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## MADISON'S FULL FAITH AND CREDIT CLAUSE: A HISTORICAL ANALYSIS

Charles M. Yablon\*

### ABSTRACT

*The Defense of Marriage Act (DOMA) has created a new wave of interest in the Full Faith and Credit Clause and its apparent contradictions. Important recent scholarship has shown that American lawyers in the eighteenth century often viewed the term "full faith and credit" as referring to an evidentiary rule. This interpretation ameliorates, but does not actually resolve, the apparent conflict between the first sentence of the Clause, which seems to create a mandatory rule of sister state deference, and the second sentence of the Clause, which seems to give Congress plenary power to abrogate that rule. Rather than seek a chimerical general understanding of the Clause, this Article focuses on James Madison to provide a new and strikingly different historical account of the creation of the Full Faith and Credit Clause. It shows how the Full Faith and Credit Clause was part of a broader plan by Madison and others to curb the ability of states to take acts that were harmful to one another and to the nation, particularly those which, by interfering with vested contract and property rights, jeopardized the country's economic well-being. Madison purposely sought a Clause that would embody a vague but dynamic deference obligation that could be increased by Congress over time.*

*Madison's actions and writings regarding the Full Faith and Credit Clause strongly suggest that he would have considered congressional actions to weaken or abrogate existing deference obligations not just unwise and unjust, but unconstitutional. Unlike powers which appropriately belonged to the federal legislature irrespective of how they were exercised, Madison's justification for the powers granted under the second sentence of the Clause was based on how Madison expected those powers to be used, namely, to "provide for the harmony and proper intercourse among the states." What emerges from this analysis*

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*is a picture of the Full Faith and Credit Clause that has significant similarities to the “one way ratchet” interpretation which has been used to argue that the DOMA is unconstitutional, but one in which the presumed constraints on congressional action are the product of national interest, political virtue, and natural law as well as the language of the Full Faith and Credit Clause.*

#### INTRODUCTION

The Full Faith and Credit Clause<sup>1</sup> is the only part of the United States Constitution that appears, at least to modern eyes, to contain a contradiction. The first sentence consists of an unconditional mandate that:

Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.

Yet the second and final sentence, the so-called “Effects Clause,” appears to grant plenary power to Congress to prescribe what effects, if any, the acts, records, and judicial proceedings of one state will have in the others:

And Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

It would appear that any coherent interpretation of the Full Faith and Credit Clause must privilege one of these sentences over the other, and will therefore require a substantial departure from the actual text.

The apparent inconsistency in the language of the Full Faith and Credit Clause becomes a concrete legal issue, however, only if Congress chooses to pass a law that appears to violate the mandate of the first sentence of the Clause. Congress arguably did that in 1996 with the passage of the Defense of Marriage Act (DOMA),<sup>2</sup> which has created a

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<sup>1</sup> U.S. CONST. art. IV, § 1. The phrase “full faith and credit” was taken verbatim (but only after considerable debate among the founders) from a very similar clause in the Articles of Confederation, whose drafters may have been the first to use it. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 488–89 (Max Farrand ed. 1911) [hereinafter 2 Farrand]. The derivation of the phrase in the Articles is uncertain and has been the subject of much recent historical research. *See, e.g.*, David Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1607 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1217–22 (2009).

<sup>2</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). DOMA seeks to relieve states of any obligation to give legal effect to same-sex marriages that have been recognized under the laws of other states. The recent decisions and legislative acts legalizing same-sex marriage in New York, Maine, Connecticut, Iowa, Vermont, Massachusetts and other states make it very likely that DOMA will increasingly be invoked in states that do not recognize same-sex marriage to avoid giving legal effect to such marriages in states that now permit them. *See* A.B. 8354, 234th Leg., 2011–2012 Sess. (N.Y. 2011); S.B. 115, 2009 Leg., 2009–2010 Sess. (Vt. 2009) (legislation legalizing same-sex marriage); L.D. 1020, 124th Leg., 1st Sess. (Me. 2009) (legislation legalized same-sex marriage, but was overturned by a proposition the same year); H.B. 436, 161st Leg., 1st

new wave of interest in the Full Faith and Credit Clause and its apparent contradictions. Some important recent scholarship has sought to interpret the clause through historical inquiries into the meaning of the term “full faith and credit” in England and the United States in the eighteenth century and more generally into the conflict of law rules that existed at that time.<sup>3</sup> This work has shown that the term “full faith and credit” was

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Sess. (N.H. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that limiting marriage to heterosexual couples is unconstitutional); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding statute limiting marriage to heterosexual couples violative of equal protection); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding no “constitutionality adequate reason” for denying right to gay marriage). California’s back-and-forth stance on same-sex marriage raises unique DOMA issues. Recently, a federal district court overturned California’s ban on same-sex marriage (enacted by referendum); the referendum had overturned an act of the state legislature legalizing same-sex marriage. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The status of same-sex couples married in California before the ban remains unclear. Additionally, the legalization of same-sex marriage in the District of Columbia raises unique DOMA issues. It is not a state, and states’ full faith obligations to it are unclear. See D.C. CODE § 46–401 (2010).

The Department of Justice’s recent decision not to defend the constitutionality of DOMA relates only to Section 3 of that statute, which defines marriage, for federal law purposes, as “only a legal union between one man and one woman,” which the Attorney General found violative of the Equal Protection Clause of the Constitution. Letter from Eric Holder, U.S. Att’y Gen., to John Boehner, U.S. Speaker of the House (Feb. 23, 2011) (on file with author). The Department of Justice did not discuss Section 2 of DOMA, which relieves states of any obligation to recognize same-sex marriages in other states and which arguably rests on an independent constitutional basis, the second sentence of the Full Faith and Credit Clause. *Id.* As more married same-sex couples seek to assert their rights in states that do not recognize same-sex marriage, we can expect more litigation invoking Section 2 of DOMA and challenging its constitutionality. That constitutional issue will turn on precisely the same interpretative question about the meaning of the Full Faith and Credit Clause described at the beginning of this piece.

<sup>3</sup> Historical articles dealing with the Full Faith and Credit Clause tend to appear when the Clause becomes involved in contemporary constitutional issues. Kurt Nadelmann’s exhaustive historical inquiry was the last of a number of historical pieces generated by contemporary issues concerning the effect of the Clause on out of state application of workman’s compensation laws. See Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 75 (1957). Ralph Whitten has produced even more exhaustive historical analyses of the Clause, first in connection with contemporary debates about the constitutional limitations on state assertion of territorial jurisdiction, Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1980) [hereinafter Whitten, *State-Court Jurisdiction*], and later offered a revised and expanded version of that analysis in response to the controversy following the passage of DOMA, Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 257 (1998) (first sentence of the Clause “originally understood as a narrow evidentiary command”) [hereinafter Whitten, *FF&C and DOMA*]. Douglas Laycock’s discussion of the historical origins of the clause was part of a broader argument concerning constitutional limits on choice of law rules. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992). Daniel A. Crane also deals with these historical questions in connection with the DOMA controversy concluding that the first sentence was “a default provision in the absence of more specific congressional legislation.” Daniel A. Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 335 (1998) [hereinafter Crane, *Original Understanding*]. More recently, Steven Sachs has shown that the early Congress did not always consider the first

not understood to be nearly as sweeping as it now appears, but was often viewed by American lawyers in the late eighteenth century as an evidentiary rule, requiring only that courts take cognizance of judgments validly issued by other states and treat them as prima facie evidence of the underlying claim.<sup>4</sup> It did not necessarily require that such judgments be treated as conclusively determining the pending dispute.<sup>5</sup>

If this meaning is applied to the first sentence of the Full Faith and Credit Clause, the apparent conflict is ameliorated, although not actually resolved.<sup>6</sup> The self-executing mandate of the first sentence is reduced to a narrow evidentiary rule, leaving an untrammelled Congress free, under

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sentence to be self-executing and that it was often understood as part of an evidentiary framework." Sachs, *supra* note 1, at 1201. Finally, in an important recent article in the *Yale Law Journal*, David Engdahl provides additional support for an evidentiary interpretation of the term "full faith and credit" in sources prior to the Constitution, which he couples with a reading of the constitutional clause which leaves the question of the effect of sister state judgments, "dependent entirely on Congress's discretion." Engdahl, *supra* note 1, at 1658. This article is, in large measure, a response to the articles by Professors Whitten, Engdahl, and Sachs.

<sup>4</sup> See Engdahl, *supra* note 1, at 1655; Sachs, *supra* note 1, at 1206; Whitten, *FF&C and DOMA*, *supra* note 3, at 257.

