Insurance Co. v. French*, *Green v. Van Buskirk*, and *Crapo v. Kelly*, discussed in the preceding subsection.

Second, it was within the legitimate scope of the judicial power to adapt common-law doctrine to statutory purposes, even though such changes did not involve "errors" and were not required by a clear congressional directive. Thus in *Christmas v. Russell* the Court, contrary to the traditional common-law rule governing foreign judgments, held that fraud could not be pleaded to a sister-state judgment unless it was available as a plea in the judgment-rendering state. This can, of course, be characterized as an interpretation of the implementing statute, as the Court itself appeared at one point to describe it, but the implementing statute did not clearly require the result, and earlier decisions of other courts had reached the contrary conclusion that this was one of the features of foreign judgments left unaffected by the Act of 1790. Thus it appears legitimately classifiable as a "change" made under the Court's

429. *Id.* at 5, 12-15.
430. See text at notes 375-76, and 382-94 *supra*.
431. 72 U.S. (5 Wall.) 290 (1866).
432. See note 381 *supra*.
433. See 72 U.S. (5 Wall.) at 304.
434. See cases cited in note 309 *supra*.
common-law authority; however, it was a change clearly made in deference to legislative supremacy, rather than in derogation of it.

For the purposes of this article, however, it is more important to recognize the one form of judicially-initiated change that would not have been permitted under the early conception of common-law authority and separation of powers; it would clearly have been impermissible to alter the basic rules allocating sovereign legislative and judicial authority among the states, that is, as they pertained to full faith and credit cases, the rules of "territorial" jurisdiction. Such an alteration would have been thought of as an act of legislation that only Congress was competent to perform, similar to the exclusive legislative function of declaring what acts were crimes. As the Court stated in Crapo v. Kelly, "[e]xcept for the purposes and to the extent to which these attributes have been transferred to the United States, the State of Massachusetts possesses all the rights and powers of a sovereign state." 435 The rules governing the jurisdiction of independent sovereigns vis-a-vis each other had been left untouched by the Constitution, except as it had delegated legislative authority to Congress to rearrange or even abolish those rules. Congress had done nothing to the rules under its Article IV, section 1, authority, or any of its other delegated powers; therefore, the rules remained as they were. As the Court stated in D'Arcy v. Ketchum, "[t]here was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule." 436 There being no "evil" or error in the old rule, and the rule not being subject to any other of the categories of cases in which change might permissibly be effectuated, no judicially-initiated change was allowed. Consequently, the Court could not have expanded the authority of a state to permit it to assert jurisdiction over nonresidents in any case where the nonresident had sufficient minimum "contacts, ties, or relations with the state." 437 Nor could it have held an assertion of "quasi in rem" jurisdiction to be in violation of the international rules of jurisdiction. 438 In both instances the allocation of authority between the states as independent sovereigns would have been fundamentally altered; and this was a task which, if it was to be performed at all, was exclusively delegated to Congress, just as was the power to create federal crimes.

It is also important to recognize the effect of the implementing

435. See text accompanying note 392 supra.
436. See text accompanying note 361 supra.
statute on the authority of the Court to enforce the international rules of jurisdiction against the states. The Court had "jurisdiction of" the common law only when a case fell within a grant of appellate jurisdiction to it. In diversity cases, it could review the actions of the lower federal courts and administer the jurisdictional rules without reference to whether a "federal question" was present in the case. In cases appealed from the state courts, however, the Court's authority existed only under section 25 of the Judiciary Act of 1789. Because of the implementing statute, a proper claim under section 25 would exist whenever a state court refused the effect to a sister-state judgment that the sister-state would have given the judgment. In considering whether such an effect had been improperly denied to the judgment, however, the Court could consider the "international" jurisdiction of the rendering court—i.e., it had "jurisdiction of" the common-law rules.

Had the implementing statute not existed, there would ordinarily have been no basis on which the Court could exercise jurisdiction under section 25. The Constitution only required a state to admit a sister-state judgment into evidence as conclusive proof that the judicial proceedings it embodied had occurred and adjudicated the matters described in the record. It required no more precise effect than this, and thus did not directly require the forum state to enforce the judgment. Nor were the rules of jurisdiction incorporated within the Constitution. Consequently, if a state refused to enforce a sister-state judgment because it disagreed that the judgment was within the rendering state's jurisdiction, no federal question would have been presented. So long as the state was willing to admit the judgment as conclusive proof of its existence and contents, its refusal to enforce the judgment would present only a nonfederal issue which was not an appropriate basis for an exercise of the Court's appellate jurisdiction.

