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Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records

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BETWEEN JUDGMENT AND LAW: FULL FAITH AND CREDIT, PUBLIC POLICY, AND STATE RECORDS[†]

ABSTRACT

Although the Full Faith and Credit Clause was intended to solidify the Union by requiring states to give appropriate respect to the official acts of other states, the application of the Clause has been controversial and analytically challenging. Full faith and credit caselaw has developed along diverging paths: one path requiring “exacting” faith and credit for final judgments and the other path severely limiting the faith and credit given to legislative acts through the creation of a public policy exception.

State records that are not a close fit within the two paradigms of “judgment” and “law” have been largely neglected in the Supreme Court’s treatment of full faith and credit. In 2011, however, the Fifth Circuit’s en banc decision in Adar v. Smith revealed a resurgent, if not novel, debate over whether the public policy exception should apply to just such a hybrid circumstance: non-adversarial judicial records.

This Comment argues that because the Full Faith and Credit Clause is a rule of evidence designed to facilitate interstate comity without infringing on the sovereignty of the states, states are obliged, by virtue of res judicata, to “recognize” most out-of-state records. However, states can refuse, by virtue of the public policy exception, to “enforce” those same records. The public policy exception, traditionally limited to public acts, therefore applies to the full spectrum of state records covered by the Clause.

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INTRODUCTION

Article IV of the United States Constitution begins with the self-executing command, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”¹ From ratification to the present, the application of the Full Faith and Credit Clause has been controversial,² which is not surprising given the Clause’s perceived antagonism to the right of each state to implement and develop domestic policies that may not always accord with sister-state policies. This Comment argues that the Clause is little more than a theoretical threat to state sovereignty; instead, it operates as a rule of evidence to facilitate, rather than undermine, horizontal federalism.

The latest skirmish in the federalism struggle involves a single document, but one of profound personal significance to every citizen: a birth certificate. An accurate birth certificate is particularly significant to a child who relies on the state to secure a more stable future. One such child was born in Shreveport, Louisiana in 2005.³ Infant J—as he would be named in court documents—was immediately surrendered by his birth mother to the state. In 2006, Mickey Smith and Oren Adar adopted Infant J pursuant to New York state law that permits joint adoptions by unmarried couples.⁴ Mr. Smith and Mr. Adar forwarded the adoption order to the Louisiana Department of Vital Records and Statistics and requested that the state registrar issue an amended birth certificate reflecting Infant J’s new name and parentage.⁵ The registrar responded that she would not include the names of both fathers on the birth certificate because Louisiana does not recognize joint adoptions by unmarried couples.⁶ Significantly, the registrar did *not* contest the legal status of Infant J’s adoptive parents; she merely refused to enforce an incidental effect of the adoption decree.⁷ Mr. Smith and Mr. Adar sued to challenge her denial.⁸ In *Adar v. Smith*, the question was whether Louisiana must enforce an out-of-state

¹ U.S. CONST. art. IV, § 1.

² See *infra* Part I.A; see also David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584 (2009); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957).

³ See *Adar v. Smith (Adar I)*, 597 F.3d 697, 701 (5th Cir. 2010), *rev’d*, 639 F.3d 146 (5th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 400 (2011).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Adar v. Smith (Adar II)*, 639 F.3d 146, 149–50 (5th Cir. 2011) (en banc).

⁸ *Id.* at 150.

adoption decree that it opposes as a matter of public policy, and thus whether full faith and credit can be used as a method by which one state's public policy trumps another state's public policy.

Part I of this Comment introduces the Full Faith and Credit Clause and demonstrates that, despite the more humble intent of the Framers, the Clause has evolved into a normative constitutional provision with corresponding mandates for the interstate effect of a state's "judicial Proceedings," or judgments, and a state's "public Acts," or statutes. While judgments traditionally receive nationwide *res judicata* effect, statutes are given effect only if they do not contravene the public policy of the forum state.⁹ The latter principle is known as the public policy exception to full faith and credit. But the Supreme Court has largely failed to articulate the applicable norms for state records that do not fit this framework. Part I concludes by exploring this failure—and the resulting chaos—by way of the Supreme Court's 1998 opinion in *Baker v. General Motors Corp.*¹⁰

Part II returns to the Fifth Circuit's recent attempt to organize the clutter in *Adar v. Smith*. The court seized upon *Baker's* distinction between *recognition* and *enforcement* to hold that Louisiana is not constitutionally obligated to enforce a New York adoption decree in the same way New York would enforce it.¹¹ The inexorable conclusion is that non-adversarial judgments, unlike their adversarial counterparts, are no longer immune from the public policy exception.

Finally, Part III reassesses the adequacy of full faith and credit's traditional rules for resolving the interstate effect of Infant J's adoption decree. It begins with the premise that the current confusion over the Full Faith and Credit Clause should be reconciled in a way that propels us to a more coherent understanding of how our federal system deals with the ever-increasing breadth and diversity of state records. To that end, Part III proposes that the overarching question of what faith and credit is owed to a sister-state record can only be resolved by adding substance and clarity to the distinct requirements of *recognition* and *enforcement*. More generally, mechanical and uniform application of the Clause to the spectrum of state records is both impracticable and unwise. This is an area of the law that demands flexibility.

⁹ See Part I.B.

¹⁰ 522 U.S. 222 (1998).

¹¹ *Adar II*, 639 F.3d at 160–61.

Ultimately, this Comment concludes that full faith and credit is a rule of evidence based on values of *res judicata*, and those values are not undermined by a broad application of the public policy exception to the enforcement requirement. Yet, the public policy exception is indispensable to preserving the equally important value of horizontal federalism. The most obvious downside of this argument is that the Clause is excised from the constitutional shield for individual rights: if Louisiana's differential treatment of the plaintiffs in *Adar* is unconstitutional, it is not because full faith and credit requires otherwise. This may seem a discouraging message for litigators and activists struggling to achieve more widespread recognition of civil rights for non-traditional families.¹² But it is not. It is actually an argument for avoiding distraction.

I. THE LANDSCAPE OF FULL FAITH AND CREDIT

This Part illustrates the spectrum of government records that might be eligible for full faith and credit. At one end of the spectrum are money judgments, a snug fit for the core objectives of the Clause.¹³ At the opposite end of the spectrum are statutes, correspondingly a poor fit.¹⁴ This Comment's focus is on the state government records that fall somewhere in between those

¹² The popular intrigue with full faith and credit reached a fever pitch in the late-twentieth century as politicians and scholars confronted the question of whether states have a constitutional obligation to recognize same-sex marriages celebrated in other states. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 148 (1998) (stating that the interest in full faith and credit "has reached epidemic proportions now . . . Senators, state legislators, governors, [and] religious groups . . . have suddenly taken an active interest in [the Clause], an obscure constitutional provision usually tended to by academic specialists" (footnotes omitted)). Congress's response to the states' consternation over same-sex marriage was the Defense of Marriage Act (DOMA), which only fueled the debate. See, e.g., Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 944 (1998). Today, those who advocate for marriage equality as a constitutional right rarely invoke the Full Faith and Credit Clause, instead focusing on more robust Fourteenth Amendment protections. See, e.g., Brief for Appellees, *Perry v. Brown*, 671 F.3d 1052 (9th Cir.) (No. 10-16696) (arguing that California's denial of marriage rights to same-sex couples violates both due process and equal protection), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). As this Comment should make clear, that strategy is indisputably the correct strategy, not only in the context of marriage, but also in the context of other civil rights issues that impact nontraditional persons and families, including the interstate recognition and enforcement of adoption decrees and birth certificates. See Shawn Gebhardt, Comment, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419 (2009) (arguing for a more robust understanding of full faith and credit in the context of interstate recognition of revised birth certificates issued to citizens who have completed sex reassignment surgery).

¹³ See 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4467 (2d ed. 2002) ("The most familiar application of the full faith and credit statute has involved enforcement of money judgments."); see also *infra* Part I.B.1.

¹⁴ See *infra* Part I.B.2.

two extremities: a massive collection of judicial, legislative, and executive records that a citizen could conceivably secure in state *A* and seek to enforce in state *B*. The adoption decree at issue in *Adar v. Smith* is a fitting paradigm of a record that is neither a money judgment nor a public act, but rather the product of a non-adversarial judicial proceeding.

Of the three sections below, the first provides an overview of the history and purpose of full faith and credit, with an emphasis on the early common law meaning of faith and credit, the genesis of the Full Faith and Credit Clause in the Constitution, and the implementation of the Clause by Congress. Section B discusses the Supreme Court's interpretation of full faith and credit, which plainly and explicitly distinguishes between the credit owed to judgments (usually money judgments) and the credit owed to statutes. Section C examines the analytical challenges posed by state records that fall somewhere in the cosmic middle of the full faith and credit spectrum.

A. *History and Purpose of Full Faith and Credit*

Understanding the origins of the Full Faith and Credit Clause¹⁵ requires a quick look through the lens of a Founding-Era creditor seeking—usually in vain—to enforce a money judgment by chasing down his debtor in a foreign colony.¹⁶ In the mid-eighteenth century, the creditor's first problem was obtaining a copy of the original judgment.¹⁷ The second problem was convincing the foreign colony's court that the copy was authentic.¹⁸ These problems were exacerbated by the “best evidence” rule, which placed great emphasis on original or sealed records and commanded more or less “[f]aith” and “[c]redit”—equating to more or less evidentiary force—based on the range of authentication that copies of records might bear.¹⁹

¹⁵ For a much more exhaustive analysis of the early history of full faith and credit than will be provided here, including pre-ratification history, see Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009).

¹⁶ *Id.* at 1209.

¹⁷ *Id.* at 1210 (“Even when copies of records could be found, the copies themselves were highly unreliable. . . . [W]hen legal copying was done by hand, it was easy for a copyist's mistake to change the meaning of an authoritative legal text.”).

¹⁸ *Id.* (“In today's courts, such questions of authentication are almost inconceivable; yet at the time of the Founding, the legal distinction between a foreign record and a document *purporting* to be a foreign record could not be ignored.” (footnote omitted)).

¹⁹ *Id.* at 1211 (discussing the “hierarchy of public records” created under the best evidence rule and the evidentiary force—described in terms of “[f]aith” and “[c]redit”—owed to different modes of authentication).

Even when suitable evidence of a foreign judgment was presented to the forum court, direct enforcement of the judgment was not permitted.²⁰ Rather, the court would recognize the judgment for defensive purposes, not allowing a plaintiff to proceed for a second time against the same defendant.²¹ If enforcement of the foreign judgment was sought, the authenticated judgment was *prima facie* evidence of its own existence, but it did not have any substantive effect.²² A foreign judgment could therefore be reexamined on its merits.²³ In addition to procedural concerns, courts had substantive reasons for denying conclusive effect to final judgments. Professor Stephen Sachs explained:

A foreign court was foreign, and might apply an uncivilized and barbarous law. Permitting a new action at home to enforce a foreign award risked participating in foreign injustices. Such reasoning explains why courts were more willing to treat foreign judgments as conclusive for purposes of defensive estoppel—which at worst left the status quo in place²⁴

While this skepticism of foreign judgments made plenty of sense for conscientious courts, it also resulted in a manifest injustice: debtors could frequently avoid judgments simply by relocating to another jurisdiction.

Several colonies responded by passing statutes that granted deference to sister colonies' judgments against debtors.²⁵ Furthermore, the Articles of Confederation contained a provision that “[f]ull faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”²⁶ Evidence suggests that the

²⁰ *Id.* at 1213 (“Instead, plaintiffs relied on a separate theory of contract: a foreign money judgment was consideration for an implied promise to pay, which could be enforced through an action of debt or assumpsit in the same manner as a simple contract.”).

²¹ *Id.*

²² *See id.* at 1213–14.

²³ *See id.* at 1213.

²⁴ *Id.* at 1215.

²⁵ *Id.* at 1221–22 (quoting the statutes of Connecticut, Maryland, South Carolina, and Massachusetts and noting that the Massachusetts statute was the only one that “went beyond the authentication of judgments to provide for their substantive effect”).

²⁶ ARTICLES OF CONFEDERATION of 1781, art. IV; *see Sachs, supra* note 15, at 1217 (pointing out that full faith and credit scholars who prefer a more expansive interpretation of the Clause often argue, incorrectly, that the phrase “full faith and credit” originated in the Articles of Confederation, while “the term had been used for over a hundred years to indicate high evidentiary value”).