<sup>5</sup> In theory, one can distinguish between a pure evidentiary rule, which deals only with procedures for authenticating and proving the existence and content of a foreign judgment or other official act without specifying its effect, and rules which set forth the effect of such judgments, once proved. Professor Sachs most clearly takes this minimalist view of the first sentence of the constitutional clause as well as the Articles' clause, arguing that in their original meaning, both dealt only with "authentication" issues. Sachs, *supra* note 1, at 1226, 1230. Whitten takes almost the same position, but believes that the clauses required not only that the sister state judgments be authenticated but that they be admitted into evidence. Whitten, *FF&C and DOMA*, *supra* note 3, at 269-71; Whitten, *State-Court Jurisdiction*, *supra* note 3, at 546-47. Both Whitten and Sachs believe that courts would use other legal principles, namely those of the law of nations, to determine the effect such evidence would have. See Whitten, *FF&C and DOMA*, *supra* note 3, at 284; Sachs, *supra* note 1, at 1213, 1225. They agree that the usual result, based on English precedents of the time, was to treat the foreign judgment as prima facie evidence of the claim. See Sachs, *supra* note 1, at 1213; Whitten, *FF&C and DOMA*, *supra* note 3, at 284. Engdahl appears to endorse a somewhat more expansive interpretation. See Engdahl, *supra* note 1, at 1610. Beginning with the English case law, which not only recognized foreign judgments, but also generally treated them as at least prima facie evidence of the underlying claim, Engdahl argues that this "familiar prima facie evidence rule" was incorporated into the meaning of the term "full faith and credit" in the Articles' clause. *Id.* at 1611. All these writers contrast this with a rule of "substantive deference" that required the courts of one state to treat the judgments of another as conclusive on the underlying claim, much as they would an authenticated prior judgment of their own state courts. See *id.*; Sachs, *supra* note 1, at 1206; Whitten, *FF&C and DOMA*, *supra* note 3, at 273-74. Whitten, Engdahl, and Sachs all recognize that rules of substantive deference were sometimes applied under the law of nations (as in admiralty cases) but do not believe that it was part of the meaning of either the Articles' clause or the first sentence of the constitutional Clause. See Engdahl, *supra* note 1, at 1593; Sachs, *supra* note 1, at 1215; Whitten, *FF&C and DOMA*, *supra* note 3, at 269-70. As we can see from this brief discussion, however, not only is there uncertainty over the meaning of the Clause, but it is closely related to uncertainty over the extent, if any, to which the Clause was intended to embody principles of deference taken from the law of nations, as well as uncertainty over the precise content of that law.

<sup>6</sup> The question would still remain whether Congress had constitutional power to abrogate or substantially modify the evidentiary or prima facie evidence rules presumably embodied in the first sentence of the Clause.

the second sentence, to legislate substantially regarding the effects of such judgments.<sup>7</sup>

The historical research that underlies these arguments is impressive, and the authors have provided much important new information about procedural and evidentiary practice in eighteenth-century England and America. Yet there are serious methodological flaws in their attempts to provide an accurate historical account of the creation and meaning of the constitutional Full Faith and Credit Clause. First, it is extremely doubtful that there is any single right answer to their narrowly focused search for the meaning of the term “full faith and credit” as used in the Constitution or the authorities that preceded it. These scholars’ careful examination of sources has revealed substantial inconsistencies in the use of the term in English practice,<sup>8</sup> in the jurisprudence of the individual states,<sup>9</sup> and in cases decided under the Articles of Confederation.<sup>10</sup> In short, what these scholars have really shown is that there was no consensus at the time of the Founding concerning the legal meaning of the term. Rather, as commentators at the time acknowledged, the language itself was highly disputable and “indeterminate.”<sup>11</sup> In light of that ambiguity, modern attempts to establish an accurate “original meaning” for the phrase as a legal term of art seems a quixotic one.

Moreover, this narrow focus on doctrinal conflicts regarding the precise legal meaning of the full faith and credit language of the Clause fails to recognize the broader constitutional issues that were foremost in the minds of the Founders as they debated the appropriate scope and

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<sup>7</sup> Nadelmann concluded that the first sentence of the Clause created a self-implementing command on each state to enforce applicable statutes of sister states in the absence of conflicting state policies, and that the second sentence of the Clause conferred power on Congress to act when such conflicts arose. Nadelmann, *supra* note 3, at 79–80. Whitten argued, in both his articles, that the first sentence of the clause was, in the absence of congressional action, merely an evidence rule requiring that states admit and recognize authenticated versions of state records as proof of the laws and judgments of sister states. Whitten, *FF&C and DOMA*, *supra* note 3, at 263–64; Whitten, *State-Court Jurisdiction*, *supra* note 3, at 545–46. Laycock provides the strongest version of the first sentence of the Clause, arguing that it is a self effectuating rule that requires states to enforce sister state laws in accordance with common law choice of law rules, which can be altered by congressional action. Laycock, *supra* note 3, at 298–301. Crane, while acknowledging “some tension” between the first and second sentence of the Clause, concludes that the first sentence was merely a default provision until Congress provided more specific rules. Crane, *Original Understanding*, *supra* note 3, at 323–24.

<sup>8</sup> After examining the eighteenth-century English law on recognition of foreign judgments, scholars have concluded that “full faith and credit” and similar terms “appear to have been evidentiary terms of art that could be used to cover a range of effects and weights.” Whitten, *State-Court Jurisdiction*, *supra* note 3, at 520.

<sup>9</sup> While a number of the states had statutes which can be plausibly read to embody versions of the prima facie rule, Massachusetts passed a statute in 1774 which appeared to prescribe a conclusive effect for sister state judgments. Whitten, *State-Court Jurisdiction*, *supra* note 3, at 531.

<sup>10</sup> See *infra* notes 64–88 and accompanying text.

<sup>11</sup> THE FEDERALIST NO. 42 (James Madison); see also discussion *infra* Part I.B.

operation of the full faith and credit obligation. As we will see, the sophisticated lawyers among the Founders were well aware that the language they were adopting in the first sentence of the Clause was somewhat vague and had been subject to differing interpretations, but were not overly concerned about ambiguities in the prior law involving sister-state deference.<sup>12</sup> Rather, the concerns of Madison and his allies concerning full faith and credit were more closely tied to the broader issues facing the Convention, concerns about the relative powers of the federal and state governments, about the need to avoid “trespasses” of the powers of one state on those of others, and the need to deter interference by misguided state legislators on minority interests and vested property rights, particularly those of out-of-state creditors.<sup>13</sup> It was these concerns that shaped the debate about the Full Faith and Credit Clause and determined its final form.

This Article seeks to provide a broader, more historically accurate account of the creation and original conception of the Full Faith and Credit Clause. Rather than seek a chimerical general understanding of the Clause, it seeks to ascertain how the Clause was understood at the time of the Founding by one particularly powerful intellect—that of James Madison.<sup>14</sup> Madison is generally viewed as the “Father of the Constitution,”<sup>15</sup> the founder who came to Philadelphia having done the most profound thinking about republican forms of government and the

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<sup>12</sup> See discussion *infra* Part II.B. There is little doubt that contemporary lawyers recognized the indeterminacy of the full faith obligation set forth in the Articles of Confederation, which can be seen in contemporary case law, in statements concerning the meaning of that sentence during the Constitutional Convention, and perhaps most clearly, in the comments of James Madison in *Federalist 42*. THE FEDERALIST NO. 42 (James Madison). Closely related to this is an exaggeration by modern scholars of the importance of this interpretative dispute to lawyers of the period, and particularly to the Founders. The primary practical effect of the distinction between an evidentiary and substantive rule was whether merits-based defenses could be asserted. The distinction was of little practical significance in the many suits decided on default judgment, see Deborah Rosen, *The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691–1760*, 5 LAW & HIST. REV. 213, 230 (1987) (noting very high default rates in colonial courts) [hereinafter Rosen, *Supreme Court*], or in suits against impecunious debtors with no substantive defenses to assert, and again, Madison tells us as much in *Federalist 42*. THE FEDERALIST NO. 42 (James Madison). Madison’s disparagement of interpretive disputes in matters of technical law was very much in keeping with the general attitude towards law in the post-revolutionary period, where attempts to displace “archaic English laws and legal technicalities” with simplified codes, later gave rise to calls for more discretionary application of “general rules of equity.” Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 791–92 (1999) [hereinafter Wood, *Judicial Review Revisited*].

<sup>13</sup> See discussion *infra* Part I.A.

<sup>14</sup> Doing so will, of course, also give us substantial insight into the views of many of those who shared Madison’s perspective on the Constitution.

<sup>15</sup> LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 76 (1995); IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION* 155 (1950) [hereinafter BRANT, *FATHER*].

weaknesses of the Articles of Confederation.<sup>16</sup> He had the most coherent, innovative, and comprehensive plans for reshaping the American republic.<sup>17</sup> Yet he was also a practical politician, skilled in the uses of ambiguity, compromise, and countervailing forces to achieve his broader political goals.<sup>18</sup> He was also a member of the Virginia planter aristocracy,<sup>19</sup> seriously concerned about the dangers posed by perceived excesses of democratic governance to vested property rights.<sup>20</sup>

It was Madison who proposed the precise language that became the actual text of the Full Faith and Credit Clause.<sup>21</sup> He played a prominent role in the debates that led to its passage, and in drafting the final language of the Clause. It was Madison who inserted mandatory rather than hortatory language into the first sentence of the Clause (changing “ought” to “shall”).<sup>22</sup> Yet it was also Madison who argued, in *Federalist No. 42*, that it was the grant of broad powers to Congress in the second sentence of the Clause that rendered it “an evident and valuable improvement” over the Articles of Confederation.<sup>23</sup>

In recent years there has been a small boom in interest among historians and legal scholars in the political thought of James Madison and the role it played in the creation of the Constitution.<sup>24</sup> There have also

<sup>16</sup> See James Madison, *Vices of the Political System of the U. States* (Apr. 1787), in 2 THE WRITINGS OF JAMES MADISON 361 (Gaillard Hunt ed., G.P. Putnam's Sons 1901) [hereinafter Madison, *Vices*]; see also BANNING, *supra* note 15, at 115; WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING 22 (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 472 (1969) [hereinafter WOOD, THE CREATION].

