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## The Full Faith and Credit Clause: Do Factual Executive Documents Require Equivalent Treatment Between States?

Darren A. Prum

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# ARTICLE

## THE FULL FAITH AND CREDIT CLAUSE: DO FACTUAL EXECUTIVE DOCUMENTS REQUIRE EQUIVALENT TREATMENT BETWEEN STATES?

*Darren A. Prum*\*

INTRODUCTION .....	152
I. FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION .....	154
A. <i>Pre-Colonial History in Recognizing Extrajudicial Documents</i> .....	154
B. <i>Colonial History in Recognizing Extrajudicial Documents</i> .....	156
C. <i>Framing the Full Faith and Credit Clause in the Constitution</i> .....	159
D. <i>Congressional Legislation Implementing the Full Faith and Credit Clause</i> .....	162
E. <i>Precedential Authority</i> .....	164
1. The Act of 1790 (28 U.S.C. § 1738).....	165
2. The Act of 1804 (28 U.S.C. § 1739).....	167
3. Common Law Principles.....	171
II. ACTIONS BY THE STATES .....	178
A. <i>A Likely Regulatory Scenario</i> .....	179
B. <i>Applicability of the Full Faith and Credit Clause</i> .....	181
1. The Act of 1790 (28 U.S.C. § 1738).....	182
2. The Act of 1804 (28 U.S.C. § 1739).....	182
3. General Legal Principles.....	184
C. <i>The Legal Liability to a State and its Employees</i> .....	186
III. POLICY RECOMMENDATIONS .....	189
CONCLUSION.....	191

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## INTRODUCTION

Largely a development of the last half-century of government expansion, many of the health, safety, and welfare protections required by the federal government now fall upon the states.<sup>1</sup> With the states picking up the load, many state jurisdictions elect to administrate these duties through agencies.<sup>2</sup> These agencies promulgate numerous regulations and enforce them too.<sup>3</sup> In making these laws and regulations, the government may require the public to submit documents that convey factual information in order to achieve the overall policy goal.<sup>4</sup>

These statutes and regulations provide guidance as to what qualifies as an acceptable submission during these interactions between the agency and the public.<sup>5</sup> Obtaining the correct document poses no problems for those individuals already living in a particular jurisdiction. However, for those individuals moving between states, the submitted official documents may emanate from another state. Depending on the language used in the statutes or regulations, a government employee may reject the official documents from another jurisdiction solely on the basis of their origination point.<sup>6</sup>

While the Constitution requires the recognition of equivalent records from another jurisdiction under the Full Faith and Credit Clause, Congress sets forth the scope and mechanism.<sup>7</sup> Many state agencies are reticent to deviate from policy and procedure absent an instruction from a higher authority like the courts. In many of these instances, the rewards are minimal for a successful legal challenge with a steep cost along the way; so an aggrieved party usually chooses to comply rather than try to enforce their constitutional rights against the state government.

When considering the acknowledgment due a factually-based official document from the executive branch,<sup>8</sup> it appears like a

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1. See 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); see generally Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1 (1993).

2. Rossi, *supra* note 1, at 1345.

3. *Id.* at 1346.

4. See *infra* notes 178-89.

5. See *infra* notes 178-89.

6. See *infra* note 189.

7. U.S. CONST. art. IV, § 1; Act of May 26, 1790, 1 Stat. 122 (recodified as 28 U.S.C. § 1738 (2006)); Act of Mar. 27, 1804, 2 Stat. 298 (recodified as 28 U.S.C. § 1739 (2006)).

8. Both a permit/license (*i.e.*; driver's license, vehicle registration, concealed weapons permit, *etc.*) and a factual document (*i.e.*; vital statistics, birth certificate, marriage record, fingerprints, *etc.*) can qualify as an executive record. In this Article, I distinguish between the

straightforward Full Faith and Credit Clause legal analysis. However, the courts have explored only a minimal amount of this part of the Constitution during our country's history.<sup>9</sup> In reviewing the scholarly literature in this subject matter, numerous scholars examined the history of the clause and continue to focus on the judicial proceedings aspects, while mostly ignoring the growing issue related to the treatment of official documents containing factual information between the states.<sup>10</sup> This aspect will continue to grow in importance as the state government executive branches continue to expand their reach upon the citizenry, and require unnecessary and burdensome compliance that could otherwise be avoided by honoring the official and factual documents from another jurisdiction that contain virtually the same information.

Given the gravity and recurring nature of this issue, this Article looks to determine if and how a state should recognize official executive documents that contain factual information from another jurisdiction. Part I of this Article evaluates the Full Faith and Credit Clause of the Constitution. Because much of the common law draws its roots from England, this section provides a historical perspective from the Middle

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two types of records to only consider those that provide factual data and not those that convey some sort of privilege.

9. See *infra* Part I.E.

10. Compare Shawn Gebhardt, *Comment: Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419, 1445 (2009), with David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1595 (2009); Stephen E. Sachs, *Full Faith and Credit Clause in the Early Congress*, 95 VA. L. REV. 1201, 1240 (2009); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 369 (1998) [hereinafter Whitten 4]; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 14 (1981-82) [hereinafter Whitten 3]; Ralph U. Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (pt. 2)*, 14 CREIGHTON L. REV. 735 (1981) [hereinafter Whitten 2]; Ralph U. Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (pt. 1)*, 14 CREIGHTON L. REV. 499 (1981) [hereinafter Whitten 1]; Kent H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 58 (1957); James D. Sumner, Jr., *The Full-Faith-and-Credit Clause: Its History and Purpose*, 34 OR. L. REV. 224, 242 (1955) [hereinafter Sumner 1]; James D. Sumner, Jr., *Full Faith and Credit For Judicial Proceedings*, 2 U.C.L.A. L. REV. 441 (1955) [hereinafter Sumner 2]; Robert E. Childs, *Full Faith and Credit: The Lawyer's Clause*, 36 KY. L.J. 30 (1947); G.W.C. Ross, "Full Faith and Credit" in a Federal System, 20 MINN. L. REV. 140, 144 (1935); Albert S. Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461, 464 (1937); Edward S. Corwin, *The Full Faith and Credit Clause*, 20 U. PA. L. REV. 371 (1933); Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919); George P. Costigan, Jr., *History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 COLUM. L. REV. 470 (1904).

Agrees to the drafting of the Constitution relating to the circumstances of the past that created the language guiding today's policies. Part I continues with the congressional implementation statutes followed by an analysis of the applicable case law to this authority and general legal principles to draw a precedent and current rule on how a Court would proceed with such a case.

Part II turns to the actions undertaken by the states where the Full Faith and Credit Clause would apply with respect to executive documents. This Part supplies a common scenario with a representative example of a state where the jurisdiction summarily rejects official executive documents from elsewhere in favor of exclusively using its own. An assessment of common law precedent relating to the Full Faith and Credit Clause, the subsequent congressional legislation, and the use of general common law principles to the representative example considers the most likely approach by the courts. The analysis then turns to the possible legal liabilities and fallout for the state and government workers should an aggrieved plaintiff decide to pursue a case.

Part III makes policy recommendations based on the constitutional assessment to the representative example and the possible legal liability for both the state and government workers. Finally, the discussion comes full circle to recognize the wide-ranging impacts of the Full Faith and Credit Clause upon the Executive Branch's expanded role within the states, along with a need for a firm awareness within each jurisdiction of its regulatory actions.

## I. FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION

Section 1, Article 4 of the U.S. Constitution states in part: "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."<sup>11</sup> While written more than two centuries ago, the meanings of yesterday and today need reconciliation prior to any application within a contemporary context. As such, the history of the clause provides the starting point for this evaluation.

### A. *Pre-Colonial History in Recognizing Extrajudicial Documents*

Originating in England's "common law," the first use of the term "Record" emanates from the practice of giving credence to another

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11. U.S. CONST. art. IV, § 1.

court's decision in the Old Royal Courts of Justice at Westminster.<sup>12</sup> During this time, the Treasury secured parchment transcripts of the pleadings and decisions, which lead to the eventual label as the "courts of record."<sup>13</sup> The courts recognized these "records" as "authentick beyond all Manner of Contradiction," which meant they provided indisputable accounts for the events in each case.<sup>14</sup> Accordingly, the doctrine of *res judicata* subsequently precluded the re-litigation of an issue already decided by these courts.

At the same time, other royal tribunals like the Admiralty Court, the Chancery Court, various church related courts, county courts, courts of the hundreds, and courts baron did not fall under the category of "courts of record" and were not required to apply common law.<sup>15</sup> Faced with a request for recognition of a foreign judgment, the Admiralty Court gave the first support to decisions of civil law outside of the country as early as 1536 for those judicial settings considered not-of-record.<sup>16</sup> Likewise, the Chancery Court also allowed foreign judgments, but it limited those situations to controversies between parties and not on the Court itself.<sup>17</sup> However, this approach with respect to admiralty law and its international consequences became the exception and not the prevailing practice amongst the courts not-of-record.<sup>18</sup>

In contrast, the Westminster tribunals treated decisions from courts not-of-record and those outside England the same.<sup>19</sup> In situations where a plaintiff prevailed in one of the not-of-record or foreign courts, but later found the matter in a Westminster tribunal, the issue presented only received *prima facie* treatment.<sup>20</sup> This meant the burden of proof would shift from the plaintiff to the defendant to show inaccuracy, mistake, or another reason for overturning the case, but it would not trigger a *res judicata* situation.<sup>21</sup>

Hence, the traditional *prima facie* rule regarding not-of-record and

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12. See Engdahl, *supra* note 10, at 1595. The Old Royal Courts of Justice at Westminster included the Court of King's Bench, the Court of Common Pleas, and the court of Exchequer. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1596.

16. *Id.* at 1597. The Admiralty courts handled cases concerning civil law, and many of the cases presented to them came from civil law as applied by maritime law or under the civil law of Rome used through much of Europe. *Id.*

17. *Id.* at 1598.

18. *Id.*

19. *Id.* at 1599. Professor Engdahl explained that Lord Hardwicke noted in two separate occasions (1737 and 1750) of his desire for a change in policy that allowed the "courts of record" to apply *res judicata* on cases between England and Ireland as well as Scotland. *Id.*

20. *Id.* at 1597.

21. See *id.*; Whitten 3, *supra* note 10, at 14.

foreign judgments remained the approach until the nineteenth century in England, but it also provided a foundation for the early American colonies' legal framework.<sup>22</sup>

### B. Colonial History in Recognizing Extrajudicial Documents

By the Colonial Period, the meaning of the word "record" came in line with the modern definition used today.<sup>23</sup> The term now began to encompass documents coming from all three government branches. The evidentiary documentation of a legislative action or proceeding received usage; while judicial decisions, which required the production of the judgment's physical record also maintained support.<sup>24</sup> Moreover, a use of the word could also mean an executive document when not contextually referring to the other two branches of the government.<sup>25</sup>

Like sovereign countries, the colonies for the most part, operated independently.<sup>26</sup> This autonomous approach created an environment whereby each colony did not need to acknowledge the courts, the records, or acts of the other jurisdictions.<sup>27</sup> With this loophole in place, many individuals with adverse judgments chose to simply relocate to a neighboring colony rather than satisfy a court order against them.<sup>28</sup> As such, the enforcement of court orders in different jurisdictions proved elusive for the issuing colony.

