

Full Faith and Credit for Status Records: A Reconsideration of *Gardiner*

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INTRODUCTION

The Full Faith and Credit Clause of the United States Constitution¹ (the “Clause”) has received a good deal of attention in recent years. While the brunt of public, media, and academic attention has focused on the role of the Full Faith and Credit Clause as it applies to the interstate recognition of same-sex marriages,² the fundamental question of how much deference must be accorded to records remains largely unaddressed.

The Clause requires recognition “in each State to the public Acts, Records, and judicial Proceedings of every other State.”³ It is well established that the U.S. Supreme Court interprets the term “judicial proceedings” to mean either final judgments or quasi-judgments, which are the judgments delivered by quasi-judicial bodies.⁴ Judgments receive the fullest faith and credit—so-called “ironclad” faith and credit.⁵ It is similarly well established that the Court

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1. U.S. CONST. art. IV, § 1.

2. See, e.g., David W. Dunlap, *Congressional Bills Withhold Sanction of Same-Sex Unions*, N.Y. TIMES, May 9, 1996, at B15; Joanna Grossman, *The Proposed Marriage Protection Act: Why It May Be Unconstitutional*, July 27, 2004, <http://writ.news.findlaw.com/grossman/20040727.html>; Adam Liptak, *Bans on Interracial Unions Offer Perspective on Gay Ones*, N.Y. TIMES, Mar. 17, 2004, at A1; Dahlia Lithwick, *Full Faith and Credulous*, SLATE, Feb. 10, 2004, <http://www.slate.com/id/2095259/>.

3. U.S. CONST. art. IV, § 1.

4. See *M’Elmoyle v. Cohen*, 38 U.S. 312 (1839); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483 (1813).

5. See WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 6 (2005) (describing “an

interprets the term “acts” to mean statutes.⁶ Statutes receive a lesser degree of faith and credit; the statutes of a sister state receive full faith and credit unless they are “obnoxious” to the forum state’s public policy.⁷

But as for the term “records,” there is no easy consensus. Neither the Supreme Court nor Congress has defined what records are, nor have they explained what level of faith and credit records should be accorded. As a result, the activities of two out of three branches of our state governments—the judicial and legislative branches—are ensured a relatively uniform level of deference and respect. But the deference accorded to activities of our state executives, embodied in records, is in limbo.

Although the Supreme Court has only singled out judgments for ironclad protection, there are several reasons why some executive actions, embodied in records, deserve the same level of full faith and credit. First, the consequences of indeterminacy can be quite severe. Second, personal status records are intensely personal to the individual to whom they pertain, and therefore, the ability of others to obtain standing to contest the effectiveness of otherwise legitimate records should be limited. Third, many of the policies underlying res judicata doctrines similarly counsel against permitting chronic attacks on an established precedent. Finally, from a historical perspective, the colonies surrendered this aspect of their sovereignty when they joined the newly formed Union, to the benefit of the new nation’s citizens.

The 2002 Kansas Supreme Court case *In re Estate of Gardiner*⁸ presents a particularly strong justification for reexamining the deference due to sister state executive records. In *Gardiner*, the Kansas courts nullified a marriage between a man, Marshall Gardiner, and a male-to-female transsexual, J’Noel Gardiner, who had been issued an amended Wisconsin birth certificate following her sex reassignment surgery.⁹ The Kansas Supreme Court ruled that while the Full Faith and Credit Clause required it to accept the amended Wisconsin birth certificate as evidence that the certificate had been issued, the court could nonetheless decide the question of J’Noel’s legal sex in accordance with Kansas law.¹⁰ Since the court held that J’Noel remained a male under Kansas law, it voided the marriage.¹¹

ironclad rule of preclusion”); William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 413–14 (1994) [hereinafter *The Iron Law*] (describing the basic rule of the Clause as an “Iron Law”).

6. See *Nevada v. Hall*, 440 U.S. 410, 412–13 (1979).

7. See *Baker v. Gen. Motors Co.*, 522 U.S. 222, 232 (1998) (“[T]he 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. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

8. 42 P.3d 120 (Kan. 2002).

9. See *id.*

10. *Id.* at 137 (“To conclude that J’Noel is the opposite sex of Marshall would require that we rewrite [Kansas law].”).

11. *Id.*

The *Gardiner* case received local and national media attention, as well as interest from academics and activists on both sides of the same-sex marriage and lesbian, gay, bisexual, and transgender (LGBT) rights debate.¹² The academic literature is rife with criticism of the *Gardiner* decision, analysis of the impact of the Defense of Marriage Act (DOMA)¹³ on *Gardiner*-like scenarios, and discussion of the intersection between same-sex marriage and full faith and credit issues generally.¹⁴ But scant attention has been paid to the more fundamental problem that permitted the Kansas court to rule as it did—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.

This Comment explores historic and contemporary Supreme Court full faith and credit jurisprudence in an attempt to identify the core principles and values that the Clause was designed to promote. My goal is to illuminate how these principles support an expansive reading of the Clause as it pertains to executive records. I argue that *Gardiner* illustrates how the current state of full faith and credit jurisprudence can cause illogical, fundamentally unfair, and unconstitutional outcomes to prevail in cases involving executive branch documents.

Gardiner represents an example of why at least some executive records—status records—should receive the same ironclad full faith and credit protection as judicial proceedings. By “status,”¹⁵ I refer to those grants of a right, or

12. See Mubarak Dahir, *Genetics vs. Love*, ADVOCATE, Oct. 10, 2000; John Hanna, *Kansas Supreme Court Says Transsexual’s Marriage is Invalid*, TOPEKA CAPITAL-JOURNAL ONLINE, Mar. 15, 2002, http://www.cjonline.com/stories/031502/bre_transmarrig.shtml; David E. Thigpen, *Domestic Disputes*, TIME, Mar. 4, 2002, at 53; David Osborne, *Sex-change Widow’s Fortune Hangs on Court’s Gender Ruling*, INDEPENDENT (London), Jan. 20, 2002, at 16; *Transsexual Marriages Rejected in Kansas*, THOMAS MORE LAW CENTER, Mar. 19, 2002, available at http://www.thomasmore.org/qry/page taf?id=63&_function=detail&sbtblct_uid1=70.

13. 28 U.S.C. § 1738C (1996).

14. See, e.g., Patrick J. Borchers, *Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998); Shana Brown, *Sex Changes and “Opposite-Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113 (2001); Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003) [hereinafter Cox, *Adoptions*]; Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289 (2005); Nancy J. Knauer, *The September 11 Relief Efforts and Surviving Same-Sex Partners: Reflections on Relationships in the Absence of Uniform Legal Recognition*, 26 WOMEN’S RTS. L. REP. 79 (2005); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional*: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires, 90 MINN. L. REV. 915 (2006); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1 (2005); Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL’Y 301 (2003).

15. Julie A. Greenberg and Marybeth Herald observe that the First Restatement of Conflict of Laws defined “status” as “a legal *personal* relationship, not temporary in its nature” (emphasis

categorizations by the state, that give rise to additional rights or obligations. These are records that implicate some aspect of individual, organizational, or corporate identity and which must be recognized by sister states so that the rights conveyed by that identity can be actualized. I limit my analysis to personal status records, but I believe a strong case can be made for other types of executive records as well, including property titles, tax records, executive pardons, corporate certificates of good standing, charters and articles of incorporation, and perhaps others. Important rights hinge on all of these records, and further research would constitute a worthy future project for other scholars.

In Part I of this Comment, I discuss the *Gardiner* case itself and critique the reasoning used by the Kansas appellate court and the Kansas Supreme Court in invalidating the Gardiners' marriage. In Part II, I explore the history and purposes of the Clause and its implementing statutes. In Part III, I examine contemporary full faith and credit jurisprudence and identify the core principles that support a higher level of faith and credit for personal status records. These include the importance of status determinations, the doctrine underlying the treatment of marriage certificates and the place of celebration rule, and res judicata principles. A brief conclusion follows.

I

IN RE *ESTATE OF GARDINER*

A. *Facts*

J'Noel Gardiner was born Jay Noel Ball in the state of Wisconsin.¹⁶ J'Noel's original birth certificate indicated that she was born male.¹⁷ But as J'Noel matured, she became aware that the body with which she was born felt "wrong."¹⁸ J'Noel was later diagnosed with gender dysphoria.¹⁹ As an adult, she decided to take steps to bring her physical and legal identity into alignment with her psychological and social identity.²⁰ While under the care of counselors, J'Noel underwent electrolysis and thermolysis in 1991 and 1992, began hormone therapy in 1992, and endured a series of cosmetic surgeries

added), and that the term includes both legal relationships with other people as well as an "individual permanent condition created by law." Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 849 (2005).

16. *In re Estate of Gardiner*, 22 P.3d 1086, 1091 (Kan. Ct. App. 2001).

17. *Id.*

18. *Id.*

19. *Id.* Gender dysphoria is a psychiatric classification used to describe a persistent discomfort involving one's sex. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994).

20. See Jodi Wilgoren, *Suit Over Estate Claims a Widow Is Not a Woman*, N.Y. TIMES, Jan. 13, 2002, § 1, at 18 ("I am anatomically, biologically, socially, and, most important, spiritually, female.").

from 1993 to 1995.²¹ In 1994, upon her psychiatrist's recommendation, J'Noel finally had complete sex reassignment surgery.²²

Following her surgery, J'Noel filed a petition in the Circuit Court of Outagamie County, Wisconsin, asking the court to issue a new birth certificate featuring her new desired name and her new, correct sex.²³ Wisconsin Statutes section 69.15(4)(b) gives Wisconsin courts the power to make such amendments, stating:

Any person *with a direct and tangible interest* in a birth certificate registered in this state may petition a court to change the name and sex of the registrant on the certificate due to a surgical sex-change procedure. If the state registrar receives an order which provides for such a change the state registrar shall change the name and sex on the original birth certificate, except that if the court orders the state registrar to prepare a new certificate the state registrar shall prepare a new certificate under sub.(6).²⁴

The circuit court issued an order to amend J'Noel's birth certificate in accordance with this statute;²⁵ a Wisconsin judge then signed the order.²⁶ With this order in hand, J'Noel obtained an amended birth certificate from the Wisconsin Department of Health and Social Services.²⁷ J'Noel then changed her driver's license, passport, and university and health documents to mirror her correct name and sex.²⁸

In 1997, J'Noel, who had earned a Ph.D in business, moved to Kansas and joined the faculty of Park College.²⁹ There, in May 1998, she met Marshall Gardiner, a wealthy Park College benefactor.³⁰ J'Noel and Marshall became romantically involved and married in Kansas in September 1998.³¹ The following year, Marshall died intestate.³² Under Kansas intestate succession laws, a surviving spouse is entitled to a spousal share of the decedent's estate.³³ But in the ensuing probate proceedings, Marshall's estranged son Joe emerged and claimed to be Marshall's sole heir.³⁴ Joe argued that although J'Noel's birth certificate and other legal records reflected the fact that she is a female,

21. *Gardiner*, 22 P.3d at 1092.

22. *Id.*

23. *Id.*

24. WIS. STAT. § 69.15(4)(b) (2000) (emphasis added).

25. *Gardiner*, 22 P.3d at 1107.

26. *Id.*

27. *Id.* at 1092.

28. *Id.*

29. Wilgoren, *supra* note 20; Park College is now Park University. See <http://www.park.edu/int/overview.pdf> (last visited Sept. 14, 2009).

30. *Gardiner*, 22 P.3d at 1091.

31. *Id.*

32. *Id.* at 1090.

33. *Id.*; see also KAN STAT. ANN. § 56-6a201, et seq. (2000).