It is certain that this would have been the result, because under the doctrine of Swift v. Tyson appellate jurisdiction was denied under Section 25 in cases coming from the state courts that presented only conflicts between the opinions of the state courts and those of the Supreme Court on matters of "general law."439

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Note that the Court would also have lacked appellate jurisdiction if a case had been appealed on the ground that a state court was refusing to apply a sister-state
Such "general law" was not "federal law," for purposes of jurisdict-

28 U.S.C. § 1738 (1976). The italicized language was added for the first time in the 1948 revision of the Judicial Code. The sole explanation for this change given in the legislative history of the bill is found in the Revisers' Notes: "At the beginning of the last paragraph, words 'Such Acts' were substituted for 'And the said.' This follows the language of Article IV, section 1 of the Constitution." See LEGISLATIVE HISTORY OF TITLE 28, UNITED STATES CODE "JUDICIARY AND JUDICIAL PROCEDURE" at A149-50 (R. Mersky & J. Jacobstein, eds., 1971) [hereinafter cited as LEGISLATIVE HISTORY]. Indeed it does conform to the constitutional language, but given the interpretation of the Act of 1790 in Mills, it appears to have made the statutes of one state "conclusive on the merits" in all others whenever they would be "conclusive" in the enacting state, whatever that means. See B. CURRIE, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 200 (1963) ("This formula [referring to the statutory formula] has proved reasonably workable as to judgments, although even in
tion under section 25. Had the implementing statute never been enacted, therefore, or had it been correctly interpreted in *Mills v. Duryee*, enforcement of the international rules of jurisdiction by the Court would have been limited to cases in which it reviewed decisions of the lower federal courts in diversity actions. Refusal to enforce a sister-state judgment in the latter cases in accord with the common-law rules governing the enforcement of foreign judgments could have been corrected by the lower federal courts and the Supreme Court under the general conflict of laws authority exercised by those courts in diversity cases.

Obviously, if the Constitution had been interpreted differently, the Court's appellate authority would have been altered accordingly. If the Constitution had been interpreted to require of its own force that sister-state judgments be given a res judicata effect, then failure by a state court to give such an effect would have produced a case sufficient for appellate jurisdiction under section 25. Similarly, if the Constitution had been interpreted to require directly that a prima facie evidentiary effect be given to sister-state judgments, then failure to give that effect likewise would have produced a case sufficient for appellate jurisdiction under section 25. In either case, appellate jurisdiction being present, the Court could have enforced the international rules of jurisdiction against the states. However, appellate jurisdiction would have been present in either case only because the Constitution would directly require that a state enforce sister-state judgments to a certain extent, just as was required by the implementing statute under the interpretation in *Mills v. Duryee*, but not by the Constitution under the interpretation described in this article.

**VIII. CONCLUSION: PART ONE**

Having explored the relevant historical materials on the full faith and credit clause to 1877, the date of the decision in *Pennoyer v. Neff*, we may now summarize our final conclusions about the "original meaning" of that clause.

Our major conclusions are, as follows:

First, neither the Constitution nor the Act of 1790 passed to implement it were designed to "incorporate" or otherwise affect
the international, territorial, common-law rules of legislative or judicial jurisdiction operating between the states in 1787, although Congress was given the authority in Article IV, section 1, to alter these rules as they pertained to statutes, records, and judgments. The Constitution itself merely commanded that state statutes, records, and judgments be admitted into evidence in other states as full proof of their existence and contents, but required the states to give them no more particular effect. The implementing statute only declared that state records and judgments, properly authenticated, should be received in evidence in other states to the same extent they would be so received in the state from which they were taken; but this statute was misinterpreted by the Supreme Court to provide that “conclusive effect on the merits” should be given any state judgment rendered with proper domestic and international jurisdiction.

Second, the Supreme Court itself had no authority to modify the fundamental rules of jurisdiction, as those rules existed between the states as independent sovereigns in 1787. This prerogative belonged exclusively to Congress. The concept of “jurisdiction of,” as opposed to “jurisdiction from” the common law did permit the Court to enforce the traditional rules against the states in cases otherwise within its appellate jurisdiction; and the same concept permitted the lower federal courts to administer the rules in cases within their jurisdiction, usually diversity cases.