However, English common law posed two unique impediments to the fledgling colonies when it came to recognizing documents from another jurisdiction.<sup>29</sup> One of the main concerns of earlier time periods centered upon the authentication of official documents.<sup>30</sup> In England, copies of documents bearing "Seals of Public Credit" received treatment as authentic and accurate; otherwise, the Court would require testimonial corroboration.<sup>31</sup>

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22. See Engdahl, *supra* note 10, at 1601.

23. Compare AMERICAN HERITAGE COLLEGE DICTIONARY 1034 (2d ed. 1985), with SAMUEL JOHNSON, A DICTIONARY OF ENGLISH LANGUAGE 472 (1755), available at <http://www.archive.org/details/dictionaryofengl02johnuoft> (last visited Oct. 17, 2011). The 1755 dictionary defined the word as, "1. To register any thing, so that its memory may not be lost; 2. To celebrate; to cause to be remembered solemnly; and 3. To recite; to Repeat; perhaps to tune;" whereas the modern explanation states, "1. To set down for preservation in writing or other permanent form; 2. To register or indicate; 3. To register (sound) in permanent form by mechanical or electrical means for reproduction . . ." *Id.*

24. *Mills v. Duryee*, 11 U.S. 481 (1813).

25. See generally Whitten 3, *supra* note 10, at 57.

26. See Sumner 1, *supra* note 10, at 227-28.

27. *Id.*

28. See Gebhardt, *supra* note 10, at 1429.

29. See Engdahl, *supra* note 10, at 1602.

30. See *id.*; Whitten 3, *supra* note 10, at 57.

31. See Engdahl, *supra* note 10, at 1602. Interestingly, this policy did not extend to

Moreover, another difficulty arose from the “locality” rule where a court drew a jury from a location where the facts of a case transpired.<sup>32</sup> Because the jury judged the case on their own knowledge, they could not inquire further into any issue beyond where the event occurred.<sup>33</sup>

To resolve these issues in the colonies, Massachusetts, Connecticut, Maryland, and South Carolina all passed laws to overcome these inherited precedents from England.<sup>34</sup> Because each jurisdiction identified the issue in its own way, the colonies’ enacted their own resolutions differently.<sup>35</sup> Although, the common thread amongst each act allowed for the recognition within the colonies beyond the ordinary judgments such as a court order or decision.<sup>36</sup>

In the circumstances surrounding the treatment of records, the Maryland and South Carolina acts provided reference to administrative actions of the executive branch.<sup>37</sup> Maryland’s law allowed for the recognition of debts acquired in the other colonies regardless of whether it emanated from the courts or through an administrative action.<sup>38</sup>

Following Maryland’s lead and adding more explicit language, South Carolina offered broad recognition beyond the other colonies and their judiciary.<sup>39</sup> South Carolina accepted all types of executive papers including copies of records, deeds, and bonds so long as the document contained a seal attesting to its veracity from an administrator spanning from the Lord Mayor of London to a notary.<sup>40</sup>

foreign seals or private ones since “tis not possible to suppose . . . to be universally known.” *Id.*

32. *See id.* at 1604.

33. *Id.*

34. *See Sumner 1, supra* note 10, at 227-28.

35. *Id.* Connecticut made the first move in 1650 to allow authentication, but it required reciprocity from other colonies and excluded foreign judgments as well as executive or legislative acts. *Id.* Maryland followed in 1715 when it passed an act to do the same; although it included foreign judgment and did not require reciprocity. *Id.* In 1731, South Carolina joined the other two colonies in recognizing judgments and documents from outside its jurisdiction. *Id.* Finally, Massachusetts passed its act just before the American Revolution with language very similar to that found in the Articles of Confederation. *Id.*

36. *Id.*

37. *See Gebhardt, supra* note 10, at 1430.

38. *Id.* The Maryland act stated “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.” *See Nadelmann, supra* note 10, at 39.

39. *See Gebhardt, supra* note 10, at 1430.

40. *Id.* The South Carolina act stated:

All exemplifications of records, and all deeds, and bonds, or other specialties, all letters of attorney, procuracy 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



Massachusetts enacted its version in 1774, just prior to the Declaration of Independence and the American Revolution.<sup>41</sup> By implementing the act, Massachusetts tried to resolve two issues.<sup>42</sup> It tried to provide a path for a party to prove to a Massachusetts Court that it received a judgment in another colony, and to how much credence it will receive in the new jurisdiction.<sup>43</sup> While not specifically mentioning documents from the executive branch of government, it contained the most similar language used in the corresponding clause of the Articles of Confederation absent the phrase "full faith and credit."<sup>44</sup>

The Continental Congress tackled the issue of recognizing actions outside a particular jurisdiction in writing the Articles of Confederation.<sup>45</sup> Language guiding the recognition of foreign judgments or of any other official transactions was not included in the first draft.<sup>46</sup> However, as the members decided to conclude their work, the Congress appointed a committee to evaluate the need for any additional articles to avoid minor oversights and errors.<sup>47</sup>

On the following day, the committee returned with the following proposal:

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; provided the Judgment Creditor gives sufficient Bond with Sureties before said Court before whom Action is brought to respond in Damages to the Adverse Party in case the original Judgment should be

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hand of the governor . . . or under the notarial seal of any notary public, shall be deemed and adjudged good and sufficient in law . . .

*See also* Nadelmann, *supra* note 10.

41. *See* Sumner 1, *supra* note 10, at 228.

42. *See* Ross, *supra* note 10, at 144.

43. *Id.*

44. *See* Sumner 1, *supra* note 10, at 228.

45. *Id.* at 229. Interestingly, Professor Sumner points out that the members of the Continental Congress had familiarity with the English practice that only allowed for prima facie treatment for those courts not-of-record. *Id.* He also surmises that in drafting the Articles of Confederation those advocating for a full faith and credit provision deemed the need for a close relationship between the newly formed states and their residents as paramount. *Id.*

46. *Id.*

47. Able, *supra* note 10, at 464. The committee members included James Duane of New York, Richard H. Lee of Virginia, and Richard Law of Connecticut. *See* Childs, *supra* note 10, at 39.

afterwards reversed and Set aside.<sup>48</sup>

While not exactly accepted by the entire body, the Congress ultimately approved the opening language where it finished with “the Courts and Magistrates of every other State,” absent a recorded vote.<sup>49</sup>

Moreover, the clause became the subject of four cases that related to recognizing another jurisdiction’s judicial decisions.<sup>50</sup> Despite the new language encompassing a possible request for recognition of administrative or executive documents from another jurisdiction, all of the cases related to the acknowledgment of judgments in other states focused on evidence.<sup>51</sup>

Accordingly, this period’s history shows that the colonies struggled to break free from the recognition restrictions inherited from English common law, that the difficulties in coming to a consensus on a guiding principle amongst the thirteen jurisdictions that acknowledged the other’s legal policies, and that some of the early language used in the laws indicated reciprocity to administrative and executive documents from outside jurisdictions.

### *C. Framing the Full Faith and Credit Clause in the Constitution*

Given the need for a more unified approach toward governing the newly formed states, the Constitutional Convention gathered in 1787 to write a superseding document. In the original Resolutions, James Madison and his fellow Virginians failed to include a full faith and credit clause. However, some attendees like Charles Pinckney of South

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48. Able, *supra* note 10, at 464-65. The committee actually returned with seven different articles for the Continental Congress’s consideration, but only this one is relevant to this evaluation. *See* Sumner 1, *supra* note 10, at 229. Of note, this is the first time that the term “full faith and credit” makes an appearance in the colonies or soon-to-be states. *See* Ross, *supra* note 10, at 141. However, one scholar explains that the earliest usage of the term emanates out of a translation from Latin by Richard Eden of the Bull of Pope Alexander VI from May 4, 1493, establishing the limits of the New World between Spain and Portugal. *Id.* The copies of this translation received treatment as if they were originals both in and out of court so long as subscribed by a notary. *See* Nadelmann, *supra* note 10. Following this lead, the Archbishop of Canterbury included in his appointment orders “that full faith be given, as well in as out of judgment, to the instrument by him [the notary] to be made.” *Id.* As a result, the notarial acts of England received the same treatment as public acts regard to their full faith treatment. *Id.*

49. *See* Nadelmann, *supra* note 10; Ross, *supra* note 10, at 142. Essentially, the final version stated, “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.” *See id.*; Sumner 1, *supra* note 10, at 229.

50. *See* Engdahl, *supra* note 10, at 1614-19. Pennsylvania had two of the cases, and there was one each in South Carolina and Connecticut. *See id.*

51. *See* Childs, *supra* note 10.

Carolina offered their own plan that included such a provision.<sup>52</sup> While commentators vary in their accounts on the amount of discussion the full faith and credit clause invoked during the Congress,<sup>53</sup> it appears that some consideration went into determining how to handle the mutual respect issue on official acts of the different states.<sup>54</sup> This responsibility fell upon the Committee of Detail to write specifics for “a Constitution conformably to the Proceedings.”<sup>55</sup>

On August 6, 1787, the Committee of Detail released a new provision that said, “Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and magistrates of every other state.”<sup>56</sup> This new language expanded upon the recognition given in the Articles of Confederation to include the statutes of the sister states as well as the judgments from the courts and magistrates.<sup>57</sup>

With the Detail Committee continuing to refine the language, it replaced “full faith” with the longer “full faith and credit” phrase on September 1.<sup>58</sup> To eliminate uncertainty with regard to the status of state statutes, the Committee replaced the language with “full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State.”<sup>59</sup> This new language created opposition from Dr. Hugh Williamson of North Carolina because he believed the state’s statutes should also receive inclusion in the provision.<sup>60</sup>

As a result of Dr. Williamson’s opposition, a new debate erupted as to whether the new document should address the issue of providing for sister-state recognition.<sup>61</sup> Virginia’s Governor, Edmund Randolph,

52. See Engdahl, *supra* note 10, at 1619. In fact, James Madison previously declared that the faith and credit clauses in the Articles of Confederation to be “extremely indeterminate” after seeing how the courts treated it in the Connecticut and South Carolina cases. *Id.* at 1618.

53. Compare *id.* at 1619-28; Able, *supra* note 10, at 469-71, with Sumner 1, *supra* note 10, at 230; see Gebhardt, *supra* note 10, at 1431.

