Juries, the Law, and the Original Function of the Full Faith and Credit Clause

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This article explores the original meaning of the Full Faith and Credit Clause of the US Constitution. Recent scholarship has focused on the understandings of the Founders and the then contemporary usages of terms of art in the text. This scholarship provides competing interpretations of the clause. These range between a broader view that the clause is self-executing, giving binding and conclusive effect to interstate acts and judgments, and a limited view, that the clause deals only with questions of evidence and admissibility but leaves questions of effect to Congress. This article offers an original perspective on these questions, by focusing on the institution of the law-deciding jury in colonial and early Republican times. The law-deciding jury was bolstered by Republican ideals, and enjoyed considerable freedom to determine the content of applicable legal rules. A close examination of reported cases dealing with interstate and inter-colonial disputes demonstrates the tendency of juries to prefer the legal rules of their own jurisdictions (in preference to the interstate or “foreign” rules). As judges and parties had few effective means to direct juries on questions of law, the law-deciding jury could (and often would) disregard interstate acts and judgments, despite the Clause and despite any doctrinally correct choice of law rule. As such, the Clause could not itself have prescribed the effect of interstate acts and judgments. The effect of such acts and judgments should instead be reserved to Congress.

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II. INTRODUCTION

The United States would be a nation of laws, not men. Although it was the People of the United States not the States themselves who did the constituting of this nation, the new Constitution did incorporate the States: it guaranteed them republican government, provided for new states to be admitted, and reserved residual powers to them. The new compact also addressed the relations of the States to each other. The States had become integers of the United States, bringing their populations – mobile, and eager to engage in commerce – closer together. It was hardly appropriate, then, for their legal systems to remain as if separate sovereign states to one another: as the People are brought closer, so too are the laws of the States. The result, adapted from the Articles of Confederation, was the Full Faith and Credit Clause in Article IV, section 1, of the Constitution.

The Full Faith and Credit Clause, however, then and now, begs the question. We see that the Clause does something, but what? Does it make the public and judicial acts of one state binding in every other state? Or are they simply matters to be taken into account by the courts and officials of other states? Can one state question, criticise or impeach the legal system of another? How does the grant of power to Congress in the second part of the clause affect the reading of the first? Confusion and obscurity at the
Founding has evolved into academic and jurisprudential controversy. The Clause invites different and inconsistent interpretative moves. Interpretation blends also with politics: interstate disagreements very often concern matters of high political controversy. The diversity of a Federal system gives bitter contests a forum – slavery then, gay marriage now – when national political channels cannot reach a decisive resolution.

In current debates, interpretations of the Clause range between the *self-executing* and the *evidentiary* theses. Part III surveys these arguments. In sketching them out here, briefly, we might start with the text: “full faith and credit shall be given”. The language is mandatory and fulsome. Could this plausibly mean less than that the states shall give “effect”? What, however, does this antiquated expression “faith and credit” mean? Did it have a special meaning in 1787? Perhaps if the Constitution had meant “effect”, it would have said “effect”, particularly as the clause does place effect in Congress’s hands. Each side has a redundancy argument, though: from effectivists, a combined historical and structural point, that the Clause does *something* important, and giving evidentiary value barely moves from the position of foreign sovereign states at common law. On the other hand, to give full effect would have changed the States’ legal systems much more radically than it seems plausible to think. We then have interpretations from the Court, beginning modestly, and progressively broadening the scope and operation of the clause. Congress’s early attempts at interpretation invite further interpretation.

This paper takes a different tack. Its argument is historical and structural. It suggests that the confusion over the Clause should be seen in the context of changes an important legal institution, specific to colonial America and the early Republic, but now long gone. That institution was the law-deciding jury of many colonies and then states.
This jury was no mere fact-finding adjunct to the expert judge. It was a democratic institution of local government, and a point of resistance to outside laws and officials. The law-deciding jury in its heyday could decide law and fact in its wisdom: it was less constrained by the forms of pleading, the demurrer, or review by judges. As a general rule, when the jury exercised this function its verdict was the law. So, what would be the law governing an interstate legal dispute? Was the Constitution to diminish the status of juries in every state, to make their decisions on questions of law subject to rulings of the judge, and to require them to abide by and apply the law of other places, whatever they might think of it? The Constitution otherwise had no designs on juries: on the contrary, it enshrined juries in Federal crimes and the Bill of Rights did so for Federal common law causes. Where the Constitution addressed itself to the legal systems of the states, its commands were to State judges, not juries.

Part IV explores these realities of colonial and early Republican justice, through analysing the reports of cases involving inter-jurisdictional disputes, not considered in other studies of the Full Faith and Credit Clause. We see juries preferring and applying their own law and custom over that of other places, in a way inconsistent with an “effects” reading of Article IV, and also inconsistent with what the doctrinally dictated choice of law rule would be, if diligently applied. Importantly, the bench in this period was just beginning to limit, through various procedures, the complete autonomy of the law-deciding jury. Nevertheless, judges were slow or still unable to upset the jury’s choice of law. Juror law-deciding was not just parochial: it was officially tolerated, if not sanctioned.
The general picture of the jury, filled out by these specific instances, strongly suggests the impracticality and political inconsistency of the full faith and credit clause establishing a uniform self-executing rule binding on all juries. But, the supremacy of the law-deciding jury did not last long into the 19th Century, and its hegemony was under pressure even by the 1780s, for reasons associated with the development of a modern economy. The Founders and others saw a need for the States to recognise each other’s laws, to some extent. But the unpredictable scope and pace of change makes it much clearer that it would be the Congress, not the rules laid down in the Constitution, that would dictate the terms of interstate legal comity.

The law-deciding jury in this account appears strange to modern eyes. It also is inconsistent in some respects with the very act of creating a Constitution – a higher law – through the exercise of popular sovereignty. Further, Federal statutes were to derive their force from that same Constitution. If we take these ideas seriously, as we should, then we can anticipate a conflict, eventually, between the law-deciding function of the jury, and the statutory and constitutional law of the Republic. It is beyond the scope of this paper, however, to untangle the full implications of a new type of legal system for the law-deciding jury, going as that question does into a much broader historical task as to the causes for the demise of the civil jury’s law-deciding function. This paper is concerned with the practicalities of jury powers; a conflict of this sort appears not to have been perceived at the time, which is not surprising given the revolutionary nature of the new Constitution, and was certainly not resolved.

So, the analysis in Part III is offered to add to the debates set out in Part II. Of course, previous historically-driven scholarship has looked at the problem of
interpretation in ways that are most concerned with reconstructing the (often subjective) intentions and understanding of the founders, judges and legislators. The historical point advanced in this paper does not have any pretence of exploring the minds of contemporary players. Rather, the focus is institutional. Part V will offer some tentative suggestions as to the relation of Part IV’s contentions to the broader debates, and will conclude the paper by noting some of the questions about interpretation that this exercise raises. The law-deciding jury is gone, so this may give reason to expand the operative meaning that the Full Faith and Credit Clause now has. However, the law-determining jury was also associated with ideas that remain current, even if it does not, and salient to interpreting the clause: self-government and democracy.

III. A FAITHFUL INTERPRETATION

This Part explores the interpretations that have been so far given to the Full Faith and Credit Clause. These interpretations address two related questions: what does the language of the clause mean? And what is the clause meant to do?

A. The Clause in Context: justice across borders

It is clear enough from the text that the Clause is dealing, at least, with the questions that would arise from the new states having separate legal systems. The States and the colonies had their own laws and courts, but they shared borders, and citizens and commerce moved across state lines. Special legal questions arise when legal disputes arise out of events that have interstate elements, such as a contract made in one state between residents of different states, to be performed in another state. Which state’s law applies, or do both apply? An especially common problem was that of judgments being
obtained in one state, and enforcement being impossible as the defendant then resided elsewhere. Should that judgment be binding elsewhere? How is it proved? Can it be questioned?

The position of the pre-Revolution colonies is best understood by considering, first, the legal principles developed by the English common law courts to deal with foreign judgments and foreign law in the 18th Century. “Foreign” legal systems included, for some purposes, the legal systems of Scotland, Ireland, (at times) Wales, and colonial possessions, and some English non-common law courts. Foreign judgments could not be executed within the common law courts. By contrast, common law judgments once rendered gave the successful party a choice: either sue out on a writ of execution to directly enforce the judgment, or bring a new action based on the judgment already rendered. If a new action was brought, the defendant could not impeach the correctness of the earlier judgment by making a plea of nil debet, which is a plea denying the existence of the underlying obligation (on which the judgment was given). Rather, he could only plead that the judgment did not exist (nulli record) or that it had since been satisfied.¹ Upon a successful party bringing a new action based upon a judgment already rendered, the doctrine of merger provided that the new action extinguished the previous one.²

Foreign judgments would not as a rule be directly enforced in this way in English common law courts. However, they could be used in the English legal system as evidence in support of a claim made under the common law. In general, a successful

party in a foreign action could utilise the foreign judgment as evidence in a claim before an English court (including to defend an action, by showing that a foreign court had already dismissed a similar claim), or bring a new action actually founded on the foreign judgment. Sumner identifies an instance of an English Admiralty court executing the judgment of a French court, although Admiralty law fell into a special category, regarded as law common to all nations. As a general rule, English common law courts did not allow direct enforcement of foreign judgments. When a party invoked a foreign judgment as evidence, it was in principle examinable by the court for its correctness.

The extent of English courts’ recognition of foreign judgments, and the weight accorded to them, appears to alter from the 17th to the 18th century. Earlier decisions stressed the importance of international comity and the law of nations, framed as reciprocating national self-interest. In Cottington’s Case (1678), the Court held that:

“it is against the law of nations not to give credit to the judgments 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 what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences.”

This reasoning suggests a receptive attitude on the part of English courts to the use of foreign judgments as evidence, and having considerable, if not almost conclusive, weight. By the latter 18th Century, a more sceptical approach is evident. Lord Mansfield in Walker v Witter affirmed that a foreign judgment would be “examinable” by the jury,

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4 Sachs, *supra* note 1, 1213.
and that the foreign judgment provided only prima facie evidence of a debt.\(^7\) Going further still, Lord Ellenborough in *Buchanan v Rucker* (1808)\(^8\) discounted a Tobago judgment, as it was given without personal service on the defendant contrary to rules of international law. He asked: “[c]an the island of To-bago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”\(^9\)

A law of proof also developed to facilitate the admission of prior judgments (foreign and domestic) into the court record. Gilbert, whose treatise\(^10\) on the law of evidence was widely used in England and America in the later 18\(^{th}\) Century, explained that there was a hierarchy for proving domestic judicial proceedings.\(^11\) At the top of the hierarchy, a party could utilise the court’s own records. Next, a party could arrange for exemplifications – copies under the Great Seal or Broad Seal – to be made and tendered. Such exemplifications were considered to be “themselves Records of the Greatest Validity”. Proof of a judgment through these means was effectively incontrovertible, and a jury would technically be bound under penalty of attainder to give effect to them. Lower in the hierarchy were copies of records authenticated with the seal of the issuing court.\(^12\)

Methods of proof differed for foreign judgments. It was not possible for obvious reasons to bring the archives of a foreign court before an English court. Nor were the seals of foreign jurisdictions recognised as sufficient to authenticate a copy of the record

\(^{\text{7}}\) See Sachs, p.1213.