Third, the states did not have the power unilaterally to expand their jurisdiction from what it would have been under the international rules; in suits within its jurisdiction the Supreme Court would have permitted other states to deny the expanding state’s judgments effect in such cases. As long as a regulation of jurisdiction did not affect the fundamental allocation of power between the states under the traditional rules, however, each government was free to make such regulations of its local jurisdiction as it saw fit. Thus the Court would not insist that all the procedural details of the common law remain in effect within the states in cases involving nonresidents, though the common-law rules, for example, governing notice and opportunity to be heard often did remain unaltered by state legislation. Presumably, the states themselves might have modified the traditional rules through unilateral acceptance of judgments rendered without jurisdiction in the “international sense” or by reciprocal actions, such as statutes permitting the enforcement of sister-state judgments under expanded jurisdictional rules whenever the sister-state would simi-

440. See, e.g., the quotation from Hollingsworth v. Barbour, in note 458 infra.
larly enforce the enacting state's judgments. 441

Given these conclusions about the "original meaning" of the full faith and credit clause, what conclusions should we draw about how the clause should be applied today? Specifically, would it be legitimate for the Supreme Court of the United States to replace the territorial rules of jurisdiction applied in the early cases with a rule like that of the "minimum contacts" test of International Shoe v. Washington, even though the early conception of the judicial function in the doctrine of separation of powers would not have permitted such action by the Court? 442 Given the apparently exclusive delegation to Congress in Article IV, section 1, of the power to declare the effect of state judicial proceedings in other states, could the Court legitimately take on the task of modifying the rules in such a radical manner?

The answer depends upon the nature of the interpretive problem. In some instances of constitutional interpretation, when the Court is called upon to interpret constitutional provisions incorporating antecedent practices, such as the provisions governing trial by jury in civil and criminal cases, 443 history may provide only an uncertain guide as to how the provisions should be applied to situations never confronted by the framers and ratifiers of the Constitution. 444 In such cases, proper performance of the judicial function requires the Court as interpreter to develop law from preexisting sources and adjudicate the disputes according to rules of general applicability; its task is essentially one of justification through the processes of inductive and deductive reasoning. 445 History may be relevant to this process of justification in providing the initial, "principled" premises from which the ultimate conclusions of the Court are derived; 446 or historical forms may be determinative of the rule adopted in the absence of other adequate guides to judicial action in preexisting sources which limit the Court's discretion to create law in a legislative-like manner. 447

441. See, e.g., Uniform Enforcement of Foreign Judgments Act.
442. See text accompanying notes 435-38 supra.
443. See U.S. Const. amends. VI & VII.
444. See Brest, supra note 14, at 106-14, where Professor Brest discusses the six-member jury cases.
446. See generally id.
447. This was essentially the position taken by Mr. Justice Marshall, dissenting in Colgrove v. Battin, 413 U.S. 149, 166 (1973), where the majority upheld the constitutionality under the seventh amendment of a local rule of civil procedure of the United States District Court for the District of Montana providing for six-member juries in civil actions:

[1] In cases where arbitrary lines are necessary, I would have thought it more consonant with our limited role in a constitutional democracy to draw
In still other cases history may reveal purposes and applications of a constitutional provision which have come, because of changes in the factual context in which the provision operates, to conflict with one another. The Court's task under such circumstances is to choose between these conflicting, preexisting sources by determining which of them remain valid, or by determining their hierarchy in the constitutional structure.\textsuperscript{446}