54. See Sumner 1, *supra* note 10, at 230.

55. See Engdahl, *supra* note 10, at 1620.

56. See *id.*; Able, *supra* note 10, at 467.

57. See Able, *supra* note 10, at 467.

58. See Engdahl, *supra* note 10, at 1620. Professor Engdahl points out that this change probably did not cause a problem because it alluded to the well-known prima facie evidence rule. *Id.*

59. *Id.* at 1621.

60. *Id.* Professor Engdahl explains that the viewpoint of the time separated the functions of making policy and interpreting the law. *Id.* The government created statutes and standards to control behavior in its jurisdiction, while the courts applied preexisting law to specific disputes by distinct parties to a given set of facts. *Id.* The notion of giving another state the power to dictate the law in the host jurisdiction would offend the belief in self-determination both internally and externally. *Id.* at 1622.

61. *Id.*

proposed a rule that the exceeded the prima facie policy to require acceptance of another jurisdiction's statutes within limits of the authority of the enacting state.<sup>62</sup>

Responding to Governor Randolph, Pennsylvania's Gouverneur Morris then put forward a more straightforward and palatable approach. He suggested changing the language to read that "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."<sup>63</sup> Effectively, Gouverneur Morris made the national legislature in charge of explaining "the . . . effect of such acts, records, and proceedings," as well as the level of proof.<sup>64</sup>

Over the next several days, a special committee received the proposals from the Detail Committee, Governor Randolph, and Gouverneur Morris.<sup>65</sup> In the special committee, the members considered the various arguments previously discussed and tried different variations with the wording to strike a delicate balance in the power struggle between self-governance, allowing sister-state recognitions, and the role of the new national legislature.<sup>66</sup> The Committee ultimately settled on the following language: "XVI. Full faith and credit shall be given in each State to the public Acts, records, and judicial proceedings of every other State, and the Legislature may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."<sup>67</sup> It was then sent to the Committee on Style where it only changed the word "Legislature" to "Congress."<sup>68</sup> Ultimately, the clause received acceptance into the larger document that became the Constitution without further discussion with the careful placement inside the section discussing the rights and obligations of the states toward its citizens, in relation to each other, and with respect to

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62. *Id.* at 1623.

63. *See* Nadelmann, *supra* note 10, at 58.

64. *See* Able, *supra* note 10, at 469.

65. *See* Engdahl, *supra* note 10, at 1624.

66. *Id.* at 164-28. During this special committee, the members took the position that the legislature should specify the method of proof for sister-state recognition of judgments only and not "public acts." *Id.* However, at the next opportunity, the discussion turned to the usurpation of self-determination within a state by another through what would become Congress and whether the language would allow a return to the prima facie evidence approach for extrajudicial judgments like those cases decided under the Articles of Confederation. *Id.* To assuage some member's concerns, James Madison then shifted the language from mandating Congress to engage in determining recognition policies in forum states to a more permissive allowance if deemed necessary and proper based on the nation's needs. *Id.*

67. *See* Able, *supra* note 10, at 470 n.28.

68. *Id.*

the federal government.<sup>69</sup>

In examining this language, Congress received numerous powers from the freshly written Constitution. First, it bestowed upon Congress the power to make laws pertaining to the state court requirements for recognizing acts, records, and judicial proceedings from other jurisdictions, which included the ability to prescribe rules of evidence.<sup>70</sup> Second, Congress received the power to dictate the level of authority a piece of evidence shall receive in a judicial court once proven pursuant to the rules Congress sets forth.<sup>71</sup> Finally, the Constitution now expanded the types of documents that another jurisdiction will acknowledge to include ones emanating from all three branches of the government including those records originating out of executive agencies, and not just the judiciary.<sup>72</sup>

Thus, the Constitution completely changed the manner in which the courts recognized documents originating outside its jurisdiction and expanded the source to include the legislative and executive branches by conveying the power to Congress to set such policies across the country.

#### *D. Congressional Legislation Implementing the Full Faith and Credit Clause*

Congress quickly began to legislate with its newly found authority pursuant the Full Faith and Credit clause when it passed The Act of May 26, 1790, which is still in effect today.<sup>73</sup> Prior to approval, the

69. U.S. CONST. art. IV, § 1.

70. See Childs, *supra* note 10, at 45-46.

71. *Id.*

72. *Id.*

73. Act of May 26, 1790, 1 Stat. 122 (recodified as 28 U.S.C. § 1738). The official title read as "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." *Id.* In pertinent, The Act of 1790 stated,

That the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by 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 attestation is in due form. And the said records and judicial proceedings shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken.

*Id.* Of note, one commentator points out sarcastically that the name is a misnomer; because final passage actually occurred on May 5, 1790. See Abel, *supra* note 10, at 472 n.33.

House of Representatives appointed a committee to draft legislation pursuant to the powers enumerated in the Full Faith and Credit Clause.<sup>74</sup> The committee drafted and amended the bill before attaching a special provision to compensate a doctor for services.<sup>75</sup> The bill passed the House of Representatives and the Senate, apparently without concerns that prevailed while drafting the clause for the Constitution.<sup>76</sup>

Consequently, The Act of 1790 ushered in a new era because Congress decided to take affirmative steps to legislate and dictate policy to the judicial branch on both the federal and state level. Congress supplied the forum courts with the proper mechanism for recognizing a sister-state's acts, records, and judicial proceedings as evidence.<sup>77</sup> Furthermore, Congress explained that the meaning of "faith and credit" should be one where the documents admitted into the courts of a forum state shall receive the same treatment as in the sister-state.<sup>78</sup>

Following the Act of 1790, Congress further refined the proof and effect of the Full Faith and Credit Clause when it passed the Act of March 27, 1804.<sup>79</sup> This legislation began with the appointment of a committee to determine "whether any additional provisions were necessary to be made to the Act of 1790."<sup>80</sup> Again extensive discussions showed a range of opinions, and the House of Representatives decided to refer the legislation to a select committee of nine members.<sup>81</sup> Similar to the preceding legislation in 1790, the Act of 1804 passed in similar fashion with slight to negligible concerns.<sup>82</sup>

74. See Whitten 3, *supra* note 10, at 40.

75. See Abel, *supra* note 10, at 472 n.35. Interestingly, Professor Nadelmann notes that the National Archives cannot find the text of the bill when he requested it because they believe it did not survive the British's burning of the capital in 1814. See Nadelmann, *supra* note 10, at 60 n.124.

76. See Abel, *supra* note 10, at 472.

77. See Gebhardt, *supra* note 10, at 1437.

78. *Id.*

79. Act of March 27, 1804, 2 Stat. 298 (recodified as 28 U.S.C. § 1739). In pertinent, The Act of 1804 stated,

Be it enacted . . . that . . . 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.

*Id.*

80. See Nadelmann, *supra* note 10, at 61.

81. *Id.*

82. See Abel, *supra* note 10, at 474. The commentator surmises that the reason for Congress's lack of attention to such an important issue stems out of its preoccupation with

In this new legislation, Congress further clarified some of the technicalities associated with the Full Faith and Credit Clause. The Act required forum states to recognize documents from sister-states, such as records and copies of office books kept in any public office of the three branches of government.<sup>83</sup> Moreover, Congress extended the jurisdictional coverage to include the public acts, records, office books, judicial proceedings, courts, and offices of the Territories of the United States and countries subject to the authority of the U.S. Government.<sup>84</sup>

Subsequently, and without making any further modifications, the acts of 1790 and 1804 were coupled together and codified into sections 905 and 906 of the *Revised Statutes of the United States*.<sup>85</sup> For the next 144 years, Congress basically left any further interpretations to the courts and chose not to further utilize the expansive authority it received from the Full Faith and Credit Clause.<sup>86</sup>

In 1948, Congress revised the federal *Judicial Code* and made two modifications to its prior legislation.<sup>87</sup> The first change relocated the old sections into section 1738 of title 28 of the *U.S. Code*.<sup>88</sup> The second adjustment was a reconstruction of the statutory language in the Act of 1804.<sup>89</sup> Congress changed the phrase "And the said records and exemplifications" to "Such Acts, records, and judicial proceedings."<sup>90</sup> The only official explanation for this adjustment comes from a Revisers Note that mentions an effort to the language of the statutes with the wording used in the Constitution.<sup>91</sup>

Hence, Congress took advantage of the authority to set scope and policy for the absolute recognition of documents from all branches of government in another jurisdiction and made certain that nonjudicial as well as court records acquired reciprocal treatment between states. This legislation has remained relatively unchanged for more than 200 years.

### E. Precedential Authority

Constitutional case law provides further guidance on the proper application of the Full Faith and Credit Clause. This part of the inquiry

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organizing the Louisiana purchase the country had just acquired from France. *Id.*

83. See Nadelmann, *supra* note 10, at 61; Childs, *supra* note 10, at 45-50.

84. Nadelmann, *supra* note 10, at 61-62.

85. See Sumner 1, *supra* note 10, at 236.

86. *Id.*

87. See Whitten 4, *supra* note 10, at 369.

88. See Sumner 1, *supra* note 10, at 236.

89. *Id.*

90. *Id.*; 28 U.S.C. § 1738.

91. See Whitten 4, *supra* note 10, at 369. Professor Whitten goes on to opine that the Revisers did not comprehend the original meaning of the words in the Constitution and that their changes failed to recognize Supreme Court interpretations and precedent. *Id.*

delves into cases pertaining to the recognition of fact-based executive records emanating from the different authorities. In tracing the different authorities for the factually based executive branch records, some courts tend to rely on precedent rooted in either the Act of 1790 or the Act of 1804; but some cases utilize long-founded general legal principles as a basis for making a decision. Curiously, none of the opinions providing precedential authority used the clause as a sole basis for requiring the acknowledgment of factually based executive branch records. Moreover, the vast majority of opinions involve the civil side of the law, but the legal precedent also contains some applications in the criminal context as well.

### 1. The Act of 1790 (28 U.S.C. § 1738)

Shortly after Congress passed the Act of 1790, confusion on how to interpret the clause settled into place.<sup>92</sup> The authentication of documents from other jurisdiction created a dilemma for some courts that looked toward the preexisting law for guidance. An early case in North Carolina focused upon a certified copy of a deed for the sale of a slave. Where the Court clung to its traditional approach by failing to recognize documents from another jurisdiction, explaining “that act is only affirmative, and does not abolish such modes of authentication as were used here before it passed, and this was the usual mode before that act.”<sup>93</sup> In other words, the court kept intact the common law precedent that required the precise authentication of the record despite the certification by a government official.