Articles' provision, in accord with common law, was "concerned more with evidentiary authentication than with substantive effect."²⁷

At the Constitutional Convention, the Articles' faith and credit provision was the subject of much debate,²⁸ but it remained largely intact as the first of two sentences in the ratified constitutional Clause.²⁹ In its entirety, the Full Faith and Credit Clause reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."³⁰ There are two significant changes from the Articles' faith and credit language. The first change was the addition of faith and credit for "public Acts," which the Founders understood to be the acts of legislatures.³¹ The second and more significant change was the addition of the second sentence, which gave Congress the power to "specify the authentication and effect of sister-state records."³² James Madison, in commenting on the Clause, contended that this delegation of power was "an evident and valuable improvement" over the "extremely indeterminate" Articles' provision.³³

Congress did not wait long to exercise its power under the Clause. The Full Faith and Credit Statute, enacted in 1790, remains in effect today.³⁴ The Act

²⁷ See Sachs, *supra* note 15, at 1221. In fact, the Continental Congress explicitly refused to specify what substantive effect sister-state records should receive. See *id.* at 1223 (noting that a separate reference to substantive effect was struck from the Articles' language).

²⁸ See *id.* at 1227–28. The Articles' clause was subject to heavy criticism, most notably by James Madison, who characterized it as "extremely indeterminate; and . . . of little importance under any interpretation which it will bear." Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 292 (1998) (emphasis omitted) (quoting THE FEDERALIST NO. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961)). Whitten pointed out that the Articles' clause was substantially similar to the first sentence of the constitutional clause, and therefore, the inadequacies that Madison sought to address—if addressed at all—are addressed by the second sentence of the constitutional clause. *Id.* at 292–93.

²⁹ See Sachs, *supra* note 15, at 1227–29.

³⁰ U.S. CONST. art. IV, § 1.

³¹ Sachs, *supra* note 15, at 1227; see also Nadelmann, *supra* note 2, at 33 (providing a historical analysis that focuses on the addition of "public acts" to the Clause and the Supreme Court's early "vacillations" in interpreting that part of the Clause).

³² Sachs, *supra* note 15, at 1227–28.

³³ See *id.* at 1228–29 (quoting THE FEDERALIST NO. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961)).

³⁴ Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (2006)). In 1804, Congress amended the Act to clarify that "records" included nonjudicial records. Act of Mar. 27, 1804, ch. 56, 2 Stat. 298. For a comprehensive analysis of the 1804 Act, see Sachs, *supra* note 15, at 1240–50. In 1948,

provides methods to authenticate acts, records, and judicial proceedings, and then concludes that “records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them . . . as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”³⁵ Of the Full Faith and Credit Statute, Professor Sachs wrote:

While the authentication provisions were relatively clear, the last sentence of the Act, giving authenticated records and judicial proceedings ‘such faith and credit . . . as they have by law or usage’ in the rendering state, led to years of confusion. Did it mean that all records from State A would have the same *conclusive effect* in State B, and that no plea or defense would be good in State B unless it would be accepted in State A as well? Or did it mean only that State A records had the same *evidentiary force* . . . as the original records in their home courts?³⁶

Several scholars have argued persuasively that the “evidentiary force” interpretation was the correct interpretation of the Full Faith and Credit Statute.³⁷ Indeed, most early courts adopted that interpretation because it made sense that the evidentiary terms *faith* and *credit* would refer to evidentiary force.³⁸

Despite the majority view in favor of the evidentiary interpretation, the Supreme Court decided almost a quarter century later in *Mills v. Duryee*³⁹ that the final sentence of the Full Faith and Credit Statute dictates that final judgments of one state bind the parties as *res judicata* in all other states.⁴⁰ The “conclusive effect” interpretation may have prevailed in *Mills* because it was

Congress added public “Acts” to the effects clause of the statute. Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 869, 947 (codified at 28 U.S.C. § 1738 (2006)).

³⁵ Act of May 26, 1790, ch. 11.

³⁶ Sachs, *supra* note 15, at 1232 (first alteration in original) (emphasis added).

³⁷ See, e.g., Engdahl, *supra* note 2, at 1632 (arguing that the First Congress “left the states free to determine how far (if at all) to give effect to sister-state laws, based on their respective conceptions of comity and such choice of law rules as each might elect to apply”); Sachs, *supra* note 15, at 1233–40.

³⁸ See, e.g., Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 467–68 (2005) (“Most courts and judges considering the question concluded that Congress was *not*, in the ‘such faith and credit phrase,’ attempting to declare a non-evidentiary effect for state judgments in other states. To these courts, it was absurd to suppose otherwise, because the words ‘faith’ and ‘credit’ were understood as evidentiary terms, and for Congress to use them in an attempt to declare the non-evidentiary effect that state judgments should have in other states would be to use the words in a sense *different* than they had been used in the first sentence of the Full Faith and Credit Clause of the Constitution.”).

³⁹ 11 U.S. (7 Cranch) 481 (1813). The Court recognized that the judgment debtor may still have grounds for collateral attack, such as lack of personal jurisdiction. *Id.* at 483.

⁴⁰ Whitten, *supra* note 38, at 468.

easy to apply to judgments: Courts in state *B* must apply *res judicata* to state *A*'s final judgments, thereby giving them the same "effect" that they would have in state *A*.

Unfortunately, the "conclusive effect" (*res judicata*) interpretation did not work as well for other types of state records, especially public acts.⁴¹ Over the next couple of centuries, courts responded to that problem by creating a counter-textual distinction between the "conclusive effect" owed to judgments and the lesser faith and credit owed to public acts,⁴² a distinction that would be unnecessary under the "evidentiary" interpretation.⁴³ The next section explores some of the analytical challenges posed by that distinction—a distinction that does not account for the breadth and diversity of state records in modern government.

This early history of full faith and credit demonstrates that the current Court's interpretation of full faith and credit—an interpretation that is sometimes criticized for being too minimalist—is actually *more* expansive than the early history of the Clause supports.⁴⁴ It must be emphasized, however, that an originalist perspective on full faith and credit, though certainly helpful to this Comment's conclusions, is not essential to its ultimate analysis. The argument being made here relies instead on the enduring wisdom of our federal system, which protects both the rights of individuals and the rights of states by employing separate and sovereign powers. Full faith and credit is a critical element in maintaining and protecting that federal system.

⁴¹ Borchers, *supra* note 12, at 159 ("To give 'Acts' of sister states the same mandatory effect as judgments would have been to force state courts to rely on sister state law every time it was offered and proved. This would have led to an absurd amount of reliance on the laws of other states, and it would have given no clear mechanism for deciding which sister state's law to choose in cases in which more than two states were connected to the transaction.").

⁴² See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (explaining that the Court's precedent differentiates between the credit owed to judgments and the credit owed to laws).

⁴³ See Borchers, *supra* note 12, at 159. Borchers argued that "the text of the Clause treats 'Acts, Records and Proceedings' in a parallel fashion, thus making it difficult to justify differential treatment of any of the three." *Id.* (footnote omitted). He further stated that "[t]he rejected 'evidentiary' interpretation of the Clause would have made the matter quite straightforward." *Id.* Under the "evidentiary" interpretation, the law of a sister state could be admitted into evidence by presenting "Acts" comprising that law, and the "Effect" of that law would be a matter of judicial discretion. *Id.* Judicial discretion could be reined in—thereby protecting the interests of the sister state—by Congress passing laws that regulated choice-of-law doctrine. *Id.*

⁴⁴ See Whitten, *supra* note 38, at 469 (arguing that the history of full faith and credit is "valuable to refute certain kinds of modern arguments for an expanded scope of the first sentence of the clause").

B. *Caselaw Development of Full Faith and Credit*

Although the text of the Full Faith and Credit Clause does not distinguish the faith and credit owed to “public Acts, Records, [or] judicial Proceedings,”⁴⁵ the Supreme Court’s treatment of full faith and credit is predicated on that very distinction. Defining the three types of state records is therefore a vital first step in any analysis of the Court’s precedent.

The Supreme Court consistently defines the term *judicial proceedings* to mean judgments.⁴⁶ The emblematic judgment, for purposes of full faith and credit, is a money judgment.⁴⁷ It is similarly well established that “public acts” are legislative statutes.⁴⁸ The third category of “records,” in contrast, is not well-defined. At least one commentator has suggested that records should entail activities of the Executive Branch in order to accommodate the traditional separation of the Judiciary, Legislature, and Executive.⁴⁹ However, courts use the term *records* much more haphazardly; in general, it is used to refer to judicial records that are not quintessential judgments and to nonjudicial records that are not quintessential public acts.⁵⁰ In other words, *records* is the catchall term for the breadth of state records not easily captured by established full faith and credit principles.

The remainder of this section addresses the faith and credit owed to judgments and the faith and credit owed to public acts, with an emphasis on the public policy exception commonly applied to public acts.⁵¹ The next and final section will introduce the unsettled question of what faith and credit is owed to records that do not fit the Court’s established framework.

⁴⁵ See U.S. CONST. art. IV, § 1.

⁴⁶ See Gebhardt, *supra* note 12, at 1419; see also, e.g., *M’Elmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). Most courts also distinguish between judgments at law and judgments in equity, a distinction adopted by this Comment. See *infra* note 109.

⁴⁷ See 18B WRIGHT ET AL., *supra* note 13, § 4467.

⁴⁸ See *Hughes v. Fetter*, 341 U.S. 609, 611 & n.5 (1951); see also Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 290 (1992) (“It is clear that ‘public Acts’ means statutes. James Wilson and William Johnson said as much on the floor of the Convention, the First Congress so understood it, and the Supreme Court has so held.” (footnotes omitted)).

⁴⁹ See Gebhardt, *supra* note 12, at 1420 (“[T]he deference accorded to activities of our state executives, embodied in records, is in limbo.”).

⁵⁰ See, e.g., *In re Estate of Gardiner*, 22 P.3d 1086, 1107 (Kan. Ct. App. 2001) (referring to a birth certificate as a state record that is owed faith and credit “[a]bsent an overriding consideration”), *aff’d in part and rev’d in part*, 42 P.3d 120 (Kan. 2002).

⁵¹ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (“A court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.”).

1. *Judgments Have Nationwide Res Judicata Effect*

In the decades following the ratification of the Constitution, the Full Faith and Credit Clause was one of the most litigated clauses, and the primary focus of that litigation was on the Clause's application to final judgments.⁵²

In the 1813 case *Mills v. Duryee*,⁵³ the issue before the Court was whether *nil debet*⁵⁴ was a good plea to an action of debt brought on a judgment rendered in another state's court.⁵⁵ The defendant in *Mills* argued that full faith and credit provided for the admission of the original debt judgment as *evidence* of the judgment's existence, but did not provide for any res judicata effect.⁵⁶ A majority of the Court disagreed, reasoning that if full faith and credit required only that judgments of other states be admitted as evidence of their own existence, the Full Faith and Credit Clause "would be utterly unimportant and illusory."⁵⁷ Justice Story, writing for the Court, concluded that there was "no rational interpretation of the [Full Faith and Credit Statute], unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision."⁵⁸

Mills established the enduring principle that money judgments of one state bind the parties as res judicata in all other states, unless it can be shown that the rendering court lacked personal or subject matter jurisdiction.⁵⁹ Indeed, a forum state must enforce a sister state's judgment even if the activity

⁵² See Borchers, *supra* note 12, at 158.

⁵³ See 11 U.S. (7 Cranch) 481, 484 (1813).

⁵⁴ *Nil debet* translates to "he owes nothing," and is "[a] general denial in a debt action on a simple contract." BLACK'S LAW DICTIONARY 1144 (9th ed. 2009).

⁵⁵ *Mills*, 11 U.S. (7 Cranch) at 483.

⁵⁶ *Id.* at 481–82. *Res judicata* is a traditional term that encapsulates two contemporary doctrines: claim preclusion (a valid, final judgment precludes a second action on that claim or any part of it) and issue preclusion (an issue of fact or law, litigated and resolved by a valid, final judgment, binds the parties in a subsequent action, whether on the same or different claim). See RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–19, 27 (1980). Treating final judgments as res judicata is justified by the familiar and desirable principles of finality and repose; as summarized by the Court, "Res judicata . . . encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

⁵⁷ *Mills*, 11 U.S. (7 Cranch) at 485.

⁵⁸ *Id.* For an argument that the holding in "*Mills* was undoubtedly wrong," see Whitten, *supra* note 38, at 468 n.15.