<sup>17</sup> JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 49 (3d ed. 2007) [hereinafter RAKOVE, MADISON].

<sup>18</sup> See BANNING, *supra* note 15, at 88–91; RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 94–95, 112, 114–15 (spec. ed. 2003); Randall Strahan, *Personal Motives, Constitutional Forms and the Public Good: Madison on Political Leadership*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 67 (Samuel Kernell ed., 2003).

<sup>19</sup> KETCHAM, *supra* note 18, at 3–7; RAKOVE, MADISON, *supra* note 17, at 1.

<sup>20</sup> RAKOVE, MADISON, *supra* note 17, at 54, 59; JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 25–38 (1990) [hereinafter NEDELSKY, PRIVATE PROPERTY].

<sup>21</sup> That is, after the language of the Clause had been substantially approved, Madison proposed the final substantive changes in the text, changing “ought” in the first sentence to “shall” and “should” in the second sentence to “may,” changes that were approved unanimously. 2 Farrand, *supra* note 1, at 484–85; see also notes 222–225 *infra* and accompanying text.

<sup>22</sup> 2 Farrand, *supra* note 1, at 489.

<sup>23</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>24</sup> This recent scholarship has provided new insights into Madison's political thought at the time of the founding, his practical political concerns and the compromises he was willing or felt compelled to make to keep the project going. Whereas earlier scholars saw Madison at the time of the Founding as an ardent federalist with little regard for the preservation of state's rights who later changed into a Jeffersonian republican, see generally BRANT, FATHER, *supra* note 15, at 11–13, 351; WOOD, THE CREATION, *supra* note 16, at 525, the newer scholarship stresses the continuities in Madisonian thought and views him as always trying to steer a middle path between the excesses of state and federal power. See generally BANNING, *supra* note 15; RAKOVE, MADISON, *supra* note 17, at 57. This new scholarship emphasizes Madison's pragmatism, as well as the ten-

been important new studies into the extent to which Madison and other founders anticipated judicial review, particularly regarding the constitutionality of federal legislation.<sup>25</sup>

This Article seeks to use this work to provide a new and strikingly different historical account of the creation of the Full Faith and Credit Clause. It shows that the fundamental debate over the Clause at the Constitutional Convention was not between advocates of evidentiary and substantive interpretations of the full faith obligation—as most prior scholarship has assumed—but between advocates of a substantive but static and limited rule of deference clearly set out in the constitutional text, and those, like Madison, who favored a vaguer but more dynamic rule of substantive deference that could be enhanced by Congressional enactment and that could lead to a relatively unified litigation system in which judgments rendered in one state could be executed in the courts of another.

It also shows how the Full Faith and Credit Clause was part of a broader plan by Madison and others to curb the ability of states to take acts that were harmful to one another or to the nation as a whole, particularly those which, by interfering with vested contract and property rights, jeopardized the country's economic well-being. To this end, the full faith obligation was expanded to include deference to legislative acts of sister states, a deference that was expected to apply only to that relatively narrow class of state laws that created, defined, or altered property or contract rights that might be enforced in other states, including bankruptcy laws of general import. Equally importantly, the federal legislature was given broad power to define and develop these obligations. Madison hoped and expected that Congress would act as a “disinterested and dispassionate umpire”<sup>26</sup> among the states, using the full faith and credit obligation to help create a coordinated judicial system for the protection and enforcement of creditors' rights.<sup>27</sup>

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tativeness and uncertainty with which Madison approached the task of Constitution drafting, his recognition that the political system the Founders were seeking to create had no real precedents in history and that its operation in practice was uncertain and unknowable. It also recognizes the important role that political “virtue” played in Madison's thought, his belief that the constitutional system being created could only survive if the powers of the federal government were wielded by men of vision and honor, who could avoid the pitfalls of faction and interstate rivalry which he saw as so endemic and destructive in the Articles of Confederation period. *Id.* at 51; David Brian Robertson, *Constituting a National Interest: Madison Against the States' Autonomy*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 200–01 (Samuel Kernell ed., 2003).

<sup>25</sup> See discussion *infra* Part III.

<sup>26</sup> James Madison, Letter to George Washington (Apr. 16, 1787), in 2 THE WRITINGS OF JAMES MADISON 346–47 (Gaillard Hunt ed., G.P. Putnam's Sons 1901) [hereinafter Madison, Letter to Washington].

<sup>27</sup> The extension of the Clause to require deference to public acts and the implicit exemption for private bills both reflect a concern with enforcing a coherent and effective nationwide structure for creditor litigation. The provision for public acts requires states (and potentially authorizes

Finally, this Article shows that the language of the Clause reflects Madison's political theory underlying the Constitution itself. The first sentence is mandatory because it, like many parts of the Constitution, was designed to restrict state sovereignty and freedom of action. The power granted to Congress in the second sentence, however, is discretionary to reflect the fact that Congress, as the supreme lawmaking power of the nation, not only cannot be forced to take action, but would also be, Madison expected, the final arbiter of its own obligations under the Constitution.<sup>28</sup> This understanding of congressional constitutional supremacy, so different from our own, largely explains why Madison was not troubled by, and appears to have not even noticed, the potential contradiction between the first and second sentences of the Full Faith and Credit Clause.

The question whether Congress can constitutionally pass a law, like DOMA, which appears to contradict the first sentence of the Clause makes sense to us because we assume, as the question does, that there is an authoritative source of constitutional interpretation separate from the actions of Congress. That authority, of course, is the Supreme Court. When we ask whether a federal law is unconstitutional, we may not be asking whether the actual Supreme Court would strike it down, but we are at least comparing the decision of Congress with an independent constitutional standard, to be applied by a hypothetical Supreme Court, most likely one that thinks about constitutional law the way we do. The Full Faith and Credit Clause appears contradictory to us because we assume both sentences are legal rules that can and must be construed by an outside legal authority (the Supreme Court) to determine the scope of congressional authority to prescribe the effects of state laws in other states. For James Madison in 1787, however, the newly created Supreme Court was a hypothetical institution of unknown effectiveness, which he hoped would be able to exercise some restraint on state legislation that was in conflict with the new Constitution.<sup>29</sup> He did not conceive that it could or should be an effective check on the federal legislature itself, much less the final arbiter of all constitutional questions. For Madison, that final arbiter was Congress itself, which was given broad new powers under the Constitution and whose acts would be the su-

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Congress) to apply choice of law rules to ensure that debts incurred in one state are subject to repayment under the same statutory conditions in other states. See *infra* notes 178–83 and accompanying text. The exemption for private bills prevents debtors who incur large debts in one state from obtaining a personal legislative discharge of such debts in another. See *infra* notes 178–83 and accompanying text.

<sup>28</sup> See discussion *infra* Part III.

<sup>29</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 73–74 (2004) [hereinafter KRAMER, *THE PEOPLE*]; Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *STAN. L. REV.* 1031, 1044–46 (1997) [hereinafter Rakove, *Origins*].

preme law of the land.<sup>30</sup> While it is true that the Constitution contained some theoretical limits on congressional lawmaking power, Madison was enough of a practical politician and student of political power to doubt that such theoretical limits could be effective in the absence of countervailing political forces.<sup>31</sup> Accordingly, Madison believed that congressional restraint ultimately rested on Congress itself, on the national perspective and independence that representatives would gain by being elected directly by the people, by the need to form large coalitions to govern effectively and thereby dilute the effect of “factions,” and by the representatives’ and senators’ own sense of honor and political virtue.<sup>32</sup> And Madison recognized that the success of such internal restraints was by no means assured.

Seen from this perspective, the potential contradiction between the first and second sentence of the Full Faith and Credit Clause is substantially lessened. The first sentence sets forth a mandatory but somewhat vague obligation of the states toward one another as coordinate members of a federal union. The second sentence expressly gives the federal legislature the power to further define and enforce that obligation. Might Congress misuse the power granted to it under the Full Faith and Credit Clause? Of course, just like it might misuse many other powers granted to it to weaken rather than strengthen the federal union. Would such actions be unconstitutional? From a practical legal or political perspective, the question was close to meaningless. For Madison in 1787, there was no meaningful distinction between Congress misusing its constitutional power and Congress acting unconstitutionally.<sup>33</sup> The real question was whether the language of the Constitution, and their own sense of political virtue, could normatively constrain Congress from acting in ways that injured the federal union or permitted states to violate each other’s rights.

Nonetheless, there is sufficient evidence of Madison’s views to strongly suggest that he would have considered congressional actions to weaken or abrogate existing obligations of sister-state deference to be not just unwise and unjust, but subject to condemnation as “unconstitutional” as well. Unlike powers that appropriately belonged to the federal legislature irrespective of how they were exercised, Madison’s justification for the powers granted under the second sentence of the Full Faith and Credit Clause were based on how Madison expected those powers

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<sup>30</sup> See *infra* note 250 and accompanying text.

<sup>31</sup> The Bill of Rights, which Madison originally opposed and whose effectiveness he always doubted, had many more such limitations. See RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 9, 62, 159 (2006); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302–03 (1990).