\(^{\text{8}}\) (1808) 103 Eng. Rep. 546 (K.B.).

\(^{\text{9}}\) *Id.*, 547. See Sachs, *supra* note 1, 1215 fn 61.


\(^{\text{12}}\) *Id.*
Rather, the authenticity of copies of foreign judgments was a matter for the jury, often requiring additional testimonial evidence in support of the claim.

Colonial courts were initially less receptive than courts in England to foreign judgments or law, and there were greater practical difficulties in proof. From the mid-17th century, this initial resistance gave way to American judges more readily accepting the doctrine. The colonies were effectively in the same position as to one another as the English courts were in relation to the courts of France or Scotland: separate and for these purposes, foreign. In this context we observe several American colonies providing means of proving and giving some weight to judgments from the other colonies, which will be explored in section II.C.1, below.

B. Text and language

We now move from considering the general context of private international law, to examine the language of the Clause as adopted in its plain and historical meanings.

1. A plain text reading?

The plain meanings of “faith” and “credit” that are most apt to the context are those that convey trustworthiness, credibility and accuracy: the ‘credit’ of a witness; a ‘faithful’ record. They overlap in expressing a meaning of accuracy, believability and truthfulness. The modifying adjective “full”, then, on a contemporary plain text reading emphasises the status of out of state judgments and public acts as accurate, and so on.

These interpretations certainly support the view that a plain text reading of the clause reaches the result that out of state judgments and acts are to have evidentiary

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13 Sachs, supra note 1, 1211.
14 Sumner, supra note 3, 226.
value, perhaps even high evidentiary value. On this reading, the clause provides that
such judgments and acts are to be regarded as credible, and credibility is, of course, a
question that arises in assessing evidence. Is it possible, though, that the plain meaning
goes further than establishing evidentiary bona fides? If an out of court judgment is not
simply credible, but also trustworthy and accurate, then the clause might establish not
just admissibility as evidence, but also weight: accurate evidence should not, in principle,
be lightly disregarded.

The difficulty with this method of interpretation is that the language is
tautological and obviously antiquated. It is redundant to use both “faith” and “credit”,
and to then add “full” as a modifying adjective. This fact, and the strangeness of the
expression to modern eyes, leads us to find out whether this clause had a contemporary
usage that will cast light on its originally intended meaning. Further, what of the second
part of the Clause? If Congress may prescribe the effect as well as the proof of interstate
judgments, acts and records, then should the first part of the clause be read only as
establishing the threshold proposition that such things are admissible? If the grant of
power to Congress means what it says, then is the first part of the Clause better read as
not self-executing?

2. Faith and credit in common law parlance

While Laycock writes that the “complete phrase ‘full faith and credit’ appears not
to have been used prior to the Articles of Confederation”, Sachs notes that the complete
expression “full faith and credit” had also been used in legal documents since the 17th
Century. In a mercantile context, a Franco-Spanish treaty (translated in London in 1662)

directed that the parties give “full faith and credit” to bills of lading and maritime passports issued to confirm a ship’s ownership and cargo. Sachs (and before him, Nadelmann) refers to three other usages. A 1740 clerical manual explained the technique for copying documents, in order that “full faith and credit” may be accorded to them. Second, a principal might use the expression to describe the confidence that a third party should have in his agent, as his representative. Third, a declaration witnessed and indorsed by a notary public would be accorded “full faith and credit”. Sachs argues that the meaning of these expressions could be ambiguous, although none should be regarded as having a conclusive legal effect. For example, to say that full faith and credit should be shown to a declaration indorsed by a notary public might mean simply that the notary had witnessed the declarant make the statement. It might also mean, however, that the statement itself was trustworthy.

Similar examples of this kind of usage – which might simply be evidentiary, but also intimating trustworthiness – are found in American sources from the time of the Constitution’s adoption. In a letter in the records of the Congress of the Confederation of United States, Samuel A. Otis, a delegate to the Second Continental Congress from Massachusetts, wrote in support of an application by Adam Babcock, a citizen of Boston, to carry mail by sea. Otis stated he was “personally acquainted” with Babcock, and that

16 Sachs, supra note 1, 1217.


18 See Sachs, supra note 1, 1218 fn 68 (referring to: “Robert Brady, A Continuation of the Complete History of England 206 (London, Edward Jones 1700) (describing a letter from King Edward III to Parliament, and noting that “[a]t the Close of his Letter he tells them, . . . [t]hat the Persons [with whom the letter was sent] came over to declare his Condition and Business, will-ing them to give full Faith and Credit to what they should say”).”

19 Sachs, supra note 1, 1218.
“full faith and credit may be given to [Babcock’s] declaration.” It is clear that Otis is not simply affirming that Babcock has made a declaration – he urges the reader to believe it to be a true and correct declaration. Another ambiguous usage of the expression appears in a draft Treaty between the United States and France in 1784 concerning the powers of consuls and other diplomatic officers. The Treaty provided for declarations and wills of seafarers, passengers and merchants to be received by the consuls of each nation, and for those documents to “receive full faith and credit” in the courts of each. This usage obviously conveys an evidentiary meaning, requiring the documents to be received. Does it also require each state’s courts to give effect to them?

“Full faith and credit” could mean something different from “credible” or “trustworthy”. It could also confirm the entitlement of an individual to an office and to exercise duties attaching to it. In 1790, Governor Martin of North Carolina notified the Congress of its ratification of the amendments to the new Constitution, and advised the Congress that “James Glasgow… is, Secretary of the said State, and that full faith and credit are due to his official acts”. A similar usage to that used by Martin is used to confirm the capacity of individuals to represent a state or institution. Prior to the


21 22 Journals of the Continental Congress, 1774-1789 20 (Gaillard Hunt ed., 1914). Art IX read in relevant part: “The consuls and vice consuls respectively shall have the exclusive right of receiving in their chancery, or on board of vessels of their nation, all the declarations and other acts which the captains, masters, seamen, passengers and merchants of their nation shall think proper to make or lodge therein; and last wills and testaments, and copies of any act duly authenticated by the consuls or vice consuls, and under the seal of their consulate, shall receive full faith and credit in all courts of justice as well in France as in the United States.”


23 Virginia Ratification Debates in the House of Senators. December 4, 1786, in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 306 (Jonathan Elliot
Revolution, the expression could be used to confirm the appointment of justices and the regularity of their official acts. These usages are evidentiary, confirming a person’s authority.

Clearly, the meaning of the expression “full faith and credit” depended quite heavily on its context. In the judicial context, English common law courts used the shorter expression “faith and credit” as a term of art to describe the status of judgments in the ecclesiastical courts, when matters within the special jurisdiction of those courts came into contention. The leading early authority was *Bunting v Lepingwel*, in which the common law court recognized and abided by a determination of a question of marriage by the ecclesiastical courts, for the reason that:

“…conusance [cognizance] of the right of marriage belongs to the Ecclesiastical Court, and the same Court has given sentence in this case, the Judges of our Law ought (although it be against the reason of our Law) to give faith and credit to their proceedings and sentences.”

This rule of affording “implicit faith” – specifically applicable to the relation of ecclesiastical courts’ judgments to common law matters – was applied in a series of English cases, including *Caudrey’s Case*. Nadelmann suggests that these cases offer a

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ed., D.C. 1836). Edm. Randolph, Governor of Virginia: “That John Beckley, Esq., is clerk of the House of Delegates for this commonwealth, and the proper officer for attesting the proceedings of the General Assembly of the said commonwealth, and that full faith and credit ought to be given to all things attested by the said John Beckley, Esq., by virtue of his office…”

24 2 Journals of the Continental Congress 1774-1789 41-2: “I, Nathaniel Gorham, Notary and tabellion Publick, by lawful Authority duly admitted and sworn, hereby certify, to all whom it doth or may concern, That Thadeus Mason, Josiah Johnson, and Simon Tufts, Esqrs. are three of his Majesty's Justices of the Peace (quorum unus) for the County of Middlesex; and that full faith and Credit is, and ought to be given to their Transactions, as such, both in Court and Out.”

25 Nadelmann, supra note 17, 44.


27 Id., 952. See Sachs, supra note 1, 1219. See also Nadelmann, supra note 17, 44-6

28 Co. 1, 77 Eng. Rep. 1 at 8 (1595): “… the Judges of the Common Law ought to give faith and credit to their sentences, and to allow it to be done according to the ecclesiastical law… And this is the common
likely precursor to the drafters of the first Full Faith and Credit Clause in the Articles of Confederation. He especially notes that in 1776, the rule from *Bunting* and the “full faith” language was cited by defense counsel in the trial of *Elizabeth, Duchess-Dowager of Kingston*29 for bigamy, before the House of Lords (exercising its special jurisdiction over peers). Nadelmann argues that the notoriety of the case means the founders were likely aware of it, and that this is the probable source of the expression in the Articles.

This may well have been the case. Even assuming it to be so, however, there are difficulties in transferring the meaning of the expression “faith and credit” from this line of adjudication to the American context. The relation of common law to ecclesiastical courts has no equivalent.30 American courts were not identified by their position within the monarchical and religious state. They would function with equality of status. The clear demarcation in England of marriage as a matter for ecclesiastical courts – which was the basis for decision in these cases where the expression “faith and credit” was used – would not exist in the United States. In America, there would be many disputes in which jurisdiction was not demarcated between the legal systems of the states.

received opinion of our books, as appeareth 1 H. 7- 9. 34 H. 6. 14, & c. And in *Bunting and Leppingwel's case*, in the Fourth Part of my Reports." See also *Grove v. Elliott" We must give faith and credit to their proceedings, and presume they are according to their law, 4 Co. 29." See especially Nadelmann, supra note 17, 44-6; see also Sachs, supra note 1, 1218-20.