34. Petition for Writ of Certiorari, *Gardiner v. Gardiner*, 537 U.S. 825 (2002) (No. 01-1853), at 4-5.

she nevertheless remained a male in the eyes of Kansas law, and therefore her marriage to Marshall Gardiner was void.³⁵

To support his claim, Joe cited a Kansas statute banning marriages between persons of the same sex.³⁶ While neither party contested that the Kansas legislature intended to ban same-sex marriages,³⁷ they did dispute whether J'Noel's and Marshall's marriage violated this statute.³⁸ Joe successfully persuaded the district court judge that J'Noel's sex must be determined by Kansas law, not by Wisconsin law.³⁹ The court found that Kansas public policy, embodied by statute, banned same-sex marriage, and that "[f]or purposes of marriage under Kansas law . . . J'Noel was born and remains a male."⁴⁰

Reviewing the district court's decision, the Kansas Court of Appeals observed that "[t]he question here is whether J'Noel should have been considered a female under Kansas law at the time the marriage license was issued."⁴¹ The bulk of the court's analysis addressed the question of how Kansas courts should determine the legal sex status of a transsexual.⁴² On the issue of the full faith and credit Kansas owed to J'Noel's amended Wisconsin birth certificate, the court held that "the Full Faith and Credit Clause of the Constitution . . . requires full faith and credit to be given to records of other states. Absent an overriding consideration, the certificate itself is entitled to full faith and credit."⁴³ The court then reasoned—mistakenly in my view—that "[o]ne such overriding consideration could be violation of Kansas public policy."⁴⁴

The appellate court found no error in the district court's refusal to give J'Noel's birth certificate full faith and credit.⁴⁵ But it nonetheless reversed and remanded to the district court for a determination of whether J'Noel was male or female under Kansas law at the time her Kansas marriage license was issued.⁴⁶ The appellate court directed the district court to consider both the appellate court's newly propounded factors for sex determination and the Kansas birth certificate amendment laws⁴⁷ in making its determination.⁴⁸

35. *Gardiner*, 22 P.3d at 1090.

36. *Id.*; see also KAN. STAT. ANN. § 23-101 (2000).

37. *Gardiner*, 22 P.3d at 1092.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See *id.* at 1092–1106.

43. *Id.* at 1107.

44. *Id.*

45. *Id.* at 1110.

46. *Id.*

47. See KAN. STAT. ANN. § 65-2422c (2006) (only authorizing minor corrections to be made under KAN. ADMIN. REGS. § 28-17-20); KAN. ADMIN. REGS. § 28-17-20(b)(1)(A)(i) (2006) (implementing KAN. STAT. ANN. § 64-2422c and only permitting birth certificate amendments later than ninety days after the filing of the original if the registrant's sex was incorrectly recorded

Joe Gardiner petitioned for review by the Kansas Supreme Court, which agreed to hear his case.⁴⁹ The court noted that the petition presented two main arguments: (1) that the appellate court failed to “ask the fundamental question of whether a person can actually change sex within the context of K.S.A. 23-101” and (2) that “policy questions are for the legislature rather than the courts,”⁵⁰ and the Kansas legislature had previously declared that the strong public policy of Kansas is to only recognize a marriage between one man and one woman.⁵¹

In its decision, the Kansas Supreme Court observed two lines of thought emerging from international and domestic cases addressing the validity of marriages involving a transsexual.⁵² The first line treats a person’s sex as fixed at birth as a matter of law; the Court thought this line, if followed, would invalidate the Gardiner marriage.⁵³ The second line, which the Court proffered would validate the Gardiner marriage if followed, treats sex as a question of fact, with later medical and psychological data relevant to a court’s subsequent sex determination.⁵⁴ The Kansas Supreme Court found the first line more persuasive and held that J’Noel’s marriage was void since it violated Kansas’s public policy. The U.S. Supreme Court denied J’Noel’s petition for a writ of certiorari.⁵⁵

B. Criticism of Gardiner

Both the appellate court and the Kansas Supreme Court incorrectly framed the legal questions they faced, which illustrates their failure to appreciate the nature of the issue with which they were dealing. The appellate court treated the case as implicating the Kansas law addressing the determination of legal status following sex-change operations.⁵⁶ Instead, the court should have focused on the full faith and credit issue: was the question of J’Noel’s sex status, which had already been determined by a Wisconsin state court judge and which was evidenced by a Wisconsin record, open for reinterpretation by the

or if a physiological or anatomical change occurred).

48. *Gardiner*, 22 P.3d at 1108–10.

49. *In re Estate of Gardiner*, 42 P.3d 120, 122 (Kan. 2002).

50. *Id.* at 125–26.

51. See KAN. STAT. ANN. § 23-115 (2001 Supp.).

52. *Gardiner*, 42 P.3d at 124.

53. *Id.*; see also *Corbett v. Corbett*, 2 All E.R. 33, 48 (1970) (holding that for purposes of determining one’s legal sex, operative intervention should be ignored); see also *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999) (holding that sex is immutably fixed “by our Creator at birth”).

54. *Gardiner*, 42 P.3d at 124; see *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding that one’s legal sex must conform to one’s anatomical features and gender or psychological sex); see also *In re Kevin* (2001) 28 Fam. L.R. 158 (Austl.) (holding the law treats post-operative transsexuals as their newly-assigned sex, assuming surgery is successful).

55. *Gardiner v. Gardiner*, 537 U.S. 825 (2002).

56. See *In re Estate of Gardiner*, 22 P.3d 1086, 1093 (Kan. Ct. App. 2001).

Kansas district court? The answer to this question is surely no.

The court did recognize the full faith and credit issue with respect to J'Noel's birth certificate, but its statement that absent an overriding consideration, "the Constitution still requires full faith and credit to be given to the records of other states" cites to no authority.⁵⁷ Nor does the subsequent sentence, in which the court claims that "[o]ne such overriding consideration could be violation of Kansas public policy."⁵⁸

The Kansas Supreme Court similarly failed to correctly frame the issue before it. Neither the "sex is fixed at birth" nor the "sex is a question of fact" lines of reasoning should have proven dispositive, since both ignore the fact that the Wisconsin system's definitive definition of J'Noel's sex should have been respected by the Kansas courts. The court's decision therefore denied full faith and credit to J'Noel's birth certificate, a Wisconsin executive document that deserved recognition as both a record in its own right and as documentation of legal status altered pursuant to the judgment of a Wisconsin court.

The approach adopted by the Kansas courts represents a familiar mistake in full faith and credit jurisprudence. The error is to treat the Clause as requiring a forum state to *merely admit into evidence* a sister state's action (regardless of its form), when in fact the Clause requires the forum state to give the action its *full legal effect*. Although it is true that a forum state need only give the same degree of faith and credit to the judgment, act or record of a sister state that the sister state would itself give to that judgment, act or record, the Kansas courts were nevertheless required to give J'Noel's birth certificate full legal effect.⁵⁹ Wisconsin Statutes section 69.21(1)(c)⁶⁰ governs the evidentiary weight vital records must receive; it establishes that the evidentiary value of amended records may be determined by the judge before whom the amended record is offered. The Kansas appellate court, incorrectly interpreting

57. *Id.* at 1107.

58. *Id.*

59. *See, e.g.*, Restatement (Second) of Conflict of Laws, § 109 cmt. C (1988) (noting that the Clause does not require enforcement of a sister state judgment which remains subject to modification in the sister state); 30 Am. Jur. 2d Executions, § 669 ("Since a judgment rendered by the court of another state is accorded full faith and credit to the same extent, and with as broad a scope, as it has by law or usage in the courts of the state where the judgment was rendered, its force and effect must be determined by the laws of such state"); 30 Am. Jur. 2d Executions, § 689 (noting that the effect of the Clause is to "require that the doctrine of res judicata be applied in one state to a judgment rendered in another state to the same extent as it is applied in the state of its rendition," therefore "[a] state must, regardless of policy objections, recognize the judgment of another state as res judicata, even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of the forum state"). *See also Gardiner*, 22 P.2d at 1086 (citing *State v. Pope*, 927 P.2d 503, 511 (Kan. Ct. App. 1996); *Keller v. Guernsey*, 608 P.2d 896, 898-99 (Kan. 1980) ("[T]he general rule is that a judgment rendered by a court of one state is entitled, in the courts of another state, to recognition, force or effect to the same extent and with as broad a scope as it has by law or usage in the courts of the state where the judgment was rendered.").

60. WIS. STAT. § 69.21(1)(c) (2000).

evidentiary weight to mean *legal effect*, decided that Wisconsin's section 69.21(1)(c) permitted the Kansas district court to "determine the weight of the evidence offered in the form of the birth certificate" and decided that the district court "appeared to give the birth certificate little or no weight, which was its option."⁶¹

Some legal commentators have advanced the theory that the Framers intended the Clause to provide only a method for admitting foreign records into evidence in the forum state's courts. This theory posits that the forum court may do with the foreign record what it pleases, and that the Clause does not provide both a means of admitting a record and a mandate of its effect.⁶² The appellate court seems to have embraced this explanation, although the U.S. Supreme Court's opinion in *Mills v. Duryee* should have made clear that such reasoning has no legitimacy. In *Mills*, the Court, in an opinion written by Justice Story, rejected the appellant's contention that the Clause only requires that a sister state judgment be admitted as evidence.⁶³ Justice Story also added persuasive authority in his Commentaries, in which he wrote:

[The Framers] intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals; but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the state, where they originated.⁶⁴

Justice Story's explanation reflects an awareness of the need to be wary of forum state judges who purport to extend to a record the full effect it deserves—the level it would receive in the sister state—and yet conveniently find that in the sister state the record would be entitled to little or no effect. As Douglas Laycock warns, "To formally admit the law as evidence but to give it little or no substantive effect is not to give it full credit; it is a clever way of giving little or no credit."⁶⁵

61. *Gardiner*, 22 P.3d at 1109.

62. See Petition for Writ of Certiorari, *Gardiner*, 22 P.3d 1086 (2001) (No. 85030) (noting that the trial court judge rejected Gardiner's full faith and credit argument by arguing "[I]f I gave full faith and credit, all I would do is give full faith and credit to the fact that [the Wisconsin court] authorized . . . a change in her birth certificate . . . if [the court] gave full faith and credit, it would have no impact on the findings of the Court today."); James D. Sumner, Jr., *The Full-Faith-and-Credit Clause: Its History and Purpose*, 34 OR. L. REV. 224, 230 (1955) (noting that in the few cases decided under the Articles' Clause, the courts "held that the clause was nothing more than a rule of evidence"); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 27 (1981–82) (arguing the Articles' Clause was "designed to require only that sister state judgments be admitted into evidence as *conclusive proof of their own existence and contents*").

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

64. Joseph Story, COMMENTARIES, § 1304 (1891).

65. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 304 (1992).

The rule adopted by the Kansas courts in the *Gardiner* litigation would undermine the precise principles the Full Faith and Credit Clause was designed to bolster. Justice Jackson observed that “[t]o be administered uniformly a rule of faith and credit must be relatively stable, certain, and of long standing.”⁶⁶ But the faith and credit rule the Kansas courts applied in dealing with executive records possesses anything but these characteristics. If followed by other states and permitted by the U.S. Supreme Court, executive status records would be subject to a hodgepodge of conflicting rules and policies.

This situation is particularly concerning in the context of status records. First, state executives exercise their power in ways that bear directly on our most precious individual rights. Second, the widening scope of state executives’ duties means that an ever-increasing number of these rights are brought under the ambit of the executive while the status of those rights, insofar as they will be recognized in sister states, continues to be indeterminate.⁶⁷ Third, because the U.S. Supreme Court has never clearly declared the proper level of full faith and credit due to records—and, by inference, the rights arising from them—state courts take widely varying and often contradictory approaches when dealing with them.