Similarly, the Supreme Court also evaluated a copy of a bill of sale for slaves in 1835 that occurred in New Orleans.<sup>94</sup> In *Owings v. Hull*, a notary made a copy of the bill of sale and recorded it as required under the laws of Louisiana, which did not allow for its subsequent removal.<sup>95</sup> The Court explained that

The record is authenticated in the precise manner required by the act of congress, of the 26th May 1790, having the attestation of the clerk, and the seal of the Court annexed, together with a

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92. See Sachs, *supra* note 10, at 1240. This commentator explained that three common approaches emerged from the decisions of the time. *Id.* Many courts acknowledged the Act of 1790 and the Constitution in upholding judgments from outside its jurisdiction; while some evaluated the proper treatment for sister-state judgments in new cases by judgment creditors. *Id.* However, due to the focus of this Article on the acknowledgment of records from another jurisdiction, only the third approach by the courts that evaluated documents from another state becomes relevant.

93. *Ellmore v. Mills*, 2 N.C. (1 Hayw.) 359, 359 (N.C. Super. L. & Eq. 1796).

94. *Owings v. Hull*, 34 U.S. 607 (1835).

95. *Id.* at 610.



certificate of the sole judge of the Court that the attestation is in due form of law.<sup>96</sup>

Accordingly, a lower court in another jurisdiction must accept the factual document and deem it the same as the original pursuant to the Act of 1790.<sup>97</sup>

In another decision interpreting the Full Faith and Credit Clause regarding judgments for precedent, the Circuit Court for the Eastern District of Virginia considered an interracial marriage case where the ceremony occurred in the District of Columbia but the parties decided to live in the State of Virginia.<sup>98</sup> In this situation, the court specifically recognized the constitutional issue and precedent but chose to distinguish its case on two points. First, the court did not consider the marriage document as an executive record within the meaning of the Constitution because a clergyman or magistrate issued it.<sup>99</sup> This opinion explained that “the clause in question could only go to the extent of rendering indisputable the fact of the marriage and of its legality in the place of contract.”<sup>100</sup>

Secondly, the circuit court found no precedential authority to allow individuals the ability to select which public policy applies within a given jurisdiction. The court explained “[i]t has never pretended that the laws of a state can, by the acts of individuals, be subordinated within its own jurisdiction to the laws established by another state.”<sup>101</sup> The court continued that the marriage document only added further proof that the party’s actions violated Virginia’s statutes.<sup>102</sup> Predictably, the court chose to distinguish this case from the applicable precedent regarding executive documents containing factual information.

Considering these three cases as precedent under the authority of the Act of 1790, the two earlier interpretations of the legislation validated the requirement to give sister-state effect to factual executive branch documents when properly authenticated. However, the one case that distinguished itself from the precedent made a strong point when it observed that nongovernmental entities issued the marriage licenses of the time, which have disallowed application of the legislation. The second point echoed the debates from the drafting of the Full Faith and Credit Clause and seemed to advocate for states’ rights over a strong national policy, which appears contrary to interpretations discussed in

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96. *Id.* at 627.

97. *Id.*

98. *Ex parte Kinney*, 14 F. Cas. 602, 603 (C.C.E.D. Va. 1879) (No. 7,825).

99. *Id.* at 607.

100. *Id.*

101. *Id.*

102. *Id.* at 608.

the Act of 1804.

Thus, the few decisions interpreting the Act of 1790 appear to provide authority to the recognition of sister-state factual documents issued by the executive branch of the government.

## 2. The Act of 1804 (28 U.S.C. § 1739)

In 1890, the Supreme Court made its first decision where the Act of 1804 received mention with regard to factual documents issued from the executive branch of government.<sup>103</sup> The contested document was a copy of a land warrant from the Land Office of the United States in Washington.<sup>104</sup> In this case, the Court stopped short of interpreting the Act of 1804 when it determined that section 891 of the Revised Statutes of the United States provided ample authority.<sup>105</sup> As such, the Act of 1804 may have provided valid authority as to the policies associated with factual executive records, but the Court chose to remain silent on the legislation rather than give guidance and set precedent.

In the same year, the Supreme Court chose to validate in whole an earlier opinion from the Court of Claims in 1887 with regard to decisions made executively or administratively by a state government.<sup>106</sup> The lower court held that under the Act of 1804 an authenticated record should receive “faith and credit” amongst the states.<sup>107</sup> The lower court further explained that the limit for “faith and credit” afforded a document did not in itself formulate an award or judgment; and if it prompted a decision at the state level, it could not apply to the federal government.<sup>108</sup> Nevertheless, this explanation and subsequent validation by the Supreme Court provided further support for the requirement and recognition of the executive branch documents between states.

The Supreme Court of Alabama cited the Act of 1804 as authority

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103. *Culver v. Uthe*, 133 U.S. 655 (1890).

104. *Id.* at 656.

105. *Id.* at 658. According to the court, the statute directly on point states,

Copies of any records, books or papers, in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record.

*Id.* (quoting Rev. Stat. § 891).

106. *Williams v. United States*, 137 U.S. 113 (1890).

107. *Williams v. United States*, 22 Ct. Cl. 116 (1887).

108. *Id.*

when it evaluated the due recognition of a Louisiana marriage certificate.<sup>109</sup> This court explained that under the federal statute, the certification by Louisiana's Secretary of State provided sufficient documentation and did not require an additional endorsement by a presiding justice for validity.<sup>110</sup> Moreover, the Alabama Secretary of State had already approved the authentication laws of Louisiana with respect to this subject, so the Court validated the proper authority under both the federal and state legislation to recognize the sister-state factual document.<sup>111</sup>

In contrast, the Supreme Court of Maine added a new wrinkle to the existing interpretations of the Act of 1804 when it decided a case involving a marriage record from New Hampshire.<sup>112</sup> This court began by observing that the laws of Maine provided for the recognition of judicial records originating in other states and federal jurisdictions, but failed to take any action outside that realm.<sup>113</sup> The court then turned to the Full Faith and Credit Clause of the Constitution and the Act of 1804 to identify that the federal law that directly addressed the issue.<sup>114</sup> In its evaluation, the court pointed out the federal requirements for proper authentication of factual executive branch documents under the Act of 1804 to receive sister-state acknowledgment as appropriate, but it also recognized that the legislation did not preclude the use of common law methods for gaining the same acknowledgment.<sup>115</sup> As a result, the Supreme Court of Maine validated the requirement that factual executive branch documents issued by a sister-state must receive recognition within its state, but the court created the option of using the federal or common law methods for gaining the appropriate certification of the record.

Turning to a criminal law application, the Missouri Supreme Court considered a case where the government sought validation for the use of prison records from several other states against a defendant.<sup>116</sup> In evaluating the proper method for authenticating another state's factual document, the court stated, "[t]he Federal statute is not exclusive of legislation by the State and a state statute providing for a mode of authenticating such documents, which does not *exclude* documents authenticated as provided by the Federal act, is valid and may be

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109. See generally *Reid v. State*, 168 Ala. 118 (Ala. 1910). This case was later used as precedential authority to recognize a Tennessee marriage document in the Alabama Court of Appeals for a case involving bigamy. See *Witt v. State*, 5 Ala. App. 137 (Ala. Ct. App. 1912).

110. *Id.* at 121.

111. *Id.*

112. *Reed v. Stevens*, 120 Me. 290 (Me. 1921).

113. *Id.* 291-92.

114. *Id.*

115. *Id.*

116. *State v. Hendrix*, 331 Mo. 658 (Mo. 1932).

followed.”<sup>117</sup> Nonetheless, the court further explained that should a party rely on and fail Missouri’s method of authentication without meeting the issuing state or federal standards, then the document does not meet the statutory requirements for evidence in a criminal trial.<sup>118</sup> Accordingly, the Missouri court placed a boundary that limited recognition within its jurisdiction for factual documents to those that could either meet the authentication requirements of the federal statute or those documents adhering to the issuing or receiving state’s laws.<sup>119</sup>

Furthermore, the Washington Supreme Court evaluated the use of fingerprints certified by wardens of penitentiaries in other states to identify a defendant under the Full Faith and Credit Clause of the Constitution and the Act of 1804.<sup>120</sup> In its analysis of precedent, the court looked at the federal statutes, Oregon and California state statutes, the precedent set in Alabama’s *Reid* case along with Missouri’s *Reed* decision, and its own previous decisions for recognizing intrastate executive branch factual documents.<sup>121</sup> In summing up its assessment, the court concluded that the “great weight of authority” approved the comparison of a criminal’s fingerprint records from another state with a certified copy of a defendant’s while reiterating its position that “the courts must take judicial notice of them and that such documents are receivable in evidence without extrinsic proof of their correctness or verity.”<sup>122</sup>

Likewise, the Texas Court of Criminal Appeals evaluated the recognition due a Louisiana birth certificate used to identify the correct age of a criminal defendant.<sup>123</sup> The defendant claimed a birth year that made him a minor, but the Louisiana records demonstrated he had attained the age of majority.<sup>124</sup> In allowing the birth record from Louisiana to have legal effect, the Texas Court derived its authority from the Act of 1804 while citing precedent from the *Johnson* case in Washington and the previously discussed authority out of Alabama.<sup>125</sup>

Similarly, the U.S. District Court for the Southern District of California confronted an entitlement question regarding the true age of

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117. *Id.* at 663.

118. *See generally id.*

119. *Id.* Interestingly, the Missouri Supreme court cited a case discussed *infra* where it declared under general law principles that to gain sister-state effect, the factual executive branch document must originate from a government organization or institution. *Id.* at 664 (citing *State v. Pagels*, 92 Mo. 300 (Mo. 1887)).

120. *State v. Johnson*, 194 Wash. 438 (Wash. 1938).

121. *Id.* at 442-47.

122. *Id.* at 447 (quoting *State v. Bolen*, 142 Wash. 653 (1927)).

123. *Northern v. State*, 216 S.W. 192, 195 (Tex. Crim. App. 1948).

124. *Id.*

125. *Id.*

an individual trying to qualify for social security benefits.<sup>126</sup> The authenticity of a delayed birth certificate by order of a State Court of Record became a central question in the case.<sup>127</sup> Upon recognizing the application of the Full Faith and Credit Clause, the court applied the same precedent as the previously discussed *Williams*, but did not directly reference it. Accordingly, the constitutional provision did not apply federally.<sup>128</sup> However, the Act of 1804 did apply to the federal government with heavy emphasis on the language stating the treatment must occur “no more and no less” than the courts of another state.<sup>129</sup> In this circumstance, the court turned to the State of Texas’s approach where the civil and criminal statutes codified the common law rule of treating the document as prima facie evidence.<sup>130</sup>

Finally, the Supreme Court of Iowa determined a case where the state’s Department of Public Safety suspended a chauffer’s license based on a notice it received from Colorado’s Motor Vehicle Division.<sup>131</sup> The central issue before the court with regard to Colorado’s notice focused on whether the state properly authenticated it upon dispatch.<sup>132</sup> In recognizing the applicability of both the Act of 1790 and 1804 together, the court explained that:

As to a matter of this nature it is not necessary that the technical provisions of said two United States Code sections be strictly followed. Any legal appearing form of certification from another state to Iowa or any other state which, in fact, gives the information to Iowa as to appellant’s suspension in Colorado is sufficient.<sup>133</sup>

Accordingly, the Iowa Supreme Court appears to maintain a lower standard for authentication of factual documents issued by executive branch in other states than the other jurisdictions.