<sup>32</sup> THE FEDERALIST NO. 10 (James Madison); Strahan, *supra* note 18, at 63; see also discussion *infra* Part III.C.

<sup>33</sup> See *infra* notes 282–284 and accompanying text.

to be used, namely, to “provide for the harmony and proper intercourse among the states.”<sup>34</sup> He sought justification for federal legislation permitting judgments obtained in one state to be executed in others, not based on plenary congressional power to prescribe any rules it wished, but by “the nature of the [Federal] Union.”<sup>35</sup> Finally, there is a substantial likelihood that Madison and other Founders believed that some uncertain but significant level of deference to the judgments of sister states was part of unwritten natural law principles embodied in the law of nations, and that such deference could be increased by legislative enactments, but that any legislative attempt to weaken or abrogate such deference would violate fundamental law.<sup>36</sup>

What emerges from this analysis is a picture of the Full Faith and Credit Clause that has significant similarities to the “one way ratchet” interpretation of the Clause that has been used to argue that DOMA is unconstitutional,<sup>37</sup> but one in which the presumed constraints on congressional action are the product of national interest, political virtue, and natural law, as well as the language of the Full Faith and Credit Clause. Madison inserted mandatory language into the first sentence of the Clause because he wanted it to be a mandatory obligation of the states created and enforced by the federal government. With respect to Congress itself, however, Madison believed the first sentence could only function as an instruction to Congress to act properly, in a political sense, by passing laws necessary to strengthen the federal union, and refrain from passing laws that weakened or permitted states to weaken it. The potential inconsistency in the Clause arises only if Congress acts badly in these Madisonian terms. Although Madison was undoubtedly aware that such congressional misconduct could occur, he thought that the danger of such anti-federal actions by a national legislature was small and certainly far less than leaving the power to prescribe the effects of state judgments to state courts or state legislatures.<sup>38</sup> Moreover, compared to other types of congressional misconduct that Madison feared might imperil the union, the likelihood that Congress would pass

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<sup>34</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>35</sup> 2 FARRAND, supra note 1, at 448.

<sup>36</sup> See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1137–39 (1987); see also discussion *infra* note 205.

<sup>37</sup> The interpretation of the Clause as a “one way ratchet,” was first put forward by Laurence Tribe and Ralph S. Taylor, Jr., in a letter to Senator Edward Kennedy opposing the Defense of Marriage Act. It interprets the first sentence of the Clause as establishing a constitutionally mandatory minimum level of state deference toward sister states which can be increased by Congressional action, but not decreased or abrogated by Congress. 142 CONG. REC. S5931 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (reprinting Letter from Laurence Tribe, Professor, Harvard Law Sch., and Ralph S. Taylor, Jr., Professor, Harvard Law Sch., to Edward M. Kennedy, U.S. Senator (May 24, 1996)). Tribe and Taylor’s argument, however, made no reference to historical materials. This Article demonstrates that such an interpretation has strong support in well-established historical sources of the Founding period.

<sup>38</sup> See THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 45 (James Madison).

laws that abrogated the full faith and credit mandate must have seemed to Madison to be vanishingly small. In this, of course, Madison was correct. The republic had been in existence for over 200 years before Congress took any such action.<sup>39</sup>

This Article sets forth the historical bases for this new and somewhat controversial account of Madison's Full Faith and Credit Clause. It consists of three parts. Part I looks at the period immediately prior to the drafting of the Clause, focusing particularly on the political and legal controversies surrounding interstate enforcement of debts during this period, the development of Madison's political thought and critique of existing state legislatures as well as Madison's views as expressed in the major political debates of the first half of the Constitutional Convention.

Part II takes a detailed look at the debates leading to the adoption of the constitutional Full Faith and Credit Clause and the historical controversies that have arisen concerning it. It shows that in those debates, Madison achieved pretty much what he wanted: a somewhat vague but mandatory obligation on the part of the states to act as part of a coordinated legal system, an obligation that could be "ratcheted up" over time through federal legislation.

Part III focuses on the apparent contradiction between the first and second sentences of the clause and the way that potential contradiction would have appeared to Madison before the development of judicial review and the establishment of the Supreme Court as final arbiter of constitutional issues.

## I. FULL FAITH AND CREDIT BEFORE THE CONSTITUTION

### A. *Madison at the Start of the Constitutional Convention*

The Full Faith and Credit Clause was a creation of the latter part of the Constitutional Convention, the months of August and early September 1787, when the great compromises involving power-sharing had been reached and the Committee on Style was revising and meshing the various draft proposals of the early Convention into a single coherent draft of a supreme law for the United States.<sup>40</sup> Yet its creation was strongly influenced by the debates that had preceded it.

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<sup>39</sup> For that reason, until the passage of DOMA, there was no case law and very little commentary on the meaning or appropriate interpretation of the second sentence of the Full Faith and Credit Clause. See 142 CONG. REC. S5932-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (reprinting Letter from Laurence Tribe, Professor, Harvard Law Sch., and Ralph S. Taylor, Jr., Professor, Harvard Law Sch., to Edward M. Kennedy, U.S. Senator (May 24, 1996)); Crane, *Original Understanding*, *supra* note 3, at 311-12.

<sup>40</sup> See 2 Farrand, *supra* note 1, at 445-89.

James Madison came to the Convention probably more prepared for the job of constitution-making than any other delegate. After attending the College of New Jersey (today, Princeton University), from which he graduated in two years, Madison served in the Virginia Convention in 1776 and two terms in the Virginia House of Delegates.<sup>41</sup> In 1780, he became the youngest member of the Continental Congress, but “[w]ithin two years, the awkward freshman had become the most effective man in Congress,”<sup>42</sup> and was frequently chosen for service on critical committees.<sup>43</sup> His service in Congress had made him acutely aware of the deficiencies in the Articles of Confederation and he was a leader in congressional movements to reform them.<sup>44</sup>

Madison had also conducted his own intellectual study of republican forms of government in both classical and modern times,<sup>45</sup> and had developed a powerful and coherent critique of the deficiencies of the current American government. This was set forth most clearly and succinctly in a document he wrote in April 1787 (just before the beginning of the Constitutional Convention) titled *Vices of the Political System of the United States*.<sup>46</sup>

The vices involved were primarily those of the states and state legislatures, which had refused to comply with constitutional requisitions and were levying customs duties, concluding treaties with the Indians and usurping other powers of the federal government and failing to comply with treaties validly made by the United States in accordance with the law of nations.<sup>47</sup> Yet Madison also saw as a central defect of the current system, the “trespasses of the states on the rights of each other,” citing these as “alarming symptoms” which may be “daily apprehended.”<sup>48</sup> Although his first and clearest example is the favoritism

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<sup>41</sup> Madison began at Princeton in 1769 and graduated in 1771. IRVING BRANT, JAMES MADISON, THE VIRGINIA REVOLUTIONIST 69, 96 (1941) [hereinafter BRANT, REVOLUTIONIST]. He then stayed an extra half-year, probably for health, but he also continued his studies in law and languages. *Id.* at 96–103; KETCHAM, *supra* note 18, at 51. He served in the Virginia legislature from 1776–1777, and 1784–1786. *See* BRANT, REVOLUTIONIST, *supra*, at 190, 313–15; IRVING BRANT, JAMES MADISON: THE NATIONALIST 343 (1948) [hereinafter BRANT, NATIONALIST]; Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 42 n.149 (2001) [hereinafter Kramer, *We the Court*].

<sup>42</sup> BANNING, *supra* note 15, at 13.

<sup>43</sup> *Id.* at 19.

<sup>44</sup> *See id.* at 43–49; RAKOVE, MADISON, *supra* note 17, at 45–47.

<sup>45</sup> James Madison, *Of Ancient and Modern Confederacies*, in 2 THE WRITINGS OF JAMES MADISON 369 (Gaillard Hunt ed., G.P. Putnam’s Sons 1901) (1787) [hereinafter Madison, *Of Ancient*]. Madison apparently prepared these historical notes in the form of a small thirty-page pamphlet that he intended to carry with him, presumably to the constitutional debates. *Id.* at 369 n.1.

<sup>46</sup> Madison, *Vices*, *supra* note 16, at 361.

<sup>47</sup> *Id.* at 361–62.

<sup>48</sup> *Id.* These are “alarming symptoms” presumably, of the breakdown of the federal union. For a discussion of the interstate economic conflicts existing during the Confederation period, see Robertson, *supra* note 24, at 186–91.

shown by the states to their own citizens in providing port facilities, he found equally troubling the state laws that interfered with debt collection by out-of-state creditors. As he stated:

Paper money, instalments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the citizens of every other state, Acts of the Debtor state in favor of debtors affect the Creditor State, in the same manner as they do its own citizens who are relatively creditors toward other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of coin was properly delegated to the federal authority, the policy of it equally requires a controul on the States in the cases above mentioned.<sup>49</sup>

There is much in this paragraph that is relevant to understanding Madison's approach to the Full Faith and Credit Clause. Note first Madison's observation—which as we will see was an accurate reflection of the political realities of the time—that states could be categorized as relatively pro-debtor or pro-creditor, based presumably on the aggregate power of those factions on the legislature of the state. Note also his view that legislative recognition of paper money, installment payments, and property as legal tender all constituted infringements on the rights of creditor states, as did limiting the rights of creditors to sue in the courts of that state. One might, of course, have equally well made the argument that pro-creditor states like Massachusetts, which required all debts to be paid in specie, were infringing the rights of debtor states, but his statement reflects, I believe, a consistent pro-creditor bias in Madison's thought, although Madison would more likely have described it as a concern with protecting the "vested rights" of contractual creditors.<sup>50</sup> Moreover, Madison's capitalization of "Acts" in "Acts of the Debtor states," while not dispositive given the casual approach to spelling at the time, suggests that Madison was thinking about the ways that legislative acts of one state could disrupt commercial relations in other states.<sup>51</sup> Finally, Madison points out that an effective federal authority would have

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<sup>49</sup> Madison, *Vices*, *supra* note 16, at 362. As Robertson notes, a loose coalition of "[m]any (though not all) merchants, manufacturers and creditors" shared an interest in, among other things, "protecting commercial credit." Robertson, *supra* note 24, at 193.