The remainder of this Comment will explain why the uncertainty and instability of the treatment of records leads courts to violate the letter and the spirit of the Clause. The approach embraced by *Gardiner* relies on a fundamental misunderstanding of the purpose of the Clause and the demands it makes of the states.

II

THE HISTORY AND PURPOSES OF THE FULL FAITH AND CREDIT CLAUSE AND ITS IMPLEMENTING STATUTES

A. The Drafting and Adoption of the Clause

In England and the American colonies, the word “record” broadly referred to any written document that evidenced the work of an official (much as it does

66. Robert H. Jackson, *Full Faith and Credit: The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 26 (1945).

67. Ralph U. Whitten once argued that the Framers’ original understanding of the Full Faith and Credit Clause might differ from our own in part because whereas there was once “a sharp distinction drawn between law making, or legislation, and law application, or adjudication,” the lines between these functions have blurred over time. Whitten, *supra* note 62, at 67. Whitten asserted that state judges might now behave in ways once only permissible for state legislators, and that therefore some common law judicial decisions might be properly considered acts rather than judgments for full faith and credit classification purposes. *Id.* at 67–69. While my goals differ greatly from Whitten’s, his observation is nevertheless valuable. I assert that the blurring between law implementation, or execution, and its two sister functions requires a reexamination of our understanding of the Full Faith and Credit Clause.

today).⁶⁸ Since there were no electronic means of communication and no widespread method of transportation faster than horse or ship, authentication of official documents was of great concern.⁶⁹ The term often referenced judicial decisions, because in order to authenticate a judicial decision rendered in a sister colony—or even a judicial decision rendered in a neighboring village or county—one had to produce the physical record of the judgment.⁷⁰ However, a “record” could also have referred to a legislative record (the evidentiary record of a legislative action or proceeding). Finally, the term, standing alone, could also be understood to refer to nonjudicial, nonlegislative documents—executive documents.⁷¹

The colonies operated, for faith and credit purposes, much like independent nations. Like sovereign countries, the colonies had no inherent obligation to recognize the judgments of the courts of the other colonies, much less their records or acts.⁷² As a result, debtors could avoid their repayment obligations by relocating to a neighboring colony. A handful of colonies, including Massachusetts, Connecticut, Maryland, and South Carolina, attempted to remedy this problem by adopting statutes that extended heightened deference to the actions by sister colonies’ officials or judges against debtors.⁷³ Because each colony perceived the problem and the proper solution differently, the colonies’ approaches were not uniform. But within their narrow purpose—that is, to curb debt-skipping, not to establish a federal union—these acts extended recognition beyond mere judgments. For example, Maryland’s 1715

68. See 2 SAMUEL JOHNSON, A DICTIONARY OF ENGLISH LANGUAGE (1755), available at <http://www.archive.org/details/dictionaryofengl02johnuoft>. Johnson’s dictionary defines record (in its verb form) as “1. To register any thing, so that its memory may not be lost . . . 2. To celebrate; to cause to be remembered solemnly” and record (in its noun form) as “Register; authentick memorial.” Johnson lists examples of the noun’s usage, including “The king made a *record* of these things, and Mardocheus wrote thereof” (citing the biblical book of Esther) and “Though the attested copy of a record be good proof, yet the copy of a copy never so well attested will not be admitted as a proof in judicature” (citing John Locke). *Id.* Similarly, Johnson defines recorder as “1. One whose business is to register any events . . . 2. The keeper of the rolls in a city.” All of these definitions contemplate a broad interpretation of the term. *Id.*

69. See Whitten, *supra* note 62, at 57 (“At the time, statutes, records (such as deeds), and judgments presented difficult problems of authentication and proof for a new federal nation Statutes, in the view of many decisions, had to be proved by authenticated copy; judgments presented similar problems of authentication and admissibility.”).

70. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483 (1813).

71. See Whitten, *supra* note 62, at 57; see also Leonard S. Goodman, *Mandamus in the Colonies: The Rise of the Superintending Power of American Courts*, 2 AM. J. LEGAL HIST. 1, 6 (1958) (discussing the case of *Basford v. Proprietors of Kingston*, a 1745 New Hampshire case involving the recording of a land patent where “the Kingston town clerk refused to: ‘Enter and Record in the Records of the Said Town . . . according to the Custom in Such Cases’”).

72. Sumner, *supra* note 62, at 242. Though it was not his focus, Sumner recognized the pre-constitutional tripartite distinction between judicial, legislative, and executive actions, noting that “[t]he Connecticut act did not pertain to executive or legislative acts of other colonies.” *Id.* at 227.

73. See *id.* at 227–28 (noting that such acts were passed in Massachusetts, Connecticut, Maryland, and South Carolina).

act required “that all debts and records, whether by judgment, recognizance, deed inrolled, and upon record, the exemplification thereof . . . shall be sufficient evidence to prove the same.”⁷⁴ In Maryland, therefore, debts acquired in sister colonies could achieve deference not merely via judgments of the courts, but also through administrative actions of the executive.

South Carolina’s 1731 act was more explicit in recognizing the deference due to the executive:

All exemplifications of records, and all deeds, and bonds, or other specialties, all letters of attorney, procuration or other powers in writing, and all testimonials which shall at any time hereafter be produced in any of the courts of judicature in this province, and shall be attested to have been proved upon oath under the corporation seal of the Lord Mayor of London, or of any other major or chief officer of any city, borough, or town corporate . . . or under the hand of the governor . . . or under the notarial seal of any notary public, shall be deemed and adjudged good and sufficient in law . . .⁷⁵

The statutory language clarified that deference was extended not merely to the judicial acts of other colonies, but to all manner of executive documents: to the exemplifications of records, and to deeds and bonds authorized not by a judge, but by any one of a vast hierarchy of administrators ranging from the Lord Mayor of London to a humble notary.

When the Continental Congress adopted the original Articles of Confederation (the “Articles”) in 1776, the Articles did not include a Full Faith and Credit Clause; rather, one was added subsequently.⁷⁶ A preliminary version read, in pertinent part:

That full Faith and Credit shall be given in each of these States to the Records, Acts and Judicial Proceedings of the Courts and Magistrates of every other State, and that an Action of Debt may lie in the Court of Law in any State for the Recovery of a Debt due on Judgment of any Court in any other State . . .⁷⁷

But this version, for unknown reasons, was replaced with “Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.”⁷⁸ This fact does not reveal much about the drafters’ motivation, but it suggests a desire to expand the scope of the clause from matters related to the recovery of debt to all manner of governmental activity.

74. Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 39 (1957).

75. *Id.*

76. Albert S. Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461, 464 (1937).

77. *Id.* at 464–65.

78. *Id.* at 465.

James D. Sumner notes that the Clause as it appeared in the Articles suffered from “glaring defects”: it had no method for enforcing its supposed command and no way to impose uniformity in its interpretation by the states.⁷⁹ Sumner also contends that it only extended faith and credit to judicial proceedings, not to acts or records, but this presumes that the phrase “of the courts and magistrates” modifies not just the object “judicial proceedings,” but rather the entire object string “records, acts and judicial proceedings.”⁸⁰ Sumner’s interpretation violates both the *ejusdem generis* (of the same kind) and *reddendo singula singulis* (refers only to the last) canons of statutory construction.⁸¹ It seems more natural to interpret “of the courts and magistrates” to be necessary in order to clarify that faith and credit must be given not just to the proceedings of judges but also to the proceedings of magistrates—not, as Sumner would have it, to limit the application of faith and credit to only acts of the judiciary.

The Articles, of course, were short-lived. When the Constitutional Convention gathered in 1787, the Clause was the focus of some—though not great—attention. On August 6, 1787, the Committee of Detail presented an initial version: “Full faith shall be given in each State to the acts of the Legislature, & to the records & judicial proceedings of the Courts & Magistrates of every State.”⁸² Although this draft is more tenuous in its treatment of records by specifying the branch of government associated with both acts and judicial proceedings but not the branch associated with records, Sumner nevertheless considered it “the beginning of a trend toward the broader concept of full faith and credit which was finally incorporated in the Constitution.”⁸³

On August 29, the convention considered and passed a second draft: “Full faith ought to be given in each State to the public acts, records, and judicial proceedings of every other State; and the Legislature shall by general laws determine the Proof and effect of such acts, records, and proceedings.”⁸⁴ This version more explicitly mandated faith and credit for all three coordinate branches. It also mandated the extension of full faith and credit to acts, records, and proceedings, while delegating to Congress some degree of authority to craft the specifics of its command—a feature which persisted through subsequent versions. This round of changes sparked debate about what the new version meant; Edmund Randolph of Virginia, who had worked on the Clause’s development, appears to have “considered the effect of the main clause as

79. Sumner, *supra* note 62, at 230.

80. *Id.*

81. See BLACK’S LAW DICTIONARY (7th ed. 1999).

82. 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 601 (1911).

83. Sumner, *supra* note 62, at 231.

84. FARRAND, *supra* note 82, at 445.

extending to an ‘act of any state whether legislative, executive, or judiciary.’”⁸⁵

The drafters made additional changes over the course of several days, some of which demonstrated awareness among the Framers that the Clause under the Articles—like the Articles themselves—was too lax, and too closely modeled on principles of international relations and comity instead of on principles of federalism and solidarity. Most notably, at Madison’s urging, the phrase “shall be given” was substituted for “ought to be given.”⁸⁶ Madison thought the Constitution’s version of the Clause was “an evident and valuable improvement” over the Articles’ “extremely indeterminate” version.⁸⁷ And in a debate between James Wilson and Colonel Mason over the Clause’s phrasing, Wilson argued that Congress must have a role in declaring the effect given to acts, records, and judgments, lest the Clause “amount to nothing more than what was then taking place among all independent nations.”⁸⁸ The Clause’s final incarnation reflected these changes: “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.”⁸⁹

Several scholars have also expressed that the Articles’ Clause and the Constitution’s Clause differed in that the Articles’ Clause demanded faith and credit for the workings of the judiciary—records of judgments—while the Constitution’s Clause demanded faith and credit more broadly for the entire sphere of the workings of sister state governments, to the extent that the faith and credit demanded did not clash fundamentally with the forum state’s sovereignty.⁹⁰ Ralph Whitten, for example, argued that the Articles’ Clause “require[d] full faith and credit only to the records, acts and judicial proceedings of the courts and magistrates of every other state, while the Constitution includes ‘public acts’ within its command.”⁹¹ Sumner noted that the Articles’ Clause “was certainly a step in the right direction, [but] it did not

85. Abel, *supra* note 76, at 468 (citing FARRAND, *supra* note 82, at 445–48).

86. See FARRAND, *supra* note 82, at 489.

87. See Sumner, *supra* note 62, at 235 (citing THE FEDERALIST No. 42, at 198 (James Madison) (1857)).

88. *Id.* at 234.

89. U.S. CONST. art. IV, § 1.

90. See Edward S. Corwin, *The Full Faith and Credit Clause*, 81 U. PA. L. REV. 371, 373 (1933) (arguing that the Constitution’s Clause differs from the Articles’ Clause in that “the ‘acts’ and ‘records’ to which [the Constitution] extends full faith and credit are not confined to those of ‘courts and magistrates.’”); Sumner, *supra* note 62, at 230 (stating that the Articles’ Clause “was certainly a step in the right direction, [but] it did not go far enough in that full faith and credit was demanded only for judicial proceedings,” whereas the Framers “gave some thought to the respect to be paid the official acts of the states”); Whitten, *supra* note 62, at 31 (arguing that the Articles’ Clause “require[d] full faith and credit only to the records, acts and judicial proceedings of the courts and magistrates of every other state, while the Constitution includes ‘public acts’ within its command”).