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126. *Tindle v. Celebrezzee*, 210 F. Supp. 912, 913 (S.D. Cal. 1962).

127. *Id.* at 915; *see infra* text accompanying notes 135-37.

128. *Tindle*, 210 F. Supp. at 914-15; *see supra* text accompanying notes 107-08.

129. *Tindle*, 210 F. Supp. at 914-15; *see supra* text accompanying notes 107-08.

130. *Tindle*, 210 F. Supp. at 914-15; *see supra* text accompanying notes 107-08. The court explained that “[b]ut even under the constitutional provision the rights to be accorded are coincidental with the right accorded by the State whose judgment it is sought to enforce.” *Id.*

131. *Shaw v. Dep’t of Pub. Safety*, 131 N.W.2d 261, 262-63 (Iowa 1964). This Article differentiates between factual based executive documents and permit or privilege based ones. While on the surface level, the suspension of the chauffer’s driver’s license in *Shaw* would be excluded, the main issue in these cases focuses on the factual report issued by the State of Colorado. This report fits within the context of a factual based executive document this Article seeks to examine.

132. *Id.* at 263.

133. *Id.*

Keeping authority under the Act of 1804 in mind, the factual executive branch documents appear to receive equivalent treatment between the states so long as proper authentication occurs. Some states will require stricter conformance to the authentication requirements than others, while the federal government may turn to the applicable state law for its guidance. In these situations, some states accept the documents under the prima facie evidence rule while others give it immediate legal effect. This recognition applies under both the civil and criminal contexts.

Hence, the vast weight of legal precedent concerning the Act of 1804 demonstrates that each state must accept executive branch factual documents from another jurisdiction as long as it meets the minimal authentication requirements.

### 3. Common Law Principles

When considering the precedent based on the general principles of law, the subject matter of the different cases tend to fall into four different classifications. The first group of cases involve real property documents where the conveyances or the official government surveys need clarification on the proper treatment by the courts. This line of precedent sets forth the standard for the second category where the courts evaluated a policy for naturalization documents. In the third group, several different cases illustrate the proper treatment for a litany of factual records from the executive branch of the government; while the last category demonstrates the use of factual documents within the context of criminal law.

#### a. Real Property Documents

In the first category and continuing the same direction with respect to the authentication requirements for factual documents as articulated in common law, the Supreme Court sustained the inherited approach for records that originated in another state or under the jurisdiction of a previous country. In 1833, the Court entertained the *Percheman* case to determine the proper evidentiary treatment for a certified copy by the government of a Spanish land grant from the Florida Territory despite the nonproduction of the original.<sup>134</sup> Without considering the implementation acts nor the Full Faith and Credit Clause, the Court stated, “on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in

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134. *United States v. Percheman*, 32 U.S. 84 (1833).

evidence.”<sup>135</sup> A later court explained that this decision seemed to allow for validation based on the actions of Congress, such as the treaty with Spain to cede the Florida Territory to the United States, rather than using the legislation pursuant to the Full Faith and Credit Clause.<sup>136</sup>

However, in 1838 the Supreme Court heard another case out of Florida regarding a copy of an original land grant from the proper representatives of the King of Spain.<sup>137</sup> In the *Delespine* case, the point of contest focused on the fact that the document in question emanated from a copy of the original.<sup>138</sup> Somehow, the destruction of the original document occurred and only the second copy remained in existence; although, the official records indicated its presence at an earlier date.<sup>139</sup> Interestingly, the Court allowed the second-generation copy as valid proof of the land grant; but it failed to explain any basis in the law, statutes, or Constitution for this decision.<sup>140</sup>

Subsequently, a third case involving a Florida land grant by the Spanish government also received the attention of the Supreme Court and indirectly articulated the rule for admitting the document in the *Delespine* decision made two years earlier.<sup>141</sup> Prior to reviewing the previous decisions of *Owings* and *Percheman* followed by an explanation for distinguishing *Delespine*, the Court in *Wiggins* expressed the rule for copies as:

It follows, in this case, as in all others where the originals are confined to a public office, and copies are introduced, that the copy is (first) competent evidence by authority of the certificate of the proper officer: and (second) that it proves, prima facie, the original to have been of file in the office, when the copy was made. And for this plain reason: the officer's certificate has

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135. *Id.* at 85.

136. *United States v. Wiggins*, 39 U.S. 334, 346 (1840).

137. *United States v. Delespine*, 37 U.S. 654, 655 (1838).

138. *Id.* Because of the treaty between the United States and Spain in 1819 to cede Florida, Congress established a land commission to ascertain land claims. *Id.* The secretary of the commission certified the translated documents from Spanish to English and kept the official records along with the public archives of East Florida. *Id.*

139. *Id.*

140. *See, e.g., id.* In the later opinion of *United States v. Wiggins* with related facts, the Court gave a subtle inference to the logic behind the decision in this case after directly distinguishing the two cases and stating, “We have established that the copy of the petition and decree are made prima facie evidence by the certificate of the secretary.” *Wiggins*, 39 U.S. at 347.

141. *Wiggins*, 39 U.S. at 347. In this case, the landowner requested and received a grant of real property from the Governor of Florida while under Spanish rule. *Id.* Following the treaty that ceded Florida to the United States, the landowner requested a determination of the real property rights following the change in governmental rule because the land commission set up by Congress lost this original document too. *Id.*

accorded to it the sanctity of a deposition: he certifies, “that the preceding copy is faithfully drawn from the original, which exists in the secretary’s office, under my charge.”<sup>142</sup>

As a result, the Court continued to affirm the common law practice of authenticating valid documents from jurisdictions outside its own as prima facie evidence only.

Following the trio of decisions regarding the grants of land, the Supreme Court decided 3 more cases in 1842 and 1843 that required the determination of the amount of deference to accord the land surveys done by the federal government in the wake of the Florida Treaty.<sup>143</sup> All 3 cases focused on the plats and certificates produced by the U.S. Surveyor General to establish a claim for land, and each case cited to the *Wiggins* case as precedent.<sup>144</sup> The courts in *Breward* and *Acosta* reiterated the position that when an official government document contains an authorized signature, the courts must treat it as prima facie evidence but shall not give it legal effect.<sup>145</sup> Moreover and expanding on the *Breward* and *Acosta* stance, the *Hanson* opinion clarified that “[p]lats and certificates, because of the official character of the surveyor-general, have accorded to them the force and character of a deposition. . . .”<sup>146</sup> Consequently, the Court reinforced the prima facie evidence rule for executive branch documents while providing a limitation on its ability to determine an outcome for a given issue within a case.

In 1927, the Supreme Court was asked to resolve a border dispute between New Mexico and Texas.<sup>147</sup> Central to the dispute of the border’s location was the actual positioning of the Rio Grande in 1850. To support their respective positions, the two states offered conflicting official government documents containing various surveys, patents, maps, and engineering notes done as part of the Treaty of Guadalupe-Hidalgo with different attestations from various government officials

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142. *Id.* at 346.

143. *See generally* *United States v. Breward*, 41 U.S. 143 (1842); *see also* *United States v. Hanson*, 41 U.S. 196 (1842); *United States v. Acosta*, 42 U.S. 24 (1843).

144. *See generally* *Breward*, 41 U.S. at 143; *see also* *Hanson*, 41 U.S. at 196; *Acosta*, 42 U.S. at 24.

145. *See* *Breward*, 41 U.S. at 147; *Acosta*, 42 U.S. at 26.

146. *Hanson*, 41 U.S. at 200, 201. In this case, the Court chose to order a new survey after receiving proof from a privately funded evaluation that the Surveyor-General did not follow the calls of the grant and that the former Governor of East Florida had taken such actions when provided with these types of discrepancies. *Id.* at 198, 202.

147. *New Mexico v. Texas*, 275 U.S. 279 (1927). In this case, the channel of the Rio Grande as it existed in 1850 provided the agreed upon boundary. The central disagreement occurred on the correct location of the river at that time.



including a Mexican Boundary Commissioner.<sup>148</sup> In resolving one of the contentious points regarding a factual document from Mexico, the Court turned to the precedent set with *Wiggins* and *Acosta* to permit the admission of records authenticated by the Mexican Boundary Commissioner so long as he maintained proper custody of the original.<sup>149</sup>

#### b. Naturalization Documents

Looking at the precedent set with the real property records, the Eighth Circuit Court of Appeals faced a similar issue with respect to the use of a copy of an individual's naturalization document when the government could not find the original.<sup>150</sup> Citing the Supreme Court's decisions in *Wiggins*, *Hanson*, and *Acosta*, the court repeated its policy of affording such executive factual documents under the prima facie approach while treating it as it would a deposition.<sup>151</sup> The court explained "[i]t is not conclusive; but when no especial incentive for falsification appears, and the records are shown to have been carelessly kept, it should prevail over the bare fact that seven years later an original record cannot be found."<sup>152</sup>

Citing the *Brelin* opinion as precedent, the Second Circuit Court of Appeals also decided a similar case regarding a naturalization document in 1945.<sup>153</sup> In this case, the court stated, "[c]ertificates issued subsequent to the Act of 1906 constitute prima facie evidence of citizenship, and no certified copy of the court record is required."<sup>154</sup> This decision reaffirmed the judicial opinion that factual documents originating out of the executive branch do not need additional certifications from a court of competent jurisdiction and that they provide the truth until discredited by other evidence.

#### c. Other Government Documents

Amongst the earliest decisions at a state court level with respect to factually based executive documents, the Supreme Court of Maine decided a mail theft case in *Merriam v. Mitchell* in 1836.<sup>155</sup> One of the issues presented to the court focused on how to treat records from the

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148. *Id.*

149. *Id.* at 296-97.

150. *United States v. Brelin*, 166 F. 104 (8th Cir. 1908).

151. *Id.* at 105-06.

152. *Id.*

153. *See Brassert v. Biddle*, 148 F.2d 134, 135 (2d Cir. 1945).

154. *Id.* at 135.

155. *See Merriam v. Mitchell*, 13 Me. 439, 439 (1836).