30 The case concerned the relation of the House of Lords (an institution that, particularly in relation to its capacity to hold peerage trials, was alien to the Constitution) to ecclesiastical courts (which also did not exist in America) in the trial of an aristocrat. It is hard to think of legal proceedings that are less republican. Article IV section 1 would mostly be concerned with the relations of legal systems in different places (not parallel courts in the same territory), with local courts (often lay-courts) adjudicating less salacious matters than the alleged bigamy of a Duchess.
C. American innovations and foreign judgments

1. Colonial efforts

As early as 1643, the Confederation of New England Colonies apparently thought it necessary to coordinate the treatment of judgments. It appointed a commission which reported in 1644, and advised that verdicts of other courts should have “due respect” and be received as “good evidence”.31 A 1650 Connecticut statute closely implemented the advice. It provided for the judgments of other colonies’ courts to receive “respect” in its own courts32 and to constitute good evidence for the party concerned, until some other evidence or reason were shown to the contrary.33 Significantly, the statute limited its application to the judgments of colonies who reciprocally respected the judgments of Connecticut courts.34

This attempt at providing for admissibility and some degree of effect was not successful: no other colony provided for the recognition required by the statute until

31 See Nadelmann, supra note 17, 43 (Citing the Commission’s view: “that every such verdict or sentence may have a due respect in any other court through the Colonies where occasion may be to make use of it, and that it may be accounted good evidence for the plaintiff until either better evidence or some other just cause appear to alter or make the same void, and that in such case, the issuing or the cause be respeted for some convenient time, that the court may be advised which were the verdict or sentence first passed.”) It is interesting that there were no similar efforts at statutory reform in the United Kingdom to provide for the courts of the four kingdoms and the several courts of England to recognise one another’s judgments. One explanation is found in the fact that colonial courts in practice did not match the relatively high level of respect afforded by the courts of England (Sumner, supra note 3, 227) to foreign judgments, with the additional dimension of practice departing from doctrine. The distinctive features of American practice are explored in Part III.

32 See Ross, supra note 2, 142 fn10 (Stating that the statute provided, under the title “Verdicts: “any verdict or sentence of any court within the colonies, presented under authentic testimony, shall have a due respect in the severall courtes of this jurisdiction, where there may bee occasion to make use thereof….”).

33 Ibid. (The statute continued: “[The judgment] shall be accounted good evidence for the partye, until better evidence or other just cause appeare to alter or make the same void: And that in such case the issueing of the cause in question bee rerpoted for some convenient time, that the courte may be advised with, where the verdict”). See also Nadelmann, supra note 17, 38-9.

34 See Nadelmann, supra note 17, 38-9 (Extracting from the statute: “That this order shall be accounted valid and improved onely for the advantage of such as line within some of the confœderated colonyes; and where the verdicts in the courts of this colony may receive reciprocall respect by a like order established by the generall courte of that colonye.”).
Massachusetts in 1774. Until then, Maryland in 1715 and South Carolina in 1734 each passed laws providing for the authentication by “exemplification” or sealing, and hence also the admissibility, of judgments from other colonies. These laws did not address the weight to be given to those judgments or address the capacity of their own courts to impeach them, and they made no reference to “faith” or “credit”.

Just prior to the Revolution, in 1774 Massachusetts legislated to provide for the authentication and effect of judgments from any other American colony where a judgment debtor had taken up residence or bought property in the Massachusetts province. The law explicitly provided for the judgment debt to be actionable as if it had been originally given by a Massachusetts court. The Massachusetts statute was directed

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35 See Nadelmann, supra note 17, 39 (Extracting from the statute: “[P]roviding what shall be good evidence to prove foreign and other debts...”…”that all debts and records, whether by judgment, recognizance, deed inrolled, and upon record, the exemplification thereof, under the deed of the courts where the said judgment was given or was recorded, shall be sufficient evidence to prove the same.”).

36 See Nadelmann, supra note 17, 39-40 (Extracting from the statute: "All exemplifications of records, and all deeds, and bonds, or other specialties, all letters of attorney, procuration or other powers in writing, and all testimonials which shall at any time hereafter be produced in any of the courts of judicature 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, borough or town corporate, in any of his majesty's dominions, or under the hand of the governor and public seal of any of his majesty's plantations in America, or under the notarial seal of any notary public, shall be deemed and adjudged good and sufficient in law, in any of the courts of judicature in this province, as if the witnesses to such deeds were produced and proved the same viva voce.”).

37 14 Geo. III. (Mass.), ch. 322 (1774) (hereafter “Massachusetts Act”). See Nadelmann, supra note 17, 40; Sachs, supra note 1, 1222 fn 84; Ross, supra note 2, 142 fn 11.

38 Massachusetts Act, sec.2: “a true copy of the record and proceedings of the ...court ...in the said neighboring colony ... where said judgment ...shall be recovered, attested under the hand of the clerk of the court ... shall be ... as, good and sufficient evidence of such judgment, and have the same effect.”

39 See Ross, supra note 2, 142.

40 Massachusetts Act, sec. 1: “...where any person ... shall recover judgment ...in any court in any or either his majesty's neighboring colonies in America, and [such judgment debtor] shall remove into or reside within this province, or ...acquire any real or personal estate within this province ...it shall ... be lawful for [the judgment creditor] to ... maintain ...action ...of debt upon such judgment ...in any executive court within this province proper to try the same, in such way and manner as he ...might have done if such judgment ...had been originally recovered in the executive court in this province, where said action of debt shall be brought.”
at both the ‘evidentiary’ and ‘effects’ aspects of the foreign judgments problem.\(^{41}\) The question that must then be considered is the influence of this statute on the Articles of Confederation.

2. Drafting and applying the Articles of Confederation

Ross argues that the Founders clearly had in mind the Massachusetts statute in framing the Full Faith and Credit Clause of the Articles of Confederation. The initial draft of the Articles did not include a Full Faith and Credit Clause. A committee appointed to make proposals to supplement what already had been agreed to in the draft reported back to the convention the very next day with a proposal for such a clause.\(^{42}\) The very short time involved suggests that the idea came from elsewhere.\(^{43}\) That proposal was the clause then adopted. The Articles provided, in Article IV:

“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.”

It is notable that this economically-worded provision connects the acts, records, and judicial proceedings to which full faith and credit would be given to “courts and magistrates”. As will be explored in the next section, the Constitution would have a wider scope, extending to public acts. The Articles of Confederation, moreover, did not state the authority of foreign judgments as explicitly as the Massachusetts statute had.

Nadelmann doubts the connection between the Massachusetts statute of 1774 and the Articles of Confederation. He instead refers to Gilbert’s Law of Evidence, the most widely-used evidence treatise in the American colonies. Nadelmann argues that the

\[^{41}\text{Ross, supra note 2, 144.}\]
\[^{42}\text{5 Journals Of The Continental Congress 885-7. See Sumner, supra note 3, 229-30; Nadelmann, supra note 17, 35}\]
\[^{43}\text{Nadelmann, supra note 17, 36.}\]
Articles of Confederation, using the expression “faith and credit”, draw on the
evidentiary connotation rather than any concept of substantive effect. Gilbert had written
that the basic problem that the law of evidence and proof seeks to solve is understanding
things we do not ourselves see: we may instead give “faith and credit” to those who did
witness it.\textsuperscript{44} Nadelmann argues also that the language of the Massachusetts statute is
jumbled, and that the Full Faith and Credit Clause of the Articles of Confederation is a
model of draftsmanship, closer to Gilbert,\textsuperscript{45} although it is more accurate to say that the
Massachusetts statute was precise, whereas the Articles’ economical formulation is
textually closer to Gilbert. In any case, Ross accepts that even if the Massachusetts
statute had been the model for the drafters, the Articles of Confederation version omits
any mandate that out-of-state judgments have the same authority as in-state judgments,
leaving this question in the hands of the several states.\textsuperscript{46} The Articles of Confederation
did not go as far, or do so as clearly, as the Massachusetts statute.

The few cases in which the Articles’ Full Faith and Credit Clause was cited
suggest a limited operation. Even cases recognising “effect” do so in a qualified way.
So, in \textit{Millar v Hall} (1788),\textsuperscript{47} the Supreme Court of Pennsylvania applied the Full Faith
and Credit clause and the law of nations, and allowed a debtor the benefit of the
discharge from the courts of Maryland of a debt. The discharge was done under the law

\textsuperscript{44} Nadelmann, \textit{supra} note 17, 41-2, citing the 1756 and 1760 editions of Gilbert, \textit{supra} note 10, 4: "Now
this, in the first place, is very plain, that when we cannot see or hear anything ourselves, and yet are obliged
to make a judgment of it, we must see and hear by report from others; which is one step further from
demonstration, which is founded upon the view of our own senses; and yet there is that faith and credit to
be given to the honesty and integrity of credible and disinterested witnesses, attesting any fact under the
solemnities and obligation of religion, and the dangers and penalties of perjury, that the mind equally
acquiesces therein as on a knowledge by demonstration....”

\textsuperscript{45} Nadelmann, \textit{supra} note 17, 44.

\textsuperscript{46} Ross, \textit{supra} note 2, 145.

\textsuperscript{47} 1 Dall. 229 (Pa. 1788).
of that State.\textsuperscript{48} The Court held that the Maryland statute had no force within Pennsylvania, but that it carried weight and had influence, and the fact that the discharge had been given (notably, by a court) created obligations in equity and justice.\textsuperscript{49}

The Pennsylvania Supreme Court reached a contrary result in \textit{James v Allen} (1786).\textsuperscript{50} The Court declined to afford a debtor the benefit of a discharge from imprisonment given by a New Jersey court under the laws of that State. The New Jersey law, the court held, should be construed as exclusively local in its nature and terms.\textsuperscript{51} It is notable that in these cases, the courts strictly dealt with the status of interstate judgments, but that as those judgments applied statute law, some consideration was given to the applicability of the statute as well as the effect of the judgment. As with \textit{James v Allen}, the courts of Connecticut in \textit{Kibbe v Kibbe} (1786)\textsuperscript{52} and Pennsylvania in \textit{Phelps v Holker} (1788)\textsuperscript{53} both refused to give effect to decisions of Massachusetts courts in which a debtor had been sued and judgment given after trivial items of the debtor’s property in Massachusetts were attached, fulfilling the Massachusetts statutory requirements for service on the debtor for all purposes. The Connecticut court refused to recognize this

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\textsuperscript{48} See Nadelmann, \textit{supra} note 17, 52; Whitten, \textit{supra} note 11, 30.
\textsuperscript{49} 1 Dall. 229, 232: "It is true, that the laws of a particular country, have \textit{in themselves} no extraterritorial force, no coercive operation; but by the consent of nations, they acquire an influence and obligation, and, in many instances, become conclusive throughout the world ... From the nature of the act then, it appears to be founded upon equitable grounds, for general and just purposes; it ought therefore to be regarded in all other countries, and should enjoy that weight, in our decisions, which it naturally derives from general conveniency, expediency, justice, and humanity. For, mutual conveniency, 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." See Nadelmann, \textit{supra} note 17, 52-3.
\textsuperscript{50} 1 Dall. (Phila. Co.) 188 (1786).
\textsuperscript{51} \textit{Ibid.}, 191. See Nadelmann, \textit{supra} note 17, 50-1.
\textsuperscript{52} Kirby (Conn.) 119 (1786). Kirby’s Reports were published under the title, \textit{Reports of Cases Decided in the Superior Court of the State of Connecticut from the year 1785, to May 1788, with Some Determinations in the Supreme Court of Errors}.
\textsuperscript{53} 1 Dall. (Pa.) 261 (1788).
\end{flushright}
type of service as creating a basis for a judgment in personam, and M’Kean CJ in Phelps held that the attachment gave rights over the property within Massachusetts, not elsewhere.54

D. Drafting the Constitution of the United States

After this short and restricted operation, the Full Faith and Credit Clause was reconsidered in drafting the Constitution.55 Drawing on the Pinckney Plan and the Hamilton Plan56 (not before the Convention) the Committee of Detail placed a draft clause before the Convention, in Article XVI:57

"Full faith shall be given in each state to the acts of the legislatures and to the records and judicial proceedings of the courts and magistrates of every other state."

