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FULL FAITH AND CREDIT AND SECTION 1983

David Rohlfig*

Mickey Smith and Oren Adar are the unmarried parents of Infant J, whom they adopted legally in the state of New York in 2006.¹ Infant J was born in Louisiana, and the two men sought to have his birth certificate amended by the Louisiana registrar so that it would reflect their new family arrangement.² This is a relatively routine process³ made statutorily available to parents who have adopted Louisiana born children in another state.⁴ While the Louisiana law says that the

* J.D., 2013, University of Pittsburgh School of Law; B.A. Western Connecticut State University. Thank you to Professor Rhonda Wasserman, Professor James Flannery, and to the Pitt Law Review staff for their help and patience. Any errors or misstatements are my own.

¹ *Adar v. Smith*, 639 F.3d 146, 149 (5th Cir. 2011).

² *Id.*

³ See *Adoption Information*, DEPARTMENT OF HEALTH AND HOSPITALS: STATE OF LOUISIANA, <http://new.dhh.louisiana.gov/index.cfm/page/680> (last visited May 31, 2013).

⁴ LA. REV. STAT. ANN. § 40:76 (2013), which reads:

(A) When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United States, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption or, if the case has been closed and the adoption decree has been sealed, upon the receipt of a certified statement from the record custodian attesting to the adoption decree.

(B) The decree is considered properly certified when attested by the clerk of court in which it was rendered with the seal of the court annexed, if there is a court seal, together with a certificate of the presiding judge, chancellor, or magistrate to the effect that the attestation is in due form. The certified statement is considered proper when sworn to and having the seal of the foreign state or territory's record custodian.

(C) Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing:

- (1) The date and place of birth of the person adopted.
- (2) The new name of the person adopted, if the name has been changed by the decree of adoption; and

registrar “*shall* make a new record in the archives,”⁵ upon production of the required proof of adoption, in this case, the registrar refused to do so for reasons of public policy, citing to the fact that Louisiana does not allow adoption by unmarried couples.⁶ The two men then filed suit under § 1983,⁷ on their own as well as Infant J’s behalf, complaining that the registrar failed to afford the constitutionally required full faith and credit deserved by the adoption decree, and that the failure to provide an amended birth certificate was a violation of their constitutional rights to equal protection.⁸ The district court for the Eastern District of Louisiana awarded summary judgment for Oren and Mickey, stating that the adoption decree required full faith and credit by the registrar and ordered issuance of an amended birth certificate.⁹ This decision was affirmed by the Fifth Circuit in an opinion that echoed the conclusions of the lower court, that the Constitution required that the registrar afford full faith and credit to the New York adoption decree.¹⁰

This did not prove to be the resolution of the controversy, and the Fifth Circuit decided to rehear the case *en banc*. The court reversed the prior decision on multiple grounds, including the conclusion that § 1983 is not an appropriate recourse for violations of the Full Faith and Credit Clause,¹¹ that the Clause creates no right vindicable under § 1983,¹² and that as a member of the executive branch, the registrar is not subject to the requirements of the Clause.¹³ These issues have not arisen (or at least been addressed) previously, and a subsequent denial of

(3) The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child.

⁵ *Id.* (emphasis added).

⁶ *Adar*, 639 F.3d at 149–50. See LA. CHILD. CODE ANN. art. 1221 (2013).

⁷ 42 U.S.C. § 1983 (2012).

⁸ *Adar*, 639 F.3d at 150.

⁹ *Adar v. Smith*, 591 F. Supp. 2d 857, 860 (E.D. La. 2008), *aff’d*, 597 F.3d 697 (5th Cir. 2010), *rev’d*, 639 F.3d 146 (5th Cir. 2011).

¹⁰ See *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010).

¹¹ *Id.* at 157–58.

¹² *Id.* at 151–53.

¹³ *Id.* at 158–61.

certiorari by the Supreme Court leaves them unsettled, notwithstanding a circuit split created by the *en banc* decision.¹⁴

This Note will consider whether § 1983 does in fact provide an adequate and appropriate recourse to violations of the Full Faith and Credit Clause, and further what usefulness or necessity this procedural posture holds in the future. Part I of the paper will offer a short overview of the history and current state of the Full Faith and Credit Clause, and Part II will briefly explain the requirements to bring an action under § 1983. Part III will establish that the Full Faith and Credit Clause creates an individual right vindicable under § 1983, that members of the executive branch are (or at least should be) governed by the requirements of the Clause, and that § 1983 is an appropriate recourse to remedy violation of the Clause by members of the executive. Part IV will then consider the growing necessity for these actions given the blurring of responsibilities between branches of government and especially the increase in opportunities for and occurrences of executive action “giving credit” to out of state judgments.