U.S. Post Office before the state.<sup>156</sup> In evaluating the issue, the court did not cite any precedent but explained that the records originated out of a legally required directive “by a sworn officer of the government.”<sup>157</sup> In such situations, the opinion clarified that documents are admissible to show the post office’s transactions, while the court will consider the records truthful until proven otherwise.<sup>158</sup>

Following this decision, the Supreme Court of Maine heard another case concerning the use of factual records from the executive branch of the federal government.<sup>159</sup> This time the documents came from the collector of internal revenue and recorded the payments of special licenses on alcohol for the federal government.<sup>160</sup> While not a case of first impression, the opinion cited *Merriam* and numerous other cases where various courts allowed factual executive documents that originated within the state to receive prima facie treatment.<sup>161</sup> Based on the precedent, the Supreme Court of Maine continued the policy of allowing these types of records with proper authentication.

In 1878, the Supreme Court turned to evaluating the admission of weather records kept by the U.S. Signal Service in Chicago as part of its required duties in an unrelated torts case.<sup>162</sup> While the appeal focused on whether the lower court properly allowed the evidence despite the absence of a law authorizing these records for evidentiary purposes and as to its competency, the case provides another example of the treatment afforded an executive branch factual document.<sup>163</sup> The Court turned to the rules of evidence in evaluating the records and explained that the document did not emanate out of a private entry but from a duty to record the observed facts.<sup>164</sup> As such, this case inadvertently supports the approach that executive branch documents receive treatment as prima facie evidence only while supporting the previous requirement that the records lack legal effect.

Shortly after, the Third Circuit Court of Appeals evaluated how to treat records kept by the U.S. Treasury.<sup>165</sup> In its reasoning, the court

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156. *Id.* at 456-57.

157. *Id.* at 456.

158. *Id.* at 456-57.

159. *See State v. Gorham*, 65 Me. 270, 271 (1876).

160. *Id.* at 271-72.

161. *Id.* at 272. While many of these cases cited by the court could provide precedent for this evaluation of the law, the underlying facts do not present a situation where the factual executive document crosses between states or with the federal government to trigger the Full Faith and Credit Clause of the Constitution or the legislative actions. Accordingly, these do not provide precedential authority for the purposes of this Article.

162. *Evanston v. Gunn*, 99 U.S. 660, 665-66 (1878).

163. *Id.* at 665.

164. *Id.* at 666.

165. *See Chesapeake & Delaware Canal Co. v. United States*, 240 F. 903, 904 (3d Cir.

turned to two of the times' most widely published treatises and explained that:

We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts.<sup>166</sup>

Accordingly, the Third Circuit approved the recognition of the treasury records as appropriate in this case.

#### d. Criminal Law Documents

Turning to the precedential authority emanating out of the criminal law context, the Missouri Supreme Court decided a case where the defendant claimed a mental illness and wished to use certified copies of his medical records at hospitals for the mentally ill in Illinois.<sup>167</sup> While considering the requirements for recognition of the factual documents under Illinois and Missouri statutes, the court acknowledged that the government owned neither hospital.<sup>168</sup> Accordingly, the court decided that it was proper to disallow the evidence, because the letter from the hospital's superintendent failed to qualify as neither a record from a federal government official nor as part of a sister-state factual

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1917).

166. *Id.* at 907. This court cited the footnotes from two different treatises as cases containing ample precedent: *Ruling Case Law* and the *Cyclopedia of Law and Procedure*. (*Id.*) In reviewing the footnoted cases from *The Ruling Case Law* treatise of 1915 and the *Cyclopedia of Law and Procedure* of 1905, many of the cases cited as precedent concern factual documents from an entirely intrastate scenario that would lend nothing to this inquiry that seeks to determine the appropriate treatment across jurisdictions either federal-state or state-state. See generally *Evanston*, 99 U.S. at 660; *White v. United States*, 164 U.S. 100, 101 (1896); *Bank v. Brown*, 53 L.R.A. 523.

167. *State v. Pagels*, 4 S.W. 931, 933-34 (Mo. 1887).

168. *Id.*

document.<sup>169</sup>

Forty years later, a 1929 criminal case in Oregon expanded the precedent for factual records based on the use of general legal principles in 1929.<sup>170</sup> The Supreme Court of Oregon reviewed a case where the defendant received a life sentence based on the state's repeat offender law and had to decide on whether the use of his prison photograph at trial was proper.<sup>171</sup> This court recognized that the photo's authentication in a trial proved difficult, but it determined that "[t]he only purpose of the photograph was to aid in identifying the defendant as the man who had previously been in prison."<sup>172</sup> Consequently, the Supreme Court of Oregon validated the use of the factual documents from Washington in order to qualify the defendant as a habitual offender and sentenced him accordingly.

Refining this approach with respect to fingerprints from the prison systems in Oregon, Washington, and Colorado, Justice Cardozo wrote the opinion for a N.Y. Court of Appeals in a case determining the identity of the defendant and whether he committed crimes in the other states.<sup>173</sup> Without acknowledging the Full Faith and Credit Clause or the congressional legislation as authority, Justice Cardozo turned to the line of cases decided on general principles of law to explain:<sup>174</sup>

No doubt a foreign custodian, annexing fingerprints to his certificate, would be competent to certify without the aid of any statute that they were prints or copies of prints kept upon his files in conformity with law, and to state, after comparison with the warrant of commitment, the name of the prisoner whose prints were so recorded. There would be a presumption in such circumstances that the prisoner fingerprinted was the prisoner committed; . . . The rule of confrontation which in this state is purely statutory has never been deemed to require the exclusion of certificates or records made by a public officer in the course of his official duty. . . . Upon proof that a person bearing the same name had been convicted by a court of competent jurisdiction, a certificate, so framed, would be admissible in evidence, if properly authenticated. . . . The certificate being received,

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169. *Id.*

170. *State v. Smith*, 128 Or. 515, 524 (Or. 1929).

171. *Id.* at 525-26.

172. *Id.* at 526.

173. *People v. Reese*, 258 N.Y. 89, 94-95 (1932).

174. *Id.* at 94-99. In the opinion, Justice Cardozo cites numerous cases and treatises as precedential authority for the proper treatment of factual documents. *Id.* Many of these cases do not apply in this analysis because they apply to wholly intrastate documents. He does cite the previously discussed cases of *Percheman*, *Evanston*, and *Chesapeake & Delaware Canal Co. Id.* at 95, 98.

comparison of the prints annexed with the prints of the defendant on file in this State could then be made in open court by a witness qualified to testify.<sup>175</sup>

Despite the understanding that properly authenticated factual documents from another state required acceptance, the court decided that the state legislature exclusively authorized the custodian of fingerprint records from New York to certify prior convictions from his own records and did not provide for such credentials from another jurisdiction.<sup>176</sup> Consequently, Justice Cardozo's opinion sidestepped the issue regarding the recognition of factual documents from another state by finding enough authority within the N.Y. Statutes to protect a criminal defendant's rights from a possible injustice over a prosecutor's need to gain a conviction.

As such, the approach that uses the general principles of law as precedent appears to validate the requirement that one state must accept the executive branch's factual documents from another jurisdiction in both civil and criminal contexts provided that a stronger piece of legislation with a more compelling public policy does not preempt the action. This acceptance comes with the notion that the facts contained in the document provide a truthful record until proven erroneous and that it does not need additional judicial certifications above those required in the issuing jurisdiction. These documents cover a broad range of scope in their type and description while providing a factual record of an event(s).

Therefore, the general legal principles developed by the courts during the history of our country also provide strong authority that properly certified executive branch factual documents shall gain acceptance within a receiving state as reliable and accurate.

In reconciling the foregoing, precedent strongly indicates under all three lines of authority derived from the Constitution's Full Faith and Credit Clause, that a state must accept an official factual document from another jurisdiction's executive branch of government.

## II. ACTIONS BY THE STATES

In states with larger regulatory infrastructures, the ability to draft rules that do not comply with either the Full Faith and Credit Clause or the implementing statutes frequently create more bureaucratic barriers to avoid conformance due to the increased complexity of the issues. When the issues involve less sophisticated or common types of

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175. *Id.* at 95-96.

176. *Id.* at 95-97.

transactions, the states appear to readily meet the requirements of the Full Faith and Credit Clause of the Constitution without incident.<sup>177</sup>

When complex issues involve multiple agencies trying to protect the public, the result may cause agencies to forget their responsibility to honor documents with factual information from other states in carrying out their duties. These multipronged approaches create situations where one agency promulgates the rules while another handles the enforcement. This leaves a gap in authority as to which agency takes the lead when a problem arises because the two entities may look to the other in order to avoid a resolution.

With this premise in mind, I will present a representational regulatory scenario followed by both an analysis of the applicability of the Full Faith and Credit Clause of the Constitution and an evaluation of the legal liability to such cases.

### *A. A Likely Regulatory Scenario*

States are presented with many factually based executive documents from other jurisdictions on a daily basis. Documents such as birth certificates, vital statistics, marriage licenses, and criminal records commonly cross state lines. One increasingly pertinent issue is the movement of families with children from one state to another. For those children old enough to attend school, each state creates minimal requirements for admission. One of the requirements that must accompany a child's application includes an immunization statement. These statements may include a detailed account of the child's vaccination record or may provide an acceptable reason for not obtaining them. Regardless of the status, one administrative agency will most likely determine the required vaccinations while another will handle the regulatory and compliance aspects.

In a state with large population migrations like Florida, the legislature charges the Department of Health (DH) with the responsibility of maintaining the state's public health system.<sup>178</sup> The system must "promote, protect, and improve the health of all people in the state through the specific mission stated in the statute."<sup>179</sup>

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177. An example of this type of situation occurs with government issued birth certificates, marriage licenses, and with the use of fingerprints and photos of individuals who spent time in jail.

178. FLA STAT. § 381.001 (2011).

179. *Id.* The statute lays out the mission as follows:

The mission of the state's public health system is to foster the conditions in which people can be healthy, by assessing state and community health needs and priorities through data collection, epidemiologic studies, and community participation; by developing comprehensive public health policies and

In carrying out this mission, the Florida Statutes specifically require DH to determine the appropriate health requirements for school children and the authority to adopt rules and enforce the health requirements.<sup>180</sup> As part of setting the health standards, the DH, in consultation with the Department of Education, received “the authority to adopt rules and enforce” the health requirements.<sup>181</sup> Pursuant to this statute, the DH “shall adopt rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases.”<sup>182</sup> Under this mandate, the DH promulgated regulations that require each student to present immunization records or the appropriate exemptions solely on its forms.<sup>183</sup> Nonetheless, the DH carries out its legislative mandate to set standards and protect the public.

While the DH sets the regulations, the Florida Legislature splits the responsibility in enforcing the licensing and compliance regulations between the Department of Children and Families (DCF) for preschools without a kindergarten<sup>184</sup> and the Department of Education for public and private schools.<sup>185</sup> Similar to other agencies, DCF enforces the regulations through regular inspections of the schools pursuant to its statutory authority and may take disciplinary actions.<sup>186</sup> When those inspections turn up discrepancies, the agency classifies the violation based on a progressive enforcement policy.<sup>187</sup> For those situations where a violation occurs due to “Health Immunization Records,” the regulation provides for “Technical Support” to the school on the first instance up to the issuance of a complaint with fines of \$50 per day for each violation.<sup>188</sup>

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objectives aimed at improving the health status of people in the state; and by ensuring essential health care and an environment which enhances the health of the individual and the community.