This proposal differed from the Articles of Confederation because (apart from using the more sparse language of “full faith”) it made explicit reference to the acts of the legislature.58 Amendments were proposed and debated. The records of debate show initially different views as to the actual meaning of the clause in this new form. These debates expose the purpose that the delegates hoped to achieve, and the different mechanisms proposed to realise it. Mr Williamson of North Carolina proposed substituting the words of the Articles of Confederation, stating that he did not understand the draft clause. Madison’s Notes records this explanation:

"They supposed the meaning to be that judgments in one state should be the ground of

54 See Nadelmann, supra note 17, 49-50.
56 As explained by Ross, supra note 2, 145, this proposal also referred to public acts, and used language similar to that which would eventually appear in the first part of the clause: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of another.”
57 2 The Records of the Federal Convention of 1787, at 188 (Max Farrand ed., 1911) (hereafter “2 Farrand”). See Ross, supra note 2, 143; Sachs, supra note 1, 1226 fn 105.
58 Sumner, supra note 3, 231.
actions in other states, and that acts of the legislatures should be included, *as they sometimes serve the like purpose as act* for the sake of Acts of insolvency etc."

Nadelmann explains that the reference to “Acts of insolvency” refers to the practice of some States in dealing with bankruptcy through private Acts.⁵⁹ If the delegates had thought that wording along the lines of that already proposed – being similar in operation, but different in scope, to the Articles of Confederation – would allow judgments and statutes in one State to give rights of action in others, then the reality was more complicated. The cases decided under the Articles (above) found the effects of this formulation to be limited. In response to this explanation of the purpose, that judgments and perhaps acts should “give ground” for actions elsewhere, several options emerged through amendments.

Mr Pinckney of South Carolina moved to commit the clause with the additional proposition, “To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange." This proposal – creating Federal legislative powers over bankruptcy – suggests that the full faith and credit clause was regarded as addressing the related problem,⁶⁰ of State measures (statutes, public and private) shielding debtors. It also suggests that the full faith and credit clause itself was not regarded as itself providing for any such clear resolution of the law to be applied: it would be left to Congress. Madison spoke in favour, and proposed a further, similar amendment to the clause: to allow the legislature to provide for execution of judgments in

⁵⁹ Nadelmann, *supra* note 17, 55-6. Nadelmann also points out (*supra* note 17, 54-5), Madison’s handwritten notes indicate that the words in italics were struck out, and that as Madison continued to work over his draft of the *Notes* between 1821 and 1836 before publication, we cannot really know when that alteration was made.

other states.  

As noted in considering the previous English common law doctrine on foreign judgments, above, to allow execution of the judgments of one state in another would have been a radical alteration. For this reason, Randolph argued that Madison’s proposal was unprecedented. He proposed instead an amendment allowing for the legislative, judicial and executive acts of States instead to be “binding” in other States, as applicable. Gouverneur Morris then moved his own version, with a structure similar to that later adopted, with both “full faith” and a legislative power to determine proof and effect. A committee of five considered the draft and proposed a further amendment with a similar structure, limiting Congress’ power to determine “effects” to judgments.

At this stage, it is worth recapitulating the range of proposed amendments on the question of the operative meaning of the clause. On an initial amendment, delegates explained that the clause should provide a means by which the acts and judgments of one state could ground rights of action in others. There were two types of drafting response: one, under which the clause itself would provide for interstate laws and judgments to be “binding” (Randolph), and the other, which would create new powers in Congress, either

\[^{61}\] Nadelmann, supra note 17, 57.

\[^{62}\] 2 Farrand, 448: “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.” See Nadelmann, supra note 17, 57; Sachs, supra note 1, 1228.

\[^{63}\] 2 Farrand, 448: “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. See Nadelmann, supra note 17, 58; Sachs, supra note 1, 1228.

\[^{64}\] 2 Farrand, 485: “Full faith and credit ought to be given in each State to the public acts, records, and Judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, Records, and proceedings shall be proved, and the effect which Judgments obtained in one State, shall have in another.” See Nadelmann, supra note 17, 58; Sachs, supra note 1, 1228.
to make Federal laws to be applied (Pinckney’s proposal) or to prescribe the effect of State acts, legislative and judicial (Madison’s “execution” proposal, and the Morris and committee of five proposals falling short of execution, and going beyond it to include public laws).

These different amendments aimed at a common goal: providing a national rule on enforceability, rather than leaving this question to the states, as had been done under the Articles of Confederation. The choice was whether this rule would be dictated by the Constitution itself (as per Randolph, using the word “binding”) or by statute (the rest). From the debate taking this course, and producing different competing amendments with these structures, we have strong grounds for inferring that the first part of the clause, stipulating (like the Articles of Confederation had) “full faith and credit”, did not resolve, or even address in any significant way, the question that the delegates were most concerned to answer.

As noted above, the clauses before the Convention differed from the Articles of Confederation by making reference to acts of legislatures, as well as judgments and records. When read together with the words “full faith and credit”, it could appear that the inclusion of statutes would require a different meaning to be given to the content of that “full faith and credit” than would be the case with a clause referring only to judgments and records. The delegates, however, do not appear to have recognised this inclusion as broadening the self-executing meaning of “full faith and credit”. Rather, the effect of public acts would depend on Congress taking action. For example, Dr Johnson

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65 Ross, supra note 2, 145.
explained (in responding to Morris’s amendment\textsuperscript{66}) that the inclusion of public acts and the creation of a power to “declare the effect thereof”, “would authorize the general legislature to declare the effect of legislative acts of one state in another state” \textsuperscript{67}.

Further debates over the committee’s proposal, and additional amendments, confirm this understanding of the structure of the clause as a whole, and the limited content of “full faith and credit”. Morris (with support from Mason and Wilson) proposed expanding Congress’s powers to declare “effect”, to extend over acts and records, as well as judicial proceedings.\textsuperscript{68} Wilson explained that the power vested in Congress was crucial, and that without the legislature being able to provide for effect, “the provision would amount to nothing more than what now takes place among all independent nations.” Randolph opposed Morris’s amendment, but did so on the basis of the same understanding of the structure of the proposed clause. He opposed acts (as opposed to judicial decisions) being given effect elsewhere, and directed his opposition against the Congressional power, not the “full faith and credit” part of the clause.\textsuperscript{69}

Morris’s amendment was adopted. The significant point for present purposes concerns the drafters’ apparent understanding of the respective functions of the two parts of the Clause. As Madison argued in The Federalist No.42, the critical change between the Articles of Confederation and the Constitution was that:

“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

\textsuperscript{66} Supra note 63.

\textsuperscript{67} 5 Debates on the Adoption of the Federal Constitution 504 (Jonathan Elliot ed. 1888), volume 5, 504.

\textsuperscript{68} Such that the clause then finished: “…by general laws prescribe the manner in which such acts, Records, and proceedings shall be proved, and the effect thereof.” Nadelmann, supra note 17, 58.

\textsuperscript{69} 2 Farrand, 488.
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 drafting history and the Articles jurisprudence gives good reason for agreeing with Madison’s assessment. Without the Congressional power, the clause would have been of indeterminate meaning. Elsewhere, the words “full faith and credit” referred in some contexts to admissibility and evidence, and in others to the “implicit faith” rule deriving from *Bunting* and other cases.

Nadelmann and Laycock argue a contrary view: that the first part of the clause should be regarded as doing more work than this. In this respect, they refer to the final amendments made to the clause before it was committed and sent to the committee on style (which altered the reference to “Legislature” to read “Congress”, and broke the clause into two sentences). There were two such changes: the word “shall” was substituted for “ought to”, and “the Legislature may” was substituted for “the Legislature shall”. The debates do not explain why. Laycock in particular sees this amendment as having the effect of making the first part of the clause self-executing as to effect. This is a large claim in proportion to the evidence. Of course, “shall” does require more than “ought to”, but the word “shall” was also used in the Articles of Confederation, and Madison’s own description of the first part of the clause, extracted above, applied to a Clause that used “shall”.

Nadelmann makes a more modest claim: he argues that in interpreting the clause, we should regard the drafters as choosing between two different streams of authority.

70 *Supra* note 26 and accompanying text.
from English common law: the rule from *Walker v Witter* that judgments could be examined, and the principle that judgments were to receive “implicit faith”. Madison’s last amendment, he says, gives reason to think that the drafters chose “implicit faith”.\(^73\)

The same arguments as were made in response to Laycock (looking to the Articles jurisprudence, and to the drafters’ expressed views) apply here. Further, the two strands in English doctrine and practice in the late 18\(^{\text{th}}\) Century could be seen as connected parts, not binary choices. Judgments from the colonies, other parts of the United Kingdom, and foreign nations, were examinable (or impeachable) even if as a general proposition they were followed. The “implicit faith” rule to which Nadelmann refers developed in common law courts (as the discussion in Part II.A above explored), in cases where the other judgment emanated from a non-common law court with a specialised and demarcated jurisdiction (such as an ecclesiastical court). The situation would be quite different in the United States. Further, even within English law the implicit faith rule was not always observed. In the *Duchess-Dowager of Kingston* case, for example the House of Lords decided *contrary* to the finding of the ecclesiastical court.