I. FULL FAITH AND CREDIT

Read literally, the Full Faith and Credit Clause (“the Clause”), appears extremely broad in its requirement that “*Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State.*”¹⁵ This section of the Constitution is implemented into law as directed by its second article,¹⁶ but is not as a result clarified to any great extent,¹⁷ save for two

¹⁴ In the case that eventually became *Finstuen v. Crutcher*, the Tenth Circuit found an Oklahoma statute unconstitutional because it denied recognition to any out of state adoption by parents of the same sex. 496 F.3d 1139 (10th Cir. 2007). This action against the statute was filed in federal court under § 1983 on the basis that the statute violated the Full Faith and Credit Clause. Complaint at 7, *Finstuen v. Edmonson*, 2004 WL 3139176 (W.D. Okla. 2004) (No. 04CV1152). Neither the district court nor the court of appeals addressed the appropriateness of § 1983 to remedy violations of full faith and credit, but nonetheless the case was tried under this theory and the plaintiffs prevailed. See *Finstuen*, 496 F.3d 1139 (2007).

¹⁵ U.S. CONST. art. IV, § 1 (emphasis added).

¹⁶ “And Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1. See 28 U.S.C. § 1738 (2006) which reads:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by

important requirements—that the federal courts afford the same faith and credit constitutionally required of the states, and that acts, records and proceedings shall be given the same full faith and credit in each court in the United States as they would have in the state of the rendering court.¹⁸ However, as Professor Wasserman notes, while the first sentence in both the Constitution and the statute seems to require the same “full faith and credit” of public acts, judicial proceedings, and records, the Supreme Court has long differentiated the amount of “faith and credit” owed to them individually.¹⁹ In *Baker v. General Motors Corp.*, the Court reiterated that there is an “exacting” obligation to afford full faith and credit to judgments of the courts of other states, requiring a decision be given the same effect (both in terms of issue and claim preclusion) in the forum where recognition is sought as it would have in the forum where it was rendered.²⁰ The same is not true for public acts,²¹ which are not due the same deference provided that the law applied to a particular controversy bears a reasonable relationship to that controversy so as to avoid being “arbitrary or fundamentally unfair.”²² This outcome makes sense, as an alternate result would require one state to apply the

the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

¹⁷ See Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 467–68 (2005).

¹⁸ See Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 19–21 (2008).

¹⁹ See *Baker v. General Motors Corp.*, 522 U.S. 222, 232–34 (1998) for the most recent discussion by the Court of the state of the Clause, explaining that, “[Their] precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.” For a more expansive explanation of the Court’s jurisprudence differentiating public acts from judicial proceedings, see Wasserman, *supra* note 18, at 21–23.

²⁰ *Baker*, 522 U.S. at 233–34.

²¹ See Whitten, *supra* note 17, at 471–72.

²² *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985).

laws of another state in certain controversies, and vice versa, preventing a state from ever applying its own law in multi-state controversies.²³

In any case, it is firmly established that to properly recognize a judgment, the recognizing forum must give it the same preclusive effect it would have in the jurisdiction where it was rendered.²⁴ *Baker* also makes clear that while the second forum, where recognition is sought, must give the same preclusive effect to a foreign judgment as it would receive in the rendering forum, the method of enforcement is governed by the laws of the recognizing forum.²⁵ Plainly stated, “[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even handed control of forum law.”²⁶ This is an important distinction that federal courts of appeal understand to mean that while a state may not decline to recognize the judgment of another on the basis of public policy, an exception exists where a rendering state’s judgment would actually dictate or alter the policy of the recognizing state.²⁷ To summarize, the state of the Clause in relation to judgments is foreign judgments must be as preclusive in the recognizing forum as they would be in the rendering forum, regardless of the second forum’s public policy. The one (so-called)²⁸ exception to the Clause is that the enforcement mechanisms of the rendering forum do not accompany recognition in the second forum.²⁹

²³ See *Pac. Emp’r Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501–02 (1939) (noting the absurdity of this result).

²⁴ *Baker*, 522 U.S. at 233–34.

²⁵ *Id.* at 234–36 (“Full faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.”).

²⁶ *Id.* at 235.

²⁷ See *Rosin v. Monkin*, 599 F.3d 574 (7th Cir. 2010) (holding New York plea bargain provision excepting convicted sex offender from the New York registry did not prevent Illinois from requiring his registry upon relocation to that state because the terms of the plea bargain constituted enforcement measures); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981) (holding Texas sheriff could require deputy sheriff applicant to divulge past criminal involvement in California incident, even though a California court order had expunged the record).

²⁸ When considered further, this is not so much an exception but a proper application of the Clause doctrine—if a State recognizes a judgment as it would one made by its own courts, it would then also sensibly apply its own laws and procedures to enforce that judgment.