FLA. STAT. § 1003.22 (2011) (amended Apr. 27, 2012).

180. FLA. STAT. § 1003.22(3) (2011).

181. *Id.*

182. *Id.* The statutes also provide for exemptions based on religious reasons, a valid medical reason by a Florida licensed physician, the DH determines the vaccinations unnecessary, or an authorized official issues a temporary release. *Id.* § 1003.22(5).

183. FLA. ADMIN. CODE 64D-3.046 (2011).

184. FLA. STAT. ch. 402.3025(2) (2011) (citing FLA. STAT. ch. 402.301-402.319 (2011)).

185. *Id.* ch. 402.3025(1)(a).

186. *Id.* chs. 402.310, 402.311.

187. FLA. ADMIN. CODE 65C-22.010 (2011).

188. *Id.* 65C-22.010(2)(e)4. The regulation reads as follows:

4. Children’s Health/Immunization Records Disciplinary Sanctions.

a. For the first violation of a Class III Children’s Health and/or Immunization standard, technical assistance shall be provided. The violation will be classified as “Technical Support.”

For those children moving between states, the documents presented may originate from their former state. If one fails to make a trip to a healthcare professional in their new jurisdiction to unnecessarily obtain new documents, DCF will reject those records as nonconforming to its standards solely because it comes from another jurisdiction.<sup>189</sup> As such, an innocent child and a school can get caught in between a finger pointing exercise between administrative agencies while the government as a whole completely disregards the Full Faith and Credit Clause of the Constitution.

### *B. Applicability of the Full Faith and Credit Clause*

In considering the applicability to the representational scenario outlined using the State of Florida's immunization requirements for children, the influence of the Full Faith and Credit Clause of the Constitution coupled with the congressional legislation and common law precedential authority provides a point of conflict. As this Article earlier illustrated, the courts do not give clear guidance on the exact source of the precedential authority. Therefore, this examination will look at all three possibilities: the Act of 1790, the Act of 1804, and common law general legal principles.

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b. For the second violation of the same Class III Children's Health and/or Immunization standard, the department shall issue a formal warning letter stating the department's intent to take administrative action if further violations of the standard are found. The violation will be classified as "Technical Support."

c. For the third violation of the same Class III Children's Health and/or Immunization standard, the department shall issue an administrative complaint imposing a fine in the amount of \$25 for each violation. This Class III violation and subsequent Class III violations of the same standard within a two year period will be classified as "Class III."

d. For the fourth violation of the same Class III Children's Health and/or Immunization standard, the department shall issue an administrative complaint imposing a fine in the amount of \$30 for each violation.

e. For the fifth violation of the same Class III Children's Health and/or Immunization standard, the department shall issue an administrative complaint imposing a fine in the amount of \$40 per day for each violation.

f. For the sixth and subsequent violation of the same Class III Children's Health and/or Immunization standard, the department shall issue an administrative complaint placing the provider's license or registration on probation status for a period not to exceed six months, and the department shall also issue an administrative complaint imposing an additional fine of \$50 per day for each violation.

*Id.*

189. Supplemental Inspection Sheet regarding Child records/infractions from Miatta Jalaber, Department of Children & Families (Oct. 11, 2011) (on file with author).



### 1. The Act of 1790 (28 U.S.C. § 1738)

Under the Act of 1790, Congress essentially directed the forum courts with an approach for accepting a document with factual information originating from the executive branch of another jurisdiction.<sup>190</sup> Following the precedential authority based in this legislation, a properly authenticated document with factual information originating from the executive branch of the government shall receive reciprocal treatment by another state.<sup>191</sup> This authentication can occur through traditional methods prescribed in common law or under the direction of the congressional legislation, which requires a seal from an issuing state's court that an attestation on the document by a government official complies with the jurisdiction's laws.<sup>192</sup> Consequently, the authority under the Act of 1790 would require a court in a receiving state to give the same legal effect in its jurisdiction as provided by the laws from where it was issued.<sup>193</sup>

In relation to the scenario presented, this means that Florida's DCF must initially refuse a properly authenticated immunization document with factual information from another state for a child looking to attend school as nonconforming solely based on the grounds that only a DH form satisfies the regulation. However, should the proper representative of the child decide to challenge this rejection by DCF, a court in the State of Florida would need to consider the sister-state document and determine the legal effect within its jurisdiction. So long as the child maintains the proper immunizations for attending school in the state that issued the document, the court in Florida would need to follow the precedential authority explaining the Act of 1790 and strike down the legislation and accompanying regulations that solely require the DH forms.

Hence, the Act of 1790 provides authority with respect to a document with factual information originating from the executive branch of another jurisdiction to require reciprocal treatment as long as the dispute finds its way into the court system.

### 2. The Act of 1804 (28 U.S.C. § 1739)

Alternatively, the Act of 1804 may serve as the underlying source that applies toward the representative example from Florida. This legislation requires each state's executive branch of government to accept properly authenticated, factually based documents originating

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190. 28 U.S.C. § 1739 (2012) (originally enacted as Act of May 26, 1790, 1 Stat. 122).

191. *See supra* Part I.E.1.

192. *See supra* Part I.E.1.

193. *See supra* Part I.E.1.

from other jurisdictions, expanding the responsibilities associated with the Full Faith and Credit Clause beyond just the courts.<sup>194</sup> Under the precedential authority providing guidance for this legislation, one state must provide equivalent treatment toward factually based executive branch documents from other jurisdictions.<sup>195</sup> However, the receiving state may require different levels of authentication based on its own court precedent, but at the very least, it needs some type of certification by someone authorized within the issuing governmental unit.<sup>196</sup> In those situations where the original document remains on file with the issuing office and the copy contains an official state seal or some other form of authentication, the receiving state government must accept it in lieu of their own despite legislation to the contrary.

Moreover, the level of credence to give these sister-state documents also varies from that of *prima facie* evidence to full legal effect depending on the state.<sup>197</sup> In a *prima facie* situation, the state government would accept the executive document as truthful until proven otherwise.<sup>198</sup> The burden of proof for denying the document would shift to the state government receiving the document to show it as inaccurate, a mistaken, or another valid reason for not accepting it as correct.<sup>199</sup>

In the case of official immunization records, many states create and maintain a proprietary database for these records. A state official maintains these records and allows for the issuance of properly authenticated copies when necessary just like they do for birth certificates, driving histories, and prison records. Should a child's representative present this document from another state to a school in Florida, the *prima facie* approach will require acceptance as self-proving in lieu of the DH form stated in the regulations as the only satisfactory evidence of immunizations for a student. The Florida administrative agency deciding to reject the document will bear the burden of proving that it fits into one of the acceptable categories for denial on accuracy grounds prior to issuing a determination of noncompliance. With the *prima facie* approach requiring the acceptance of official immunization records from another state, the Florida regulations requiring solely a DH form to satisfy the immunization requirements for school age children fails to allow for the acceptance of official documents from another jurisdiction.

Therefore, the precedent and authority conveyed in the Act of 1804

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194. 28 U.S.C. § 1739 (originally enacted as Act of Mar. 27, 1804, 2 Stat. 298).

195. *See supra* Part I.E.2.

196. *Supra* Part I.E.2.

197. *Supra* Part I.E.2.

198. *Supra* Part I.E.2.

199. *Supra* Part I.E.2.

requires an administrative agency to accept factually based official documents from other jurisdictions in lieu of its own unless it can prove a proper reason for denial.

### 3. General Legal Principles

Finally, the common law general legal principles also provide a source of precedent and authority with respect to factually based executive branch documents. The precedent for this approach requires the courts from each state to accept factual documents from executive branches outside its jurisdiction so long as a different piece of legislation with a stronger public policy argument does not preempt it.<sup>200</sup> While not needing additional judicial certifications for acceptance, a state government receiving an official record from another jurisdiction must treat the facts contained in the document provided as a truthful record until proven otherwise.<sup>201</sup>

Applying the Florida example to the common law legal principles precedent will result in a blend of the previous analysis concerning the Act of 1790 and the Act of 1804. Following the Act of 1790, the application of the general legal principles articulated in common law required the Florida government to reject immunization records validly authenticated and originating from another jurisdiction for a child trying to attend school on the basis that the forms came from another state and for this dispute to face a legal challenge in court. Once validated by a judicial decision as contrary to precedential authority and an impermissible action, the state of Florida would be required to change its statutes and regulations in order to comply with the court order or suspend its enforcement of the applicable laws.

Likewise, the treatment of factually-based executive branch documents under general legal principles mirrors that of the *prima facie* approach used with the Act of 1804. Should a court action occur under the Florida policy, the governmental unit rejecting the immunization record for a student from another state solely due to the differences in forms would bear the responsibility of proving that the document fits into one of the acceptable categories for denial. Given that many of the state immunization records for children occur in government administrated databases, the State of Florida would face a difficult task absent some sort of fraud.

Furthermore, the State of Florida could try to fit its approach into the limited precedent based on a different piece of legislation rooted in its own public policy. The State of Florida would argue that the

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200. *See* Part I.E.3.

201. *Supra* Part I.E.2.

requirement to submit the DH form ensures the health, safety, and welfare of the children in the schools. Consequently, the Cardozo opinion discussed earlier helps provide persuasive authority.<sup>202</sup>

However, this argument quickly weakens when considering other facts in conjunction with the potential public policy defense from the State of Florida. First, the DH permits children into schools that object to immunizations for religious reasons. This means that some children enter schools without attaining the DH standard. Therefore, students with immunization records from another state pose less of a threat to their classmates because they maintain at least some type of vaccination history.

Furthermore, while courts allow each state to set its own public policies irrespective of another jurisdiction, the courts must also recognize that it operates within the construct of a broader national system that may require accommodation.<sup>203</sup> Many of the immunization standards originate from the federal government from agencies like the National Institutes of Health or national organizations such as the American Academy of Pediatrics. The standards from another state most likely follows one of these two organizations, so the child's vaccination history will adhere to some type of national policy. As such, the State of Florida would have a difficult time showing a court that a child with vaccinations from another state poses a greater threat to a school's population than one without, especially if the other jurisdiction follows some type of national guideline.