91. Whitten, *supra* note 62, at 31.

go far enough in that full faith and credit was demanded only for judicial proceedings,” whereas the Framers “gave some thought to the respect to be paid the official acts of the states.”⁹² And Edward S. Corwin observed that the Constitution’s Clause differs from the Articles’ Clause in that “the ‘acts’ and ‘records’ to which it extends full faith and credit are not confined to those of ‘courts and magistrates.’”⁹³

In sum, whether the Constitution represents an expansion of the scope of the Clause in the Articles, or reflects the maintenance of an already broad scope, there is strong evidence that the Framers intended to codify a robust level of faith and credit to executive records.

B. The Purposes of the Clause

The Full Faith and Credit Clause appears in Article IV of the Constitution, which is dedicated to the rights and obligations of the states with respect to their citizens, to one another, and to the federal government.⁹⁴ Each clause in Article IV plays a role in breaking down the international model under which the colonies had previously operated. Thus, the Full Faith and Credit Clause appears alongside the Privileges and Immunities Clause, which prohibits the states from discriminating against the citizens of sister states; the Extradition of Fugitives Clause, which requires the states to turn over captured sister state fugitives upon the request of that state’s executive; the Fugitive Slave Clause, which until nullified required states to turn over runaway slaves as they would fleeing criminals; and the Republican Form of Government Clause, which ensures that the federal government will guarantee certain rights with respect to how the states choose to govern.⁹⁵

92. Sumner, *supra* note 62, at 230.

93. Corwin, *supra* note 90, at 373.

94. See U.S. CONST. art. IV.

95. *Id.* As a general matter, there is a history of protecting rights and preserving the availability of remedies under the Clause. This tradition may have taken hold as a result of the Clause’s being rooted in the Framers’ attempts to prevent the injustice caused by debt skippers. The Clause therefore seems to be successfully invoked more often to protect individual rights than to quash them. In *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), for example, the Supreme Court held that full faith and credit principles do not preclude a state from awarding an injured person workers’ compensation even though another state had already done so. See also *Carroll v. Lanza*, 349 U.S. 408, 413–14 (1955). This concern was also present in *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939), in which the Court ruled that a sister state’s interest in compensation for its employees who are temporarily abroad cannot override the forum’s interests in the bodily safety and economic protection of workers located within the forum. *Pacific*, 306 U.S. at 504–05. The Court’s finding that the forum’s interest in capping the potential liability of companies transacting business within the forum is not strong enough to prevent other states from giving more generous recovery presents a policy that might be generalized from economic rights to personal rights. The fact that worker’s compensation awards are typically made in quasi-judicial administrative proceedings greatly strengthens the relevance of these cases to the uncertain status of records, which are also the product of executive actions.

All of the clauses appearing in Article IV were designed, therefore, to “create[] one nation out of separate states . . . without abolishing those states.”⁹⁶ In other words, the Framers’ goal was for the states to act as coequals. It is tempting to conclude that the states sacrificed a degree of sovereignty for the sake of unity, but it is more fair to acknowledge that each state received as much as—and perhaps more than—it surrendered. For while each gave up a degree of control over sister state visitors, judgments, fugitives, and records, each received the guarantee that its own citizens’ rights, courts’ decrees, and executives’ actions would be respected in the other states of the Union. In this respect, Article IV in general, and the Full Faith and Credit Clause in particular, are as much extensions of state sovereignty to the rest of the nation as they are infringements upon state sovereignty.⁹⁷

The Framers’ unification mandate broadly protected judicial, social, political, and economic matters through regulation of the administration of justice.⁹⁸ In *Baker v. General Motors Corp.*, the Supreme Court reasoned that the Clause’s

animating purpose . . . was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.⁹⁹

The requirement to make available “a remedy upon a just obligation” is central to the Clause’s effectiveness; it is intended to trump a state’s desire to ignore obligations established in other states.¹⁰⁰ Indeed, as the Court previously reasoned in *Milwaukee County*, the Clause’s purpose “ought not lightly . . . be

96. Laycock, *supra* note 65, at 259; *see also* Jackson, *supra* note 66, at 17 (arguing that the Full Faith and Credit Clause is “among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence”); Sumner, *supra* note 62, at 242 (explaining that the Clause “was placed with other provisions which were designed to establish one country with equal privileges being accorded the citizens of each state throughout the rest of the United States”).

97. *See Pacific*, 306 U.S. at 501 (characterizing the purpose of the Clause as “to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states”). The *Pacific* Court presumably omitted any reference to records because no records were in dispute in that case.

98. *See* Sumner, *supra* note 62, at 242.

99. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (*quoting Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

100. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (the Clause should invalidate a state court’s choice of law if the choice “threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State”); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980) (the purpose of the Clause is to prevent the “parochial entrenchment on the interests of other States”); *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979) (the Clause should prohibit activity which “poses [a] substantial threat to our constitutional system of cooperative federalism”); *Carroll v. Lanza*, 349 U.S. 408, 413 (1955) (the Clause should invalidate “any policy of hostility to the public Acts” of another state).

set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.”¹⁰¹

Obligations “created under the law” come in many varieties, and there is no reason to assume that the obligations to which the Clause applies should be limited to those that are judicially created or embodied in legislation. As I discuss further in Part III.C, by issuing status records, the executive branch of government is responsible for a great variety of rights—obligations between private parties, between private parties and the state, and between public entities.¹⁰² These records are no less “created under the laws or by the judicial proceedings” of a state than are statutes or judicial decisions; the legitimacy of nearly every official state activity is “created under the laws” of that state.¹⁰³ The rights acquired through status records, therefore, also must not lightly be set aside.

Sumner has also noted some additional rationales for the Clause. For example, by providing a relatively clear-cut rule—one that mandates, rather than suggests, faith and credit—the Framers created an economical and streamlined way to enforce rights acquired in sister fora.¹⁰⁴ Such a rule also establishes some degree of uniformity among jurisdictions and codifies the core principles of common law *res judicata* doctrine: avoiding wasteful use of public and private resources, avoiding conflicting decisions and double recovery, and preventing harassment of defendants.¹⁰⁵ Additionally, the faith and credit rule provides stability, so that all actors can predict how other states will treat their various legal statuses. As a result, the Clause legitimates the expectations around which members of society structure their personal and commercial activity.

These purposes apply specifically to executive records, particularly to those determining personal status. Uniform treatment of executive records avoids waste by permitting just one round, not endless rounds, of government or third-party intervention. Because personal status conflicts often arise in the family law or wills and estates context, permitting repetitive or harassing litigation poses real threats, financially and emotionally, to family stability. Where wills or intestacy are involved, uniform treatment may have the further benefit of distributing the decedent’s estate more in keeping with his or her wishes, or at least allowing the decedent to plan accordingly. Ultimately, the approach I advocate would constitute a recognition in the legal system that the

101. *Milwaukee County*, 296 U.S. at 277.

102. See *infra* notes 148–164 and accompanying text.

103. *Baker*, 522 U.S. at 232 (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

104. Sumner, *supra* note 62, at 244–49.

105. *Id.*

Constitution, which protects human dignity, requires that status determinations be respected, and that where possible, the individual should be the driving force behind initiating changes in his or her own status.

C. The Implementing Statutes

The Clause consists of two subclauses. The first, as I have discussed, defines what activities are entitled to full faith and credit and then mandates such full faith and credit for these activities. I refer to this subclause as the “Scope Subclause.” The second authorizes Congress to work out the details by determining the practical effect of the Clause’s command. I refer to this subclause as the “Effects Subclause.”¹⁰⁶ I next explore how Congress has fulfilled its duty under the Effects Subclause by implementing statutes that declare the effects states must give to foreign acts, records, and judgments in order to meet the faith and credit command.

In the Constitution’s early days, the young nation, evolving from the familiar international model of coexistence into the unfamiliar federal model, had difficulty adapting to the notion that it was a unified whole. This dynamic influenced the interpretation of the Clause. Bench and bar alike mistakenly accepted the Clause only as a mere evidentiary guideline.¹⁰⁷

The first implementing statute directly addressed this misconception. The Act of May 26, 1790, entitled “An Act To prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other State,” is still in effect today and reads as follows:

Be it enacted . . . [t]hat the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are

106. This is a modification of the term “Effects Clause,” used by Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 2001 (1997). I refer to subclauses so as to distinguish the parts of the Clause from the Clause itself. Recall that Madison opined that the Effects Subclause was the Clause’s primary innovation; Kramer points out that Madison thought the Articles’ Clause left its obligation too ill-defined to be followed, and left too much room for crafty native judges to escape its mandate. *Id.* at 2003; see also *THE FEDERALIST* No. 42 (James Madison) (1857).

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

or shall be taken.¹⁰⁸

The 1790 Act therefore did two things: (1) it provided the proper mechanisms for authenticating a sister state's acts, records, and judicial proceedings for entry into the evidentiary record of the courts of the forum state, and (2) it clarified that the term "faith and credit" meant not simply that those documents should be admitted into the courts of the forum state, but that they should have the same effect in the forum state as they would in the sister state.¹⁰⁹ Justice Story, interpreting the 1790 Act twenty-three years later, reminded the unconvinced:

It is argued that this act provides only for the admission of such records *as evidence*, but does not declare *the effect* of such evidence when admitted. This argument cannot be supported, The act declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken.¹¹⁰

Therefore, Congress did not simply require admission and leave the issue of effect for the states. Nor, presumably, could Congress honor its constitutional mandate by prescribing no effect for acts, records, or judgments. Larry Kramer believes that Madison was "describing a power to clarify and enforce, not repeal or diminish," and argues that "the concept of respect and equality implicit in the concept of a Union has an irreducible element that even Congress should not be permitted to undo."¹¹¹ The Effects Subclause therefore grants Congress a range of, but not absolute, discretion. In sum, the Clause does more than simply provide a manner for testing the authenticity of a record without prescribing the effect it deserves.¹¹²

If it was unclear at the time that the term "records" in the Clause encompassed nonjudicial as well as court records, Congress's second implementation act should have clarified this ambiguity. The Act of March 27, 1804 explicitly mandated the interstate recognition of executive records:

108. Act of May 26, 1790, 1 Stat. 122 (recodified as 28 U.S.C. § 1738).

109. See *Mills*, 11 U.S. (7 Cranch) at 484; see also Story, *supra* note 64, § 1313. Story states:

It has been settled . . . that this enactment does declare the effect of the records, as evidence, when duly authenticated. It gives them the same faith and credit as they have in the State court from which they are taken. If in such court they have the faith and credit of the highest nature, that is to say, of *record* evidence, they must have the same faith and credit in every other court. So, that Congress have declared the *effect* of the records, by declaring, what degree of faith and credit shall be given to them. If a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere. If re-examinable there, it is open to the same inquiries in every other State. It is, therefore, put upon the same footing as a domestic judgment.

Id.

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

111. See Kramer, *supra* note 106, at 2005.

112. See *id.*

Be it enacted . . . [t]hat . . . all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper . . . *And the said records and exemplifications*, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are, or shall be taken.¹¹³

After the 1804 Act, it should have been clear that full faith and credit was owed to an expansive class of records, many of which were the product of the executive.