²⁹ *Baker*, 522 U.S. at 235–36.

II. SECTION 1983

Explaining § 1983 in a few paragraphs is a futile undertaking—there are books and articles written solely on the topic and its application, and countless cases brought under the statute. This Part will offer a basic explanation of the requirements for a § 1983 claim. The statute provides recourse for individuals whose constitutional rights have been violated and allows the injured party to sue for redress.³⁰ To prevail under § 1983 an injured party typically must demonstrate that a defendant was acting “under color of” state law, and that the defendant’s action deprived the plaintiff of a right, privilege, or immunity guaranteed by the Constitution (or in some cases, federal statute).³¹ Section 1983 does not require exhaustion of other remedies available to a plaintiff, meaning that an injured party may file suit in federal court without pursuing the matter in state courts.³² The statute’s requirement that a defendant must have acted “under color of” state law means that the actor in question must have been in the position to commit the wrong due to his position under state law, not that the action was required by law.³³ Another way to view the concept of “under color of” state law is to define it as state action—the federal courts have tended to treat the two as meaning essentially the same thing.³⁴

The second requirement of § 1983, that a plaintiff must have been denied a constitutional right, may operate to confine the holdings of *Monroe v. Pape*³⁵ in some instances, requiring that a plaintiff pursue available state court remedies before filing a § 1983 action.³⁶ Section 1983 actions may be brought to remedy violations of due process that are considered either substantive or procedural in nature, with those rights that are deemed substantive tending to be more readily

³⁰ MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 1 (2011).

³¹ See *Monroe v. Pape*, 365 U.S. 167 (1961) (overruled in part not relevant here).

³² *Zinermon v. Burch*, 494 U.S. 113, 124–26 (1990) (“Overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.”).

³³ COLLINS, *supra* note 30, at 20–22.

³⁴ MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 86 (2d ed. Fed. Jud. Ctr. 2008) (noting that in *Lugar v. Edmonson Oil Co.*, the Court stated that “color of state law would not constitute state action if color of state law were interpreted to mean merely acting with the knowledge of and pursuant to [a] statute.” 457 U.S. 922, 935 (1982)).

³⁵ See *Monroe*, 365 U.S. 167.

³⁶ COLLINS, *supra* note 30, at 42–43.

remediable under the statute.³⁷ The Supreme Court has held that where an alleged violation was not of a right enumerated or guaranteed directly by the Constitution or Bill of Rights, and recourse existed under state law, a plaintiff will only be allowed to bring action under § 1983 where the state courts cannot afford adequate or meaningful relief.³⁸ I will assume for the sake of argument that any extant right stemming from the Full Faith and Credit Clause would be considered substantive, as the Supreme Court has found other rights arising out of Article IV to be substantive, and more broadly, a right guaranteed by the Constitution is generally considered to be substantive.³⁹

In addition to these requirements, the statute has other important contours to consider, such as who may be hailed into court as a defendant and what relief may be granted. Relevant to this Note, unqualified personal immunity from suit for injunction or damages is only enjoyed by legislators—all other state actors may be sued at least for injunction, regardless of the reasonableness of their actions.⁴⁰ Members of the executive branch are subject to § 1983 action for injunctive relief at all times, and if they have acted unreasonably or in bad faith they may also be subject to damages.⁴¹ Members of the judiciary, when acting in a judicial capacity⁴² and with proper jurisdiction, are subject only to injunction,⁴³ and are held free from

³⁷ *See id.* at 43–45.

³⁸ *See id.* at 25–33. *See also* 42 U.S.C. § 1997e (2012) (suits by convicts must exhaust all administrative remedies, and must exhaust habeas corpus options as well); *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (stating that section 1983 action was not available where potential for state remedy to takings claim still existed); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Younger v. Harris*, 401 U.S. 37 (1971) (doctrines of abstention). *See also* COLLINS, *supra* note 30, at 25–28 (explaining that the Supreme Court has refused to allow § 1983 claims to proceed where other avenue for recovery or resolution exists at the state level).

³⁹ COLLINS, *supra* note 30, at 40.

⁴⁰ *See id.* at 155–79.

⁴¹ *See id.* at 156–70 (discussing the aspects of “Good Faith Immunity” for executives).

⁴² *See Mireles v. Waco*, 502 U.S. 9 (1991); *Forrester v. White*, 484 U.S. 219 (1988).