⁵⁹ See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 437–39 (1943) ("From the beginning this Court has held that these provisions [of full faith and credit] have made that which has been adjudicated in one state res judicata to the same extent in every other.").

underlying the judgment would be illegal in the forum.⁶⁰ Nearly two centuries after *Mills*, the Court reiterated that “[f]or claim and issue preclusion (res judicata) purposes . . . the judgment of the rendering State gains nationwide force.”⁶¹

2. *Public Acts Are Subject to the Law of the Forum State*

While the law of interstate judgment enforcement proceeded in accord with *Mills*, the law of interstate public act enforcement did not follow.⁶² The *Mills* Court probably did not anticipate the awkwardness of its holding as applied to public acts because nineteenth-century courts largely agreed on applicable laws in interjurisdictional conflicts—the injury state’s law for tort claims, the place of making for contract disputes.⁶³ In the twentieth century, however, states began experimenting with choice-of-law principles; for example, worker’s compensation statutes would stipulate the application of forum law, even for accidents occurring out of state.⁶⁴ Courts faced the question of whether those statutes were due the same full faith and credit as judicial proceedings. The answer to that question was a resounding *no*,⁶⁵ and the public policy exception to full faith and credit was born.⁶⁶

⁶⁰ See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (holding that Mississippi must enforce a Missouri judgment that the defendant was liable for money owed under a futures contract even though Mississippi law forbade gambling in futures); see also *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (“In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded . . .”).

⁶¹ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (footnote omitted); see also *Nevada v. Hall*, 440 U.S. 410, 421 (1979) (“A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter.”).

⁶² See Borchers, *supra* note 12, at 159. The “such faith and credit” command of the Full Faith and Credit Act interpreted by the *Mills* Court referred only to judicial proceedings, not to public acts. See 28 U.S.C. § 1738 (2006); see also Engdahl, *supra* note 2, at 1654 & n.313 (noting that Justice Story, author of the *Mills* opinion, “seems never to have reckoned with any possible sister-state effect for *statutes*” (emphasis added)).

⁶³ Borchers, *supra* note 12, at 159.

⁶⁴ *Id.*

⁶⁵ See *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935) (“A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”).

⁶⁶ Commentators disagree on the necessity, the wisdom, and even the constitutionality of the public policy exception, but even those who oppose it concede that it is an established and enduring principle in full faith and credit jurisprudence. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

*Alaska Packers Ass'n v. Industrial Accident Commission*⁶⁷ has been characterized as “[t]he most significant case along the route to giving states broad authority to apply their own law” under the public policy exception to full faith and credit.⁶⁸ In *Alaska Packers*, the Court considered conflicting workmen’s compensation statutes and decided that “not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause.”⁶⁹ More specifically, the Court held that full faith and credit did not require California to apply Alaska’s workmen’s compensation statute because the employee did not reside in the place where the employment commenced; the employment was to be performed entirely in the place where the injury occurred; and the Alaska statute did not intend to preclude access to any other remedy.⁷⁰

While continuing to affirm the presumption in favor of forum public policy when state statutes conflict,⁷¹ the Court began to develop the Due Process Clause of the Fourteenth Amendment as a countervailing constraint on that presumption.⁷² In 1930, in *Home Insurance Co. v. Dick*, the Supreme Court held that it was a violation of due process for a Texas court to apply Texas law to interpret a contract that was executed in Mexico between a Mexican citizen and a Mexican insurance company.⁷³ Although the assignee of the original policy holder was a Texas domiciliary, the Court held that the minimal connections between the dispute and the State of Texas made the application of Texas law a violation of the company’s due process rights.⁷⁴ Notably, the Court did *not* hold that Texas violated the Full Faith and Credit Clause.⁷⁵

⁶⁷ 294 U.S. 532.

⁶⁸ See Borchers, *supra* note 12, at 160.

⁶⁹ *Alaska Packers*, 294 U.S. at 548.

⁷⁰ *Id.* at 549. The Court remarked that a litigant who wishes to challenge the right of a state to apply its own statutes “assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.” *Id.* at 547–48.

⁷¹ See, e.g., *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941) (“[T]he full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own.”).

⁷² Borchers, *supra* note 12, at 160.

⁷³ 281 U.S. 397, 407–08 (1930).

⁷⁴ *Id.*; see Borchers, *supra* note 12, at 161 n.94.

⁷⁵ This is notable because the Court could have, but did *not*, tinkered with the public policy exception to full faith and credit in order to accomplish a just result for the aggrieved plaintiff. Instead, the Court found a violation of the Fourteenth Amendment’s Due Process Clause, *Home Ins. Co.*, 281 U.S. at 407–08, a constitutional provision that, along with the Equal Protection Clause, is designed to protect individual rights. See U.S. CONST. amend. XIV, § 1.

In 1981, a plurality of the Court united the full faith and credit test—more specifically, the public policy exception—and the due process test by declaring that a choice-of-law decision by a state court will be invalidated if the chosen state “has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”⁷⁶ *Allstate Insurance Co. v. Hague* involved a claim for benefits under an uninsured-motorist clause.⁷⁷ The plurality affirmed a Minnesota state court’s decision to apply its own law despite Wisconsin having significantly more contacts with the dispute.⁷⁸ Justice Stevens’s concurrence in the judgment was emblematic of the Court’s view that full faith and credit imposed very few constitutional requirements on state choice-of-law decisions: After conceding that “there is little in this record other than the presumption in favor of the forum’s own law,” Stevens still concurred with the plurality’s judgment that full faith and credit was not owed to Wisconsin law.⁷⁹

The modern Court has given strong indications that it will not augment the modest restrictions on a state’s freedom to apply its own law to a case that implicates the interests and laws of other states, as long as the forum state has a sufficient interest in the dispute.⁸⁰ In *Franchise Tax Board v. Hyatt*,⁸¹ the Court held that Nevada was not required to give full faith and credit to the statutory immunity that California conferred on its public employees for both negligent and intentional torts.⁸² The Court found that Nevada had sufficient contacts based on the occurrence of an injury to a Nevada citizen and the occurrence of allegedly tortious conduct in Nevada.⁸³ Despite the conservative tenor of

⁷⁶ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

⁷⁷ *Id.* at 305. Mrs. Hague, an Allstate policy holder, moved from Wisconsin to Minnesota shortly after her husband was killed in a motorcycle accident near the border of the two states. *Id.* Mrs. Hague brought an action in a Minnesota court seeking a declaration that the \$15,000 uninsured motorist coverage on each of her late husband’s three automobiles could be “stacked” to provide total coverage of \$45,000, pursuant to Minnesota law. *Id.* Allstate asserted that Wisconsin law, which did not allow “stacking,” should govern. *Id.* at 305–06.

⁷⁸ *Id.* at 313. The Allstate insurance policy was delivered in Wisconsin, the accident occurred in Wisconsin, and all persons involved were Wisconsin residents at the time of the accident. *Id.* at 305–06.

⁷⁹ *Id.* at 331–32 (Stevens, J., concurring in the judgment). Seven years after the *Allstate* decision, the Court held that the *Allstate* contacts test, already a low threshold, is not even necessary in applying a choice-of-law rule that existed at the time that the Full Faith and Credit and Due Process Clauses were ratified. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725–26, 729 (1988).

⁸⁰ *See, e.g., Nevada v. Hall*, 440 U.S. 410, 410 (1979) (holding that California was not required to give full faith and credit to a Nevada law capping damages in suits against the State arising out of an automobile accident in California between a Nevada state employee and a California citizen).

⁸¹ 538 U.S. 488 (2003).

⁸² *Id.* at 494–95.

⁸³ *Id.*

Hyatt, the Court left the door slightly ajar for those who would prefer a more expansive interpretation of full faith and credit for public acts by declaring that “we are not presented here with a case in which a State has exhibited a ‘policy of hostility to the public Acts’ of a sister State.”⁸⁴

The idea that a “policy of hostility” toward another state’s laws might violate the Full Faith and Credit Clause originated in the 1951 case *Hughes v. Fetter*.⁸⁵ The case involved a wrongful death action bought by the executor of a Wisconsin decedent’s estate.⁸⁶ The Wisconsin wrongful death statute covered only deaths “caused in [the] state”; therefore, the executor attempted to rely on an Illinois wrongful death statute.⁸⁷ The Court held that Wisconsin’s dismissal of the case on grounds that Wisconsin had “a local public policy against Wisconsin’s entertaining suits brought under the wrongful death acts of other states” violated full faith and credit.⁸⁸

Several commentators have contended that the outcome in *Hughes* was correct, but the reasoning was flawed: Instead of relying on full faith and credit, the Court should have found a violation of the Equal Protection Clause.⁸⁹ Professor Patrick Borchers explained:

Under the Wisconsin statute and its extrapolated policy, only persons with the good fortune to be killed in Wisconsin could recover. Persons killed outside Wisconsin—even if killed in a state like Illinois that recognized a cause of action for wrongful death—lost, and lost on the merits. . . . Even being charitable, this seems like a completely irrational basis for classification, *and irrational classifications are invalid for equal protection purposes*.⁹⁰

In other words, if the Court had taken a closer look at what was truly unsettling about the Wisconsin statute—the irrational basis for classification—it would have arrived at the same outcome but based on a different constitutional

⁸⁴ *Id.* at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

⁸⁵ 341 U.S. 609 (1951). *Hughes* prompted widely divergent readings. Compare *Kramer*, *supra* note 66, at 1980–87 (reading *Hughes* to prohibit discrimination against the law of another state on grounds that it violates the public policy of the forum), with Borchers, *supra* note 12, at 167–71 (refuting *Kramer*’s analysis).

⁸⁶ *Hughes*, 341 U.S. at 610.

⁸⁷ *Id.* at 610 & n.2.

⁸⁸ *Id.* at 610, 613.

⁸⁹ See, e.g., Borchers, *supra* note 12, at 168 (“I have always been inclined to agree with Currie that *Hughes* is really an equal protection case.”); Brainerd Currie, *The Constitution and the “Transitory” Cause of Action* (pt. 1), 73 HARV. L. REV. 36, 60–61 (1959).

⁹⁰ Borchers, *supra* note 12, at 168 (emphasis added) (footnote omitted).

provision.⁹¹ Regardless, the “policy of hostility” exception (to the public policy exception) did not have legs. The Court consistently—and unequivocally—recognizes the public policy exception for public acts.⁹²

At this point, the framework for applying full faith and credit appears straightforward. There are two bright-line rules: 1) judgments—or more specifically, final money judgments—have nationwide *res judicata* effect;⁹³ but 2) public acts are subject to the public policy exception, which means that the forum state is almost always free to apply its own law.⁹⁴ Unfortunately, this straightforward framework does not answer all full faith and credit inquiries. The problem is that not all state records seeking faith and credit in a sister state are final judgments or public acts. What happens, for example, when a citizen of state *A* arrives in state *B* seeking enforcement of a non-adversarial judicial record that was issued as a matter of routine procedure, such as a fishing license? What level of faith and credit is owed to nonjudicial “status” records, such as professional licenses or birth certificates? How should we treat a negotiated settlement signed and sealed by a court? Is an adoption decree entitled to “exacting” faith and credit—like a final judgment—or subject to the public policy exception—like a public act? The next and final section of Part I explores the challenges posed by records that are not a seamless fit for established full faith and credit principles.

C. Other State Records and the Lack of Supreme Court Consensus

As discussed above, full faith and credit jurisprudence in the twentieth century developed along diverging paths: one path requiring that final judgments receive “exacting” faith and credit and one path severely limiting the extent to which state laws receive faith and credit.⁹⁵ Other types of records have been neglected in full faith and credit jurisprudence and scholarship.⁹⁶

⁹¹ *See id.*

⁹² *See* 18B WRIGHT ET AL., *supra* note 13, § 4467 n.13; *see also* *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998) (“The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” (quoting *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939))).

⁹³ *See supra* Part I.B.1.

⁹⁴ *See supra* note 92. Though not a bright-line rule, it should be reiterated here that when a forum state is faced with a choice-of-law question, full faith and credit generally cedes to due process as a constitutional constraint on the application of forum law. Furthermore, when the substantive law contains irrationally discriminatory classifications, equal protection allows for the vindication of individual rights.

⁹⁵ *See Baker*, 522 U.S. at 232–33.