What is the proper role of the Court with regard to major modi-

\textsuperscript{446} Professor Brest poses a hypothetical case, in which there is a colloquy in the constitutional convention revealing (1) that the commerce clause was intended \textit{generally} to permit Congress to regulate only commerce that concerns more states than one and (2) that the clause at the time of its framing could not have been \textit{applied} to allow Congress to regulate intrastate sales of milk, because at the time such sales did not affect the economy of any state other than the one where the sale was made. After the passage of a hundred years, however, intrastate sales of milk came to have substantial interstate effects. Change in the facts thus causes the general purposes of the clause to conflict with a specific, articulated application of it. \textit{P. BREST, supra} note 14, at 157-58. Clearly, here the choice by the Court should be in favor of regulatory power, in conformance with the general purpose of the clause. The specific application has become obsolete, because its factual premises are no longer valid. Adherence to the application would thus violate the preexisting source limitation mentioned in the text, because it would constitute the selection of an invalid source over one whose factual premises remain valid. Although the full faith and credit clause presents no such problem with regard to the doctrines of jurisdiction considered here, there is one nonjurisdictional problem under the full faith and credit clause which might present a "changed circumstances" difficulty. I previously argued that the full faith and credit clause did not originally authorize Congress to declare the effect of one state's common law doctrines in another. \textit{See} note 252 \textit{supra}. This was at a time, however, when positivistic notions of law did not control judicial behavior. \textit{See} text accompanying notes 403-08 \textit{supra}. Suppose, however, that it is possible to "prove" that this has changed, and that state judges and others view it as proper for state courts to "legislate." Changing moral and political views, at least to the extent that they result in actual changes in behavior, can also alter the "factual" context in which a constitutional clause operates. \textit{Cf.} P. \textit{BREST, supra} note 14, at 161-62 (the meaning of the eighth amendment's proscription against cruel and unusual punishment is drawn from evolving standards of decency). It might therefore be legitimate for the Court to sustain the constitutionality of an act of Congress under article VI, section 1, promulgating general conflict of laws rules to govern common-law doctrine, because such doctrine would, under the suppositions described, be the equivalent of statutory law, \textit{i.e.}, the equivalent of a "public act," or statute. This, of course, passes over a whole host of problems about how Congress should be permitted to determine whether the "facts" have changed.
fications in the jurisdictional rules in full faith and credit cases? Here the overriding, "preexisting source" of law for the Court is found in the separation of powers doctrine. One must, of course, agree with James Madison, that "[e]xperience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary." Separation of powers questions can thus pose all of the interpretive difficulties of other constitutional questions, and history can often remain as uncertain a guide to the proper boundaries of the three departments of government as it is on other issues. Not all cases, however, are hard ones. In some the text of the Constitution is so clear that only one result is possible. In other cases the combination of text, structure, and history leave us with an equally clear view of how the framers and ratifiers of a provision would have understood that a particular question should be resolved. Such, I believe, is the case regarding the division of function between Congress and the Court in Article IV, section 1. The materials canvassed above reveal with a convincing degree of certainty that only Congress was thought to have power to alter the traditional effect that a state-court judgment should have in another state. It follows that only Congress was given authority to condition a particular effect upon the presence of certain jurisdictional prerequisites. Until Congress spoke, the allocation of sovereign authority between the states was to remain basically the same as it had been prior to the formation of the Constitution; the full faith and credit clause directly made only a minor encroachment on the relationship between the states. The only remaining question, then, is whether the Court should abide by this clear original understanding in the absence of altered factual, moral, or political circumstances justifying a departure from it.

In the case of Article IV, section 1, it seems particularly important for the Court not to deviate from the original understanding of the meaning of the clause. The historical materials reviewed above demonstrate that the general purpose of the full faith and credit provision was to integrate the judicial systems of the states in accord with the understood procedures of the time for the enforcement of foreign judgments. As such, the integration was quite limited, and the encroachment on the preexisting sovereign pre-

450. For example, no one could reasonably argue that all bills for raising revenue shall originate in the Supreme Court. See U.S. Const. art. 1, § 7.
451. See note 448 supra.
rogatives of the states' was minor, at least insofar as the direct operation of the clause was concerned. Greater integration could only be accomplished through the action of the political branches of government. Substantial protection was, as a consequence, provided to the states that their sovereign status vis-a-vis other states would not be altered without their representation and participation in the act of modification. In this way, there was a more complete separation of powers between the legislative and judicial branches in Article IV, section 1, than in other constitutional provisions, a separation that guaranteed substantial protection to the states that their retained prerogatives would not be eroded by a process of judicial construction. As it turned out, the appellate power of the Supreme Court actually complemented this protection, because it provided the vehicle missing under the Articles of Confederation for insuring that each state would respect the sovereign authority of the others, as defined in the rules of international jurisdiction at the time that the Constitution was formed or as subsequently defined by Congress. A shift in the responsibility for reformulating jurisdictional rules from Congress to Court would effectively eradicate these protections and thus run counter to the language, the structure, and the general purposes of the full faith and credit clause.

The resulting scheme is not, however, so bad. Under the “original understanding,” Congress may enact a set of nationwide long-arm jurisdictional rules to govern the validity of the judgments of state courts in sister state proceedings. Furthermore, this congressional power is not limited to provision of jurisdictional rules available only on collateral attack of state-court judgments in other

452. It has always been well known that there is no complete separation of powers in the Constitution. See The Federalist No. 47 (Madison), at 225-31, No. 48 (Madison), at 331-38 (J. Cooke ed. 1961). Indeed, it is clearly impossible for the separation of powers to be perfect:

[T]he Ideal Rule of Law is an ideal only. . . . In part it is because the traditional doctrine of the Separation of Powers, presupposed by the Ideal Rule of Law, is itself inadequate. . . . Even the judges cannot comply with its requirements [the requirements of the Ideal Rule of Law] completely.