⁴³ COLLINS, *supra* note 30, at 172. Another author considers this immunity to be broader, noting that § 1983 was amended as part of the Federal Courts Improvement Act to say that injunctive relief will not be granted against a judicial officer where no declaratory decree was violated or declaratory relief was not available. SCHWARTZ & URBONYA, *supra* note 34, at 134. In any case, this matters little to the premise of this Note, which will be most concerned with executive actors, though the Note’s consideration of the importance of § 1983 to remedy FF&C violations in a hybridized government must take this into account.

liability for damages under § 1983.⁴⁴ Officials who are seen to act in more than one capacity (such as administrative officials who act in a judicial capacity) do not present much difficulty for the theory of this Note, as the actions I am concerned with are for injunctive or declaratory relief, and members of the executive and judicial branch are subject to such actions.⁴⁵ In any case, the Supreme Court has found that where an official is more local and operates in many capacities that blur the separation of branches, this blurring necessitates a diminution of absolute immunity given the indivisibility of the official's actions.⁴⁶

In sum, and for the purposes of this Note, § 1983 provides a remedy for individuals whose constitutional rights have been violated by an official acting "under color of" state law.⁴⁷ Actions for injunction or declaratory relief may be brought against members of the executive branch, and to a lesser extent to judicial actors as well.⁴⁸ While § 1983 provides *many* complexities, these generally accepted doctrines are the extent of what is necessary for this paper.

III. SECTION 1983 AND FULL FAITH & CREDIT

A. *The Right to Full Faith and Credit*

In *Adar v. Smith*, the majority found that the Clause does not confer a constitutional right that may be vindicated by an action under § 1983.⁴⁹ This holding seems to contradict the holding in a recent, related case, as well as express statements by the Supreme Court. Furthermore, the holding seems to rely on an overly broad reading of the Court's decision in *Thompson v. Thompson*.⁵⁰

In his brief in support of petition for writ of *certiorari*, Dean Chemerinsky argues that the Clause satisfies the requirements to create a right that is vindicable by § 1983 action, as set forth in *Dennis v. Higgins*.⁵¹ The factors taken from that case are "(1) whether the provision creates obligations that are binding on the

⁴⁴ See *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

⁴⁵ But see SCHWARTZ & URBONYA, *supra* note 34, at 134; see also *supra* text accompanying note 44.

⁴⁶ See *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975).

⁴⁷ See generally COLLINS, *supra* note 30.

⁴⁸ *Id.* at 172. But see SCHWARTZ & URBONYA, *supra* note 34, at 143.

⁴⁹ *Adar v. Smith*, 639 F.3d 146, 155–56 (5th Cir. 2011).

⁵⁰ See *Adar*, 639 F.3d at 169–72 (Wiener, J., dissenting).

⁵¹ Chemerinsky Brief, *supra* note 75, at 2–6.

states; (2) whether the plaintiff's interest is sufficiently concrete for judicial enforcement; and (3) whether the provision was intended to benefit the plaintiff.⁵² Applying these factors to the *Adar* case, Dean Chemerinsky argues that the Clause satisfies them in that it first requires states to give full faith and credit to the judgments of other states,⁵³ and the Supreme Court has stated it is a command to states to act in keeping with its directions.⁵⁴ The second factor, whether the interest is judicially enforceable, Chemerinsky considers somewhat self-evident—the Clause and its implementing statute have been enforced by courts and the standards for enforcement are provided by the Clause.⁵⁵ The final factor, whether the provision is meant to protect the plaintiff, has been addressed by the Court on multiple occasions stating that the Clause “preserve[s] rights acquired or confirmed [in] judicial proceedings in one state by requiring recognition of their validity in others,”⁵⁶ that the judgment establishes a right in its holder,⁵⁷ and that the Clause protects citizens from “uncertainty, confusion, and delay that necessarily accompany re-litigation of the same issue.”⁵⁸ This points toward the conclusion that the Clause is meant to protect individuals who have gone to the trouble of obtaining a judgment in one jurisdiction from the hassle of further, complicated proceedings in a second forum. In sum, the factors set forth by the Court in *Dennis* counsel in favor of finding a right to have been created by the Clause.

Beyond this, Dean Chemerinsky notes that the Supreme Court has expressly and repeatedly stated that the Clause creates a right to full faith and credit.⁵⁹ Judge

⁵² *Id.* (citing *Dennis*, 498 U.S. at 448–49).

⁵³ U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each state . . .”).

⁵⁴ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (The Clause “substituted a command for the earlier principles of comity . . .”) (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

⁵⁵ *Baker*, 522 U.S. at 233 (A “final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”); see also Chemerinsky Brief, *supra* note 75.

⁵⁶ *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941).

⁵⁷ *Estin*, 334 U.S. at 546.

⁵⁸ *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982).