⁹⁶ *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 cmt. c (1971) (noting that the Supreme Court “has not had occasion to determine whether full faith and credit requires a State of the United States to

This void is a source of underlying tension in contemporary full faith and credit cases. This section will explore that tension by way of the Supreme Court's 1998 decision in *Baker v. General Motors Corp.*⁹⁷

The full faith and credit question raised by *Baker* emerged in the intersection of two lawsuits initiated by different parties in different states.⁹⁸ The plaintiff in the first lawsuit, Ronald Elwell, was a former employee of General Motors who studied vehicular fires and frequently testified in products liability cases.⁹⁹ As part of the settlement agreement to his wrongful termination action, Elwell agreed to be enjoined from "testifying, without the prior written consent of [GM] . . . in any litigation already filed, or to be filed in the future, involving [GM]."¹⁰⁰ A Michigan court entered the injunction.¹⁰¹

Elwell was then subpoenaed by a Missouri court to testify in a tort action filed by Kenneth and Steven Baker after their mother was killed in a collision involving a GM pickup truck.¹⁰² GM objected to Elwell's participation as a trial witness, arguing that the Michigan injunction barred his testimony.¹⁰³ The Bakers countered that "the Michigan injunction did not override a Missouri subpoena."¹⁰⁴ The Missouri district court ruled in favor of the Bakers, stating that the Michigan injunction did not need to be enforced because of the public policy exception to full faith and credit: the Michigan injunction violated Missouri's "public policy" favoring disclosure of all relevant and non-privileged information.¹⁰⁵ The Court of Appeals for the Eighth Circuit reversed, holding that Elwell's testimony was inadmissible because the district

enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act"); Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 751 (1998) ("[W]hile the potential for interstate equity conflict has existed for a long time, it has not previously received much attention for a number of reasons. First, equitable remedies issued by state courts today are far more likely to have extraterritorial impact than in prior eras. Second, jurisprudential shifts since the nineteenth century make equity conflict a problem that would seldom have occurred to earlier jurists." (footnote omitted)); Gebhardt, *supra* note 12, at 1421 (noting "the lack of guidance from Congress and the U.S. Supreme Court as to what level of credit is due to executive records of a sister state").

⁹⁷ 522 U.S. 222.

⁹⁸ See *id.* at 225–26.

⁹⁹ *Id.* at 226.

¹⁰⁰ *Id.* at 227–28 (internal quotation marks omitted). The parties also agreed that if Elwell were ordered to testify by a court or other tribunal, such testimony would not violate the Michigan court's injunction or the GM–Elwell agreement. *Id.* at 229.

¹⁰¹ *Id.* at 228.

¹⁰² *Id.* at 229.

¹⁰³ *Id.* at 229–30.

¹⁰⁴ *Id.* at 230.

¹⁰⁵ *Id.* Elwell testified and the Bakers were awarded \$11.3 million in damages. *Id.*

court “erroneously relied on Missouri’s policy favoring disclosure . . . for Missouri has an ‘equally strong public policy in favor of full faith and credit.’”¹⁰⁶

In reversing the Eighth Circuit and holding that Elwell’s testimony in the Missouri action did not offend full faith and credit, a majority of Justices of the U.S. Supreme Court began by emphasizing the well-established distinction between public acts and final judgments: “Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”¹⁰⁷ Predictably, the majority framed the differentiation in terms of when a forum court is permitted to invoke the public policy exception: While “[a] court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy,” there is “no roving ‘public policy exception’ to the full faith and credit due *judgments*.”¹⁰⁸

Perhaps recognizing that the type of record in question is important to any discussion of full faith and credit, the Court observed that equity decrees are “considered equivalent to judgments at law” for purposes of full faith and credit and therefore are “entitled to nationwide recognition.”¹⁰⁹ From this statement, if equity decrees are owed the same “exacting” faith and credit as judgments at law, it would seem to follow that Missouri owes full faith and credit (or *res judicata*) to Michigan’s injunction.¹¹⁰ Yet the Court did not so hold. Instead, Justice Ginsburg’s majority opinion veered into a lengthy discussion of two counter-principles to the “exacting” faith and credit owed judgments.¹¹¹

¹⁰⁶ *Id.* (citation omitted) (quoting *Baker v. Gen. Motors Corp.*, 86 F.3d 811, 819 (8th Cir. 1996), *rev’d*, 522 U.S. 222 (1998)).

¹⁰⁷ *Id.* at 232.

¹⁰⁸ *Id.* at 233.

¹⁰⁹ *Id.* at 234. There are notable differences between judgments at law and judgments at equity. *See Price*, *supra* note 96, at 752 (“Judgments ‘at law’ in the United States typically (though not exclusively) involve judgments for money damages, executable by attachment of the defendant’s property. Equitable remedies or decrees, on the other hand, are court orders directing a defendant to undertake or refrain from a certain course of action. ‘Law’ remedies are said to be ‘in rem’; equitable remedies are ‘in personam.’ Equitable relief demands obedience of a defendant, but in most cases a court can only obtain compliance with the decree through threat of contempt.” (footnotes omitted)).

¹¹⁰ *See Borchers*, *supra* note 12, at 175–76 (describing the first part of Justice Ginsburg’s opinion as “sailing with the steady doctrinal wind of the near absoluteness of the credit due judgments”).

¹¹¹ *Baker*, 522 U.S. at 235. This Comment refers to “counter-principles” instead of “exceptions” only because Justice Ginsburg rejected Justice Kennedy’s characterization of her opinion as creating new exceptions. *Id.* at 239 (“This conclusion creates no general exception to the full faith and credit command . . .”); *id.* at 243 (Kennedy, J., concurring in the judgment) (“My concern is that the majority, having stated the principle, proceeds to disregard it by announcing two broad exceptions.”).

The first counter-principle is that “[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of the forum law.”¹¹² The second counter-principle is that “[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority.”¹¹³ Therefore, Elwell could testify without offending full faith and credit because: 1) Missouri law controls the “enforcement” (or lack of enforcement) of the Michigan judgment within Missouri’s borders; and 2) Michigan was not authorized to perform “official acts” over which Missouri has exclusive control.¹¹⁴

Justice Ginsburg’s earlier contention that an equity decree is a judgment and that judgments are not subject to the public policy exception was significantly undermined by the pronouncement of these two counter-principles, which functionally preclude one state’s equity decrees from interfering with another state’s public policy or official acts. Indeed, Justice Kennedy observed in his concurrence in the judgment that “[t]he Court’s reliance upon unidentified principles to justify omitting certain types of injunctions from the doctrine’s application leaves its decision in uneasy tension with its own rejection of a broad public policy exception to full faith and credit.”¹¹⁵ Despite his recognition of the “uneasy tension” in the majority opinion, Justice Kennedy was equally evasive of the question of what faith and credit is owed to injunctions or other equity decrees.¹¹⁶ Justice Kennedy wrote:

[D]etermining as a threshold matter the extent to which Michigan law gives preclusive effect to the injunction *eliminates the need to decide* whether full faith and credit applies to equitable decrees as a general

¹¹² *Id.* at 235 (majority opinion).

¹¹³ *Id.*

¹¹⁴ *See id.* at 235, 239. Justice Ginsburg went on to compare *Baker* to a line of cases holding that one state’s decree to convey land cannot transfer title to real property in another state. *Id.* (citing *Fall v. Eastin*, 215 U.S. 1 (1909)).

¹¹⁵ *Id.* at 245 (Kennedy, J., concurring in the judgment). Justice Kennedy characterized Justice Ginsburg’s “extended analysis” of full faith and credit as “unnecessary” and “problematic.” *Id.* at 243. He pointed out that the “exceptions to full faith and credit have a potential for disrupting judgments” and criticized the majority for placing injunctions like the one at issue in this case “outside the ambit of full faith and credit.” *Id.* at 243–44.

¹¹⁶ *Id.* at 245, 246–47. Justice Kennedy would have resolved the case on the narrow holding that the Bakers were not parties or privies to the Michigan injunction and therefore could not be bound by it. *Id.* at 246–47. But Justice Kennedy misconstrued GM’s claim. *See id.* at 237 (majority opinion). GM was not trying to bind the Bakers; rather, the company was trying to bind Elwell. *Id.*

matter or the extent to which the general rules of full faith and credit are subject to exceptions.¹¹⁷

Although Justice Kennedy's analysis of preclusive effect misconstrued GM's claim,¹¹⁸ he was nevertheless correct to point out inconsistencies in the majority's opinion, especially the waffling over whether public policy can be invoked to refuse enforcement of a judgment.¹¹⁹

One other Justice added his voice to the cacophony. Justice Scalia, concurring in the judgment, would have resolved this case with the simple conclusion that "the judgment of a state Court cannot be enforced out of the state by an execution issued within it."¹²⁰ He explained:

The Full Faith and Credit Clause did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*. No execution can issue upon such judgments without a new suit in the tribunals of other States.¹²¹

Justice Scalia's opinion seems to echo the early understanding of full faith and credit as "a rule of evidence, rather than of jurisdiction," and to reframe it in terms of recognition (an out-of-state record carries with it the *res judicata* doctrine of its home state) and enforcement (the new forum assumes jurisdiction over the substantive *effect* of the record).¹²²

¹¹⁷ *Id.* at 251 (Kennedy, J., concurring in the judgment) (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 243–44. As Justice Kennedy noted, this majority opinion undermines the Court's previous jurisprudence, which was "careful not to foreclose all effect for the types of injunctions [that] the majority would place outside the ambit of full faith and credit," by allowing application of a *de facto* public policy exception. *See id.* at 244. Justice Kennedy did not use the phrase "de facto public policy exception," but this is clearly what he meant. He was concerned that the majority was allowing the public policy exception to seep into the previously insulated arena of judgments. His concern is not unfounded. Justice Ginsburg's two counter-principles to the "exacting" faith and credit due judgments are both deferential to the public policy of the forum state. For practical purposes, Justice Ginsburg opened the door for courts to invoke public policy as a defense to enforcing out-of-state judgments in the same way that they invoke it to avoid enforcing public acts.

¹²⁰ *Id.* at 241 (Scalia, J., concurring in the judgment) (internal quotation marks omitted). Scalia concluded: "To recite that principle is to decide this case." *Id.*

¹²¹ *Id.* (internal quotation marks omitted).

¹²² *Id.* at 242 (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 291–92 (1888)) (internal quotation marks omitted). Despite concurring only in the judgment, Justice Scalia did not express discontent with the majority opinion. *See id.* at 241–42. It seems likely, therefore, that Justice Scalia's intent was to underscore the lack of an enforcement requirement in full faith and credit. Justice Scalia pointed out that *even if* Missouri owed recognition to the Michigan injunction, enforcement of the judgment would remain wholly dependent on Missouri law. *Id.* at 242.

The most disappointing aspect of all three opinions in *Baker* is the glaring omission of any meaningful discussion about the nature and character of the actual “record” at the center of the controversy.¹²³ The GM–Elwell injunction was part of a negotiated settlement, *not the product of a fully litigated final judgment* that would warrant res judicata.¹²⁴ Though signed and sealed by a judge, the injunction looked and acted like a private contract, rather than a judicial order based on extensive fact-finding and the application of law. Instead of acknowledging that critical distinction, a majority of the Court proceeded as if it were dealing with a judgment at law, which explains “the steady doctrinal wind” that characterized the first part of Justice Ginsburg’s opinion.¹²⁵ The majority was then forced to part directions with that doctrinal wind to explain why this particular equity judgment did not fit the doctrine. Justice Ginsburg accomplished that by articulating two counter-principles—counter-principles that looked remarkably like de facto public policy exceptions—to the general rules of full faith and credit, and then creatively justifying the holding on those bases.¹²⁶ Many questions were left unanswered by the Court’s failure to explain why the equity decree at issue in *Baker* was not the type of judgment that is owed nationwide res judicata effect. More generally, the Court’s manifest confusion over the appropriate rationale for the result in *Baker* is compelling evidence of the need to clarify the scope of full faith and credit.

Fortunately, a few important lessons can be gleaned from *Baker*. First, the Justices seemed to agree that while “exacting” faith and credit is still the general rule for judgments, not all judgments are “judgments” for purposes of full faith and credit.¹²⁷ Second, horizontal federalism is an omnipresent concern: Michigan’s injunction imposed a burden on Missouri courts—a burden that the Justices ostensibly agreed was greater than GM’s contractual reliance on its settlement with Elwell. Third, and most importantly, full faith and credit is rarely automatic or mechanical in a world where quintessential money judgments are a tiny sliver of the official records slipping across state

¹²³ See Price, *supra* note 96, at 769 (observing that one “surprising feature [of *Baker*] is that the Court did not discuss the fact that the underlying injunction was part of a settlement agreement between General Motors and Elwell, not the result of a fully litigated judgment on the merits”); see also *id.* at 748–49 (stating that “[t]he Court reached the correct result in [*Baker*], but the basic problems of ‘equity conflict’ remain unresolved”). Price defined “equity conflict” as “the constitutional issues implicated when a state court enters a coercive equitable decree with multistate or nationwide effect based solely on state law.” *Id.* at 752.

¹²⁴ See *id.* at 769.

¹²⁵ Borchers, *supra* note 12, at 175; see also *supra* notes 107–08 and accompanying text.

¹²⁶ See *supra* notes 111–14 and accompanying text.

¹²⁷ Price, *supra* note 96, at 827.

lines to ask for faith and credit. Lower courts are therefore left with the unenviable task of identifying the instances when an exception to full faith and credit is, in fact, the rule.