<sup>50</sup> Jennifer Nedelsky extensively analyzes the central role that property rights played in Madisonian thought. NEDELSKY, PRIVATE PROPERTY, *supra* note 20, at 16–66; *see also* discussion of bankruptcy/creditors' rights *infra* Part I.C. As Nedelsky notes, Madison's concerns over debtor relief laws permitting payment of debts in paper money was part of this general concern over state legislative infringement of property rights. NEDELSKY, PRIVATE PROPERTY, *supra* note 20, at 22–23. A prohibition on states permitting payment of debts in anything but specie was later incorporated into Article I, Section 10, of the Constitution.

<sup>51</sup> *See* NEDELSKY, PRIVATE PROPERTY, *supra* note 20, at 30 (noting that the "legislative injustice" Madison feared most was not direct confiscation, but "interferences with the security of expectation and transaction").

a strong incentive to control states that sought to devalue the currency for repayment of debts, both to preserve American creditworthiness in foreign commerce and to avoid conflicts among the states.

This in turn points to Madison's proposed solution to the vices of the current system, which is, in short, a more powerful and effective national government. Madison stated plainly that the "most fatal if not more frequent cause" of these vices "lies in the people themselves,"<sup>52</sup> particularly in their tendency to form "factions," which then become a majority that oppresses a minority or individuals. This tendency toward faction will be weaker in a large republic, however, than in a small one. In a large republic, Madison stated, "[t]he Society becomes broken into a greater variety of interests, of pursuits of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert."<sup>53</sup>

Yet it is worth noting that Madison does not think that a large republic will eliminate the problem of faction by itself. Rather, he hopes it will ameliorate the effect of factional interests on legislators sufficiently so that other more beneficial incentives will motivate those legislators' actions. These incentives were concern for the long-term general good, concerns for justice (which Madison here conflates with religious belief, while recognizing that religion can also lead to faction), and "respect for character," by which Madison apparently meant the desire to enhance one's honor and reputation.<sup>54</sup> In illustrating the relative weakness of such motivations, Madison again used as an illustration the legislative approval of paper money. He asked, "[i]s it to be imagined that an ordinary citizen or even Assemblyman of R. Island in estimating the policy of paper money, ever considered or cared, in what light the measure was viewed in France or Holland, or even in [Massachusetts] or [Connecticut]?"<sup>55</sup> Madison seemed to imply that paper money would not only be viewed unfavorably, but as a sign of poor character in all those jurisdictions. Madison concluded that a larger republic must also be joined with an election process "as will most certainly extract from the mass of society the purest and noblest characters which it contains."<sup>56</sup> A change in the character of the legislators was as important to ameliorating the vices of the system as a change in the governing law.

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<sup>52</sup> Madison, *Vices*, *supra* note 16, at 366.

<sup>53</sup> *Id.* at 368. This of course is the beginning of Madison's famous argument, set forth most memorably in *Federalist 10*, that a large republic can be a "remedy" for the problem of faction. THE FEDERALIST NO. 10 (James Madison).

<sup>54</sup> Madison, *Vices*, *supra* note 16, at 367.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 369.

B. “Full Faith and Credit” in the Articles of Confederation

In his discussion of the vices of the current political system, Madison distinguished those actions of the states that clearly violate their obligations under the Articles of Confederation or international law (like failure to pay requisitions or abide by federal treaty obligations) and those that occur, at least in part, because of an absence of federal authority (such as failure to require common action on matters of national importance, or to protect states against internal violence).<sup>57</sup> On one important evil of the system, the tendency of states to trespass on each other’s rights, Madison did not state whether most such actions violate the Articles of Confederation, probably because he himself was unsure of the answer.<sup>58</sup>

The Articles of Confederation did contain a provision that seemed to mandate some level of interstate deference, at least with respect to judicial proceedings. It 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.<sup>59</sup>

The meaning of this provision and particularly the term “full faith and credit” has been the subject of important recent scholarly work. The focus of this section, however, will be on a fact that those scholars recognize but whose historical significance, I believe, they do not fully appreciate. That is, that at the time of the Constitutional Convention, the faith and credit clause in the Articles of Confederation had no clear and determinate meaning.

The clause was born in confusion. Added as part of a revision of the Articles that took place in 1777, at the time of its passage, an amendment was proposed that included not only the “full faith and credit” mandate but explicitly provided 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 that the judgment creditor posted a sufficient bond.<sup>60</sup> This provision, which might appear to

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<sup>57</sup> *Id.* at 363–65.

<sup>58</sup> With regard to one such trespass, the tendency of states to impose tariffs and other restrictions on commerce with other states, Madison does note that it is “not contrary to the federal articles” but is “certainly adverse to the spirit of the Union.” *Id.* at 363. He makes no similar comment, however, with regard to his other examples, including the “occlusion of the courts” to the collection of debts.

<sup>59</sup> ARTICLES OF CONFEDERATION of 1781, art. IV. This full faith and credit clause was not part of the original Articles of Confederation, but was added in November 1777. See Sachs, *supra* note 1, at 1223–24. It became effective on March 1, 1781. See Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1725 (2009).

<sup>60</sup> Nadelmann, *supra* note 3, at 35 (citing 5 JOURNALS OF THE CONTINENTAL CONGRESS 887

create a rule of substantive deference, at least for debt actions,<sup>61</sup> was voted on separately from the full faith and credit mandate.” The full faith and credit mandate passed, apparently without debate, but the rest of the provision, as well as a another proposed amendment requiring that the judgment debtor must have had notice of the “original writ upon which judgment shall be founded” were defeated.<sup>62</sup>

One can interpret this muddled history one of three ways. First, that since the more explicit requirement suggesting substantive deference was voted down, the remaining full faith and credit mandate must refer only to an evidentiary rule.<sup>63</sup> Second, that the rule remained one of substantive deference, but without express requirements regarding posting of bonds or prior notice. Third, that the rule, intentionally left vague, signified only that the states owed one another’s judgments some level of deference, possibly greater than that which existed between independent nations.

The litigation engendered by the Articles’ clause reflects all these differing points of view. There were three reported decisions involving the Article of Confederation’s full faith and credit clause decided prior to the Constitutional Convention.<sup>64</sup> Any of the Founders familiar with them would have concluded, as Madison did, that the Articles’ clause was “extremely indeterminate.”<sup>65</sup>

*Jenkins v. Putnam* was an action for trover in South Carolina for slaves taken by an American privateer.<sup>66</sup> The slaves had been sold in a prior condemnation proceeding in a North Carolina admiralty court.<sup>67</sup> The South Carolina court held that it was “bound by the sentence of the Court of Admiralty in North Carolina” and that “[t]he act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it.”<sup>68</sup>

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(Worthington Chauncy Ford et al. eds., 1907)).

<sup>61</sup> Engdahl believes the provision regarding debt actions still embodies no more than a prima facie evidentiary rule. Engdahl, *supra* note 1, at 1610. Whitten finds the available historical evidence inconclusive on the point. Whitten, *State-Court Jurisdiction*, *supra* note 3, at 524–26. Nadelmann, relying largely on the temporal proximity between this proposal and the passage of a Massachusetts law providing substantive deference for sister state debt actions, leans toward a substantive deference reading, but ultimately cites Madison, who stated in another context, “[t]he truth, perhaps, in this as in many other instances, is, that if the compilers of the text had severally declared their meanings, these would have been diverse as the comments made upon it.” Nadelmann, *supra* note 3, at 49 (citing Madison’s Letter to Edmund Randolph (Mar. 10, 1784), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 66, 67 (1865)).

<sup>62</sup> See Nadelmann, *supra* note 3, at 36.

<sup>63</sup> See, e.g., Whitten, *FF&C and DOMA*, *supra* note 3, at 280 n.82; Sachs, *supra* note 1, at 1224.

<sup>64</sup> *Kibbe v. Kibbe*, 1 Kirby 119 (Conn. Super. Ct. 1786); *James v. Allen*, 1 Dall. 188 (Pa. Ct. Com. Pl. 1786); *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8 (S.C. Ct. Com. Pl. & Gen. Sess. 1784).