⁵⁹ Chemerinsky Brief, *supra* note 75, at 6–7. See, e.g., *Barber v. Barber*, 323 U.S. 77, 81 (1944) (state court’s refusal “to give credit to [a] judgment because of its nature is a ruling upon a federal right”); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443 (1943) (When state court “refuses credit to the judgment of a sister state . . . , an asserted federal right is denied.”); *Titus v. Wallick*, 306 U.S. 282, 291 (1939); *Manhattan Life Ins. Co. of N.Y. v. Cohen*, 234 U.S. 123, 134 (1914) (Court has jurisdiction to review decision in which “rights under the full faith and credit clause were” passed upon); *Tilt v.*

Southwick's special concurrence in *Adar* calls into question the Court's characterization of the Clause as creating a right, since its decision in *Thompson v. Thompson* stated that the Clause functions "only [to] prescribe a rule by which courts . . . are to be guided when a question arises . . . as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than the one where the court is sitting."⁶⁰ Judge Southwick writes that were it not for this reaffirmation in *Thompson*, she might be more inclined to find *National Securities* as an "anachronism,"⁶¹ but since the Court saw fit to revisit the conclusion, she had to afford it more weight and could not agree that the Clause allowed the court of appeals to find further rights to exist.⁶²

It should be noted in response, however, that the excerpted language relied on by the majority and concurrence was initially contained in dicta,⁶³ and was cited in *Thompson* as a qualification to a specific point, not a part of the holding.⁶⁴ The Supreme Court has, as noted, expressly stated that the Clause creates an individual right, and has not constrained that statement in its later decisions. In fact, in its decision in *Dennis* the Court provided a framework for understanding what rights may be guaranteed to the individual by the Constitution.

The *Adar* majority relied on *Thompson* as a clear statement that the Clause guarantees no right on which to base § 1983.⁶⁵ The majority understood the *Thompson* court, in an action brought under the Parental Kidnapping Prevention

Kelsey, 207 U.S. 43, 50 (1907) ("a right under the [Clause] was specially set up and claimed by the executors," who sought but were denied full faith and credit for probate judgment); *German Sav. & Loan Soc'y v. Dormitzer*, 192 U.S. 125, 126–27 (1904) (case involving full faith and credit due a divorce decree dealt "with the constitutional rights of the [private party]"); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641 (1900) (state court decision denied plaintiff "a right given by" the U.S. CONST. art. IV, § 1).

⁶⁰ *Adar v. Smith*, 639 F.3d 146, 164 (5th Cir. 2011) (Southwick, J., concurring) (quoting *Thompson v. Thompson*, 484 U.S. 174, 182–83 (1988) (quoting in turn from *Minn. v. N. Sec. Co.*, 194 U.S. 48, 72 (1904))).

⁶¹ *Id.*

⁶² *Id.* at 165.

⁶³ *N. Sec. Co.*, 194 U.S. at 72.

⁶⁴ See *Thompson*, 484 U.S. at 182–83. When read in context, the quotation taken from *Northern Securities* reads more sensibly as a qualification of the previous statement that the Full Faith and Credit Clause does not give rise to an implied cause of action, and is not meant to confine the rights that are conferred or guaranteed by it. *Id.*

⁶⁵ *Adar*, 639 F.3d 146 *passim*.

Act (PKPA), to allow no right of action under that act, which incorporated the wording of the Clause and its implementing statute into its own language.⁶⁶ The PKPA is a federal law that requires states to give full faith and credit to child custody orders made in the courts of a sister state, provided that the decree is made in keeping with the requirements of the PKPA.⁶⁷ The Court held that a parent could not bring action under the PKPA to force a State to recognize and enforce the custody judgment made in another state, since no implied right of action was created by the language of the statute, which (as mentioned) mirrors that of the Clause.⁶⁸ The Fifth Circuit majority relied on this to hold that the Clause provides no right on which to base an action.⁶⁹

In his dissent, Judge Wiener addressed this reliance as an overbroad interpretation of the Court's findings because the facts of *Thompson*, as well as all of the cases relied on by the majority, are importantly distinct in that they are suits seeking remedies for the actions of private parties as opposed to those of the state.⁷⁰ Additionally, Judge Wiener points out that if the majority is correct and there is no right guaranteed by the Clause, then it makes little sense that the Supreme Court serves as the court of last resort for appeals from state courts brought regarding issues relating to it.⁷¹ In the opposite view, the Clause confers a right and remedy to full faith and credit violations between the state and a private party, but no right to action exists between private parties.⁷² This understanding of the Clause, reading *Thompson* as governing actions between private parties, then distinguishes that

⁶⁶ See *Thompson*, 484 U.S. 174 *passim*; Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2012).

⁶⁷ *Thompson*, 484 U.S. at 175–76.

⁶⁸ *Id.* at 187.

⁶⁹ See *Adar*, 639 F.3d 146.