Emblematic of this task is *Adar v. Smith*, a case in which the Court of Appeals for the Fifth Circuit was asked to clarify the faith and credit owed to an adoption decree.¹²⁸

II. EXAMINING *ADAR V. SMITH*

Infant J was born in Shreveport, Louisiana in 2005.¹²⁹ In 2006, Mickey Smith and Oren Adar adopted Infant J in New York pursuant to New York state law that permits joint adoptions by unmarried, same-sex couples.¹³⁰ Mr. Smith and Mr. Adar forwarded the adoption order to the Louisiana Department of Vital Records and Statistics, and they requested that the State of Louisiana issue an amended birth certificate reflecting Infant J's new name and parentage.¹³¹ The registrar refused the request, noting that unmarried couples are not permitted to adopt children jointly in Louisiana as a matter of public policy.¹³² The registrar instead offered to place *either* Adar's or Smith's name on the birth certificate because Louisiana adoption laws provide for single-parent adoption.¹³³ For reasons that are far from frivolous, Adar and Smith were not satisfied with that option.¹³⁴

¹²⁸ See *infra* Part II.A.

¹²⁹ *Adar I*, 597 F.3d 697, 701 (5th Cir. 2010), *rev'd*, 639 F.3d 146 (5th Cir. 2011) (en banc).

¹³⁰ *Id.*; see also *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (App. Div. 2004) (permitting joint adoption by an unmarried, same-sex couple).

¹³¹ *Adar I*, 597 F.3d at 701.

¹³² *Id.* Adar and Smith cannot meet the requirement of marriage because Louisiana does not permit same-sex marriage, nor does it recognize same-sex marriages celebrated in other states. See LA. CONST. art. XII, § 15; LA. CIV. CODE ANN. art. 96 (1999); LA. CIV. CODE ANN. art. 3520(B) (2011). Louisiana's adoption policy is therefore inextricably linked with Louisiana's marriage policy, but there is an important distinction: the registrar asserted that the former policy, as applied to birth certificates, is controlling for "any out-of-state joint adoption by unmarried couples, whether homosexual or heterosexual." Brief of Appellant at 7, *Adar I*, 597 F.3d 697 (No. 09-30036), 2009 WL 6027991.

¹³³ *Adar II*, 639 F.3d 146, 150 (5th Cir. 2011) (en banc).

¹³⁴ See Petition for Writ of Certiorari at 3–4, *Adar II*, 639 F.3d 146 (No. 11-46), 2011 WL 2689011 ("Obtaining an amended birth certificate that accurately identifies both parents of an adopted child is vitally important for multiple purposes, including determining the parents' and child's right to make medical decisions for other family members at the necessary moments; determining custody, care, and support of the child in the event of a separation or divorce between the parents; obtaining a social security card for the child; obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death; claiming the adopted child as a dependent on the parents' respective insurance plans; registering the child for school; claiming the child as

The couple brought suit under 42 U.S.C. § 1983 for declaratory and injunctive relief, claiming that the Louisiana registrar violated both the Full Faith and Credit Clause and the Equal Protection Clause when she refused to issue a birth certificate with the names of the two fathers.¹³⁵ The district court granted summary judgment to Adar and Smith on the full faith and credit claim.¹³⁶ A panel of the Fifth Circuit affirmed the decision, but not on the basis of full faith and credit; rather, the panel held that the registrar misconstrued Louisiana law—she was in fact required by state statute to reissue Infant J’s birth certificate.¹³⁷ The panel’s decision was vacated by the Fifth Circuit’s decision to rehear the case en banc.¹³⁸

The salient full faith and credit questions presented to the Fifth Circuit were: (1) whether a violation of full faith and credit is redressable in federal court in a § 1983 action and (2) whether a forum state violates the Full Faith and Credit Clause when a state official *recognizes but refuses to enforce* an adoption decree on the basis of contrary public policy.¹³⁹ This Part examines the court’s response to each question. The § 1983 discussion is important because it persuasively refutes any interpretation of full faith and credit expansive enough to elevate individual rights over federalism as the core objective of the Clause.¹⁴⁰ The recognition and enforcement discussion is important because it is the closest a court has come to articulating a full faith and credit framework that could conceivably accommodate all types of records.

a dependent for purposes of federal income taxes; and obtaining a passport for the child and traveling internationally.”).

¹³⁵ *Adar II*, 639 F.3d at 150.

¹³⁶ *Id.*

¹³⁷ *Id.* The registrar’s interpretation of Louisiana’s vital statistics law invites skepticism because neither *public policy* nor *unmarried couples* are mentioned in the laws governing birth certificates. According to LA. REV. STAT. ANN. § 40:76 (2012), the registrar “shall make a new record . . . showing,” *inter alia*, “the names of the adoptive parents” when presented with a properly certified out-of-state adoption decree. The phrase “adoptive parents” is not defined in the vital statistics laws, and the registrar argued that her interpretation of “adoptive parents” was necessarily informed by Louisiana adoption law that excludes unmarried couples. Regardless, the question of whether Louisiana misconstrued its own law is outside the scope of this Comment.

¹³⁸ *Adar v. Smith*, 622 F.3d 426 (5th Cir. 2010).

¹³⁹ *Adar II*, 639 F.3d at 147, 150.

¹⁴⁰ This is not to say that individual rights are less important than federalism as a general matter. In fact, the author of this Comment would argue the opposite. However, just as many constitutional provisions were designed to protect individual rights, other provisions were designed to maintain interstate harmony or to secure the sovereignty of the states. The Full Faith and Credit Clause, by virtue of its text, context (Article IV), and historical development, is rightly concerned with horizontal federalism over individual rights.

A. *Full Faith and Credit Does Not Confer an Individual Right*

Some of the majority's most vigorous analysis was expended on a question that was not even raised by the State's brief: whether 42 U.S.C. § 1983,¹⁴¹ the jurisdictional predicate for the plaintiffs' action, provides a remedy for a violation of the Full Faith and Credit Clause.¹⁴² Section 1983 is the vehicle "by which a citizen is able to challenge conduct by a state official that he claims has deprived or will deprive him of federal constitutional or statutory rights."¹⁴³ In order to find that Adar and Smith did not have a § 1983 cause of action for their full faith and credit claim,¹⁴⁴ the court had to find that full faith and credit does not contemplate a "right" for individuals. This is precisely what the court found.¹⁴⁵

The majority opinion, written by Chief Judge Jones, begins with a definition of full faith and credit as "a rule of decision to govern the preclusive effect of final, binding adjudications from one state court or tribunal when litigation is pursued in another state or federal court."¹⁴⁶ The majority then leveraged its definition of full faith and credit into an equally contracted definition of the "right" conferred by full faith and credit: "Because the clause guides rulings in courts, the 'right' it confers on a litigant is to have a sister

¹⁴¹ 42 U.S.C. § 1983 (2006), commonly referred to as "Section 1983," provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Thus, in order to establish a cause of action under § 1983, a plaintiff must prove that (1) the conduct was committed by a person acting under color of state law and (2) that as a result of this conduct, the plaintiff was deprived of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *See id.*

¹⁴² *Adar II*, 639 F.3d at 151. The majority's unsolicited attention to the § 1983 question is perhaps best explained by Judge Southwick's special concurrence, which noted that "considering Section 1983 to be a remedy for purported violations of this Clause is a new, if not quite brand-new, argument." *Id.* at 163 (Southwick, J., concurring specially); *see also, e.g.*, Brief of Appellant, *supra* note 132, at 24.

¹⁴³ Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 1 (1985).

¹⁴⁴ There is no question that § 1983 is available for a violation of the Fourteenth Amendment, a separate claim in Adar and Smith's suit. *Adar II*, 639 F.3d at 161 ("Without doubt, Appellees have standing to pursue this claim under § 1983.").

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 151.

state judgment *recognized* in courts of the subsequent forum state.”¹⁴⁷ No more and no less.¹⁴⁸ In support of this conclusion, the court advanced historical¹⁴⁹ and practical¹⁵⁰ arguments. Most importantly, the court pointed out that caselaw is consistent in defining the “right” bestowed by full faith and credit as a “right” to court judgments that properly recognize sister-state judgments.¹⁵¹ The majority cited its own precedent,¹⁵² Seventh Circuit precedent,¹⁵³ and multiple Supreme Court cases,¹⁵⁴ including *Thompson v. Thompson*.¹⁵⁵ The significance of *Thompson* is underscored by the competing analyses it provoked in Judge Wiener’s dissent and Judge Southwick’s special concurrence.¹⁵⁶

In *Thompson*, the Supreme Court held that the Parental Kidnapping Prevention Act (PKPA),¹⁵⁷ which imposed restrictions on the power of state courts to modify the child custody decrees of other state courts, did not give

¹⁴⁷ *Id.* (emphasis added). While conceding that “the [Supreme] Court has at times referred to the clause in terms of individual ‘rights,’” the majority emphasized that the Court “consistently identifies the violators of that right as state courts.” *Id.* at 154.

¹⁴⁸ *See id.* at 151.

¹⁴⁹ *See id.* at 152–53 (explaining that common law full faith and credit pertained only to judicial proceedings and was incorporated into the Constitution as a useful means of ending litigation).

¹⁵⁰ *See id.* at 154–55 (asserting that nonjudicial state actors “are unsuited and lack a structured process for conducting the legal inquiry necessary to discern whether a judgment is entitled to full faith and credit”).

¹⁵¹ *Id.* at 153. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), is the only federal case that appears to support the proposition that § 1983 is a remedy for violations of full faith and credit by nonjudicial state actors.

¹⁵² *See Adar II*, 639 F.3d at 155. The Fifth Circuit cited *White v. Thomas*, 660 F.2d 680, 685 (5th Cir. Nov. 1981), which held that full faith and credit does not require a Texas sheriff to obey California law. *Adar II*, 639 F.3d at 155.

¹⁵³ *Adar II*, 639 F.3d at 155. The court also cited *Rosin v. Monken*, 599 F.3d 574, 576 (7th Cir. 2010), which held that full faith and credit does not require executive officials to execute out-of-state judgments in the manner prescribed by the judgment because the “primary operational effect of the Clause’s application” was “for claim and issue preclusion (res judicata) purposes.” *Adar II*, 639 F.3d at 155 (internal quotation marks omitted).

¹⁵⁴ *Adar II*, 639 F.3d at 155. The Fifth Circuit cited, among other cases, *Durfee v. Duke*, 375 U.S. 106, 111 (1963), which held that a judgment is not entitled to full faith and credit unless the second court finds that the questions at issue in the first case “have been fully and fairly litigated and finally decided in the court which rendered the original judgment,” and *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass’n*, 455 U.S. 691, 705 (1982), which held that “before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court’s decree, [and if] that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.” *Adar II*, 639 F.3d at 155 (internal quotation marks omitted).

¹⁵⁵ 484 U.S. 174 (1988).

¹⁵⁶ *See infra* notes 169–82 and accompanying text.

¹⁵⁷ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3568, 3568–73 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

rise to a private cause of action.¹⁵⁸ The Fifth Circuit majority found it persuasive that the Supreme Court did not suggest § 1983 as a possible private remedy when a state court refused to comply with the PKPA's requirements; instead, the Supreme Court simply observed that state courts—again, the only state actor that could violate the relevant “right”—would be kept in check by the availability of final review by the Supreme Court.¹⁵⁹

Judge Wiener, in his dissent, was exasperated with the majority's “twisting” and “cherry-picking” of *Thompson*; in Judge Wiener's view, because the defendant in *Thompson* was a private citizen rather than a state official, *Thompson* can only be read for the narrow holding that “there is no *private remedy* against *private parties* for violations of the [Full Faith and Credit] Clause.”¹⁶⁰ The stark and bitter contrast between the majority's analysis and the dissent's analysis left a plentiful and fertile middle ground; mercifully, Judge Southwick's special concurrence adroitly plowed it.¹⁶¹

Judge Southwick explained why she sympathized with the dissent's analysis of the language in *Thompson*, but ultimately agreed with the majority's conclusion “as to the overall effect” of *Thompson*.¹⁶² While Judge Southwick acknowledged that *Thompson*'s holding—that full faith and credit does not give rise to an implied federal cause of action—was a “strong statement,” she cautioned that by referring to a “cause of action,” the Court may have meant only that the Full Faith and Credit Clause did not itself provide *both* the right *and* the remedy.¹⁶³ If Judge Wiener's argument that full faith and credit contemplates an individual right¹⁶⁴ is accurate, then the court would be compelled to “start[] . . . down the road to considering that all that is needed is a vehicle such as Section 1983 by which to enforce the right.”¹⁶⁵ The

¹⁵⁸ *Adar II*, 639 F.3d at 155–56.