In 1948, Congress modified the language of the 1804 Act, changing the phrase “And the said records and exemplifications” to “Such Acts, records, and judicial proceedings.”¹¹⁴ This change caused a good deal of confusion about Congress’s intent. To some, the addition of the word “Acts” where it was previously absent signaled that Congress intended to extend the effect of faith and credit where it was previously lacking, and to bring state statutory law up to par with state decisional law.¹¹⁵ To others, it was meaningless wordsmithing.¹¹⁶ For the purposes of this Comment, the more important observation about the change is that it appears to elevate acts to a status already occupied by both judicial proceedings and records. Perhaps Congress’s real intent was to make clear to any remaining skeptics that the Clause does indeed apply to all three branches of government, even if Congress did not make clear the ramifications of its actions.

The history of the implementing statutes illustrates the cyclic tradition of naysaying about the Clause’s true scope, followed by correction from Congress or the Supreme Court. Such correction is again due.

III

CONTEMPORARY FULL FAITH AND CREDIT JURISPRUDENCE AND ITS APPLICATION TO EXECUTIVE STATUS RECORDS

Having established that executive records deserve faith and credit under the Clause and its implementing statutes, in this Section I will address the question of what level of deference executive records should be given. I will do this by comparing the treatment of other types of governmental actions to the

113. Act of Mar. 27, 1804, 2 Stat. 298 (recodified as 28 U.S.C. § 1739) (emphasis added).

114. See 28 U.S.C. § 1738 (2000).

115. Oliver P. Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause*, 12 MINN. L. REV. 439, 443 n.12 (1928) (observing the language of the 1804 Act is “sufficiently broad to include acts of legislatures”).

116. Laycock argues that both the original and the current implementing statutes demand that the forum state give the same effect to a sister state’s law, whether act, record, or judgment, as would be given by that sister state. Laycock, *supra* note 65, at 22.

treatment of records, and by considering aspects of executive records that warrant a high level of deference.

A. *The Judicial Branch: Judicial Decisions*

Judicial decisions receive great deference. In *Baker*, the U.S. Supreme Court held that “[a]s to judgments, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”¹¹⁷ However, that deference is only extended to those judgments that are (1) final and (2) the product of courts with both subject matter jurisdiction and personal jurisdiction over the parties.¹¹⁸ Judgments are therefore subject only to attacks on their finality or to collateral attacks under familiar *res judicata* principles.

Res judicata and finality are the primary justifications for judgments’ status under the Clause. The purposes of *res judicata* doctrine are “everywhere the same: to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protect the party relying on the prior adjudication from vexatious litigation. Moreover, the trend in the United States is toward increased finality.”¹¹⁹

I briefly discussed *res judicata* principles in Part II.B, above, and indicated why those principles also support a higher level of faith and credit for personal status records.¹²⁰ With respect to finality, Lea Brilmayer argues that judgments stand alone. Legislation falls short of this exacting standard because it is of a “more tentative nature,” since legislatures can “change their minds.”¹²¹ “In contrast to adjudicative findings of past fact,” Brilmayer writes, “legislation amounts to an act of will.”¹²² Brilmayer does not address the status of records, only that of judgments and statutes.¹²³ But the comparison between adjudicative findings and legislative activity is relevant to the task of fleshing out a standard for records, because records’ functions are more akin to that of

117. *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998); *see also Matsushita v. Epstein*, 516 U.S. 367, 373 (1996); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982) (“In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum.”).

118. *Baker*, 522 U.S. at 232–33; *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.”); *Williams v. North Carolina*, 325 U.S. 226, 228 (1945) (holding that full faith and credit is only demanded when “the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person”) (quoting James Kent, 1 COMMENTARIES ON AMERICAN LAW 261 (2d ed. 1832)).

119. ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 477 (7th ed. 2006).

120. I examine these principles in greater detail in Part IIIC-3, *infra*.

121. Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 98 (1984).

122. *Id.*

123. *See id.*

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, they frequently establish private, rather than public rights. For example, the public has almost no interest in your right to own your particular automobile (established by your vehicle title), your place of birth (established by your birth certificate), or the date on which you incorporated your small business (established by its corporate charter). Thus, the principle of finality also supports extending the faith and credit currently acknowledged for at least some executive records.

In keeping with this principle of finality in the context of judgments, the U.S. Supreme Court has held that despite public policy objections, a forum state cannot deny enforcement of a sister state's judgments on the basis that the activity underlying the judgment would be illegal in the forum.¹²⁴ In *Fauntleroy v. Lum*, with Justice Holmes writing for the majority, the Court demanded that a Mississippi court enforce a Missouri judgment that the defendant was liable to the plaintiff for money owed under a futures contract, although Mississippi had criminalized "gambling in futures" and forbade its courts from enforcing such contracts.¹²⁵ The Court's ruling came over the concerns of Justice White, who argued in dissent that different conditions in different states called for different regulations, and that the majority had "obliterate[d] all state lines" and "endow[ed] each state with authority to overthrow the public policy and criminal statutes of the others."¹²⁶ Despite Justice White's doomsday predictions, the rule of *Fauntleroy* remains intact today.¹²⁷

As ironclad as the full faith and credit command is with respect to judgments, there are nevertheless some exceptions. While some decrees may demand extraterritorial enforcement—decrees for payment of money, for example¹²⁸—others do not. Those equity decrees "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."¹²⁹ One example of the rule against this kind of trampling on another state's

124. See *Baker v. Gen. Motors Co.*, 522 U.S. 222, 233 (1998) (noting the Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it") (quoting *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

125. *Fauntleroy v. Lum*, 210 U.S. 230, 233 (1908).

126. *Id.* at 239.

127. See *Coghill v. Boardwalk Regency Corp.*, 396 S.E.2d 838, 839 (Va. 1990) (citing *Fauntleroy* in holding that the Clause bars a Virginia court from collaterally attacking a sister state judgment, even if based on error of law); Reynolds, *The Iron Law*, *supra* note 5, at 413–14 (indicating the *Fauntleroy* opinion articulates the basic "Iron Law" required by the Clause).

128. See *Baker*, 522 U.S. at 234 (citing *Barber v. Barber*, 323 U.S. 77 (1944)).

129. *Id.* at 235.

enforcement autonomy is the prohibition against one state's judgment automatically transferring title to land located in another state.¹³⁰

Another example is presented in *Baker*, in which the Court held that a Michigan court order barring the defendant from testifying against General Motors ("GM") in litigation pending in Missouri was unenforceable.¹³¹ In *Baker*, GM and Ronald Elwell, a former GM employee, entered into a stipulated injunction in Michigan.¹³² The injunction barred Elwell from testifying against GM in any litigation, in Michigan or otherwise.¹³³ Elwell was subsequently subpoenaed to testify against GM in litigation pending in Missouri.¹³⁴ Justice Ginsburg, writing for the majority, explained that "[r]ecognition, under full faith and credit, is owed to dispositions Michigan has authority to order. But a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve."¹³⁵

Importantly, a rule recognizing a higher level of faith and credit for personal status records would not force the hands of extraterritorial institutions in the manner barred by *Baker*. Justice Ginsburg explained that the Michigan decree could not "determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court."¹³⁶ The judicial decree at issue in *Baker* did not seek just to establish a fact, or settle a question of law, between two parties.¹³⁷ Rather, the Michigan decree sought to blind the Missouri court to the entire evidentiary landscape that every court is entitled to see.¹³⁸ Permitting the Michigan courts to gag vital witnesses who have been subpoenaed in Missouri proceedings would threaten the very functioning of the judicial system by preventing courts from carrying out their basic fact-finding duties and by hindering their ability to uncover the truth. Establishing what courts can do with evidence is one thing; preventing courts from hearing evidence altogether is quite another. Justice Ginsburg's valid concerns about third-party rights would not be implicated with respect to a status determined by an executive record—especially not to a status in which very few third

130. *Id.* at 239 (citing *Fall v. Eastin*, 215 U.S. 1 (1909)). But even here, the *Baker* Court acknowledged that although the forum in *Fall* did not have to enforce the sister state judgment, such a judgment would nevertheless preclusively adjudicate the rights to the land with respect to the parties. This reasoning, if extended to records, would seem to prohibit a forum from relitigating a person's sex once established by a sister state's equitable decree.

131. *Id.* at 226.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 240–41 (citing *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 282–83 (1980) ("Full faith and credit must be given to [a] determination that [a State's tribunal] had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.")).

136. *Id.* at 239.

137. *See id.*

138. *See id.*

parties should have an interest, like those established by birth records.

Therefore, the principles underlying *res judicata*—conservation of judicial and societal resources, protecting expectations, and curbing vexatious litigation—and the principle of encouraging finality with respect to factual matters support a higher level of faith and credit for personal status records than the *Gardiner* court recognized.

B. The Legislative Branch: Public Acts

The term “public acts” in the Clause refers to statutes,¹³⁹ and while judgments are given nearly complete deference, statutes receive lesser recognition. Rather than requiring ironclad faith and credit for statutes, the Clause only requires a forum state to defer to a sister state statute if the statute does not violate the public policy of the forum.¹⁴⁰ Statutes therefore present complicated choice of law problems, as the public policy exception is both a very tempting escape hatch for a forum court wishing to apply domestic law and a vague enough principle to permit the court to do so with the most tenuous of justifications.

As the *Gardiner* certiorari petition argued, the choice of law framework should not be considered applicable to executive records.¹⁴¹ While choice of law analysis resolves uncertainty about which state’s law to apply in the first instance, many disputes arise after this stage.¹⁴² In *Gardiner* and similar cases, the real dispute is over whether rights acquired in a sister state must be respected in the forum—not over whose law should first be applied.

139. See *Carroll v. Lanza*, 349 U.S. 408, 411 (1955); see also Laycock, *supra* note 65, at 290 (“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.”).

140. See *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 504–05 (1939).

141. Under choice of law doctrine, states have interests in all kinds of things, and the definition and weight one gives to a particular interest or contact can ultimately determine the outcome of the analysis. In *Gardiner*, the Kansas court dealt with the effect of a Wisconsin document, issued by Wisconsin, amended in Wisconsin, pursuant to that state’s laws, following a surgery which took place in Wisconsin which was performed at the behest of therapists, general practitioners, and surgeons professionally certified in and regulated by Wisconsin. It would therefore seem that, J’Noel’s individual preference aside, Wisconsin ought to have some interest in seeing that its record, and the status change it authorized, is respected. See Reynolds, *The Iron Law*, *supra* note 5, at 431–33 (explaining the prohibition on judgments which purport to transfer title to land located in another forum and hypothesizing that the rule is justified “because the situs jurisdiction has a strong interest in protecting the reliability of its land records [so] it must have the authority to ensure that those records are not confused by foreign decrees”). If the state’s interest in protecting the reliability of land records is so strong for this reason, that interest must be similarly strong for some of its other executive records. See also Laycock, *supra* note 65 at 34 (arguing in favor of focusing on locating relationships for purposes of establishing which jurisdiction’s law should apply).

142. See *Petition for Writ of Certiorari, Gardiner v. Gardiner*, 537 U.S. 825 (2002) (No. 01-1853), at 20.

The 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.”¹⁴³ This standard demonstrates that the U.S. Supreme Court has been very permissive towards the application of forum statutory law. Under choice of law principles, there are few areas of law, if any, in which a sister state is competent to legislate but the forum state is not. Nevertheless, despite the weaker protection for statutes under full faith and credit jurisprudence, Laycock observes that “[t]he Court and almost all commentators agree that a state denies full faith and credit when it applies its law to a dispute that is wholly local to some other state.”¹⁴⁴

Laycock does not specifically define the term “wholly local,” but rather cites to the Court’s opinion in *Phillips Petroleum Co. v. Shutts*, in which the Court rejected the Kansas Supreme Court’s attempt to apply Kansas law to every claim in a class action involving disputes over natural gas leases.¹⁴⁵ The Kansas Supreme Court held that Kansas law applied, despite the fact that over 99 percent of the leases were outside of Kansas and 97 percent of the defendant class members had no connection to the state.¹⁴⁶ The Court noted that Kansas had a “lack of ‘interest’ in claims unrelated to that State” and that application of Kansas law to such claims would be “sufficiently arbitrary and unfair as to exceed constitutional limits.”¹⁴⁷ This understanding of a dispute that is “wholly local” to a sister state is helpful in understanding how the Kansas courts overstepped in *Gardiner*.