In applying the law they often have to interpret it.

J. Lucas, The Principles of Politics 113-14 (1968). See text accompanying note 449 supra. Even if possible a complete separation of powers would not be desirable. "I shall undertake . . . to shew that unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained." See The Federalist No. 48 (Madison), at 332 (J. Cooke ed. 1961).

453. It is not unusual to find the separation of powers and federalism doctrines related to each other in this way. See L. Tribe, American Constitutional Law § 2-3 at 17-18 (1978).
states. The Article IV, section 1, authority and the "necessary and proper clause" of Article I, section 8, give Congress a wide choice of means with which to accomplish objectives within its delegated powers.\textsuperscript{454} The question whether the jurisdictional rules provided by legislation should be enforced against the states through a system of direct or collateral attack, or both, would seem pretty clearly to constitute a choice of means, rather than ends.\textsuperscript{455} Similarly, if Congress feels that the existing territorial rules operate satisfactorily, it may simply require the states to follow them and couple its requirement with a system of direct appellate review in the Supreme Court.\textsuperscript{456}

Additionally, we will see in Part Two that the Supreme Court legitimately possesses the power to develop certain kinds of "territorial" rules of jurisdiction under the due process clause of the fourteenth amendment. Although we will argue that it erred in both \textit{Pennoyer v. Neff} and \textit{International Shoe v. Washington} in the way it went about this development, nevertheless it might do so properly by following a different line of reasoning. The resulting whole will arguably be a rather more coherent approach to state-court jurisdiction than found in current or past case law.

What, therefore, are the inquiries to be made in Part Two? So far as due process is concerned, we must primarily examine what the pre-fourteenth amendment context reveals about the relative power of a state to legislate, in cases involving nonresidents, modifications in the traditional territorial rules of jurisdiction. That is, was it possible, as suggested in \textit{Dearing v. Bank of Charleston}, for the state legislatures to bind their own courts to enforce a judgment rendered contrary to international rules of jurisdiction, a judgment which no other state court would be obligated to enforce?\textsuperscript{457} Or was it, as held in \textit{Beard v. Beard}, a violation of due process of law for state courts to enforce such legislation against nonresidents, on the theory that the international rules were beyond the authority of the state legislatures to regulate, so that those rules remained in effect as "domestic law" and had to be enforced as a matter of due process by state courts even on direct

\textsuperscript{454} See McCullough v. Maryland, 17 U.S. 159, 202-04, 4 Wheat. 316, 412-16 (1819); see also G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOUGH V. MARYLAND 172-73 (1969).

\textsuperscript{455} This does not, of course, foreclose the possibility of Congress also providing rules of jurisdiction under some other grant of power to it in the Constitution, such as \textsection{5} of the fourteenth amendment.

\textsuperscript{456} Cf. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 92 (section 34, the Rules of Decision Act, which required federal courts to follow state laws as rules of decision "in cases where they apply.").

\textsuperscript{457} See text accompanying notes 344-49 supra.
attack of judgments by nonresidents?458

Given the conclusions reached about the proper "original interpretation" of the due process clause, we must then examine how that clause should be applied to limit a state's "territorial jurisdiction" today.

458. See text accompanying notes 364-71 supra. Note that this position was apparently not that of the Supreme Court. Mr. Justice Johnson, dissenting in Mills v. Duryee, had stated that the principle "of natural justice" that a state might not exercise jurisdiction over persons and property not within its limits (or over persons not owing it allegiance) "never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute." See text accompanying note 299 supra (emphasis supplied). Similarly, in Hollingsworth v. Barbour, 29 U.S. 284, 4 Pet. 466 (1830) (which focused on common-law notice standards, rather than international territorial rules) the Court felt compelled to examine certain state statutes to determine whether a state court had jurisdiction under them, no such jurisdiction existing under principles of the common law or courts of equity.

By the general law of the land, no court is authorized to render a judgment or decree against any one, . . . until after due notice, by service of process, to appear and defend. This principle is dictated by natural justice; and is only to be departed from, in cases expressly warranted by law, and excepted out of the general rule.
Id. at 288, 4 Pet. at 472 (emphasis supplied).