¹⁵⁹ *See id.* at 156.

¹⁶⁰ *Id.* at 170–71 (Wiener, J., dissenting) (“*Thompson* is ambiguous as to whether it holds, on the one hand, that the [Full Faith and Credit] Clause . . . does not create a federal *right*; or, on the other hand, that Congress did not intend to create a private *remedy* to enforce the rights created by the [Full Faith and Credit] Clause.” (footnote omitted)). Judge Wiener, indignant at what he perceived to be the majority's “determination to sweep [a] high-profile and admittedly controversial case out the federal door,” asserted that full faith and credit does create a federal right, and as such, a § 1983 cause of action. *See id.* at 166.

¹⁶¹ *Id.* at 163 (Southwick, J., concurring specially). Judge Southwick recognized her role as peacemaker when she observed that the court was in “untraveled territory” and “[i]t is to be expected that different judges making diligent examinations will discern different courses.” *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 164.

¹⁶⁴ *See id.* at 170 n.19 (Wiener, J., dissenting).

¹⁶⁵ *Id.* at 164 (Southwick, J., concurring specially).

dispositive question, yet again, is whether full faith and credit is expansive enough to accommodate an *individual right*.

Judge Southwick found that no such right was created,¹⁶⁶ and thus she “[could not] continue down that road” to a § 1983 remedy.¹⁶⁷ Judge Southwick based her conclusion on language from *Thompson* that was unaddressed by the majority and dissent, language that “gave a clear and quite limited explanation of the reach of the [Clause].”¹⁶⁸ Judge Southwick quoted *Thompson*:

[Full faith and credit] *only prescribes a rule by which courts . . . are to be guided* when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.¹⁶⁹

Significantly, this language did not originate in *Thompson*, but rather was pulled in from the Court’s 1904 decision in *Minnesota v. Northern Securities Co.*,¹⁷⁰ a decision that predated the use of § 1983.¹⁷¹ According to Judge Southwick, the Court’s import of *Northern Securities*’s exceedingly narrow definition of full faith and credit demonstrated that the current Court would be unwilling to find an individual right conferred by the Full Faith and Credit Clause.¹⁷²

Although Judge Southwick asserted that *Thompson* “[was] too recent and clear an explanation of the effect of the Full Faith and Credit Clause to be ignored,” she did not go so far as to conclude that Adar and Smith were left without a remedy. Rather, Judge Southwick pointed out that the majority should have declined to adjudicate the couple’s Equal Protection claim—a claim that this Comment briefly addresses in Part III—because it had not yet been heard by the district court.¹⁷³ Judge Southwick also declined to comment

¹⁶⁶ *Id.* at 165.

¹⁶⁷ *Id.* at 164–65.

¹⁶⁸ *Id.* at 164.

¹⁶⁹ *Id.* (emphasis added) (quoting *Thompson v. Thompson*, 484 U.S. 174, 182–83 (1988)) (internal quotation marks omitted).

¹⁷⁰ 194 U.S. 48, 72 (1904).

¹⁷¹ *Adar II*, 639 F.3d at 164 (Southwick, J., concurring specially) (explaining that § 1983 was adopted in 1871, but was not “given life” until 1961 when the Court decided *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part* by *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)); *see supra* note 141 and accompanying text.

¹⁷² *See Adar II*, 639 F.3d at 165 (Southwick, J., concurring specially).

¹⁷³ *Id.* (“[T]he usual practice is not to consider an issue until it has first been addressed by the district court. I would follow that practice here.” (citation omitted)).

on whether the registrar's inaction actually violated full faith and credit because she considered it an improvident question in light of the unavailability of § 1983.¹⁷⁴ Contrary to Judge Southwick's guarded approach, the court did in fact reach the second full faith and credit question.

B. Full Faith and Credit Does Not Require Direct Enforcement of Judgments

Adar and Smith contended that full faith and credit obliged Louisiana to give effect to the adoption of Infant J, evidenced by a New York adoption decree, by issuing a birth certificate with the names of both fathers.¹⁷⁵ The registrar conceded that Louisiana was compelled to recognize the adoption order as a “valid and true judgment under New York law,”¹⁷⁶ but she advanced several justifications for refusing to enforce the judgment,¹⁷⁷ including the public policy justification that Louisiana law does not permit unmarried couples to adopt.¹⁷⁸ The registrar's proffered distinction between recognition of an out-of-state judgment or record and enforcement of an out-of-state judgment or record prompted the Fifth Circuit to discuss the precise obligations that full faith and credit imposes on state actors. In doing so, the court came close to articulating a full faith and credit framework that could conceivably accommodate all types of state records.

The majority began its analysis by explaining that the registrar's distinction between recognition and enforcement was supported by the Supreme Court's decision in *Baker*.¹⁷⁹ The court elevated two principles from Justice Ginsburg's opinion in *Baker*, principles that are superficially contradictory but—as the Fifth Circuit demonstrated—capable of reconciliation with an appropriate

¹⁷⁴ *Id.* at 164 (explaining that § 1983 was adopted in 1871, but was not “given life” until 1961 when the Court decided *Monroe*, 365 U.S. 167); *see supra* note 141 and accompanying text.

¹⁷⁵ *See Adar II*, 639 F.3d at 151 (majority opinion).

¹⁷⁶ *Adar I*, 597 F.3d 697, 708 n.31 (5th Cir. 2010), *rev'd*, 639 F.3d 146.

¹⁷⁷ *See, e.g., Adar II*, 639 F.3d at 179 (Wiener, J., dissenting). In addition to the public policy argument, the State advanced two main arguments. First, while “[t]he [New York] decree's preclusive effects may bind the parties to the adoption . . . they do not project New York adoption law onto Louisiana's public records.” Brief of Appellant, *supra* note 132, at 12. Second, an adoption decree is not the kind of judgment to which Louisiana must give categorical full faith and credit. *Id.* at 45 (“[A]n adoption decree is fundamentally different, for full faith and credit purposes, from the paradigmatic ‘money judgment’ and even from a divorce decree. An adoption decree creates a new legal status and forges ongoing relationships. Its extraterritorial effects are not properly gauged by uncritically applying boilerplate from prior [full faith and credit] cases.”).

¹⁷⁸ *See* LA. CHILD. CODE ANN. art. 1221 (2012) (restricting adoption to single persons or married couples); LA. REV. STAT. ANN. § 40:76(C) (2012) (stating that the registrar “shall make a new record . . . showing,” *inter alia*, “[t]he names of the adoptive parents”).

¹⁷⁹ *Adar II*, 639 F.3d at 158–59 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–35 (1998)).

emphasis on the verbs.¹⁸⁰ The first principle was that the obligation of states to *recognize* another state's judgment is "exacting."¹⁸¹ The second principle was that states are not obligated to "adopt the practices of other States regarding the time, manner, and mechanisms for *enforcing* judgments."¹⁸² Here, the Fifth Circuit concluded that "[o]btaining a birth certificate falls in the heartland of *enforcement*, and therefore outside the full faith and credit obligation of *recognition*."¹⁸³ Thus, Louisiana law controls the incidental Louisiana benefits that flow from an out-of-state adoption decree.¹⁸⁴

The majority explained that the Louisiana registrar was not constitutionally obligated to do anything more than recognize Adar and Smith as the legal parents of Infant J and enforce the New York adoption decree in the same way that it would enforce an adoption decree issued by Louisiana courts.¹⁸⁵ The hitch, of course, is that Louisiana law does not permit adoptions by unmarried couples like Adar and Smith as a matter of public policy.¹⁸⁶ In other words, unlike New York, Louisiana does not recognize Adar and Smith's right to adopt.¹⁸⁷ Furthermore, Louisiana does not recognize Adar and Smith's right to marry.¹⁸⁸ While the constitutionality of Louisiana's adoption and marriage

¹⁸⁰ See *id.* (citing *Baker*, 522 U.S. at 232–35).

¹⁸¹ *Id.* (quoting *Baker*, 522 U.S. at 233).

¹⁸² *Id.* at 159 (emphasis added) (quoting *Baker*, 522 U.S. at 235) (internal quotation marks omitted).

¹⁸³ *Id.* at 160 (emphasis added) ("Louisiana can be described as the 'sole mistress' of revised birth certificates that are part of its vital statistics records.").

¹⁸⁴ *Id.* at 161. The majority cited *Estin v. Estin*, 334 U.S. 541 (1948), as dispositive. See *Adar II*, 639 F.3d at 159. In *Estin*, the Supreme Court enforced a New York alimony decree in direct conflict with a divorce decree entered in Nevada. See *id.* (citing *Estin*, 334 U.S. at 544). The Court held that the divorce decree changed the couple's marital status in every other state, but that a change in marital status "does not mean that every other legal incidence of the marriage was necessarily affected." See *id.* (quoting *Estin*, 334 U.S. at 544–45) (internal quotation marks omitted). The majority also discussed *Hood v. McGehee*, 237 U.S. 611 (1915), "where children adopted in Louisiana brought a quiet title action concerning land in Alabama against their adoptive father's natural children." *Adar II*, 639 F.3d at 159 (citing *Hood*, 237 U.S. at 611). The adopted children argued that Alabama's inheritance law, which excluded adopted children, violated full faith and credit. *Id.* The Supreme Court disagreed and held that a state's denial of the inheritance rights of adopted children was "no failure to give full credit to the adoption of the plaintiffs." *Id.* (quoting *Hood*, 237 U.S. at 615) (internal quotations omitted).

¹⁸⁵ *Adar II*, 639 F.3d at 159 ("In this case, the Registrar has not refused to recognize the *validity* of the New York adoption decree. [She] concedes that the parental relationship of Adar and Smith with Infant J cannot be revisited in [Louisiana] courts."). The majority further held that "no right created by the New York adoption order (i.e., right to custody, parental control, etc.) [had] been frustrated" because "nothing in the order [entitled Adar and Smith] to a particular type of birth certificate." *Id.*

¹⁸⁶ *Id.* at 149–50.

¹⁸⁷ *Id.* at 159.

¹⁸⁸ LA. CIV. CODE ANN. art. 96 (1999) (denying any "civil effects" to "[a] purported marriage between parties of the same sex").

laws can (and should) be debated, that was not the question raised by these plaintiffs.¹⁸⁹

The questions raised by *Adar v. Smith* concern full faith and credit, and the Fifth Circuit held that full faith and credit does not oblige Louisiana to enforce a right that the state does not confer on its own citizens as a matter of domestic public policy.¹⁹⁰ While the answer is sound, the foundation of the court's reasoning never rose to the surface of the opinion. Part III endeavors to make that foundation more explicit.

III. FULL FAITH AND CREDIT'S PUBLIC POLICY EXCEPTION REACHES THE FULL SPECTRUM OF STATE RECORDS

The public policy exception to full faith and credit encapsulates a century of judicial efforts to reconcile the seemingly contradictory objectives of full faith and credit and federalism: on the one hand, states must respect the laws of other states, and on the other, they must be free to make and enforce their own laws. The public policy exception ensures that full faith and credit requirements do not infringe on the latter privilege by allowing states to refuse recognition of the public acts of other states.¹⁹¹ Formal legislation, however, is not the only way that states exercise sovereignty within our unique federal system.¹⁹² States also exercise sovereignty through the formal and informal acts of an elected judiciary and an elected executive, branches of government that are owed just as much deference and respect as the legislature. As a result, full faith and credit rules in the modern era must contemplate a spectrum of state records that are explicit expressions of sovereignty, fraught with overlapping government prerogatives, priorities, and policies.

To further complicate matters, courts have never treated “public Acts, Records, and judicial Proceedings” equally or consistently.¹⁹³ Instead,

¹⁸⁹ It should be reiterated here that *Adar* and *Smith* did not attempt to get an adoption decree for Infant J from Louisiana, and would therefore lack standing to challenge Louisiana's adoption laws. *Adar* and *Smith*'s challenge was to the registrar's differential treatment of unmarried adoptive parents in issuing birth certificates. See *Adar II*, 639 F.3d at 147.

¹⁹⁰ See *id.* at 159 (stating that full faith and credit has never “require[d] the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes” (alteration in original) (quoting *Broderick v. Rosner*, 294 U.S. 629, 642 (1935))).

¹⁹¹ See *supra* Part I.B.2.

¹⁹² See 16A AM. JUR. 2D *Constitutional Law* § 249 (2009). See generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225.

¹⁹³ See U.S. CONST. art. IV, § 1. See generally *supra* Part I.B.