As Whitten and Sachs argue, the first part of the clause could have substantive meaning without giving effect to interstate acts and judgments or making them binding. It instead created a clear rule of evidence and admissibility that individual states could not question or nullify. Whitten argues that the first part of the clause created an

\(^{73}\) Nadelmann, *supra* note 17, 59, 70, 79-80. This argument refers to authority that dealt with foreign judgments, rather than statutes, but Nadelmann also concludes that the inclusion of “public acts” could not possibly have resulted in the meaning that the courts of a state should apply the statutes of other states despite their own law, and that the contemporary view in any case was that the clause was not self-executing as to acts: *Ibid.*, 73.
evidentiary rule that the states could not controvert.\textsuperscript{74} Sachs elaborates this argument, and draws on a comparison with a Delaware statute passed a year before the Convention, which provided for documents bearing the seal of the Bank of North America to receive “full faith and credit”. This could only mean, Sachs argues, that the documents were admissible evidence, as the Bank could obviously not write its own laws. “Full faith and credit”, in that statute and, Sachs argues, in article IV, means that the acts and records are entitled to recognition as authentic, that they are the acts and records of the institutions that created them, and that no other evidence may be led to the contrary.\textsuperscript{75} This point recognises and responds to the inelegancy that can arise from reading the first part of the clause as establishing an “admissibility” rule for statutes. We do not tend to think of statutes as being admissible or not. However, Sachs’ point goes somewhat beyond admissibility, to authentication, which was an important question for a period in which proof of documents was a more difficult, and also more powerful, weapon in litigation, and one which was therefore scrutinised more closely. To the extent that the inclusion of public acts was understood by the Founders to be significant, it was in relation to the second part of the clause. As the contributions of Dr Johnson and the others on Morris’s amendment made apparent, the delegates were aware that the combination of these parts of the clause, gave a broad and new power to the Congress; and in their understanding, this legislative power was the key and controversial part of the clause on which questions of the effect of public acts would turn.

\textsuperscript{74} Whitten, \textit{supra} note 11, 42-5.

\textsuperscript{75} Sachs, \textit{supra} note 1, 1230-1.
The interpretation offered by Sachs, attributing the clause with a limited but consequential operation, is plausible, if not also the most attractive, in attempting to reconstruct the intentions of the drafters. This discussion, however, underlines the difficulties of pursuing originalist interpretation through ascertaining or estimating the subjective purposes of historical actors. To summarise, the “effects” reading depends most on the following arguments, each of which draws a response. First, English common law courts had used “faith and credit” to describe the effect of judgments from non-common law courts. Against this, there is the use of the expression to describe authentication, and the differences between the relationships among English courts and those of America. Second, the late amendment of “ought to” to “shall”. This alteration, however, simply brought the clause back in line with the Articles, which had a limited operation. Further, much of the debate in Convention, in which delegates recognised the first part of the clause as not self-executing, was over versions of the clause that did use “shall”.

Importantly, the structure of these arguments focuses attention particularly on subjective intention and shades of meaning. Many of the arguments and counter-arguments depend on showing (or, failing that, assume) that particular individuals had other sources in mind, or had expressed themselves properly, or had understood proposals and debate (even while also at times expressing doubt and confusion). So, many of the conclusions that can be drawn will be necessarily qualified.

The argument to be made in Part III, while also historical and best understood in the context of these debates, will make the different interpretative move, of construing
the Clause by reference to its most pertinent practical context: the existing legal institutions responsible for applying it.

E. **The Clause after adoption: Congressional interpretation and judicial exegesis**

Congress waited only until 1790 to use its powers under Article IV. The first part of the statute provided means for records to be proved and admitted. The second part addressed the status judicial proceedings and records – but not public acts – would have:

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.

Does this second provision mean that the records and judicial proceedings of other states would be binding or otherwise conclusive in the courts of other states? The Supreme Court in *Mills v Duryee* held this to be the case, and this came to be the law of the land through the middle part of the 19th Century. This holding was based exclusively on the Act of 1790, placing no weight on the first part of the Full Faith and Credit Clause of the Constitution. However, as Engdahl explains, the “effects” understanding of the second part of the 1790 statute was later extended, to interpret the similar operative words of Article IV as having the same meaning. The reasoning was as follows:

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76 See Sachs, *supra* note 1, 1231-2 (citing Ch. 11, 1 Stat. 122 (1790) (codified as amended at 28 U.S.C. § 1738 (2006) (hereafter the 1790 Act). The 1790 Act provided: “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.”)

77 Ibid.

78 11 U.S. (7 Cranch) 481 (1813).


80 Engdahl, *supra* note 70, 1588-9
statute, using the words “faith and credit”, meant ‘have binding effect’, so the words “full faith and credit” in Article IV would be interpreted to mean the same thing (“to have binding effect”).

This self-executing meaning would then also apply in relation to ‘public acts’, which had not been covered by the Act of 1790, but which were covered in the constitutional text. It is this judicial interpretation of both the constitutional clause and of Congress’s own attempt at interpretation through statute that scholars such as Sachs and Engdahl now challenge (albeit with different conclusions) by reference to historical factors.

The foregoing sections of Part III have explored the arguments concerning the constitutional clause. A further, important question is whether the Act of 1790 originally had the broad meaning attributed to it by Mills v Duryee and later cases. Sachs and Whitten argue that it did not. Whitten makes an argument based on language: his premise is that the proper historical interpretation of “full faith and credit” in Article IV is evidentiary. Thus, as the Act of 1790 in its second part likewise provided for “faith and credit” to be given, Congress by using the same words as in the first part of Article IV did no more than clarify the means of proving interstate records and judicial proceedings and making them admissible in the same way that those records would be admissible in their home state.

Sachs also argues convincingly that the Act would not have provided for

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81 Engdahl points out that this reasoning overlooks the inclusion in the Act of 1790 of the words “such faith and credit… as they have by law or usage in the courts of the state…” Engdahl argues that the Court has confused the meaning of the constitutional language with the statutory provision, resulting in the “classic rule” formulated and justified in Mills v. Duryee being eclipsed: supra note 70, 1652-4.

82 See eg Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887), holding that the Full Faith and Credit Clause in the Constitution “implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in Mills v. Duryee and steadily adhered to ever since.” See Laycock, supra note 15, 300.

83 Whitten, supra note 11, 52.
judicial proceedings to be binding and effective, referencing textual clues, and comparisons with other authentication statutes and the status of Federal records. Importantly, he also refers to practical consequences in the contemporary legal environment of the statute providing for effect rather than simple admissibility: no provision was made for courts to resist being bound by interstate decisions rendered in excess of jurisdiction or without adequate service, as those concepts were understood under general principles of common law; and judgments could have been executed in other jurisdictions, which would create an entirely novel process, which had been criticised at the Philadelphia Convention.

Finally, a series of judicial decisions very shortly following the Founding suggest that the effect of the Act of 1790 (and the constitutional clause itself) was ambiguous, at the least. In the first case decided under the statute, Armstrong v Carson, counsel for the defendant refused to argue against the Act giving effect, and Justice Wilson held that the Act declared “in direct terms, that the record shall have the same effect in this court, as in the court from which it was taken”. Justice Washington in Green v Sarmiento gave a similar result. In Peck v Williamson, however, Chief Justice Marshall held of a Massachusetts judgment, sued on in North Carolina, that neither the Constitution nor the

\[84\text{ See Sachs, supra note 1, 1233-40.}\]
\[85\text{ The statute was described in contemporary reports as providing for the “authentication” of records, and the title of the statute “prescribes how records are to be authenticated “so as to take effect” in other states, applying the law of substantive effect as it finds it rather than imposing a new rule.” See Sachs, supra note 1, 1233-4.}\]
\[86\text{ Ibid., 1234-5.}\]
\[87\text{ Ibid., 1237-8.}\]
\[88\text{ Ibid., 1236-7. See also Buchanan v. Rucker, supra note 8 and accompanying text.}\]
\[89\text{ Sachs, supra note 1, 1238-9.}\]
\[90\text{ Armstrong v Carson, 1 F. Cas at 1140. See also Whitten, supra note 11, 41.}\]
\[91\text{ 10 F. Cas. 1117 (C.C.D. Pa. 1810) (No. 5,760).}\]
Act, both using the formulation “faith and credit”, had prescribed the effect, which would instead be governed by the common law. Marshall CJ received support in the courts of Pennsylvania, South Carolina, and New York (under Chancellor Kent). Massachusetts agreed with Marshall CJ, before reversing in a later case, and New Jersey held the Act to have prescribed effect, but that judgments were still examinable. Only the Kentucky courts agreed with Justices Wilson and Washington that interstate judgments had conclusive effect. The difference in view was not resolved until 25 years after the adoption of the Constitution in Mills v Duryee, through the opinion of Justice Story, who at 34 years of age was too young to have participated in the Philadelphia Convention or the ratification debates.

It is not the purpose of this paper to engage in a detailed review of Sachs’ recent and carefully-argued position or Whitten’s argument, or to critique the respective reasons of the courts between 1790 and 1813. Rather, these positions are sketched out in order to familiarise the reader with the existing debates, to which Part III will add.

92 19 F. Cas. 85 (C.C.N.C. 1813) (No. 10, 896): “Unless congress had prescribed its effect, it should be allowed only such as it possess 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.” See also Whitten, supra note 11, 44.


94 Bartlett v. Knight, 1 Mass. At 409. See Whitten, supra note 11, 49.


96 Curtis v. Martin, 2 N.J.L. 377 (1805). See Whitten, supra note 11, 49.


98 See Whitten, supra note 11, 50.

99 Engdahl, supra note 1, 1647.
Engdahl, for his part, proposes that the Act of 1790 did provide for judgments to have “effect”, due to the difference in wording between Article IV and the Act of 1790, but this is really in the context of interpreting and critiquing the jurisprudence that follows; it does not answer Sachs. Laycock also takes issue with Whitten’s approach. He argues that Whitten cannot defend his limited view of the full faith and credit clause in Article IV, without attributing the words “faith and credit” in the statute and in Article IV with contradictory meanings, without also rejecting the interpretation of the statute in *Mills v Duryee*. This misses the point of Whitten’s inquiry, which is to determine historical meaning at adoption. Indeed, it is in the nature of historical scholarship exploring constitutional meaning that it will discount the importance of later judicially-stated doctrine, focussing instead on the legal and political landscape of the society at the Founding. The civil jury is an as yet unmapped region of this landscape, and it is this area that we will explore in Part III.