Disputes involving a legal status—or involving rights, obligations, or other legal statuses stemming from a legal status—established by a record issued or amended in a sister state will almost always be wholly local to that sister state. Taking *Gardiner* as an example, it is largely undisputed that Kansas has an interest in regulating marriages that take place within the state. And in some cases, disputes that implicate the status of a Kansas marriage are properly before Kansas courts, which may properly apply Kansas law. But a dispute that, at bottom, is a dispute over the sex of one of the partners, when that question has been decided in a sister forum, is not one that is local—or even partly local—to Kansas. It is wholly local to Wisconsin, the state in which the legislature passed statutes detailing the amendment procedures governing Wisconsin-issued birth certificates, in which a judge issued an order to change a record in accord with those statutes, and in which an amended certificate was issued and a legal status was changed. Thus, this is an area in which a sister

143. *Baker v. Gen. Motors Co.*, 522 U.S. 222, 233 (1998).

144. Laycock, *supra* note 65, at 332; *see also* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310–11 (1981).

145. Laycock, *supra* note 65, at 332; *see also* *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 823 (1985).

146. *Phillips Petroleum Corp.*, 472 U.S. at 815.

147. *Id.* at 822.

state is competent to legislate but the forum state is not. A Wisconsin birth certificate will forever be a Wisconsin birth certificate. It will never be a Kansas birth certificate, and therefore Kansas has no interest in either the regulation of Wisconsin birth certificate or the status that arises from such regulation.

C. The Executive Branch: Records

While the U.S. Supreme Court has delineated one level of full faith and credit that is due to judgments and another level that is due to state statutes, it has never clearly explained the level of full faith and credit that is due to state executive documents. The Court's omission suggests that "there are just two categories of State action to which the full faith and credit obligation applies—statutory and decisional law, on the one hand, and judgments in adversarial proceedings, on the other."¹⁴⁸ But this cannot be the case; both the Constitution and Congress have established that the obligation also applies to executive records.¹⁴⁹ Nor can the treatment of executive records necessarily be uncritically lumped in with that of either laws or judgments. Executive records cannot be treated like laws because records "operate with respect to specific persons, not prospectively as to all persons similarly situated"; yet some records cannot be treated like judgments because "they do not arise out of adversarial proceedings."¹⁵⁰

The U.S. Supreme Court or Congress must remedy this situation due to the great volume of executive decisions whose level of faith and credit in sister states is unclear and due to the immense impact that such decisions have on our lives. The state executive branch is not merely the governor. It encompasses the entire panoply of elected officials (secretaries of state, attorneys general, state treasurers, state auditors, insurance commissioners, and the like), department heads, and appointed officials who administer state affairs (such as board

148. Petition for Writ of Certiorari at 12–13, *Gardiner v. Gardiner*, 537 U.S. 825 (2002) (No. 01-1853); see also *Baker v. Gen. Motors Co.*, 522 U.S. 222, 232–33 (1998) (differentiating between credit-owed laws and credit-owed judgments).

149. See Part II, *supra*.

150. Petition for Writ of Certiorari at 16, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853). It should be acknowledged that a disparity exists between different judgments and acts. Some judgments, and some acts, are more deserving of faith and credit than others. We should expect this variation among executive records, too. I certainly advocate that birth certificates present a particularly strong case for ironclad, or at least for ironclad-like, protection. Professional licenses, on the other hand, seem more likely to implicate extraterritorial public policy concerns; a multitude of others can be affected by a professional's standing, while a person's sex seems to be no one's business but his or her own. Also, the structure of the sister state's government, and the mechanism through which the sister state's record was created, may require a higher or lower degree of deference. Greenberg and Herald concede this view may be correct, arguing that records amended pursuant to a court order might be entitled to judgment-like full faith and credit, while records amended through an administrative process alone might deserve only statute-like faith and credit. Greenberg & Herald, *supra* note 15, at 847.

members, public university regents, and advisory panelists), as well as hosts of employees. Given the sheer scope of the executive branch, it is the branch of government that individuals likely deal with most often.

The current size and power of the executive is largely a phenomenon of the twenty-first century. Since the framing of the federal Constitution, the scope of state executives' duties has expanded as a result of at least two forces. The first is the growth of the modern regulatory state following the Progressive Era. The second is the growth of the federal government following the New Deal, which required state executives to administer newly created federal programs.¹⁵¹

In the first century of the nation's life, a state's legislature dominated its executive.¹⁵² But by the Progressive Era, the public widely viewed legislatures as corrupt, inept, and abusive of their considerable power.¹⁵³ The Progressive backlash led to a movement designed to strengthen the executive.¹⁵⁴ Executives became responsible for initiating the budget process so as to best match resources with (executive) policy objectives.¹⁵⁵ They gained direct control of agencies and key personnel.¹⁵⁶

The executive also grew because the New Deal ushered in the growth of federal power and, to a degree unprecedented in our history, federal programs—regulatory, social, and otherwise.¹⁵⁷ This shift demanded larger and more powerful state governments—headed by the executive—taking on new roles in order to administer federal programs at the state level.¹⁵⁸ Where the Progressive Era grew and transformed the executive from the bottom up, the New Deal acted similarly from the top down.

151. See Texas State Historical Association, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/PP/npp1.html> (last visited Sept. 14, 2009); see also <http://www.tshaonline.org/handbook/online/articles/GG/mzgfq.html> (last visited Sept. 14, 2009).

152. See Rogan Kersh et al., "More a Distinction of Words than Things": The Evolution of Separated Powers in American States, 4 ROGER WILLIAMS U. L. REV. 5, 14–15 (1998).

153. See *id.*

154. See *id.*

155. See *id.* at 33.

156. See *id.*

157. See Texas State Historical Association, Government, <http://www.tshaonline.org/handbook/online/articles/GG/mzgfq.html> (last visited Sept. 14, 2009). The association states:

During the years of the Great Depression, the New Deal, war, postwar prosperity, and rising Texas urbanism, change in Texas government foreshadowed the contemporary state. A dominant characteristic of the period was the growth of state administration, including the implementation of new welfare and other social-service programs, which owed much to the influence of the federal government, the emerging dominant partner in the federal system.

Id.

158. Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1345 (2005).

The relationship that formed between the federal and state governments continues today. As Jim Rossi recently observed, “In a variety of regulatory contexts—ranging from health, safety and environmental regulation to network infrastructure and transportation—Congress and federal regulators routinely look to state and local governments to implement federal programs and regulatory goals.”¹⁵⁹ When federal regulators look to state governments to serve these functions, they look primarily to the executive. More recently, the roles of state attorneys general have broadened as a result of “[l]egislative mandates in broad policy areas such as antitrust, consumer protection, and the environment and the general growth of state government.”¹⁶⁰ The well-documented broadening of the state executive’s role in every citizen’s life makes it all the more important that this branch’s power be defined and understood.

Birth certificates and corporate charters are perhaps the clearest examples of the power the executive has to shape our lives. These documents, by their nature, define us and our institutions—and throw open or slam shut doors to innumerable public and private rights. Rights also derive from vital records, permits, licenses, grants, executive findings, pardons and reprieves, and through other records of executive action.¹⁶¹

Taking sex status alone, Greenberg and Herald note that there are over one thousand federal benefits and “myriad” state rights to which married couples are entitled.¹⁶² Therefore, transsexuals and their families have literally hundreds of benefits and rights at stake in their recorded and recognized sexual categorization by the states.¹⁶³ Transsexuals’ uncertain status raises questions about their right to adopt children, to have parental standing in court, to receive government benefits, to change names, to attend all-male or all-female schools, and to be protected against discrimination in the workplace and against abuse in state institutions.¹⁶⁴ Because the great majority of U.S. jurisdictions prohibit same-sex marriage, two persons who wish to marry and partake in the incidents of marriage must, in most states, possess executive documents and/or judicial decisions which establish that they are, respectively, male and female.¹⁶⁵ Since the eligibility to obtain a particular status hinges, at the micro-level, on the discretion of the executive, it is clear that the executive wields power over

159. *Id.*

160. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 2 (1993).

161. See Petition for Writ of Certiorari at 12, 17, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853).

162. Greenberg & Herald, *supra* note 15, at 845–46.

163. See *id.*

164. See Petition for Writ of Certiorari at 14, 23, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853).

165. See Human Rights Campaign, Marriage & Relationship Recognition, http://www.hrc.org/issues/marriage/marriage_laws.asp (last visited Sept. 13, 2009).

some of our most basic and cherished rights.

Thus, the executive has enormous power over our everyday lives in many ways, making the level of faith and credit given to executive records in sister states of utmost importance. In the remainder of this Section, I explore three core principles running through the Supreme Court's full faith and credit jurisprudence that support my thesis that records are entitled to a higher level of deference under the Clause. These include the special importance of status determinations, the treatment of marriage certificates and the place of celebration rule, and *res judicata* principles. I will examine each theme in turn.

1. The Importance of Status Determinations

Executive records that pertain to the creation or modification of status present one of the strongest cases in favor of robust faith and credit for executive records. A corporate charter conveys legitimacy in the eyes of the law; it grants an entity the right to conduct business within a state and elsewhere, to the degree other states recognize it. Likewise, a birth certificate conveys legal personhood in the eyes of the law and establishes key elements of that person's identity: it enables the person to be considered a citizen of the United States and of the issuing state, to marry, to receive government benefits, and to fulfill government obligations. Perhaps unsurprisingly, many lower courts have already found that birth certificates constitute either records or acts and are therefore deserving of full faith and credit.¹⁶⁶ Others have found that other types of executive records must receive full faith and credit.¹⁶⁷

Because such status records cement an individual's, or individual entity's, standing in the eyes of the law, they are normally issued in a nonadversarial context. This is not simply for administrative efficiency, but also because the rights and obligations that status records establish are unique to the person to whom the record pertains. Third parties normally have no interest in the status of another, and therefore have no standing to challenge that status. Moreover, status records create a relationship between an individual and the state, not among multiple individuals. At the same time, individual interests are at their peak when the government determines an individual's status. The balance is therefore lopsided in favor of the individual having a high degree of control

166. See Petition for Writ of Certiorari at 18, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853); see also *Kappler v. Shalala*, 840 F. Supp. 582, 587 n.10 (N.D. Ill. 1994); *Bennett v. Schweiker*, 532 F. Supp. 837, 839-40 (D.C.D.C. 1982); *Tindle v. Celebrezze*, 210 F. Supp. 912, 914-15 (D.C. Cal. 1962); *Casares-Moreno v. United States*, 226 F.2d 873 (9th Cir. 1955); *Northern v. State*, 216 S.W.2d 192, 195 (Tex. Crim. App. 1949).