<sup>65</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>66</sup> *Jenkins*, 1 S.C.L. (1 Bay) at 8.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

In *James v. Allen*, a debtor who had obtained a discharge from imprisonment for a debt in New Jersey sought to use that judgment to obtain a discharge from the same debt in Pennsylvania.<sup>69</sup> The common pleas court held that the order relied on, the discharge from imprisonment, did not go to the “substance of the . . . demand” and had “no connection with the merits of the cause.”<sup>70</sup> It was a “private act . . . local in its nature, and local in its terms,” and therefore did not have any effect in Pennsylvania.<sup>71</sup> The court went on to say, however, that the full faith and credit clause of the Articles seemed “chiefly intended to oblige each State to receive the records of another as full evidence of such Acts and judicial proceedings.”<sup>72</sup>

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<sup>69</sup> *James*, 1 Dall. at 189. The attorney for the debtor, Thomas Bradford, Jr., then Attorney General of Pennsylvania (apparently a part time position), and later Attorney General of the United States, USDOJ: AG: ABOUT THE OFFICE, <http://www.justice.gov/ag/aghistpage.php?id=1> (last visited July 24, 2011), put forward an original argument that acknowledged, to some degree, the vagueness and uncertainty surrounding the Article’s full faith and credit mandate. In response to the creditor’s argument that the rule was merely evidentiary, he stated:

But, should the Defendant find no protection under the law of nations, the 4th Article of the Confederation, effectually supplies that defect. The article declares 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.” Now, if a judgment, or other judicial proceeding in New-Jersey had not been evidence before, this provision (to the true sense of which the law of Pennsylvania is subservient) would have made it so—if it was only prima facie evidence before, this would render it conclusive.

*James*, 1 Dall. at 190. This argument—that the Articles’ Clause must provide for a somewhat greater level of deference than exists among independent nations—is one that we will see recurring in debates over the constitutional clause. What is worth noting here is that Bradford’s argument presupposes substantial uncertainty regarding the level of deference required under the law of nations as well as under the Articles’ Clause. William Bradford, Jr., by the way, was a close friend of Madison’s from college days. See William Bradford (1755-1795), University of Pennsylvania Archives, [http://www.archives.upenn.edu/people/1700s/bradford\\_wm.html](http://www.archives.upenn.edu/people/1700s/bradford_wm.html) (last visited July 24, 2011).

<sup>70</sup> *James*, 1 Dall. at 191.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* 191-92. For Sachs, this language provides the best evidence for his position that the Articles’ clause was a pure “authentication” rule, and he quarrels with Engdahl, who sees it as another example of a prima facie rule. Engdahl, *supra* note 1, at 1588; Sachs, *supra* note 1, 1226, 1226 n.103. Yet a few paragraphs earlier in the opinion, the Judge also states that “[t]he Judgment of a foreign Court establishing a demand against a Defendant, or discharging him from it, according to the laws of that country, would certainly have a binding force here[.]” *James*, 1 Dall. at 191. While this sentence is admittedly dicta, and does not mention the Articles’ clause, it is hard to understand how the judge could maintain that foreign judgments have “binding force” but sister state judgments under the Articles merely had to be treated as “full evidence” of the prior proceedings. *Id.* at 191. I suspect the reason is that Judge Shippen makes the latter comment only after he has held that the discharge in that case was “local in its terms” and not intended to have any out of state effects. *Id.* Accordingly, treating the discharge as authentic, as required by the Articles’ clause, does not trigger any obligation to give it out-of-state effect. The earlier sentence, however, is a general statement under the law of nations concerning the effect of a valid foreign judgment that would appear to trigger an obligation of “binding” deference. Note, however, that this obligation under the law of nations does not seem to have been included, much less enhanced, by the Articles’ clause. In that sense, it is a repudiation of Bradford’s argument noted above. See *id.*

Finally, in *Kibbe v. Kibbe*, a Massachusetts creditor brought suit in Connecticut based on a prior Massachusetts judgment.<sup>73</sup> The prior judgment had been entered by default, based on the attachment of defendant's handkerchief, although notice of the action had been served on defendant's home in Connecticut.<sup>74</sup> The Superior Court of Connecticut held that the prior judgment was invalid for lack of personal jurisdiction, noting that "the defendant was an inhabitant of the state of Connecticut, and was not within the jurisdiction of the Court of Common Pleas for the county of Berkshire, at the time of the pretended service of the writ; therefore, the court had no legal jurisdiction of the cause." It went on to note, however, that:

[F]ull credence ought to be given to judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process, and have or might have had a fair trial of the cause; all which, with the original cause of action, ought to appear by the plaintiff's declaration in action of debt on such judgment.<sup>75</sup>

This, of course, is dicta, but it makes the court seem at least congenial to applying a rule of substantive deference to out-of-state judgments in cases where there has been appropriate notice and opportunity to be heard.

So we have three cases construing the Articles' full faith and credit clause in the years preceding the Constitutional Convention. One applies a rule of substantive deference, based on both the clause and admiralty law, but could have relied solely on the latter.<sup>76</sup> One holds that the

<sup>73</sup> *Kibbe v. Kibbe*, 1 Kirby 119, 119 (Conn. Super. Ct. 1786).

<sup>74</sup> *Id.* at 126.

<sup>75</sup> *Id.* The Judge goes on to note:

That the original action was upon a covenant real, and locally annexed where the lands lie; and the judgment being by default, this court never could take cognizance of or examine into the justice of the cause; therefore, cannot enforce the judgment on which this action is brought.

*Id.* Professor Engdahl makes the innovative argument that this language really supports the evidentiary interpretation of the full faith and credit clause, since "examin[ation] into the justice of the cause," *id.*, would be appropriate, indeed required, under an evidentiary rule, but not under a rule of substantive deference. Engdahl, *supra* note 1, at 1615-16. The problem with this interpretation is that the court also specifically states that it is the default judgment that seems to prevent such examination into the justice of the cause. See *Kibbe*, 1 Kirby at 126. An evidentiary interpretation would seem to require reexamination of the cause of any prior judgment, default or merits-based. An alternative interpretation would be that, as the judge noted previously, the only judgments subject to "full credence" [i.e., substantive deference] are those where both parties "have or might have had a fair trial of the cause" and that examination into the possibility of such a fair trial is not possible when judgment is entered by default. *Id.*

It should also be noted that the judge who authored this dicta, Eliphalet Dyer, was a delegate to the Continental Congress in 1777 and voted in favor of the proposed additions to the full faith and credit clause (substantive deference, notice and bonding), which were ultimately defeated. See Nadelmann, *supra* note 3, at 36.

<sup>76</sup> *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8 (S.C. Ct. Com. Pl. & Gen. Sess. 1784). Whitten also points out that the decision can be justified under a view of English law that "used defensively, all

statute involved had no out-of-state effects, but provides a strong endorsement, in dicta, of the evidentiary interpretation of the clause.<sup>77</sup> The third goes off on jurisdictional grounds, but states that in cases where the original court had jurisdiction, “full credence” ought to be given to such judgments.<sup>78</sup> I submit that what these precedents really establish is that at the time of the Constitutional Convention, there was no clear or well-established legal meaning attached to the full faith and credit mandate in the Articles of Confederation.<sup>79</sup>

A slightly broader view of these cases further supports this contention. Such cases are interesting not only for their holdings, but for what they reveal about what areas of the law were considered settled, and which were the subjects of ongoing dispute. The level of deference required by the Articles’ full faith and credit clause clearly falls in the latter category. In the five years it was in effect from 1781 to 1786, it engendered three major cases<sup>80</sup> (with two more following in 1788).<sup>81</sup> In each of them the effect of the Articles of Confederation was argued, with both the evidentiary and substantive interpretations of the rule advanced. It is perhaps significant that in none of these cases do the courts base their rulings on a straightforward interpretation of the Articles’ clause. They either avoid the question entirely by relying on jurisdictional or other grounds, or rely equally on principles of comity and the law of nations. While this could be mere coincidence, I submit it is more likely a judicial strategy that is still common today. When faced with a novel and difficult legal issue, judges often choose to avoid it, either by deciding the case on other grounds, or relying on multiple

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foreign judgments were conclusive.” Whitten, *State-Court Jurisdiction*, *supra* note 3, at 536.

<sup>77</sup> *James v. Allen*, 1 Dall. 188, 191 (Pa. Ct. Common Pleas 1786).

<sup>78</sup> *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786).

<sup>79</sup> This is also pretty much the conclusion reached by Nadelmann, Whitten, and Sachs. That is, that no definitive interpretation of the meaning of the Articles’ clause can be derived from the existing case law. See Nadelmann, *supra* note 3, at 53; Sachs, *supra* note 1, at 1224–26; Whitten, *State-Court Jurisdiction*, *supra* note 3, at 540. Only Engdahl maintains that, taken as a whole, these cases support a “prima facie rule” interpretation of the Articles’ clause, except for admiralty cases. Engdahl, *supra* note 3, at 1618.

<sup>80</sup> *Jenkins*, 1 S.C.L. (1 Bay) at 8; *James*, 1 Dall. at 188; *Kibbe*, 1 Kirby at 119.