Finally, the Cardozo opinion must be distinguished when applied to the Florida example because the difference between denying a child access to school on the basis of his immunization records and ensuring a criminal defendant receives proper treatment in the courts does not embody similar characteristics outside the factually based, executive branch documents. The consequences of using fingerprints to sentence a criminal defendant as a habitual offender provides a far more serious scenario, invoking some of the highest standards of legal analysis, because it contemplates an individual's life or liberty. In contrast, the denial of a child's access to schools based on the refusal to accept another state's immunization record does not nearly rise to that level of scrutiny, because the student already received vaccinations based on some type of standard elsewhere. Accordingly, a court hearing a case

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202. See *supra* text accompanying notes 173-76.

203. See *e.g.*, *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939); *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935). These cases apply to the Full Faith and Credit Clause in the context of sister-state judicial decisions, which offers very limited precedent in this analysis, however they can provide a limited example on how one state maintains the right to set its own public policies within its jurisdiction but must keep inside the limits of a national system.

evaluating the rejection of sister-state immunization records in Florida would probably distinguish the exception to the general principles precedent put forward by Justice Cardozo.

Thus, a Florida court facing the issue of rejected immunization forms due to noncompliance with the DH form requirement will most likely disallow the applicable statutes and regulations should it base its opinion on the common law's general legal principles.

Therefore, all three authorities conclusively indicate that factual and official executive records from another jurisdiction require treatment on par with the accepting state's own documents. Consequently, the DH regulations and the associated disciplinary provisions in the example above, will not pass a constitutional evaluation, making the laws void and unenforceable.

### *C. The Legal Liability to a State and its Employees*

On the surface level, this type of constitutional violation by a state creates a very unique but common scenario. Should the aggrieved party choose to wage a legal battle, the injury manifests deep implications. First, the student immediately suffers from the state's decision to violate his constitutional rights. Second, the student is deprived of an educational opportunity while the case makes its way through the legal system unless he relocates back to his original state. Both pose an unnecessary and undue burden on the student, so compliance usually becomes the path of least resistance. As such, in this instance, the traditional lawsuit provides an inadequate mechanism to properly protect a student's constitutional rights in this instance from improper state regulations and compliance measures due to the unequal positioning of the parties.

Conversely, the government and its employees perceive a minimal risk by keeping the status quo and forcing submission by the aggrieved party. A legal loss by the government means that the regulation gets rewritten to allow for constitutional compliance with minimal financial consequences to the individual case. The employees of the agency see no immediate repercussions from their illegal actions that injure others because they forget that their obligations operate differently than their private sector counterparts. Thus no perceived internal deterrence exists to prevent these types of abuses because the cloak of regulations appears to provide protections.

To remedy this situation, a class action lawsuit offers a better avenue to force a state government into compliance; because the individual damages individually do not justify such an action while the combined injuries provide significant incentives. Under Rule 23 of the *Federal Rules of Civil Procedure*, a named representative can commence a

lawsuit if they meet all of the requirements. The rule provides for two parts. The first part enunciates four separate prerequisites that must occur,<sup>204</sup> followed by a second component that allows for compliance with one of three different conditions.<sup>205</sup> With these criteria met, “the court must—at an early practicable time—determine by order whether to certify the action as a class action.”<sup>206</sup>

Continuing with the Florida example, a class representative will show that numerous children who arrive from another state start school each year and have similar claims. As a result, the joinder of each child’s representative becomes impracticable, so a class action will

204. FED. R. OF CIV. P. 23(a). The rule states:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

205. *Id.* 23(b). The rule reads:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*Id.*

206. *Id.* 23(c)(1)(A).

provide efficiency for the courts.

Further, most of these children bring with them their official immunization records from another jurisdiction. However, pursuant to the Florida regulations, unless they submit the DH immunization form, the school will have to deny them access or suffer discipline. This means that the questions of law or fact surrounding the requirement to provide only a Florida form as an admission prerequisite becomes common to all members of the class.

Finally, the named party will need to demonstrate its ability to ensure fair and adequate representation and that it received typical treatment.<sup>207</sup> While this will depend on the named party in the lawsuit, the refusal of out of state official immunization records occurs universally due to the Florida Regulations. The class representative's ability will remain case specific but highly likely. Consequently, a representative plaintiff could receive class certification on a lawsuit on behalf of all those injured parties where the state compelled compliance to its requirement to only accept its own documents and to refuse those official ones from another jurisdiction.

Beyond the civil liabilities, the bureaucratic employees and their general counsel offices could also face criminal action due to the special obligations placed on government workers. Like many other states, the Florida Statutes require,

All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning, and all candidates for public office, are required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state . . .<sup>208</sup>

The statute continues by providing the following oath for each covered person:

I, \_\_\_\_\_, a citizen of the State of Florida and of the United States of America, and being employed by or an officer of \_\_\_\_\_ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida.<sup>209</sup>

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207. *Id.* 23(a).

208. FLA STAT. § 876.05 (2011).

209. *Id.*

This oath, coupled with the statutory requirement placed on a government employee, creates a major difference from those in the private sector and requires a personal commitment to take appropriate actions to comply with the Constitution when confronted with such issues in the workplace.

Should a bureaucratic employee choose to ignore a potentially injured party's constitutional assertion and fail to take action, a violation of their sworn oath would occur. The employee specifically took on the duty to support the Constitution in its entirety, not just a portion of it that fails to include the Full Faith and Credit Clause. Lack of action would constitute a blatant dereliction of duty. However, the educational background of the bureaucratic employee may play a role in determining the level of culpability. Some employees may not maintain the requisite knowledge of the Constitution, but they should have the proper training to seek appropriate advice in those instances from supervisors and the Attorney General's office.

In contrast, the general counsel's office may not use such an excuse. Its main function centers on providing critical legal advice and guidance to the administrative agency and its employees. A decision by the general counsel to ignore or redirect the question creates the same violation of the sworn oath, but at a more troubling level. It is the responsibility of an attorney to maintain knowledge of the U.S. Constitution pursuant to their bar admission and by virtue of accepting the office. It is within their job description and duties to protect and defend against the occurrence of this type of abuse. The attorney could also face sanctions or even disbarment for such contemptible behavior that violates the ethical code of conduct for the profession.

Absent affirmative actions to bring the regulations into compliance upon notice, a state bureaucratic employee and general counsel could not only lose their positions, but face criminal prosecution and time in jail for such a dereliction of duty with respect to a violation of the Constitution.

### III. POLICY RECOMMENDATIONS

In light of the foregoing example, many other states likely have similar regulatory language that excludes informational documents from outside jurisdictions solely in favor of its own. The root cause of this approach remains difficult to ascertain, but a number of hypotheses present themselves on the matter. Poor legislative drafting is one reason that may cause this issue in the first place. With all of the complexities involved with drafting legislation, the wordsmith and reviewing counsel may lose sight of issues such as individuals presenting documents from



another state. The goal of accomplishing a certain objective may overtake the limits and restrictions set forth by the Constitution. While no excuse, this situation may occur more regularly than not due to the continual pressures to eliminate waste and prove efficient performance by the government.

In addition, the collective competence in a given subject of those promulgating the legislation may play a role. The complexities in many fields require special knowledge and expertise to complete the task. In the example involving immunization records for school aged children, the policy goal requires at least individuals with expertise in the areas of health, education, and the law to give input. Obtaining qualified and competent resources may prove difficult, but inadequacy of resources is no excuse for poor legislation. If this is the case, the government should not move forward with the law or regulation until properly funded or staffed.

A final reason for this type of approach is based on the intent to cause undue burdens upon citizens of other states founded on the belief that most aggrieved parties will get frustrated by challenging the government. While disingenuous and cynical, an improperly placed government employee could take a maverick type of approach in the misguided belief that the goal justifies the means. This should not occur due to the numerous checks and balances, but the possibility still exists no matter how remote.

Without considering the underlying cause, a simple solution to the Florida example starts with revising the *Florida Administrative Code* section 64D-3.046 to include in its language “or equivalent”<sup>210</sup> or by adding a third subsection 64D-3.046(1)(a) that states “The equivalent official record(s) from another state or territory governed under the laws of the United States of America.”<sup>211</sup> These two options will resolve the issue on several levels. The first and most important aspect is that the change will comply with the Constitution and the corresponding legislation. This will ensure that children entering schools with official executive documents from another state will not suffer a violation of their constitutional rights. Moreover, it will ripple through the

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210. The proposed regulation would be amended to read in 64D-3.046(1)(a)1: “DH Form 680, Florida Certification of Immunization (July 2010) *or equivalent*, incorporated by reference, available from Department of Health (DOH) county health departments (CHDs) or physicians’ offices; *or.*” *Id.* (emphasis added). This will still leave it to the courts to determine what qualifies as equivalent but allows for the acceptance of out of state documents under the Full Faith and Credit Clause of the Constitution.

211. This would also require the following minor revision to 64D-3.046(1)(a)2 to now read “DH Form 681, Religious Exemptions for Immunizations, incorporated by reference, available at DOH CHDs, must be signed by the local county health department medical director or designee; *or.*” *Id.* (emphasis added).

remaining regulations and statutes to provide immediate compliance with the Constitution and the corresponding legislation, without requiring further redrafting.

Additionally, these suggested revisions will avoid the need for litigation and possible employee discipline. While each individual instance of a state's refusal to honor an equivalent official document may not rise to a level that makes a lawsuit practical, this changes when there are many similarly situated plaintiffs that sustain injuries like that of the countless number of children changing schools between states each year. Making these changes will eliminate the financial liability associated with the cumulative effect from such a noncompliant policy. Meanwhile, it will also remove the opportunity for a government employee to find themselves in situations where they can get inadvertently caught in violating their sworn oath and eliminate the need for the resulting criminal prosecution.

Despite the various ways in which an improper policy may originate, the solutions to resolve this type of conflict with the Full Faith and Credit Clause of the Constitution and congressional legislation appear relatively straightforward by changing existing language to allow for the acceptance of official executive documents from another state. This will allow for any referencing laws or regulations to still maintain its authority without additional revisions.

## CONCLUSION

The latest expansion of the executive branch over the past half-century greatly increased the scope of regulatory actions upon the public. With this phenomenon, it also increased the corresponding number of moving parts to the governmental machine. As a result, this relationship increases the likelihood that a state government will inadvertently overstep its authority and violate the Constitution and accompanying congressional legislation. Accordingly, states must be willing to take immediate action to correct itself when discovered.

Considering the gravity of these types of violations, the state governments need to routinely implement a self-examination process for situations that blatantly void its laws, regulations, and policies. This includes looking at the factual documents required from the public and determining whether they can emanate from another state. The Constitution, in conjunction with the congressional legislation, apply to the official executive records with only factual content even though the Supreme Court does not reveal a great deal about its position on the subject.

Thus, the expansive coverage of the Full Faith and Credit Clause of

the Constitution in conjunction with the congressional legislation, includes all three branches of the government and serves as a unifying force across the states to disallow even minor infringements upon the rights of the citizens of our country, whether through the interpretations of the federal statutes or under our inherited general legal principles from England's courts of record.