⁷⁰ *Id.* at 171–72 (Wiener, J., dissenting). As Judge Wiener notes, the distinction between private action and public/state action is very relevant when considering the appropriate remedy. *Id.* In *Thompson* the alleged constitutional injury was not caused by a state actor, but by a private party. *Id.* As explained below, § 1983 is a remedy for the violation of constitutional rights by state actions. See *infra* Part III.C. *Thompson* held that no implied private right of action exists under the Clause or the PKPA for violations by private citizen actors. See *Thompson*, 484 U.S. at 182–83. This is distinctly different from the situation at issue here, where state executive action denied full faith and credit to an out-of-state judgment. *Adar*, 639 F.3d at 172. If, as I argue, the Clause confers an individual constitutional right to full faith and credit, § 1983 should provide a valid remedy to a violation of that right caused by state executive action. See *supra* Part II.

⁷¹ *Id.*

⁷² *Id.*

holding as inapplicable to *Adar* and counsels reliance on other precedent, such as the framework offered by the Court in *Dennis*.⁷³

To summarize, the Clause should be read as creating a right to its guarantee of recognition of judgments, acts, and public records because it satisfies all of the factors in *Dennis*; the right has been expressly defined by the Supreme Court and not relevantly constrained; and because *Thompson* is not relevant in cases where the action is between a private party and the state.

B. *Full Faith and Credit and the Executive Branch*

The en banc majority in *Adar v. Smith* relies in part on the premise that the Clause operates solely upon the judiciary, and that members of the executive (and presumably the legislative) branches owe no duty to recognize the preclusive effects of judgments from other states.⁷⁴ The opinion looks to an article by Professor Whitten,⁷⁵ and the language from *Thompson* mentioned above,⁷⁶ to establish this point,⁷⁷ but there is a persuasive argument against this conclusion supported by the plain language of the Clause, its history, and its subsequent interpretation by the Supreme Court.

First, the language of the Clause contains the express requirement that “each state” shall give full faith and credit to the judgments of sister states,⁷⁸ and does not indicate anywhere that the courts are the only branch of the government to which it applies. Dean Chemerinsky argues that the drafters of the Constitution were quite

⁷³ *Id.*

⁷⁴ See *Adar*, 639 F.3d at 152–57.

⁷⁵ Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998). Whitten notes that the original understanding of the Clause was as an evidentiary requirement for courts to take foreign judgments and laws as evidence of their own existence. *Id.* at 265. In his amicus brief, Dean Chemerinsky notes that the same article goes on to say that the Clause is no longer understood in this way, and Supreme Court decisions have “gone far beyond the original understanding of the provision,” so that the Clause should no longer be seen as a merely seeking inter-court comity, but instead to meet its intended purpose of ensuring cohesion between the sovereign states. Chemerinsky Brief at 10–11 (citing Whitten, *supra*, at 257); *Baker*, 522 U.S. at 232.

⁷⁶ See *Thompson*, 484 U.S. at 177–78 (saying that no right of action exists under § 1983 because the clauses requirements are only placed upon courts).

⁷⁷ *Adar*, 639 F.3d at 152–57.

⁷⁸ U.S. CONST. art. IV, § 1 (emphasis added).

capable of making express limitations on the application of certain provisions.⁷⁹ He further argues that it makes little sense to say that the Clause should be read to constrict its own application to the courts without actual mention of them, given its referral to “judicial proceedings” as one of the specific things on which it operates—the framers were clearly able to denote when they wished to have the Clause apply solely to one branch or its actions; where they did not specify, it should not be read in the narrow manner of the *Adar* majority.⁸⁰ The Supremacy Clause clearly names the “Judges in every State,”⁸¹ as under its strictures, providing further justification for the premise that the Framers were capable and willing to limit the application of constitutional requirements to certain governmental entities.⁸² This differing language used in different parts of the Constitution counsels in favor of reading the Clause to apply to all branches of government within a state, not just the judiciary.⁸³

The history and purpose of the Clause also favor its reading as applying generally to all branches, as the Supreme Court has stated that its main purpose is to act as a binding force, stronger than mere comity among the states by imposing a requirement that each state respect and recognize as valid the decisions made by the governing bodies of its sisters in the Union.⁸⁴ While this purpose does not necessitate that the Clause apply to the executive or legislative branches, it does agree with that premise—its purpose will almost surely be better served by requiring the entire government of a state to afford recognition to foreign judgments. The opposite conclusion would work against cohesion and result in the type of situation in *Adar*, where a judgment of one state is not considered valid by another because it was brought (correctly) before a member of the executive branch instead of the judiciary.