<sup>81</sup> The two additional cases were *Millar v. Hall*, 1 Dall. 229 (Pa. 1788), and *Phelps v. Holker*, 1 Dall. 261 (Pa. 1788). In *Millar*, the Pennsylvania Supreme Court applied a bankruptcy discharge obtained in Maryland to an action in Pennsylvania, although it did not rely explicitly on the Articles, but on general principles of justice and the law of nations. 1 Dall. at 229–31. *Phelps*, like *Kibbe*, 1 Kirby at 123, involved a suit to enforce a Massachusetts *in rem* judgment, though in *Phelps*, the matter was the attachment of a blanket. *Phelps*, 1 Dall. at 261. The *Phelps* court refused to give the prior judgment conclusive effect, but like *Kibbe*, 1 Kirby at 121, the holding seems based primarily on the holding that the Massachusetts court lacked *in personam* jurisdiction over the debtor or the full amount of the claimed debt. *Phelps*, 1 Dall. at 263–64. One of the four judges, however, Atlee, in a concurring opinion, argued that the prior judgment was not “conclusive evidence” by adverting to the provisions of the Articles which had been defeated in 1777. *Id.* at 261; see also *Bartlett v. Knight*, 1 Mass. 401, 410 (Mass. 1805) (Sedgwick, J.) (criticizing Judge Atlee’s argument in *Phelps*).

grounds for their decision. It seems likely that the “correct” interpretation of the Articles’ full faith and credit clause was considered just such a novel and difficult legal issue.

The fact that distinguished lawyers were willing to argue both sides of this issue is further evidence that the meaning of “full faith and credit” was far from clear or settled prior to the Constitutional Convention. While lawyers are of course paid to argue for their clients, it seems unlikely that most lawyers then, or now, would choose to make arguments which they felt the authorities they cited could not support, or which might injure their reputation as reliable and knowledgeable jurists. In that regard, it is interesting that Jared Ingersoll, one of the leading attorneys in Philadelphia (and a delegate to the Constitutional Convention) argued in *James* in 1786 for the evidentiary interpretation of the Articles’ clause,<sup>82</sup> and two years later, in *Millar v. Hall*<sup>83</sup> and *Phelps v. Holker*,<sup>84</sup> argued that the clause created a rule of substantive deference. The meaning of the clause, in short, was a litigable issue, one on which competent authorities and respectable arguments could be found for either side.<sup>85</sup>

It is also worth examining these cases to see what relationship they assume exists between the Articles’ clause and the deference obligations for foreign judgments created under the law of nations. In *Jenkins*, the Articles’ clause and the law of nations are said to constitute two independent and equally strong grounds for a rule of substantive deference, at least in admiralty cases.<sup>86</sup> In *James*, in contrast, the rule of substantive deference that exists for some foreign judgments under the law of nations does not appear to have been incorporated in any way into the Articles’ clause, which remains a pure evidentiary rule.<sup>87</sup> *Kibbe* relies on general principles of jurisdiction, which are presumably derived

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<sup>82</sup> *James*, 1 Dall. at 191.

<sup>83</sup> *Millar*, 1 Dall. at 231.

<sup>84</sup> *Phelps*, 1 Dall. at 262.

<sup>85</sup> Nadelmann offers one further piece of evidence of the indeterminacy with which the Confederation’s clause was viewed. He tells us of a committee of the Continental Congress which, on August 22, 1781, (shortly after Maryland’s ratification made the Articles effective) reported that the Confederation required “execution” in among others, the following respect: “By declaring the method of exemplifying records and the operation of the Acts and judicial proceedings of the Courts of one State contravening those of the States in which they are asserted . . . .” Nadelmann, *supra* note 3, at 53 n.95. Nadelmann accurately notes that this shows, at least, that “the drafters saw two different problems in need of clarification, one formal, the method of exemplification, and the other substantive, the effect of a foreign judgment or proceeding.” *Id.* It is also worth noting that two of the three members of that committee, Oliver Ellsworth and Edmund Randolph, were both distinguished lawyers and future delegates to the Constitutional Convention. *Id.*; see also 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 894 (Worthington C. Ford et al. eds., 1904–37).

<sup>86</sup> *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8, 8–9 (S.C. Ct. Com. Pl. & Gen. Sess. 1784).

<sup>87</sup> See *supra* notes 69–72 and accompanying text.

from the law of nations, but makes no mention of the Articles' clause.<sup>88</sup> In short, the question of the relationship between the Articles' clause and the deference obligations under the law of nations is at least as opaque and uncertain as the extent of the deference obligation under the clause itself.

As a final proof of the indeterminacy of the Article's full faith and credit clause, we can return to James Madison and his retrospective comments in *Federalist No. 42*, the only place in *The Federalist Papers* where the Full Faith and Credit Clause (both that of the Constitution and of the Articles) is discussed. With respect to the Articles' clause, Madison tells us, "[t]he meaning of the [Articles' full faith and credit clause] is extremely indeterminate, and can be of little importance under any interpretation which it will bear."<sup>89</sup>

With respect to the first part of Madison's statement, the "extreme indeterminacy" of the clause,<sup>90</sup> we have seen that it is a well-supported and justifiable position. His claim that it can be of "little importance" under any reasonable interpretation may reflect, in part, the fact that he is dealing in *The Federalist Papers* with the most profound questions of political theory as they apply to the future of his country. The choice between a rule of evidentiary or substantive deference for out-of-state judgments may appear like very small potatoes in such circumstances.<sup>91</sup> But we know that Madison did not take the problem of states' interference with one another lightly. Part of the problem was that a rule limited to judgments was too narrow for the kind of interstate coordina-

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<sup>88</sup> *Kibbe v. Kibbe*, 1 Kirby 119, 119 (Conn. Super. Ct. 1786). Similarly, *Millar v. Hall* relies heavily, explicitly and primarily on the law of nations, with only one minor nod to the "reciprocal obligation of the states under the articles of confederation," which are presumed to conform to these principles of "general conveniency, expediency, justice, and humanity." 1 Dall. at 232. Finally, *Phelps v. Holker*, which also goes off on jurisdictional grounds, gives us four separate judicial opinions, one (Bryan) based solely on Massachusetts law, another (Atlee) based on a historical interpretation of the enactment of the Articles' Clause, and two (M'Kean and Rush) which seem to imply at least that the Articles' Clause does not provide conclusive out-of-state effect to judgments issued in rem. 1 Dall. at 261-64.

<sup>89</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>90</sup> *Id.*

<sup>91</sup> Whitten finds it "highly unlikely" that a rule of conclusive deference could be considered by Madison to be of "little importance." Whitten, *State-Court Jurisdiction*, *supra* note 3, at 554. Yet to make this argument one has to believe that a rule of conclusive deference was not even considered by Madison a plausible interpretation of the Articles' clause, something belied by the case law under the Articles, as well as by Madison's own statements. Far more likely was that Madison believed that neither a *prima facie* nor a conclusive rule of deference were particularly effective in enforcing debt obligations. After all, even under the evidentiary interpretation of the clause, proof of the existence of the prior judgment was enough to establish a *prima facie* case. For debtors who defaulted or had no defense on the merits, the difference was indeed of "little importance." *Id.* It should also be noted that the default rates in eighteenth century American litigation were extremely high. In her study of colonial litigation in New York Supreme Court, Deborah Rosen found that by the 1750s, the default rate in cases in New York County was approximately sixty percent. For other New York counties it averaged eighty-four percent. See Rosen, *Supreme Court*, *supra* note 12, at 213, 230.

tion he sought. It did not, for example, deal with laws providing for repayment of debts with paper money, or the effects of various bankruptcy laws on prior debts. The most pressing problem he saw, however, was that under either a *prima facie* or conclusive rule, the need to institute an additional action gave the defaulting debtor a chance to escape across state lines. For Madison, the truly effective and sensible solution is one that provided for execution of out-of-state judgments. That was the power Madison sought for Congress and was the “power here established” by the second sentence of the Clause, which he goes on to state

may be rendered a very convenient instrument of justice, and maybe particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated at any stage of the process, within a foreign jurisdiction.<sup>92</sup>

Although the precise meaning of the Articles’ clause remains uncertain, we can get a better understanding of the constitutional clause by examining it in relation to Madison’s broader normative goals at the time of the Founding. That is the task of the next two sections.

### C. *Economic Implications of Full Faith and Credit*

We have seen that at the time of the Founding, the issue of interstate deference to judgments was closely intertwined with the enforcement and collection of interstate debts. Recall that this was a primary focus of Madison’s concerns about interstate trespasses—the way in which pro-debtor states created laws that interfered with the proper collection of debts by out-of-state creditors.<sup>93</sup> More broadly, the full faith and credit clause in the Articles of Confederation was about enforcement of out-of-state court judgments, and court judgments, in eighteenth-century America, predominantly involved the results of debtor-creditor litigation.<sup>94</sup> The reported cases under the Articles’ full faith and

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<sup>92</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>93</sup> See *supra* notes 12–13 and accompanying text.