“[s]tirring declarations of broad constitutional purpose (making the states ‘integral parts of a single nation’) have sat uncomfortably alongside ad hoc exceptions (‘[I]t is for this Court to choose in each case between the competing public policies involved.’).”¹⁹⁴ In *Baker*, for example, the Court pronounced that the full faith and credit owed to judgments is “exacting,” and then proceeded to deny faith and credit to a Michigan judgment on the basis of two counter-principles to the “exacting” rule.¹⁹⁵

The Fifth Circuit’s holding in *Adar v. Smith* was inescapable, but the court—like many courts before it—missed an opportunity to add substance and clarity to the distinction between *recognition* of a state record and *enforcement* of a state record. First, the court should have defined “state record” as inclusive of the Full Faith and Credit Clause’s full panoply of “public Acts, Records, and judicial Proceedings.”¹⁹⁶ Next, the court should have explained that the distinction between *recognition* and *enforcement* of state records has remarkably strong roots in Supreme Court jurisprudence.¹⁹⁷ Finally, and most importantly, the court should have identified the distinction as a viable mechanism to deal with records that are not covered by the established rules for judgments and public acts.

This Comment draws on close readings of *Baker* and *Adar* to define *recognition* and *enforcement* in a way that makes application of the terms a more practical, and less academic, endeavor. *Recognition* is the requirement that the forum court afford a sister-state judgment the same *res judicata* effect that the sister state’s court would give it.¹⁹⁸ *Enforcement* is the requirement that

¹⁹⁴ See Sachs, *supra* note 15, at 1204–05 (footnotes omitted).

¹⁹⁵ See *supra* Part I.C (discussing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 222 (1998)).

¹⁹⁶ See U.S. CONST. art. IV, § 1.

¹⁹⁷ See, e.g., *Baker*, 522 U.S. at 235 (“Enforcement measures do not travel with the sister state judgment as preclusive effects do”); *Watkins v. Conway*, 385 U.S. 188, 190–91 (1966) (per curiam) (holding that Georgia’s five-year statute of limitations for suits on out-of-state judgments does not deny full faith and credit); *Broderick v. Rosner*, 294 U.S. 629, 642 (1935) (stating that full faith and credit does not “require the enforcement of every right which has ripened into a judgment of another State or has been conferred by its statutes”); *Fall v. Eastin*, 215 U.S. 1, 14 (1909) (holding that while one state may bind parties with a judicial decree concerning real property in another state, the decree is not enough to transfer title to that real property); *Lynde v. Lynde*, 181 U.S. 183, 187 (1901) (stating that to give a judgment “the force of a judgment in another State, it must be made a judgment there; and can only be [enforced] in the latter as its laws may permit” (internal quotation marks omitted)); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 462–63 (1873) (“[Full faith and credit] did not make the judgments of other States domestic judgments to all intents and purposes [of enforcement.]”); *M’Elmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839) (“[T]he judgment is . . . not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution.”).

¹⁹⁸ See generally *supra* Part I.C and Part II.B.

the forum state execute a sister state's judgment in the same way that the forum court would execute its own judgments.¹⁹⁹ Simply stated, recognition of a judgment is controlled by the rendering state's law, and enforcement of a judgment is controlled by the forum state's law. This Part examines the application of these terms to the full spectrum of state records, and discovers that the requirement of *enforcement* is just another expression of the public policy exception to full faith and credit.

This Part is composed of three sections. The first section identifies the core *res judicata* values that should inform a forum court's obligation to recognize interstate records. The second section explains how the enforcement requirement permits the public policy exception to reach the full spectrum of full faith and credit, and concludes that this is a desirable outcome.²⁰⁰ The third and final section revisits *Adar v. Smith* to drive home the point that full faith and credit is a weak and inappropriate foundation from which to respond to clashing public policies, especially when an alternative constitutional remedy is waiting in the wings.

A. *The Recognition Requirement and the Values of Res Judicata*

The ability of a plaintiff-creditor to enforce a money judgment was at the forefront of the Framers' consciousness as they drafted the Full Faith and Credit Clause.²⁰¹ It is no surprise then, that this is where full faith and credit finds its most seamless application.²⁰² But early interpretations of the Clause never limited the definition of *judicial proceedings* to money judgments; instead, full faith and credit law developed in accord with the values of *res judicata*—finality, repose, and reliance.²⁰³ The values of *res judicata* should therefore remain central to a state court's evaluation of whether recognition is owed to any out-of-state record.²⁰⁴

Full faith and credit values—indeed, *res judicata* values—are most obviously advanced by the interstate recognition of judgments that are the

¹⁹⁹ See generally *supra* Part I.C and Part II.B.

²⁰⁰ Cf. Sachs, *supra* note 15, at 1206.

²⁰¹ See *supra* Part I.A.

²⁰² See 18B WRIGHT ET AL., *supra* note 13, § 4467.

²⁰³ The connection between full faith and credit and *res judicata* is so enduring that the Full Faith and Credit Act is often referred to as the “Federal Res Judicata Act.” See, e.g., *Williams v. Murdoch*, 330 F.2d 745, 751 (3d Cir. 1964).

²⁰⁴ See 18B WRIGHT ET AL., *supra* note 13, § 4467 (stating that “[n]o other result could be tolerated in a federalistic society as mobile and litigious as ours”).

product of a controversy.²⁰⁵ Judgments rendered in response to a controversy entail a tremendous expenditure of public and private resources in the fact-finding process.²⁰⁶ Therefore, it is inefficient and unfair to permit parties to relitigate the same controversy from state to state.²⁰⁷ These considerations add gravitate to the need for finality, repose, and reliance. State records that are issued without the adjudication of an actual controversy represent neither the same investment nor the same risk of forum shopping.²⁰⁸

Res judicata values are not, on the other hand, advanced by the interstate recognition of public acts. Finality, repose, and reliance have little import in the legislative arena. Statutes apply prospectively to all persons similarly situated (a class that is open), do not arise out of adversarial proceedings, and shape or reshape (as opposed to apply) the law. Statutes are the progeny of the political process, and res judicata was never intended to give “finality” and “repose” to the political process, which is inherently continual and dynamic.²⁰⁹ Each state, by virtue of its police power, should remain free to develop and implement policies that accord as closely as possible with the needs and desires of that state’s populace, without being undercut by another state’s policies.

²⁰⁵ See Borchers, *supra* note 12, at 164–65 (noting that one of the Restatement’s “four criteria for [determining] the existence of a valid judgment for full faith and credit purposes” is that “the state rendering the judgment ‘has jurisdiction to *act judicially* in the case’” and that the Restatement goes on to define “judicial action” as “action taken in the name of the state by a duly authorized representative or representatives in *the adjudication of a controversy*”). The other criteria the Restatement considers in determining if a judgment is entitled to full faith and credit are whether the rendering state has subject matter jurisdiction, whether the rendering state has a reasonable method to ensure that affected persons receive notice of the action, and whether the parties to the action complied with the formal procedures of the rendering state. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971)). Notably, all of these factors point to the expenditure of judicial resources in honoring the due process rights of litigants and in reaching a fully litigated judgment. Finality, repose, and reliance are especially important under those circumstances. However, it should be noted that judgments qualifying for full faith and credit are not always rendered by a court of law. Administrative agencies, in their adjudicatory function, can render judgments, but the key requirement is still that there is some sort of controversy. See, e.g., *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 445–46 (1943) (holding that a worker’s compensation award is subject to the Full Faith and Credit Clause).

²⁰⁶ See Borchers, *supra* note 12, at 167.

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See Engdahl, *supra* note 2, at 1658–59 (citing the Defense of Marriage Act as an example of a statute that appears destined for modification or repeal by a new generation of politicians). Engdahl further concluded that “[e]fforts to moderate and accommodate a free people’s fiercely held differences is what statecraft and political dialogue—not judicial fiat—are for. Much justice can be done by piecemeal legislative adjustment, whether or not—or until—greater movement in any chosen direction can be made.” *Id.* at 1659.

Res judicata values are advanced to varying degrees by state records that are neither adversarial judgments nor public acts. Even the most ministerial act—e.g., issuance of a fishing license—contemplates the right of the license holder to rely on the record, but that reliance is usually confined to a jurisdiction. Repose and finality are not core objectives of the many routine records issued by state governments to facilitate order and control. This explains why the interstate recognition of licenses is not mandated by full faith and credit.²¹⁰ The more a record implicates judicial proceedings, the more it implicates res judicata. The equity decree in *Baker*²¹¹ and the adoption decree in *Adar*²¹² are fitting examples.

In *Baker*, the GM–Elwell injunction was part of a negotiated settlement, not the resolution of adjudicated facts.²¹³ The injunction looked and acted more like a private contract than a judicial order based on extensive fact-finding and the application of law. Most significantly, the injunction, issued by a Michigan court, would not have been automatically entitled to res judicata effect in other Michigan courts.²¹⁴ If *recognition* is defined as the requirement that the forum court afford a sister-state judgment the same res judicata effect it would receive in the sister state’s court, Missouri was well within its rights to deny recognition to Michigan’s injunction.

The adoption decree in *Adar*, in contrast, was entitled to “recognition” in Louisiana courts, a fact that was conceded by the registrar.²¹⁵ Although not adversarial in nature, it is easy to see how the values of finality, repose, and reliance come to bear in adoption proceedings. The plaintiffs’ status as Infant J’s parents cannot remain open-ended or uncertain.²¹⁶ In general, res judicata principles support a higher level of faith and credit recognition for personal status records, an argument that was recently advanced by another student commentator.²¹⁷ Shawn Gebhardt wrote:

²¹⁰ See Eugene Volokh, *Interstate Recognition of Licenses*, VOLOKH CONSPIRACY (July 18, 2007, 2:26 AM), <http://volokh.com/posts/1184739962.shtml> (“[T]he Constitution . . . leaves each state with the authority to decide who is licensed to do what within that state.”).

²¹¹ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998); see *supra* Part I.C.

²¹² *Adar II*, 639 F.3d 146, 146 (5th Cir. 2011) (en banc); see *supra* Part II.

²¹³ See *Baker*, 522 U.S. at 222.

²¹⁴ *Id.* at 247–48 (Kennedy, J., concurring in the judgment).

²¹⁵ See *Adar II*, 639 F.3d at 159 (“[T]he Registrar has not refused to recognize the *validity* of the New York adoption decree. The Registrar concedes that the parental relationship of Adar and Smith with Infant J cannot be revisited in its courts.”).

²¹⁶ See Petition for Writ of Certiorari, *supra* note 134, at 3–4.

²¹⁷ See Gebhardt, *supra* note 12, at 1439.

[Status] records' functions are more akin to that of adjudicative findings of fact than to that of public, collaborative, political expressions of legislative will. Records, like adjudicative findings, establish factual issues upon which legal rights are settled; unlike legislation,²¹⁸ they frequently establish private, rather than public rights.

The principles of reliance and finality are therefore important to status records, suggesting that interstate recognition under the Full Faith and Credit Clause is sometimes warranted.

That does not mean, however, that all status records deserve the same unqualified *res judicata* effect as adversarial judgments. Rather, it means only that the spectrum of state records is not easily divided into the two categories of “judgments” and “other” for purposes of interstate recognition. A record-by-record evaluation may be the only way to ensure that full faith and credit continues to embrace the central values of *res judicata*.

B. The Enforcement Requirement and the Public Policy Exception

Nothing in the early history of the Full Faith and Credit Clause suggests that the Framers intended to impose anything other than a recognition requirement on American courts.²¹⁹ Nevertheless, the Court has frequently applied a much broader interpretation of full faith and credit, mandating that state courts not only recognize out-of-state records (by giving *res judicata* effect), but also enforce out-of-state records (by giving conclusive effect).²²⁰

Baker decidedly moved away from that broad interpretation by holding that an equity decree cannot bind another state's courts.²²¹ Nevertheless, the *Baker* majority's sweeping pronouncement that there is “no roving public policy exception to the full faith and credit due *judgments*” cannot be ignored.²²² The evident tension between the holding and the dicta is somewhat reconciled by Justice Scalia's concurrence in the judgment, which focused almost

²¹⁸ *Id.* at 1439–40.

²¹⁹ *See supra* Part I.A.

²²⁰ *See* 18B WRIGHT ET AL., *supra* note 13, § 4467 (“Not even strong concepts of local policy can be interposed to defeat *enforcement*.” (emphasis added)). The authors of *Federal Practice and Procedure* go on to say that “[r]ecognition for collateral purposes, however, is different, and may move free from the law of the judgment state.” *Id.* It is possible that the authors are using *enforcement* in lieu of *recognition* and *collateral purposes* to refer to incidents of “enforcement.” Indeed, the language of full faith and credit is rarely consistent across scholarship and caselaw.

²²¹ *See supra* Part I.C.