IV. **The American Jury and Inter-State Legal Disputes**

A. *The autonomous civil jury*

In 1788, the civil jury stood at the precipice of radical change, at the intersection of two great movements in American politics and law. The first such movement is the flowering of democratic and republican zeal, leading up to the Revolutionary War and the Declaration of Independence. In this context, the civil and criminal jury trial over the course of the 18th Century had transcended its position as “one of the rights of

100 *Supra* note 81 and accompanying text.
Englishmen”.\textsuperscript{102} It had also come to have a distinctive American quality and greater authority than English juries,\textsuperscript{103} through its association with self-government and democratic law-making.\textsuperscript{104} In Massachusetts, for example, under statute passed in 1648, if the jury and the judge were unable to agree on a verdict, the matter would be referred to the General Court of the province, in which democratically elected representatives outnumbered appointed magistrates by a margin of 3 to 1. Although this system proved unwieldy, the laymen on the jury could ensure that in any dispute over the content of law, a popularly elected body would resolve it.\textsuperscript{105} The jury provided a point of resistance to autocratic government by foreign governors and judges,\textsuperscript{106} and was a layman’s institution, building on mistrust of legal experts.\textsuperscript{107} John Adams, preparing notes for court, wrote:

As the constitution requires that the popular branch of the legislature should have an absolute check so as to put a peremptory negative upon every act of the government, so it requires that the common people should have as complete a control, as decisive a negative, in every judgments of a court of judicature. No wonder then that the same restless ambition of aspiring minds, which is endeavouring to lessen or destroy the power of the people in the legislation, should attempt to lessen or destroy it, in the execution of laws. The rights of juries and of elections were never attacked single in all the English history.\textsuperscript{108}

\textsuperscript{102} MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 216 (Reprint by Wm W. Gaunt and Sons 1993).
\textsuperscript{103} Thorp L. Wolford, The Laws and Liberties of 1648, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 147, 165 (David H. Flaherty ed. 1969).
\textsuperscript{104} PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 88 (1992).
\textsuperscript{106} RADIN, supra note 102, 216.
The distinctive feature of the American jury was its law-determining function, autonomous of the views of the judge on the law.\textsuperscript{109} This function remains important today in criminal matters, and in the 1780s it was also very important in many states in civil trials as well. Again, this function was specifically associated with revolutionary ideology by Adams\textsuperscript{110} and Jefferson.\textsuperscript{111}

Judicial affirmation of the jury’s right to determine the law as well as fact is found in many sources, including in the direction of Chief Justice Jay to a jury sitting with the Supreme Court in 1794, that they had “a right to take upon [them]selves to judge of both, and to determine the law as well as the fact in controversy”.\textsuperscript{112} In a context close to the central concern of this paper, we find a Connecticut judge dismissing a challenge to a juror, who took the view that the state’s laws did not permit slavery. The challenge to the juror arose in a 1788 case dealing with an escaped slave, whom statute required to be returned to his owner:\textsuperscript{113}

“An opinion formed and declared upon a general principle of law, does not disqualify a juror to sit in a cause in which that principle applied. Juries are judges of law as well as fact, as relative to the issues put to them, and are supposed to have opinions of what the law is, though a willingness to change them, if reason appears in the course of the trial. … It is enough in point of indifference that jurors have no interest of their own affected,\textsuperscript{113}


\textsuperscript{110} “Now should the melancholy case arise, that the judges should give their opinions to the jury, against one of these fundamental principles, is a juror obliged to give his verdict generally according to this direction, or even to find the fact specially and submit the law to the court? Every man of any feeling or conscience will answer, no. It is not only his right but his duty to find the verdict according to his own best understand, judgment, and conscience, though in direct opposition to the direction of the court.”: Adams, \textit{supra} note 108, 229-30.

\textsuperscript{111} “it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one in which the judges may be suspected of bias, the jury undertake to decide both law and fact”: Thomas Jefferson, \textit{Notes on the State of Virginia} 140 (J. W. Randolph ed. 1853).

\textsuperscript{112} \textit{Georgia v. Brailsford}, 3 US (3 Dallas) 1, 4 (1794).

\textsuperscript{113} \textit{Pettis v. Warren} Kirby (Conn.) 426-7 (1788).
and no personal bias... and not requisite that they should be ignorant of the cause, or unopinionated, as to the rules and principles by which it is to be decided..."

As Nelson explains, institutional and procedural differences between England and America gave the jury this special authority throughout the 18th Century. Pleading was less precise and the demurrer less utilised in America. The distinction between law and fact was not well-developed, and the English practice of juries giving an account of the facts through a special verdict, to which the judge could then apply the law, was not effective, particularly as American practice required the consent of both parties to do so. The effectiveness of judicial instructions was limited since it was commonly understood that jurors were entitled to ignore what were really judicial comments.114

In the half-century following the Revolution, these attributes of the civil jury would change. Some of the instruments of judicial control over the jury’s law-determining function had begun to appear in the 1780s and 90s. Horwitz associates these developments, including the professionalization of the bench, with the emergence of a modern economy and the need for a body of stable and rational commercial law. The process began through procedural changes, and led to a change in the ideological and theoretical understanding of the jury. Horwitz emphasises two procedural developments: the concept of a case stated or a case reserved, for a decision by a judge; and new trials for verdicts contrary to the weight of evidence. These two developments, and the development by bench and bar of a sharper concept of a distinct question of law,115 led to

114 Nelson, supra note 109, 904-10.
a third change achieved by the end of the first third of the 19th Century: confining the civil jury to questions of fact.\textsuperscript{116}

So, the civil jury in the 1780s was a difficult institution to adapt to a new national legal system. It would be difficult and even anti-democratic to bind juries across the country to apply law other than that with which they were content and had agreed to. Yet, at the same time there were developments on foot that would change the face of the civil jury completely within a few decades. This background gives logic to the interpretation of the Clause’s drafting explored above: the drafters wished to provide for the recognition of state laws in other jurisdictions, but did not do so directly. Rather, the issue was left to a Congress that could adapt the law to changing circumstances.

\textbf{B. Juries and law from outside}

In some of the cases considered here, we can observe the early exertions of judicial control over law-making. This was not an orderly or planned process, and it depended on local procedures, as well as doctrine. Even as courts moved towards a system in which judges would elucidate the law to be followed, the influence of the jury and its local sensibilities on the content of that law would persist. The cases considered here are loosely arranged into three categories, being cases dealing with: the status of individuals under the law of different jurisdictions; the enforceability, impeachment and terms of monetary obligations incurred in other jurisdictions; and the application and effects of the law and judicial proceedings of another jurisdiction, when relevant to an action brought locally on similar facts.

1. Questions of status

\footnote{Horwitz., \textit{supra} note 115, 141-3.}
The detailed report of the Massachusetts case of *Bannister v Henderson* in 1765 gives an idea of the relative functions of the bench and the jury, and the jury’s preference for deciding contentious cases by the custom and law of their own community.

The case raised a classic question: the recognition (or not) of a marriage outside the jurisdiction. The Demandant, making a claim to what is described as “great Real Estate” under his grandfather’s will, needed to show that his parents were married in order to establish his legitimacy. A jury was appointed to give a verdict on this and two other questions. The Demandant submitted that his parents were married in England, before moving to New England, where they continued to live as man and wife; that is, they cohabited. Auchmuty, counsel for the Defendant argued that “common Report” or “common Fame” of the couple living as married would not suffice to support a claim of this importance. Instead, the marriage had to be proved by certificate, being the means of proof for an English marriage. Had they been married “in a new Country where Records are not kept”, Mr Auchmuty said:

“there might have been some faint Colour for not producing a Certificate, but in England these Records are most strictly kept; for they know it is the only Evidence that will serve; the only Proof of the Legality of Marriage.”

So, Mr Auchmuty’s argument invokes reference to the English legal system, to decide a question of legal status. Gridley, counsel for the Demandant, concedes the principle that this rule would govern the dispute, noting only that a copy of the certificate

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117 Josiah Quincy, *Reports Of Cases Argued And Adjudged In The Superior Court Of Judicature Of The Province Of Massachusetts Bay, Between 1761 And 1772*, (Boston, Little, Brown, & Co. 1865) [hereafter “*Quincy’s Reports*”] 119.

would suffice.\textsuperscript{119} Mr Gridley then argued, however, that the question could instead be decided by a rule that he had seen applied “in the Course of my Practice”; that is, “Cohabitation and universal Report have always been deemed sufficient Evidence”. So, counsel have at this point divided on a question of the governing law. Mr Gridley accepts Mr Auchmuty’s general point on the need under English law for a certificate (or a copy), but then offers an alternative, local, test.

The report then notes in summary the exchanges between counsel and the bench. This bench was composed of three judges, who each gave his own view – rather than a single direction – before the jury decided. The judges did not agree. Notably, the Chief Justice quizzed Mr Auchmuty with an analogy: how do Quakers prove marriage except by report? Mr Auchmuty replied that the Quakers received “Favour” (a special dispensation), a response with which Justice Russell then agreed, that proof by report is “only instanced in Quakers”.\textsuperscript{120} The other two Justices were more disposed towards the Demandant’s argument but for different reasons. The Chief Justice held that “living” together “as Man and Wife” (ie, cohabitation) could suffice, whereas Justice Lynde held that “universal report”, where it was “corroborated with other Circumstances”, would be “sufficient Evidence”.\textsuperscript{121} The diversity in these views underlines the point that the legal question was not the province of the bench.

Significantly, and unusually, before the question then went to the jury, the Chief Justice also commented that he would have preferred that this question, which he viewed

\textsuperscript{119} “In Strictness of Law they ought to produce a Copy, and not a Certificate, though generally allowed.”: \textit{Ibid.}, p.122.
\textsuperscript{120} \textit{Ibid.}
\textsuperscript{121} \textit{Ibid.}, p.123.
as legal, not factual, had been decided by the judges in the case. However, the authority to decide the issue rested with the jury. Despite the Chief Justice’s objection, the jury resolved the point, doing so in the Demandant’s favour, finding that his parents had been married. The jury implicitly rejected the need to prove the marriage by certificate, under the law of the place where the marriage was made. Instead, the jury had applied some local rule or custom.