Another historical element relied upon by the majority in *Adar* is that the remedy for violation of the Clause has always been to appeal to the Supreme Court.⁸⁵ This is clear direction that the Court reads the Clause to apply only to the

⁷⁹ Chemerinsky Brief, *supra* note 75, at 10.

⁸⁰ *Id.*

⁸¹ U.S. CONST. art. VI, cl. 2.

⁸² Petition for Writ of Certiorari at 22; *Adar v. Smith*, 132 S. Ct. 400 (2011).

⁸³ *Id.*

⁸⁴ *Baker*, 522 U.S. at 232.

⁸⁵ *Adar*, 639 F.3d at 154.

judiciary, and that the only remedy available is appeal from state court decisions.⁸⁶ Judge Wiener addresses this contention, noting that the majority is technically correct that the remedy for violations of the Clause is generally sought in appeal to the Supreme Court, but that this is not a rule so much as a coincidence.⁸⁷ His argument is that history has shown such claims to arise in the context of a state court's failure to give adequate recognition to a judgment.⁸⁸ Historically, the party who has not obtained full faith and credit would appeal from the recognizing forum's court to its appellate court. The natural resolution, if both the intermediate and highest courts of appeal in the state withhold full faith and credit, is to appeal to the Supreme Court. However, this "historical fortuity" is not a doctrinal requirement and is supported by the argument below that as state governments continue to blur the lines separating branches of government for the sake of efficiency or other reasons, actions such as the one in *Adar* will arise with increasing frequency.

The executive branch is subject to the requirements of the Clause because of its broad language and the decisions of the Supreme Court that consider its function to be exacting and important to the cohesion of the Union. Beyond this, the Clause should be considered applicable beyond the judiciary because of the shifting nature of government, and should not be confined in its application by an "accident of history."⁸⁹

C. *Section 1983 as a Remedy*

As stated above, to bring an action under § 1983, a plaintiff must demonstrate the violation of a constitutional right, privilege, or immunity by an individual acting "under color of" state law.⁹⁰ The statute applies most often to members of the executive branch who have acted in violation of an individual's rights, and in the case of violations of the Clause, there should be no difference. As previously argued, there is a right created by the Clause that is vindicable by § 1983 action,⁹¹ and executive officers are subject to the requirements of the Clause.⁹² If these

⁸⁶ *Id.*

⁸⁷ *Id.* at 172–73.

⁸⁸ *Id.*

⁸⁹ *Id.* at 171.

⁹⁰ See *Monroe v. Pape*, 365 U.S. 167 (1961).

⁹¹ See *supra* Part III.A.

⁹² See *supra* Part III.B.

propositions are correct, then an action under § 1983 for violation of the right to full faith and credit by a member of the executive branch is appropriate. The statute requires a violation of a right by a party acting “under color of” state law, which an executive officer would necessarily be doing when refusing to recognize a foreign judgment. The *Adar* case is a prime example of this, where the registrar, acting in her position, refused to give full faith and credit to the adoption decree of the New York State courts. The registrar was clearly acting “under color of” the law of Louisiana, and she violated the rights of the men seeking recognition of their adoption decree.

IV. WHY THIS MATTERS

The interpretation of the Clause has not been as contentious as other constitutional provisions that deal more overtly with rights of equality or justice. Justice Robert H. Jackson wrote over half a century ago of it being the “Lawyer’s Clause of the Constitution,” in that its necessity and effects are far more subtle, but no less important, than other parts of the founding document.⁹³ The one major shift in the Clause’s application came in the early part of the nineteenth century.⁹⁴ The shift from its use as a rule of evidence to the broader requirements it now mandates was not a dramatic affair, though at least one commentator considers it to have been an error.⁹⁵ The Clause has slowly evolved to require similar, though not as exacting, levels of deference to the acts and records of other states to where it stands to today, allowing states to ignore foreign laws or records based on public policy, where judgments must be given the highest deference.⁹⁶

This lack of contentiousness about the development of the Clause belies the debate about its use that simmers in the academic community⁹⁷ and has recently

⁹³ See ROBERT H. JACKSON, FULL FAITH AND CREDIT: THE LAWYER’S CLAUSE OF THE CONSTITUTION 58–60 (1945).

⁹⁴ See *Mills v. Duryee*, 11 U.S. (12 Cranch) 481 (1813).

⁹⁵ See Whitten, *supra* note 17, at 468–71. Professor Whitten believes that there is little historical support for this change in interpretation, though it has stood for almost two centuries and is unlikely to be reversed at this point. *Id.*

⁹⁶ *Thomas ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

⁹⁷ See, e.g., Whitten, *supra* note 17; Rena M. Lindevaldsen, *Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator*, 16 WM. & MARY J. WOMEN & L. 29 (2009); Wasserman, *supra* note 18; David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51 (2011); Shawn Gebhardt, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419 (2009).

emerged in cases such as *Adar* and others involving same sex marriages and rights arising from them.⁹⁸ In this same line of developing jurisprudence around the Clause, cases such as the one in *Adar* seem likely to continue to occur—where a non-judicial actor has failed to afford a judgment full faith and credit, resulting in a violation of the rights of an individual. The reason for this relates to the evolving nature of the federal government and the governments of the several States as they move towards a more efficient model with less separation of power and duty between the branches.