167. See Petition for Writ of Certiorari at 18, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853); see also *Young v. JCR Petroleum, Inc.*, 423 S.E.2d 889, 892 (W. Va. 1992) (corporate dissolution); *500 Motors, Inc., v. Super. Ct.*, 122 Cal. App. 3d 827, 832 (Cal. Ct. App. 1981) (vehicle title); *People v. Terry*, 390 P.2d 381, 388 (Cal. 1964) (executive pardon); *Colby v. Long*, 289 F.2d 137, 141 (6th Cir. 1961) (vehicle title); *Wells v. Hiskett* 288 S.W.2d 257, 263 (Tex. Civ. App. 1956) (corporate charter).

over his or her status and third parties having far less. The Supreme Court endorsed this view in *Williams v. North Carolina I* (*Williams I*)¹⁶⁸ and *II* (*Williams II*)¹⁶⁹, which were decided on full faith and credit principles.

Williams I involved the plight of a North Carolina couple that fell in love while both were married to others. The two went to Las Vegas, seeking to divorce their respective spouses.¹⁷⁰ Upon acquiring residence in Nevada after six weeks, the couple, citing the “extreme cruelty” of their spouses, took advantage of Nevada’s lenient divorce laws.¹⁷¹ The couple obtained divorce decrees and then married each other in Nevada before returning to their home state to live together as husband and wife.¹⁷² Upon their return, they were arrested, prosecuted for, and convicted of bigamy.¹⁷³ In the ensuing litigation, the State of North Carolina argued that it had no obligation to recognize the Nevada divorce decrees, since the defendant spouses had neither been served nor appeared in Nevada, and convicted the defendants.¹⁷⁴

The U.S. Supreme Court overturned the conviction, holding that a divorce decree is neither an *in rem* nor an *in personam* action; rather, it pertains to status and therefore deserves unique analytic standing.¹⁷⁵ The Court recognized that a state has an interest in its relationship with one of its domiciliaries, as well as an interest in regulating important social institutions.¹⁷⁶ Those interests require other states to respect certain actions involving status even if those actions would effectively bind other interested parties, and even though the action was one that occurred *ex parte*.¹⁷⁷

The Court reinforced this concept in *Williams II*, stating that “[a]ll the world is not party to a divorce proceeding . . . all the world need not be present before a court” in order for its decree to be effective, provided that its “conditions for the exercise of power” are not called into question elsewhere.¹⁷⁸ Third persons are not permitted to interfere with another’s status because “the legal establishment of status is a socially important element of legal order.”¹⁷⁹

168. *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942).

169. *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

170. *Williams I*, 317 U.S. at 289.

171. *Id.* at 289–90.

172. *Id.* at 290.

173. *Id.*

174. *Id.* at 290–91.

175. *Id.* at 297–98, 304.

176. *Id.* at 298.

177. *See id.* at 298–99 (“Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”); *see also* Petition for Writ of Certiorari at 21, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853), at 21 (“The notion that a birth certificate amendment cannot bind a third party because he was not a party to the Wisconsin proceeding is foreclosed by *Williams*”).

178. *Williams II*, 325 U.S. 226, 232 (1945).

179. Greenberg & Herald, *supra* note 15, at 849 (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS, § 199 cmt. C (1934)).

Therefore, the rule of *Williams I* logically extends outside the context of divorce and applies to other status determinations, which are *res judicata* even against parties who were not aware of or involved in the process by which the determination was made.¹⁸⁰

Moreover, status is a unique jurisprudential concept. There are powerful policy reasons for allowing only one, definitive pronouncement of status to which all other jurisdictions must defer.¹⁸¹ First, everyone—the individual, the state, and the public—has an interest in treating status issues as final and subject to uniform recognition. The *Williams I* Court “recognized the absurdity of permitting different States to declare an individual’s status in different, mutually contradictory ways.”¹⁸² Without the Clause serving as an arbiter of finality, no divorced persons could ever be certain that their jurisdiction of residence, or even the jurisdiction through which they happen to be passing, considers their divorce legitimate. If the jurisdiction in which they are located considers their divorce invalid, then that jurisdiction could deny them the rights and privileges dependent upon their new status. The forum might deny divorced persons the right to remarry or to dispose of assets by will in accordance with their wishes, or it could, like North Carolina in *Williams I* and *II*, consider them bigamists and subject them to prosecution.¹⁸³ When liberty is at stake, it is all the more important that status determinations are unified and binding.

The interests involved in personal status determinations also rise above the typical single-state regulatory interests that receive deference in statute-versus-statute choice of law scenarios.¹⁸⁴ The *Williams I* Court identified important societal interests protected by uniform status determinations: avoiding polygamous marriages, protecting innocent children who would be rendered illegitimate, and generally avoiding “considerable disaster to innocent persons.”¹⁸⁵ The Court termed these “intensely practical considerations.”¹⁸⁶ For

180. See *Williams II*, 325 U.S. at 232 (rejecting “in rem” label for divorce proceedings but conceding that these types of proceedings are similar in that a suit for divorce is “not an ordinary adversary proceeding,” and yet other states must respect the outcome).

181. See Jackson, *supra* note 66, at 45 (stating that the Clause ensures that individuals “have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed”).

182. Petition for Writ of Certiorari at 24, *Gardiner*, 537 U.S. 825 (2002) (No. 01-1853).

183. See also Habib A. Balian, *Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CALIF. L. REV. 397, 415–16 (1995) (extending the *Williams I* rationale for granting recognition of divorce decrees to marriage certificates, noting that, for full faith and credit purposes, there is no reason why the creation of the status of marriage should be treated differently than its dissolution).

184. These broad interests might include promoting worker safety and economically protecting injured persons, see *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 503 (1939), vindicating the rights of a citizen’s estate, see *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 315 (1981); or providing remedies to those who might otherwise become public charges, see *Alaska Packers Ass’n v. Indus. Accident Comm’n of Cal.*, 294 U.S. 532, 542 (1935).

185. *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 301 (1942); see also

these same considerations, a state's initial creation or modification of status at the behest of the affected individual should receive the greatest deference; it should be the same in every jurisdiction.

Finally, echoes of status jurisprudence are evident in the law's treatment of fraternal organizations and corporations. The bonds establishing and governing fraternal organizations are considered more than contracts; they are "a complex and abiding relation," and a forum violates the Clause if it fails to give effect to the charter or bylaw of a fraternal organization domiciled in a sister state.¹⁸⁷ When a fraternal organization enters a forum, its rights depend on its charter as interpreted under the law of the sister state, not under the law of the forum.¹⁸⁸ This rule is justified, according to Justice Holmes, because the "indivisible unity" of a group with respect to its collective resources must be determined by a single law.¹⁸⁹ Similarly, in commercial law, the forum gives effect to the law of the incorporating state because of the nature of the contractual relationship between shareholder and corporation.¹⁹⁰ If the law recognizes a need for uniform interpretation of rights with regard to members of fraternal organizations and corporate shareholders, it must also recognize such need with regard to individual status—especially because the stakes are much higher with respect to the latter.

2. *Lessons from Marriage Certificates and the Place of Celebration Rule*

Marriage certificates are executive records. They are issued by state administrative officials, not by judges.¹⁹¹ In the absence of controlling U.S. Supreme Court authority on their full faith and credit status, conventions for dealing with marriages have evolved largely ad hoc. The primary rule that has developed, known as the "place of celebration" rule, upholds the validity of a marriage that was valid where it was celebrated (i.e., performed).¹⁹² This rule, which addresses when marriages performed in a sister state must be recognized

Greenberg & Herald, *supra* note 15, at 850–51. Greenberg and Herald state:

The need to recognize a divorce, adoption, or paternity decree from a sister state is born of intensely practical considerations. If states fail to recognize a change in legal status made in another state, a tangled web of status issues could result, leaving the parties and those close to them in a legal and personal quagmire.

Id.

186. *Williams I*, 317 U.S. at 301.

187. *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925); *see also* *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 546 (1915) (full faith and credit must be given to the organization's charter).

188. *Modern Woodmen*, 267 U.S. at 551.

189. *Id.*

190. *See Converse v. Hamilton*, 224 U.S. 243, 252–53 (1912); *see also Carroll v. Lanza*, 349 U.S. 408, 415–17 (1955) (Frankfurter, J., dissenting) (characterizing the stockholder relationship as creating a "transitory cause of action").

191. *See CAL. FAM. CODE* §§ 500–511 (2004).

192. *Kramer, supra* note 106, at 1966.

by the forum, is one of the potential counterarguments to my interpretation of the Full Faith and Credit Clause. It contains a public policy exception somewhat similar, but not identical, to the public policy exception that applies to statutes. In this section, however, I demonstrate that the underlying purposes and judicial treatment of the place of celebration rule actually strengthen—not weaken—the case in favor of my interpretation.

The place of celebration rule is sound for a variety of reasons, which include the desire to give effect to marriages consummated in good faith and the goal of allowing individuals and their families to know that their marriages are valid.¹⁹³ For example, if each state had significant leeway in determining which marriages to acknowledge and which it could ignore, the spouse of a married person who is injured while traveling to another state might not have a right to be notified or to visit him or her in the hospital; nor might their spouse have standing to sue or be permitted to recover damages if they die.¹⁹⁴

Kramer observes that the place of celebration rule is subject to certain narrowly-construed exceptions; most courts refusing to enforce the rule do so by citing the forum's public policy.¹⁹⁵ Justice Cardozo defined this exception in *Loucks v. Standard Oil Co.*: a marriage valid where celebrated can be denied faith and credit only where some aspect of the authorizing state's law violates "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹⁹⁶ This is a high bar—including incest, polygamy, marriages involving a minor, and the like.¹⁹⁷

Invoking the exception presents a tricky balancing act, which is perhaps why so many state courts have been reluctant to apply it, and why the Court has thus far avoided it. To successfully apply the exception, the forum state must have considerable objections to the behavior. But the individual rights at stake are among the most precious that exist. "The right 'to marry, establish a home, and bring up children' is a central part of the liberty protected by the Due

193. *Id.* at 1969.

194. *See Cox, Adoptions*, *supra* note 14, at 758 (discussing the concept of a "marriage visa").

195. Kramer, *supra* note 106, at 1966.

196. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

197. It is debatable whether, under DOMA, this standard also includes same-sex marriages performed in a sister state. There is ample literature arguing that DOMA is unconstitutional. But because the constitutionality of DOMA is outside the scope of this Comment, I do not delve into the issue here, except to say that because the rule I am advocating is a matter of constitutional law, it arguably could only be revised by constitutional amendment, not by statute. Further, the consequences of my interpretation do not necessarily conflict with DOMA, even if it is constitutional. The court's reasoning in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), is persuasive on this point. In *Finstuen*, the Tenth Circuit, on full faith and credit grounds, struck down an Oklahoma statute barring recognition of adoptions by same-sex couples performed in sister states. *Id.* at 1156. The court reasoned that it was unconstitutional for a state to legislate "categorical non-recognition of a class of adoption decrees from other states." *Id.* Therefore, regardless of state, or even federal, policy on same-sex marriage, the standing of personal status records relating to one's sex should remain protected under the Constitution.

Process Clause,”¹⁹⁸ and has been called ““fundamental to the very existence and survival”” of humanity.¹⁹⁹ Furthermore, personal decisions involving “marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education” have been classified as “among the decisions that an individual may make without unjustified government interference.”²⁰⁰ Government regulations in these areas are therefore subject to “rigorous scrutiny” to the degree that they interfere “directly and substantially” with these rights.²⁰¹

Also, as Kramer points out, most courts do not treat the exception as absolute, as they might when straightforwardly analyzing a choice of law problem between two states’ statutes.²⁰² Instead, courts acknowledge differences of degrees in state policies. They frequently do whatever possible to recognize marriages that are not *uniformly* offensive, and that have much riding on their continuation.²⁰³ Whenever possible, courts avoid de-legitimizing innocent children and placing spouses at risk of criminal prosecution, and give considerable weight to the expectations of the parties rather than simply invalidating the marriage.²⁰⁴ Some courts, when required to act, have ruled against the incidents of marriage, such as the right to cohabit, while permitting the marriage itself to continue.²⁰⁵ This treatment indicates that the exception actually only applies to bar those marriages that violate “the prevalent conception of good morals” of the American people as a whole, not that of the people of a single state.²⁰⁶ Were the latter true, the Court probably would not have ruled as it did in *Loving v. Virginia*. If those citizens of Virginia who staunchly supported the antimiscegenation laws were the sole arbiters of

198. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

199. *Zablocki*, 434 U.S. at 384 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

200. *Id.* at 397.