A Connecticut case not involving a jury illustrates the importance of this local law and custom. In *Nicole v Mumford* (1787), the defendant challenged the right of a person appointed under New York law as administrator of an estate to bring actions for the estate in Connecticut courts. The defendant pleaded that the, “administration granted in the state of New York, doth not authorize such administrator to commence or prosecute any action for the recovery of any goods, chattels, or credits, within this state.” The Court of Common Pleas allowed the plea, which the administrator brought before the Supreme Court on a writ of error. The administrator was successful – his appointment under New York law would allow him to act as administrator in Connecticut. The basis on which the Supreme Court decided this point is of note. The “immemorial usage” had been to admit administrators appointed elsewhere to prosecute actions before the courts of this State. It “was most convenient, that the whole should be transacted by some person appointed in the state where the deceased dwelt”. The basis for the decision was

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122 “I am sorry… that this Point was not left to the Court”: Ibid., p.123.
123 The report states that the jury “found the two Points in Favour of the Demandant” (Ibid., 123), which might appear inconsistent with the note at the start of the report, that a special verdict was called for on three points. However, the report notes that the third of the three points “was given (in Effect) up”, which left only two points necessary for the jury to decide: the first point, being the marriage, and the second point, being the death of the testator.
124 *Kirby (Conn.)* 270 (1787).
not the force of New York law, although that was obviously important for showing that
the plaintiff was, in fact, who he claimed to be. Nor was it any rule as to choice of law.
Rather, it was practical convenience, to the community and the parties, evidenced by the
existence of a long-standing usage of the State of Connecticut. These matters of local
cconcern and communal usages would have been the factors on which a jury would have
decided the case.

2. The enforceability, impeachment and terms of obligations
   a) Enforcing judgment debts

   As we saw in Part II, the enforceability of judgment debts was of concern to some
at the Philadelphia Convention. The Massachusetts statute of 1774 had provided a
procedure to this end, but proposals at Philadelphia to make such judgments “binding”,
and Madison’s proposal to give Congress specific authority to legislate to make
judgments executable in all jurisdictions were not adopted; rather, a general power to
prescribe effect was conferred.

   Examination of several cases suggests that the jury asserted a prominent function
in reviewing judgments from other jurisdictions. The civil jury in Connecticut is one
example. This was the case notwithstanding that in *Kibbe v Kibbe* (1786)\(^{125}\) the Supreme
Court of Errors for Connecticut, while refusing to apply a Massachusetts judgment
because of inadequate service by attachment on the defendant, observed in *obiter dicta*
that “full credence ought to be given to judgments of the courts in any of the United
States.” The matter had not yet been tried in Connecticut before a jury, and had to that
point proceeded on demurrer.

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\(^{125}\) Kirby (Conn.) 119 (1786).
Kibbe is cited\(^\text{126}\) as giving a broad meaning to the full faith and credit clause of the Articles of Confederation. Yet Connecticut practice where juries did sit departs from this meaning, suggesting that judicial control of law-making depended somewhat on procedure and whether a jury had already given a verdict in that case. In *Deming v Norton* (1788)\(^\text{127}\), the plaintiff sued for the enforcement of a guarantee given by the defendant for the debt on a promissory note of a third party, W. who resided in New York. The plaintiff had already obtained judgment from the New York Supreme Court against W. on his default. The jury in Connecticut made a special finding: that the plaintiff had agreed with W. to postpone enforcement of the obligation, in consideration of a special agreement and W. providing valuable consideration. The plaintiff on review to the Supreme Court argued that this issue and the jury’s finding was “immaterial”. The Court disagreed. The jury was entitled and correct to impugn the New York judgment: in fact, the issue as found by the jury was “the only material point in the proceedings”, and its decision was affirmed.\(^\text{128}\)

The limited consequences of the full faith and credit clause for the civil jury are illustrated further by contemporary legal argument over pleading, notably in the reports of the New York case of *Le Conte v Pendleton* in 1799.\(^\text{129}\) The plaintiff sued in New York on a judgment debt from Georgia, and the defendant raised two pleas – *nil debet* and *nuliel record* – which we encountered in Part II above. The plaintiff moved to have the defendant show why one of the pleadings should not be struck out, consistent with the

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\(^{126}\) Laycock, *supra* note 15, 299.

\(^{127}\) Kirby (Conn.) 397 (1788).


\(^{129}\) Cole, Cas. (N.Y.) 72 (1799).
Harrison, the plaintiff’s counsel, then also attacked the pleadings on their merits, making reference to the Constitution and the “implicit faith” to be shown to judgments. As we explored in Part II.A, the plea of *nil debet* is a pleading that the debt was not actually owed. So, to make a pleading of *nil debet* when a court has already given judgment on that debt necessarily and directly attacks the correctness of that judgment. Mr Harrison, therefore, was essentially making two moves in his argument, and seeking a ruling on each. First, that the defendant could enter only one plea, and second, that the Constitution *constrained* the choice of plea. How it was constrained would depend on the meaning given to the full faith and credit clause. If “implicit faith” were shown, the defendant could plead *null record* (“this is not the record”), under which the defendant could argue at trial only about the sufficiency of the proof of Georgia judgment. It follows, then, that only if “implicit faith” was *not* afforded, could the defendant plead *nil debet* and attack the correctness of the Georgia judgment. A plea of *nil debet*, then, is inconsistent with the full faith and credit clause, if the clause is interpreted to give effect (ie, to give “implicit faith”) to interstate judgments.130

Importantly, Harrison and the defendant’s counsel were in apparent agreement that pleas of *nil debet* had to be tried by the jury (“an issue to the country”).131 The defendant also cited the English case *Walker v Witter*, in which Lord Mansfield had

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130 Harrison himself made a related argument at a later hearing in the same case as to the effect of the faith and credit requirement in the Act of 1790 and the pleading of *nil debet*. Of *nil debet*, Harrison submitted that “no such plea can be received in this action, and it must be considered a mere nullity. The merits of any judgments rendered in a sister State cannot under the Act of Congress be examined here.” Cole. Cas (N.Y.) 74 (1799).

131 Although they differed over the appropriate mode of trial for *null record*, Harrison arguing that it belonged to the court, and the defendant for the jury. Cole. Cas (N.Y.) 72 (1799).
affirmed the capacity of the jury to impeach a foreign judgment, being only prima facie evidence of a debt. The Court required the defendant to elect between the two pleas, consistent with the rules of single-issue pleading; indeed, the case would stand as general authority for that proposition. The Court did not, however, constrain the defendant’s choice of pleadings in the manner sought by the plaintiff, therefore allowing the defendant to plead nil debet. Indeed, from a report of a later interlocutory hearing it is apparent that the defendant elected to plead nil debet, squarely challenging the previously rendered judgment, despite the constitutional point. At that later hearing the plaintiff again attacked the defendant’s pleading, this time raising the Act of 1790, but the court held that it could not examine the pleading on the motion then before it.

The available reports of *Le Conte v Pendleton* do not, unfortunately, state what took place at the trial or any further interlocutory hearings, so we cannot know whether the jury (if a trial did take place) decided to accord “implicit faith” to the Georgia judgment. The ruling on pleadings is illuminating, however: whether the Georgia judgment was to govern the outcome of the New York action would be decided by a jury, not a court. The jury would therefore decide on the applicable law.

133 Cole. Cas (N.Y.) 73 (1799). The Court also specifically declined to rule on the dispute over *nul tiel record*.
134 Ibid., 74 (1799).
135 Ibid., p.75.
A similar, final, illustration through pleadings of the limited enforceability of foreign judgment debts comes from the very short report of Stoddard v Allen\textsuperscript{136} decided in Vermont in 1790. Vermont was not then a state within the Union, so the case is instructive as an instance of a jury dealing with a debt from what was technically a separate sovereign legal system. The plaintiff sued on a Connecticut judgment debt, to which the defendant pleaded \textit{nil debet}. The Court allowed the defendant to impeach the original judgment by showing that the amount awarded by the Connecticut court was excessive. Further, a note at the end of the report states that “This” – ie, the act of impeaching the judgment debt – “goes no further than foreign judgments on default”,\textsuperscript{137} emphasising the distinctive, lesser status of judgments from other jurisdictions. We can infer that a jury sat in the case, as this was the constitutionally enshrined\textsuperscript{138} practice in civil causes in Vermont. What were its functions relative to the bench? Importantly, the report states that the trial bench was comprised of two judges, suggesting that (as with Bannister v Henderson) the bench could not speak with a single, authoritative voice to the jury. The most plausible interpretation of this report is an instance of a trial in which the jury decided against following the foreign legal judgment, and applied its view of the merits of the case.

b) The terms of performance

In the late 18\textsuperscript{th} century there appear to have been quite important local variations between jurisdictions on the terms and rate of interest, between England, and also

\textsuperscript{136} Nathaniel Chipman, Reports and Dissertations in Two Parts, Rutland, Anthony Haswell, 1793, \textit{Darius Stoddard vs Levi Allen}, August Term, 1790, p.44.

\textsuperscript{137} \textit{Ibid}.

\textsuperscript{138} Constitution of the Republic of Vermont, Chapter 1, Art. XIII (1777). See also Constitution of the State of Vermont, Art.12 and Ch.2, §38 (1793).
between the difference American colonies (and then States). We can observe in these decisions a bias favouring the application of local custom where interest was payable on obligations incurred elsewhere, in which the jury again played an important function.

The general rule can be observed in a pair of Massachusetts cases. *Jones v Belcher*,\(^ {139}\) decided in 1762, concerned a bond made in New England, creating a debt due to be paid in England. Authority was cited in support of interest being paid at the English rate, but the Court determined that the correct interest to be paid was that of “New England”, as the bond was originally made in New England. A marginal note elaborates this point, giving the reason that interest is computed according to the *lex loci contracti*.\(^ {140}\) We can surmise (although it is not of critical importance) that a jury rendered this verdict, given the prevailing practice and constitutional position of the jury in Massachusetts.\(^ {141}\) Of greater interest when we compare this case to others is the basis cited for the decision when local interest is applied: the *choice of a rule of local law*. The content of the local rule of interest would also be a matter for the jury, as is shown by the report of *Bromfield v Little*,\(^ {142}\) decided in 1764. There, a bench of three judges gave their views as to the content of the Massachusetts interest rules, but the jury determined the ultimate question. This was just as well, as the bench was divided over whether the

\(^{139}\) Quincy’s Reports, 9 (1762).

\(^{140}\) *Ibid*.

\(^{141}\) Nelson, *supra* note 109, 893, fn 57, and 904-5.

\(^{142}\) Quincy’s Reports, 108 (1764).
custom of “this Country” (ie, Massachusetts) included charging interest on goods sold, which was the practice in England. The jury decided against allowing interest.