Several noteworthy historical developments illustrate how the Clause's operation has changed over time. As Judge Wiener noted in his dissent in *Adar*, the Revised Uniform Enforcement of Foreign Judgments Act has been adopted “in all but two or three of the fifty states,”⁹⁹ serving to streamline the judgment recognition process by allowing a judgment holder to file an authenticated copy of the judgment with an officer designated by the act.¹⁰⁰ Further, Professor Whitten wrote almost two decades ago that the actions of state judges likely differ now from what they were at the time that the Constitution was framed, to the point that they now essentially make laws in the way that only state legislators would have been allowed in the past.¹⁰¹ In his article mentioned above, Shawn Gebhardt expands upon this idea in the area of Status Records, arguing that the records mentioned explicitly in the Clause now hold a greater meaning in our nation than they may have in the past and should be afforded the same deference as judgments.¹⁰²

These are examples of the blurring of the nature of records, acts, and judgments in ways that were likely unforeseen by the founding fathers. This is taking place because of the continued interrelation of the branches of government

⁹⁸ See, e.g., *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007); *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (discussing an individual who had undergone gender reassignment procedures and obtained record of new gender in one state was not considered to have a new gender in sister state); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tx. App. 2010) (regarding a married same-sex couple could not be divorced in Texas which failed to recognize existence of out of state same-sex marriage).

⁹⁹ *Adar v. Smith*, 639 F.3d 146, 171 (5th Cir. 2011).

¹⁰⁰ REVISED UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2 (1964). The act itself, a model, has the replaceable wording that the document or judgment must be filed with the Court Clerk, but as Judge Wiener notes, Louisiana itself has directs parish clerks to the recorder of money judgments, essentially placing responsibility for foreign judgment recognition on an executive actor. *Adar*, 639 F.3d at 171–72.

¹⁰¹ Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 67–69 (1981–82).

¹⁰² See Gebhardt, *supra* note 97.

and the evolving responsibilities that go along with that trend. The statute at issue in *Adar v. Smith*¹⁰³ does not require authentication by or filing with the judiciary—the entire process is the purview of the registrar, a purely executive position. In this case the state appears to have put the responsibility upon the executive branch to recognize a foreign judgment. In doing so, the historically recognized posture for attaining full faith and credit (afforded so much importance by the *Adar* majority¹⁰⁴) of filing initially in state court with the only access to federal courts being an appeal to the U.S. Supreme Court, is essentially nullified—there is no initial court filing and so there is no possibility of eventual appeal. This leaves little recourse other than to file a suit for injunctive or declaratory relief against an executive actor who fails to afford full faith and credit, as the plaintiffs did in *Adar*.

By disallowing the suit and requiring the plaintiffs to bring action in state court, the purposes of the Louisiana adoption recognition statute, to provide an accurate birth certificate in a timely and efficient manner, were frustrated. The Louisiana legislature had given the responsibility for recognition of a judgment to the executive branch and in doing so had necessarily made recourse for a failure to provide adequate faith and credit suit against the registrar. Since the failure to give faith and credit to the judgment was also a violation of a constitutional right, the correct action for remedy was to file suit under § 1983 in federal court.

In sum, as responsibilities of the branches of government blur, one result may be the necessity to remedy violations of the Clause by members of the executive branch. Section 1983 has historically provided recourse for violation of constitutional rights by state actors and is an appropriate action under these circumstances as well. Unless the Supreme Court chooses to go against its precedent, § 1983 actions should be seen as an appropriate remedy to violations of full faith and credit in the future.

CONCLUSION

This Note has argued that the Full Faith and Credit Clause creates a right to the recognition it requires, under the three-factor analysis in the Supreme Court holding of *Dennis v. Higgins*. Further, this right is vindicable by § 1983 action when full faith and credit is withheld by a member of the executive branch who has been properly charged with the recognition of foreign judgments. Finally, it seems likely that as the responsibilities of branches of the government continue to blur,

¹⁰³ LA. REV. STAT. ANN. § 40:76 (2007).

¹⁰⁴ See *Adar*, 639 F.3d at 153–55.

and states charge executive actors with the recognition of those foreign judgments, § 1983 is not just an appropriate recourse, but a necessary one when full faith and credit is not sufficiently provided.