201. *Id.* at 386–87.

202. Kramer, *supra* note 106, at 1971.

203. *Id.*

204. Cox, *Adoptions*, *supra* note 14, at 757 (quoting Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1064 (1994) [hereinafter Cox, *If We Marry*]).

205. Kramer, *supra* note 106, at 1971.

206. *See* Cox, *Adoptions*, *supra* note 14 at 757. Cox states:

Virtually all states have upheld the validity of a marriage by their own domiciliaries (or others) if that marriage was valid under the law of the state where it was celebrated. States recognize these out-of-state marriages . . . even when they violate the internal law of the forum state, because of the strong public policy reasons behind such recognition.

Id.

Cox further notes that these policies include “confirm[ing] the parties’ expectations, provid[ing] stability in an area where stability (because of children and property) is very important, and . . . avoid[ing] the potentially hideous problems that would arise if the legality of a marriage varies from state to state.” *Id.* (quoting Cox, *If We Marry*, *supra* note 204, at 1065).

morality for purposes of the exception, those laws would have persisted much longer than they did.

Even if an executive record is entitled to no greater full faith and credit status than that which is due to sister state statutes—that is, full faith and credit subject to the public policy exception—critics increasingly argue that the public policy exception is unconstitutional. As I have explained, the use of the exception in the marriage certificate context has emerged through the U.S. Supreme Court’s silence on the issue, not through its instruction. Some scholars agree that the exception is an obsolete holdover from international law or that it no longer has utility or doctrinal support under the Constitution. Laycock, for example, argues that “[t]he public-policy exception is a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution.”²⁰⁷ Kramer, in accord, explains that “surely ‘offensiveness’ cannot be an appropriate reason under the Full Faith and Credit Clause for refusing to entertain a claim based on another state’s law.”²⁰⁸ Even Justice Jackson observed that “[i]t is hard to see how the faith and credit clause has any practical meaning as to statutes if the Court should adhere to the statement that ‘. . . a state is not required to enforce a law obnoxious to its public policy.’”²⁰⁹

The exception has also faced increasing skepticism from the bench, which has limited its application. Even as he was creating the modern definition of the exception, then-Judge Cardozo warned that “[t]here is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another.”²¹⁰ Justice Ginsburg, in a footnote citation in *Baker*, identified the cynicism that may be involved in invoking the exception, noting the “traditional but dubious use of the term ‘public policy’ to obscure ‘an assertion of the forum’s right to have its [own] law applied to the [controversy] because of the forum’s relationship to it.’”²¹¹

As recently as *Baker*, the Supreme Court’s support for the exception, even in a less problematic setting—statute-versus-statute conflict of law issues—was lukewarm: “A court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy.”²¹² Justice Ginsburg explained that such concerns could guide the forum court, but they cannot permit the

207. Laycock, *supra* note 65, at 313.

208. Kramer, *supra* note 106, at 1986.

209. Jackson, *supra* note 66, at 27; *see also* Carroll v. Lanza, 349 U.S. 408, 415 (1955) (characterizing part of past opinion indicating that a forum may refuse to enforce a law it finds antagonistic to its public policy as “dicta”) (Frankfurter, J., dissenting).

210. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

211. Baker v. Gen. Motors Corp., 522 U.S. 222, 234 (1998) (quoting Monrad G. Paulsen & Michael I. Sovern, *Public Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969, 980–81 (1956)).

212. *Id.* at 233 n.6.

forum court to flout valid sister state laws “willy-nilly.”²¹³ Kramer has added that “[t]he measure of repugnance [in terms of the public policy exception] is fixed by the federal Constitution, and states have no business selectively ignoring or refusing to recognize the constitutional laws of sister states because they do not like them.”²¹⁴ Consideration of public policy may guide the court in applying the law, but public policy does not allow a court to ignore an established fact, embodied in a record.

Moreover, the state legislature, not the courts, determines the policy at issue in the public policy exception. In order to be considered forum policy, a doctrine must be embodied in a statute.²¹⁵ Courts are not at liberty to guess at forum policy. Nor, as Greenberg and Herald explain, does “[l]egislative inaction . . . indicate a clearly articulated public policy because, by its nature, legislative reasoning for inaction is neither clear nor articulated but rather a product of ambiguous and inexplicable rationales.”²¹⁶ Judges’ individual impressions of what the forum would tolerate, colored as it must be by personal proclivities, ideology, and the like, are not the appropriate guide. Many cases, *Gardiner* being a prime example, present novel factual scenarios on which the legislature has not expressed an opinion. Therefore, judges have little justification for negating established laws of other states, which have likely been vetted by a sister state’s legislature and executive, merely on the basis of a judge’s opinion as to what the forum state’s policy may or may not be.

As a result of these considerations, Greenberg and Herald note that “the public policy exception [with respect to marriages] has been shrinking for a long time, in part due to judicial recognition that couples who reasonably regard themselves as married should have their expectations respected.”²¹⁷ Because stability is important in spousal and family relationships, especially those involving children, courts have grown less apt to destroy relationships deemed objectionable by one forum, or by only some fora, if the broader American public does not consider such relationships objectionable.

3. *The Res Judicata Analogy*

The Clause made “the local doctrines of res judicata . . . a part of national jurisprudence.”²¹⁸ Justice Story explained how res judicata, like the Clause itself, promotes finality and stability; he noted that failing to enforce the Clause would permit “questions and titles, once deliberately tried and decided in one

213. *Id.*

214. Kramer, *supra* note 106, at 1987.

215. See *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532 (1935).

216. Greenberg & Herald, *supra* note 15, at 854.

217. *Id.* at 853.

218. Cox, *Adoptions*, *supra* note 14, at 777 (quoting *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 348–49 (1942)).

state,” to be “open to litigation again and again.”²¹⁹ This, Story warned, would occasion infinite injustice, after such trial and decision, again to open and re-examine all the merits of the case. It might be done at a distance from the original place of the transaction; after the removal or death of witnesses, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavourable to a just understanding of the case.²²⁰

Res judicata principles are therefore a very important rationale for enforcing the Clause, and the same general principles expounded by Justice Story also apply with respect to status records related to individual or corporate identity. It makes no more sense to permit endless redefinition of status issues than it does to permit such activity for judicial decisions.

First, with respect to status issues, typical collateral estoppel requirements do not exist. *Williams I* and *II* make clear that third parties cannot intervene in a status modification proceeding because they have not had “a full and fair opportunity to litigate the claim or issue” previously decided.²²¹

Second, although administrative awards are not usually accorded the same preclusive effects as are judicial decisions,²²² the factual findings of administrative bodies are entitled to extraterritorial recognition.²²³ Because some types of records are closely related to the facts they establish, at times even being one and the same, it does not seem too great a stretch to apply these preclusion principles to records as well. Records embody and evidence factual findings, some of which are made in quasi-judicial administrative hearings, and others which judges have expressly authorized.

The common limitation on administrative tribunals is that they only possess the statutory authority to apply that state’s law, whereas a state court judge possesses constitutional authority to apply any state’s law.²²⁴ However, status records are in a different posture than the findings of either a state court or an administrative tribunal—far more than mere findings of fact, they are an expression of the state executive’s sovereign power.

Justice Kennedy, concurring in *Baker*, relied on the fact that “whether or not an injunction is enforceable in another State on its own terms, the courts of a second State are required to honor its issue preclusive effects.”²²⁵ To those who would argue that there can be no issue preclusion against an absent party who has no notice of the proceedings, the Court’s *Williams I* and *II* opinions

219. Story, *supra* note 64, § 1309.

220. *Id.*

221. *Haring v. Prosis*, 462 U.S. 306, 313 (1983) (quoting *Allen v. McCurry*, 449 U.S. 90, 96 n.6 (1980)).

222. See *Reynolds, The Iron Law*, *supra* note 5, at 444–45 (discussing *Thomas*).

223. See *id.* (discussing *Thomas*).

224. See *Thomas v. Wash. Gas Light*, 448 U.S. 261, 282 (1980).

225. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 246 (1998).

reveal that there are no absent third parties to status issues—the only parties that matter are the individual and the state.

At the very least, then, fact findings embodied in a record should not be open to constant reinterpretation.

CONCLUSION

The U.S. Supreme Court has never addressed the proper deference one state must give to another state's executive records under the Full Faith and Credit Clause. If it had, the result in *Gardiner* could have been quite different: J'Noel's presentation of her authentic Wisconsin birth certificate would have settled the matter of her sex status in the Kansas district court. With that, Marshall Gardiner's presumed wishes could have been respected and validated; J'Noel could have been spared a long, painful, and disruptive legal battle; the State of Wisconsin's sovereign interest in the integrity of its records could have prevailed; and all citizens of the United States could be assured that key aspects of their identity would be impervious to challenge on "policy" grounds.

To be fair, the interpretation I advocate has an inverse: the "anti-*Gardiner*" scenario. What of my interpretation in that case? If J'Noel had, for example, been born in Kansas, where only "minor corrections" may be made to birth certificates and "fundamental changes" to such records are banned, would other states be required to consider J'Noel male?²²⁶ The answer is yes. However, this is still a preferable outcome jurisprudentially, and a person in J'Noel's circumstances would likely be no worse off. Although J'Noel's status would be firmly established (perhaps contrary to her wishes) by the Kansas record, other states, such as Wisconsin, could accommodate her by liberalizing their marriage laws to be gender-neutral, or by modifying their gender-specific laws to account for persons who have gone to the great lengths J'Noel did to adopt her "correct" sex status. Wisconsin, or any other state, could offer more gender-nonspecific state facilities (featuring unisex bathrooms or coed dormitories, for example). Just as is the case today, J'Noel would likely find some states that would accommodate her, and others that would afford her the fewest rights they could. But most states allow birth certificate amendments more freely,²²⁷ and even if J'Noel's record could not be amended, the interpretation I advocate would actually *protect* state sovereignty by recognizing that other states long ago surrendered their right to ignore it.

The U.S. Supreme Court's due process jurisprudence changed in response to an evolving, increasingly mobile and interconnected twentieth-century American society. So too must the Court's full faith and credit jurisprudence. In

226. *In re Estate of Gardiner*, 22 P.3d 1086, 1107–08 (Kan. Ct. App. 2001).

227. See Human Rights Campaign, Transgender, http://www.hrc.org/issues/transgender/transgender_laws.asp (last visited Sept. 14, 2009) (indicating nearly all states allow amendment of sex status, though the grounds for allowing amendment vary).

modern America, the purview of state executives has greatly expanded into forms of regulation that were unknown to the Framers. State executives and the regulatory apparatuses they oversee have assumed duties requiring them to issue all types of documents and render all types of decisions impacting the basic freedoms of individuals, groups, and corporate entities. From hunting and fishing licenses to vital records, corporate charters, and real property titles, the state executive plays a newly defined role in our country. Unfortunately, the U.S. Supreme Court's full faith and credit jurisprudence is more suited to the early twentieth century than to the early twenty-first. The Court must validate executive records and prevent state courts from doing to others in the future what the Kansas Supreme Court did to J'Noel Gardiner: redefine her very identity.