Decision-making would follow a different path when the debt had been incurred outside the state. This can be illustrated by reference to two quite complex Connecticut decisions. In the 1787 decision in *Phenix v Prindle*, the defendant was sued for payment for goods sold and delivered in New York. This case is sometimes cited as authority for the rule that the law of New York governs a transaction made in New York. The jury received evidence from New York merchants as to their custom on charging interest. The question was whether, as the plaintiff argued, the defendant was bound to pay that New York interest. The jury found for the defendant. This is the first significant point about the case; its importance is self-evident. Although the Supreme Court of Errors quashed this decision, its reasons for doing so illustrate the second point. The Court did not overturn the jury’s verdict on the basis of New York law as *lex loci contractus*, which is what we would have expected from *Jones* and *Bromfield*. Rather, the decision was explained by reference to the defendant’s subjective intention: he had acknowledged that that he expected to pay interest in accordance with the New York mercantile custom, and had also made payments in apparent conformity with that custom for a period. The court did not hold that the jury erred by applying the law of

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143 The court heard conflicting evidence, and the judges noted that the custom “at Home” (in England) was to charge interest. Justice Oliver thought the English custom was reasonable and formed part of local custom, Justice Cushing disagreed, and the Chief Justice equivocated. *Ibid*, 108-9.
144 Kirby (Conn.) 207 (1787).
146 The decision to reverse the jury’s verdict on this point was in fact a majority ruling (4-1). All members of the court saw the ultimate question as one governed by the parties’ intentions, with the local custom being factual background. They did not regard it as creating a legal rule. The majority opinion stated that the defendant was aware of the custom, he “received the articles charged in the plaintiff’s account; he has...
Connecticut instead of New York: had it done so, it would effectively have ruled that the jury was obliged to follow the law of another State. Instead, the Court held that the jury had gone against the overwhelming weight of uncontradicted evidence – a concept then distinct from an error of law – relevant to satisfying a legal rule (parties’ intentions in contracting), when that rule was not based in any particular jurisdiction. The foreign *lex loci contractus* would not be automatically applied as the local *lex loci contractus* was by juries in *Jones* and *Bromfield*: it would apply only if selected by the parties.

*Kissam v Burrall,* a 1787 Connecticut decision on a demurrer in which a jury was yet to give a verdict, is also cited as authority for the rule that the *lex loci contracti* governs the terms of performance. The defendant, who was sued for a debt incurred in New York and payable in New York currency, alleged that under the New York rules for computing interest, the plaintiff had been overpaid and owed a balance to the defendant. The plaintiff demurred to the defendant adducing evidence of the New York custom and other evidence on computing interest, and the Court of Common Pleas held for the defendant. As in *Phenix*, the question before the Supreme Court of Errors was not resolved by reference to the *lex loci contracti*. The Supreme Court of Errors acknowledged that were the matter governed by New York law and custom, the actually made payments, to a greater amount than the sum of the debt, without interest, from which arises a strong presumption, that part was intentionally paid for interest…” (per Dyer, Sherman, Pitkin and Ellsworth JJ, 208). The Chief Justice in dissent framed his opinion around the question of proving the intention of a party to the contract: “upon an implied contract to pay interest, it cannot be recovered in the action of book debt, though it undoubtedly may by an action on the case; because, in the action on book, the oath of the plaintiff is taken, which ought never to be admitted to prove a fact of that kind.” Ellsworth J added a separate opinion, also referring to the evidence needed to prove the parties’ agreement to pay interest: 209.

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147 See Horwitz, supra note 115, 142. See also Nelson, supra note 109, fn 120.
148 Kirby (Conn.) 326 (1787).
149 Laycock, supra note 15, fn 340.
defendant would succeed. The Common Pleas decision overruling the plaintiff’s demurrer (and therefore allowing the defendant to lead evidence of New York custom) was sustained. However, the Court then also held that the parties’ conduct subsequent to entering the contract would an inference to be drawn with a contrary conclusion: that the correct interest had in fact been paid. Resolving this question, as well as the significance and effect of the New York custom, would be determined at trial, by a jury.

It is important to note that these cases appear not to have been decided by reference to full faith and credit: they did not involve interstate judgments, and although some scholars argue that the common law of other jurisdictions falls within the scope of “judicial proceedings” in the clause, this was not argued. The cases are properly understood as early instances of American courts grappling with choice of law rules, and doing so with a local bias. In the cases where the obligation was found to be local, interest was computed in accordance with local law and custom as a matter of the lex loci contracti, as determined by the jury. When the obligation was incurred elsewhere, the lex loci contracti retreated to the background to the decision. The jury would decide the case according to a legal rule generally applicable, and not contingent on geography: the intention, expectations and conduct of the parties to the agreement. The courts did not embrace the alternative, of requiring juries to apply the law of other jurisdictions.

150 Kirby (Conn.) 326, 338 (1787): “This being transacted in the city of New York, must be governed by the laws and customs of that state; and according to what appears from the evidence to have been the custom of computing interest in New York, the bond is overpaid.”

151 Ibid., 338-9: “But as the parties might have agreed to apply some of the payments to the interest due at the time they were made, before the principal was fully paid, it is presumed to be the case; for it was both equitable and legal.— On these principles, and from the length of time since the money became due, arises a strong presumption, that there hath been a settlement of the matter in demand agreeably to the minds of the parties.

152 Laycock, supra note 15, 290.
3. The application and effect of outside law

Juries could also display an unwillingness to recognise the authority of acts and judicial proceedings from other jurisdictions where they were relevant, but were in some way inconsistent with local law, practice and understandings of justice.

In the 1786 decision of *Stoddard v Bird*, the plaintiff sued the defendant in Connecticut for wrongful imprisonment. The plaintiff was the administrator of an insolvent estate. Pursuant to an order of a New York Justice, the defendant (one of the estate’s creditors) arrested the plaintiff to obtain payment of the estate’s debt owing to him. The jury found for the administrator. On review, the defendant argued that his actions were lawful in New York and that the New York Justice was in fact obliged to issue the order that he did. The Court by majority upheld the jury’s decision. The majority did not reason that the arrest was unlawful in New York. Rather, the majority held for the plaintiff by reason that local law and justice supported the jury’s decision; even if the New York Justice’s order was regular, the defendant had still committed a wrongful act. Pitkin, J held that, “The laws of this state undoubtedly protect administrators from arrests on account of the deceased whom they represent.” Law, CJ, held that the defendant’s conduct in seeking a writ to arrest the plaintiff was undoubtedly wrong, even while:

“...it is most reasonable to suppose that … the officer [ie, the New York Justice] conducted rightly, and agreeably to the precept. The plaintiff has consequently been

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153 Kirby (Conn.) 65 (1786).
154 Ibid., 68.
155 Ibid., 67.
156 Ellsworth and Sherman, JJ in dissent held that the New York law and proceedings governed the case, should be presumed regular, and supported the defendant. Ibid., 68, 69.
157 Ibid., 68-9.
injured by the procurement and wrong act of the defendant. I am therefore of opinion the verdict is right.”

Dyer, J, also held that the defendant would clearly have “had no right in this state to arrest Stoddard, or even summon him before a court of justice, for that debt, under the circumstances which then attended it.” The defendant, in procuring a writ, was “abusing the law”, and he had “no right” to arrest the defendant even outside Connecticut. Accordingly, Dyer, J held that “I cannot see but the jury have done right.” Pitkin and Dyer JJ appear to have been influenced by a principle that the courts of other states are obliged to respect the content of Connecticut law governing administrators appointed in Connecticut when those administrators enter other states. On this question (the law governing the status of an administrator moving between jurisdictions), they disagreed with Ellsworth J, who held that the appointment is “transitory, and the action may be brought wherever he is found”. Part of the reasoning of the majority, then, is based in the view that the judicial officers of New York were bound by a choice of law principle to respect Connecticut law in relation to matters arising from the latter State. A broader reason also permeates the reasoning, however: the Court would not find an error by the jury for following the law of its own State and an intuition of justice, rather than the settled law of New York.

C. Law-finding and choice of law

The law-finding function of the civil jury meant that it was not possible to promulgate a legal rule in the way that now occurs. That jury had a particular political status, representing the people of the vicinity from which it was selected. The law-finding function would pose difficulties for enforcing any legal rule from above, but a rule that required a jury to apply the law of another place and to uphold the verdicts of
courts from other legal systems is in some senses directly contrary to this status, and particularly likely to prove impractical.

The analysis in this Part shows that the independence of juries also affected judges. Even as judges were beginning to assert greater control over law-finding, the reasoning of judges in the examples considered here avoids the suggestion that the jury would be obliged to apply the law of other jurisdictions, and would err if it failed to do so.

V. CONCLUSION

The institution of the law-finding civil jury is an overlooked part of the puzzle of the project of unifying the American legal system. When the civil jury is taken into account, and when its position within the ideology of the late 18th Century is understood, it becomes much harder to argue that the Full Faith and Credit Clause, on its adoption, created a self-executing rule by which acts and judgments of one state became binding elsewhere. Likewise, contrary to the view that a self-executing effects reading was intended to pick up existing choice of law rules, those rules were not developed as a coherent body until after the turn of the 19th Century, and there was no way of enforcing them in state juries. As the civil jury went into its rapid decline, however, there would be scope for a rule dictating the effect of interstate acts and judgments to work, and for stable choice of laws to develop and be applied. Indeed, the expansion the clause in Mills v Duryee occurred at a point where the supremacy of the judge over the jury in

158 Laycock, supra note 15, 289-90.
law-finding was well progressed. Mills gave a decision that was practicable in a way that it could not have been in 1791, but the question remains whether it was correct. Does the rule as to effect properly derive from the Constitution, or are effects, and choice of law rules generally, the domain of Congress?

The argument advanced in this paper is based on an historical institution, and it is in that sense a structural argument. It differs from many of the arguments made about the full faith and credit clause in that it is not directly concerned with identifying the intention of the founders or the contemporary meaning of the words of the clause. Of course, it does fit with a set of arguments made on other grounds that deny the self-executing nature of the clause. Rather, this paper makes an argument based on practical considerations.

There is a second aspect to the broader story about the civil jury that maintains its importance today for constitutional arguments of a different sort, such as ethical arguments. The jury in the 18th Century was an institutional expression of democratic rule and popular sovereignty. The clause was necessarily shaped by an institution, which was important because of these values. These values remain of obvious importance in interpreting the Constitution today. The most important arguments favouring a broad reading of the first part of Full Faith and Credit Clause derive from doctrine and from an expansive view of the purpose of the Clause, as creating a unified legal system.\(^{160}\) It is often difficult for historical arguments to engage with interpretative moves that are stridently contemporary, attempting to leave behind original meaning. But an ethical argument about local democratic autonomy, drawing on this important institution – the

\(^{160}\) See Jackson, supra note 159.
jury – and its practice of law-finding, may provide a new answer. If the jury was
democratic, the clause should be read accordingly, and it is democratic *legislating* by
Congress, not judge-made rules of effect and choice of law, that are most required.