²²² *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (internal quotation marks omitted).

exclusively on *the lack of an enforcement requirement* in full faith and credit.²²³ If enforcement was not contemplated, then the majority’s “no roving public policy exception” language could reasonably be limited to the recognition requirement of full faith and credit. This understanding would also explain the Fifth Circuit’s holding in *Adar* that Louisiana does not have a constitutional obligation to enforce a New York adoption decree in the way that New York would enforce it. Instead, Louisiana is merely obligated to enforce a New York judgment or record in the same way that she would enforce her own judgment or record.

This understanding of the enforcement requirement is directly supported by the first of two counter-principles articulated by Justice Ginsburg that “[e]nforcement measures . . . remain subject to the evenhanded control of forum law.”²²⁴ It is impracticable, however, to place enforcement of a state record in the hands of the forum state and then dictate that the forum state’s public policy cannot impact the modes or means of enforcement. Rather, the more workable definition of *enforcement*—and the definition that was implicitly adopted by the Fifth Circuit in *Adar*—compels the conclusion that the public policy of a forum state is never completely removed from the full faith and credit equation.

The idea that one state, by the imposition of contrary public policy, can undercut the privileges conferred by another state is admittedly discomfoting, but it is the lesser of two evils. Without the public policy exception, full faith and credit could mandate outcomes that are unfathomable to the majority of Americans. Consider two scenarios proposed by Professor Whitten:

[I]f State X were to issue a license to carry a concealed weapon to someone in State X, all other states would have to allow the licensee to carry a concealed weapon within their borders also as a matter of full faith and credit. Similarly, if State Y decided to issue driver’s licenses to ten-year olds, all other states would also have to allow State Y ten-year old licensees to drive within their borders as a matter of full faith and credit.²²⁵

²²³ *Id.* at 241–42 (Scalia, J., concurring in the judgment). Scalia emphasized that even if Missouri owed recognition to the Michigan injunction, enforcement of the judgment would still be controlled by Missouri law. *Id.* at 241 (“I agree with the Court that enforcement measures do not travel with sister-state judgments as preclusive effects do. It has long been established that ‘the judgment of a state Court cannot be enforced out of the state by an execution issued within it.’” (citation omitted)).

²²⁴ *Id.* at 235 (majority opinion).

²²⁵ Whitten, *supra* note 38, at 477.

In other words, although the public policy exception can delay the spread of popular public policy, it can also forestall the spread of unpopular public policy. More critically, if states are going to continue to serve as laboratories for new social and economic experiments, then every state—the “trial” states *and* the “control” states—must remain sovereign.²²⁶

The adoption decree in *Adar*, which clearly implicates matters of controversial public policy, is the perfect example of a state record that should carry nationwide *recognition* but not necessarily nationwide *enforcement*. On the one hand, Louisiana should not be allowed to interfere with the legal rights conferred on Adar, Smith, and Infant J by the New York adoption decree. Louisiana is obliged to respect the political and judicial discretion of the State of New York that Adar and Smith are fit parents, and that the best interest of Infant J is to be adopted by Adar and Smith. This means that Louisiana cannot relitigate Adar and Smith’s status as the legal parents of Infant J; as such, Louisiana must confer on Adar and Smith the same rights that the state confers on all legal parents simply by virtue of their legal status. On the other hand, the right to a birth certificate with the names of both legal parents is not a right that the State of Louisiana confers on all legal parents simply by virtue of their legal status.²²⁷ Louisiana birth certificate law does not provide for two-male-parent or two-female-parent birth certificates, and full faith and credit has never been read as a requirement that one state’s laws and policies accommodate the disparate laws and policies of other states. Although Louisiana’s birth certificate law may be unconstitutional on some other basis, it is not unconstitutional on the basis of full faith and credit.

Because horizontal federalism depends on the freedom of each state to apply its own public policy to matters of enforcement, the most reasonable construction of the Full Faith and Credit Clause differentiates between *recognition* and *enforcement*, and allows for the public policy exception to reach the entire spectrum of state records in regards to enforcement.

²²⁶ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²²⁷ See *supra* note 132.

C. *Revisiting Adar v. Smith: An Alternative Remedy for the Plaintiffs*

At first glance, the implications of the decision in *Adar* are bewildering. Louisiana doesn't *allow* unmarried couples to adopt,²²⁸ so the chance of an unmarried couple adopting a Louisiana baby and applying to the Louisiana registrar for an amended birth certificate is negligible. Assuming that unmarried adoptive parents want to protect the legal rights of both parents, they are *forced* out of state to adopt, and this necessitates an out-of-state adoption decree. By refusing to enforce an out-of-state adoption decree, Louisiana can nominally extend her "public policy" outside the borders of Louisiana by discouraging adoptions that other states explicitly encourage.

However, consider that Louisiana laws do *not* reach couples who steer clear of the state in adopting a child. This includes Louisiana couples, who can choose to adopt a baby from a state that permits unmarried couples to adopt and to apply for an amended birth certificate in that state, thereby avoiding Louisiana laws altogether.²²⁹ The Louisiana registrar did not dispute the validity of Infant J's New York adoption decree, nor would she have disputed the validity of a New York birth certificate with *Adar* and *Smith*'s names.²³⁰

Of course, this solution—or any other solution for that matter—will not imminently appease those who maintain that the State of Louisiana cannot posit any rational basis for a policy that discourages otherwise qualified unmarried couples from adopting. More relevant to the instant case, it seems equally unlikely that Louisiana can justify withholding a complete and accurate birth certificate from a child with *unmarried adoptive* parents, but not from a child with married *adoptive* parents or *unmarried* biological parents. These are clearly good arguments, but they are just as clearly *not* full faith and credit arguments.

The third question addressed by the majority in *Adar*—a question that the court should have remanded to the district court²³¹—was whether Louisiana

²²⁸ See *Adoption of Meaux*, 417 So. 2d 522, 523 (La. Ct. App. 1982).

²²⁹ Even the most conservative courts agree that the legal status conferred by an adoption decree cannot be relitigated. See, e.g., *Embry v. Ryan*, 11 So. 3d 408, 410 (Fla. Dist. Ct. App. 2009).

²³⁰ See *Adar II*, 639 F.3d 146, 159 (5th Cir. 2011) (en banc).

²³¹ An appellate court will not typically decide an issue that was not first decided by the trial court, unless there is no arguable basis for the plaintiffs' substantive legal claim and thus no need for any fact-finding. See *id.* at 165 (Southwick, J., concurring specially) ("[A]s to the Equal Protection argument, the usual practice is not to consider an issue until it has first been addressed by the district court. I would follow that practice here." (citation omitted)). In addition to Judge Southwick, at least six other judges on the Fifth Circuit would have remanded *Adar* and *Smith*'s equal protection claim. See *id.* at 184 (Wiener, J., joined by Benavides, Stewart,

violated the Equal Protection Clause of the Fourteenth Amendment when it refused to issue an accurate, amended birth certificate to Infant J.²³² The Fifth Circuit concluded that Louisiana adoption law does not violate equal protection because the state could rationally prefer the “stable family structure[]” of a single individual or a married couple to the less stable structure of a cohabiting unmarried couple.²³³ However, the majority’s one-page equal protection analysis badly misconstrues the equal protection inquiry raised by Infant J’s ill-fated birth certificate application.

Contrary to what the majority presumes, Adar and Smith were *not* challenging Louisiana’s adoption laws.²³⁴ Instead, Adar and Smith’s equal protection challenge—parallel to their full faith and credit challenge—was to the executive branch *policy* of denying an accurate birth certificate to out-of-state, unmarried adoptive parents.²³⁵ Because the registrar failed to offer a legitimate governmental interest advanced by this policy, Adar and Smith’s equal protection claim has legal merit even under rational basis review and should be adjudicated by a trial court equipped to do the necessary fact-finding.²³⁶ Moreover, if the equal protection claim is framed correctly, it is difficult to imagine that Louisiana could advance a legitimate governmental interest for its differential treatment of Adar, Smith, and Infant J.²³⁷

Dennis, and Prado, JJ., dissenting) (“[O]ur longstanding prudential practice demands that this [equal protection claim] be considered first by the district court, where it has never been addressed.”); *id.* at 165 (Haynes, J., concurring and dissenting) (“I respectfully dissent from the decision to reach [the equal protection] question for the reasons stated [by] . . . the dissent.”).

²³² See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Adar II*, 639 F.3d at 161–62.

²³³ *Adar II*, 639 F.3d at 162. The majority found that Louisiana’s differential treatment of Infant J, and other children of unmarried parents, was subject only to rational basis review because the children of unmarried parents are not a suspect classification and adoption is not a fundamental right. *Id.*

²³⁴ *Id.* at 183 (Wiener, J., dissenting) (“To frame this issue properly, we must remain mindful that Appellees are challenging neither (1) Louisiana’s birth certificate statute, which is facially neutral as to the marital status of adoptive parents, nor (2) Louisiana’s adoption laws, which are entirely inapplicable and unaffected here.”); see also *id.* at 184 (“Undoubtedly, the Registrar . . . has tendered a worthy defense of Louisiana’s in-state adoption laws, which prohibit Louisiana adoptions by unmarried couples. But, *the instant case does not involve a Louisiana adoption at all and poses no threat whatsoever to Louisiana’s adoption laws or adoption policy.*”).

²³⁵ See *id.* at 184 (“The one and only thing that Appellees have ever challenged is the Registrar’s refusal to accept . . . their valid out-of-state adoption decree so they may obtain a Louisiana birth certificate that accurately reflects their legal status as adoptive parents . . .”).

²³⁶ See *id.*

²³⁷ See *id.* at 184–85. Judge Wiener pointed out that the majority made a “baldly flawed assumption” that the correct comparator classes for equal protection purposes are *unmarried* adoptive parents, e.g., Adar and Smith, and *married* adoptive parents, to whom the state of Louisiana readily issues amended birth certificates. See *id.* An alternative comparator class, and the one that Judge Wiener found more appropriate, is “unmarried

The takeaway from this section is that Adar and Smith had a colorable equal protection claim against the State of Louisiana that should have been vetted by a trial court.²³⁸ The couple's full faith and credit claim, therefore, was a timely and costly distraction from the real controversy.²³⁹ The worthy pursuit of civil rights for nontraditional families depends on continued development of more substantive constitutional protections, such as due process and equal protection, as epitomized by several successful challenges to the Defense of Marriage Act (DOMA).²⁴⁰

CONCLUSION

Horizontal federalism is based on the assumption that separate sovereigns achieve great economic and social progress. And separate sovereigns are neither separate nor sovereign without the power to make and enforce their own domestic policies. The Full Faith and Credit Clause should fit within this context. But to do so, the Clause is in desperate need of judicial clarification.

While a state's domestic policies are embodied in the full range of its legislative acts, judicial judgments, and the host of records that lie between legislative and judicial activity, it is the last category that has created confusion and conflict. This Comment has argued that resolution of this conflict requires

biological parents." See *id.* at 185 (emphasis added). In other words, Judge Wiener would have held marital status constant and looked instead at the differential treatment imposed on Adar and Smith as adoptive parents. His reason for doing this was simple: by statute, Louisiana issues birth certificates to unmarried *biological* parents, see LA. REV. STAT. ANN. § 40:34(B)(1)(h)(ii) (2012), and so it was incumbent on the registrar to identify a governmental interest served by issuing one type of birth certificate to unmarried *biological* parents and another type of birth certificate to unmarried *adoptive* parents, all while the two classes maintain equal parental rights under Louisiana law. See *Adar II*, 639 F.3d at 185.

²³⁸ See *supra* note 231 and accompanying text.

²³⁹ Unfortunately for nontraditional families, the equal protection question will now have to play out against the backdrop of bad caselaw in the form of the Fifth Circuit's imprudent equal protection holding.

²⁴⁰ Section 3 of DOMA, which provides that heterosexual marriages are the only marriages entitled to federal benefits, has been held unconstitutional by several courts on the basis of equal protection. See, e.g., Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 384 (D. Mass. 2010) (holding that § 3 violates the Due Process Clause of the Fifth Amendment), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (holding that § 3 is unconstitutional as applied to the Bankruptcy Code's joint-filing provision). In early 2011, the Obama Administration announced that it would no longer defend § 3 in two pending challenges to DOMA on the ground that it violates equal protection principles. See Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. Attorney General Eric Holder explained the administration's position on DOMA: "[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional." *Id.*

states to distinguish between a request for recognition and a request for enforcement of an out-of-state record: full faith and credit requires the former, but not the latter. Instead, the public policy exception to the Clause, traditionally applied to legislative acts, also reaches state records. The delicate balance between interstate respect and interstate overreaching—a balance achieved in part by the important but limited covenant of full faith and credit—requires that states remain free to abide by their own policies and procedures in deciding whether to enforce the laws and records of other states.

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