<sup>94</sup> As Bruce Mann notes, the debtor-creditor relationship in the late eighteenth century “was a legal one, defined by the formal rules that governed the creation and collection of debts.” BRUCE MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 33 (2002). Deborah Rosen, in her study of colonial New York courts, found that “[l]egal practice of the period from 1690 to 1760 evolved in the way it did because debt litigation increasingly dominated the courts’ dockets as New York became a more commercialized society.” Deborah Rosen, *Courts and Commerce in Colonial New York*, 36 AM. J. LEGAL HIST. 139, 151 (1992) [hereinafter Rosen, *Courts and Commerce*]. Rosen also found that this increase in debt litigation was accompanied by very high rates of default judgments. *Id.* at 153. While there were many reasons for this high default rate, at least one of them is directly relevant to Madison’s concerns: the likelihood of insolvent debtors “fleeing to another colony where distance and procedural rules made arrest unlikely.” MANN, *supra*, at 26.

credit clause are consistent with Madison's economic concerns. Of the five, four involve suits for unpaid debts.<sup>95</sup>

The post-revolutionary period was also a time of serious economic depression.<sup>96</sup> Defaults by debtors frequently caused "credit cascades" as those to whom payment was due also became unable to pay their debts.<sup>97</sup> These private debt collection problems and the economic hardships they created were also associated in the mind of many with the problem of public debt and the inability or unwillingness of many states to pay their fair share of the debts incurred by the United States during the Revolutionary War.<sup>98</sup> Moreover, these credit problems gave rise to serious civil unrest among agrarian debtors in various parts of the country, unrest that manifested itself most dramatically in Shays's Rebellion in western Massachusetts.<sup>99</sup>

The states' legislative response to these issues was a matter of deep concern to Madison. He strongly condemned states that enacted "tender laws" requiring creditors to accept paper money at face value in satisfaction of debts.<sup>100</sup> Recall also Madison's complaint about state laws that made "property a legal tender" as one of the ways in which states were infringing on the rights of other states.<sup>101</sup> In contrast, the most con-

<sup>95</sup> Of those, two involve efforts by Massachusetts creditors to enforce that state's strict (and to modern sensibilities somewhat strange) statute which provided that, under appropriate circumstances, attachment of a small personal item like a blanket or handkerchief of the out-of-state debtor would subject the debtor to personal jurisdiction for the full amount of the claimed debt. *See* *Kibbe v. Kibbe*, 1 Kirby 119, 119 (Conn. Super. Ct. 1786); *Phelps v. Holker*, 1 Dall. 261, 261 (Pa. 1788); *Sachs*, *supra* note 1, at 1236.

The two others represent attempts to give out-of-state effect to statutes passed in other states to give some protection to insolvent debtors within those states. *See* *Millar v. Hall*, 1 Dall. 229, 261 (Pa. 1788); *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8, 8 (S.C. Ct. Com. Pl. & Gen. Sess. 1784). They can all reasonably be seen as clashes in the battle Madison described between pro-creditor and pro-debtor states.

<sup>96</sup> Terry Bouton, *Moneyless in Pennsylvania: Privatization and the Depression of the 1780s*, in *THE ECONOMY OF EARLY AMERICA: HISTORICAL PERSPECTIVES AND NEW DIRECTIONS* 218 (Cathy Matson ed., 2006); Cathy Matson, *The Revolution, The Constitution, and New Nation*, in *1 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES* 363, 372–82 (Stanley L. Engerman & Robert E. Gallman eds., 1996). Paper money issued by states during the war rapidly diminished in value, trade with the West Indies had been disrupted, debts incurred during the war, both private and public were coming due, and American manufactures were being undercut by British imports and the economy generally was contracting. MANN, *supra* note 94, at 170–71; Matson, *supra* at 372–83.

<sup>97</sup> MANN, *supra* note 94, at 19–20.

<sup>98</sup> *See* Madison, *Vices*, *supra* note 16, at 362.

<sup>99</sup> MANN, *supra* note 94, at 180–81. Unrest among agrarian debtors was far from limited to Massachusetts. In 1787, Madison was informed by correspondents that "much the same materials were on the verge of conflagration in the Old Dominion." BANNING, *supra* note 15, at 122; *see also* WOOD, *THE CREATION*, *supra* note 16, at 404; Robert A. Feer, *Shay's Rebellion and the Constitution*, 42 *NEW ENG. Q.* 388 (1969).

<sup>100</sup> MANN, *supra* note 94, at 172–75.

<sup>101</sup> In 1782, the Virginia Assembly passed a law permitting debts to be paid in hemp, tobacco, and flour, with the county courts determining their value. Slightly later legislation also permitted payment by title to land or slaves. A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN*

sistently pro-creditor state was Massachusetts, where Boston merchants dominated the legislature and whose law required all taxes and private debts to be paid in specie.<sup>102</sup> It also appears that litigation to recover debts was slow, expensive, and uncertain, casting disrepute on both the state courts and the lawyers who practiced before them.<sup>103</sup>

States also potentially interfered with debt obligations in other states through insolvency and bankruptcy statutes. The three decades prior to the Constitutional Convention were a period of experimentation in many colonies (later states) concerning “new statutory schemes for discharging debts as well as debtors.”<sup>104</sup> Although these statutes were generally “short lived or restrictive in their application,”<sup>105</sup> they represented a growing tendency to view insolvency not as an individual moral failing but as an economic problem requiring a public response.<sup>106</sup>

Madison had long recognized the critical role that economic concerns played in safeguarding the political and moral well-being of the nation.<sup>107</sup> His temperament, his class, and his experience in the Virginia state legislature all inclined him against legislation that he perceived as designed to relieve citizens of their rightful obligations to their creditors.<sup>108</sup> It would be a mistake, however, to view the opposition of Madison to tender laws and similar legislation as simply based on economic or class concerns. He saw them as fundamentally unfair and violations

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LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810, at 171 (1981).

<sup>102</sup> MANN, *supra* note 94, at 180. Feer makes the interesting observation that among Madison and other Federalists, Massachusetts was frequently cited as a model worthy of emulation, while Rhode Island (which in addition to being pro-debtor had not sent delegates to the Convention), was generally referred to with disdain. Feer, *supra* note 99, at 410.

<sup>103</sup> MANN, *supra* note 94, at 20–24, 32–33. Mann also notes that while the actual legal process of enforcing and collecting debts changed little throughout the eighteenth century, states varied greatly in their attitudes toward debt collection and debtor relief. MANN, *supra* note 94, at 31–32.

<sup>104</sup> MANN, *supra* note 94, at 55–77.

<sup>105</sup> *Id.* at 55.

<sup>106</sup> The state with the longest and most consistent policy of debtor relief was Rhode Island, which developed a system whereby debtors could discharge their debts (and avoid debtors' prison) by petitioning the legislature. Peter J. Coleman, *The Insolvent Debtor in Rhode Island 1745–1828*, 22 WM. & MARY Q. 413, 415–16 (1965). The petition was to be accompanied by a list of all the debtors' assets. If the petition was granted (which was done by a special act of the legislature) a commission, acting on the legislature's behalf, took the debtor's property and distributed it pro-rata to his creditors. *Id.* at 415–16; *see also* Nadelmann, *supra* note 3, at 55 nn.102 & 103 (description of Connecticut's laws regarding discharge of debtors). We have seen that the effect such discharges had on out-of-state creditors was the issue in two of the five reported cases under the Articles' clause. *See* James v. Allen, 1 Dall. 188 (Pa. Ct. Com. Pl. 1786); Jenkins v. Putnam, 1 S.C.L. (1 Bay) 8 (S.C. Ct. Com. Pl. & Gen. Sess. 1784). It was also to be an issue in the debates over the constitutional Clause. *See* discussion *infra* Part I.C.

<sup>107</sup> BANNING, *supra* note 15, at 48–49.

<sup>108</sup> RAKOVE, MADISON, *supra* note 17, at 54. He was quite pleased, for example, in having prevented the Virginia legislature from passing any bills providing for payment of debts with paper money. BANNING, *supra* note 15, at 97–99.

of natural rights of contract and property.<sup>109</sup> For Madison, the protection of property and contract rights was a basic principle of justice,<sup>110</sup> which it was an obligation of a “well constructed Union” to safeguard.<sup>111</sup> But he also saw the protection of these rights not just as a benefit to the propertied classes, but as a necessary prerequisite for a stable economic system and, therefore, a safeguard of the nation’s economic well being.<sup>112</sup> Central to protecting such rights was a swift and fair system for the administration of justice. As Madison stated in 1788:

Compare the situations of nations in Europe, where the justice is administered with celerity, to that of those where it is refused, or administered tardily. Confidence produces the best effects in the former. The establishment of confidence will raise the value of property, and relieve those who are so unhappy as to be involved in debts.<sup>113</sup>

Madison at the start of the Constitutional Convention had a rather clear idea of the economic goals of the new federal system he was hoping to create. It was one that would safeguard and enforce property rights in accordance with principles of natural justice and sound governance. Yet Madison was well aware that while such principles might represent “fundamental law” in some theoretical sense, it was far from clear how such rights could be protected from short-sighted state legislators, who had little regard for preservation of contract rights generally and even less for those of out-of-state creditors.<sup>114</sup> His most basic answer was a structural one, the creation of a larger federal government whose members would have a national perspective, and could thereby function as a disinterested “umpire” between state interests.<sup>115</sup> Since, on

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<sup>109</sup> See WOOD, *THE CREATION*, at 405–07.

<sup>110</sup> See NEDELSKY, *PRIVATE PROPERTY*, *supra* note 20, at 28–29, 31–38. Much later in his life, Madison would describe this property right in Lockean terms, stating, “[t]he personal right to acquire property, which is a natural right, give to property, when acquired, a right to protection, as a social right.” James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in 9 *THE WRITINGS OF JAMES MADISON* 361 (Gaillard Hunt ed., G.P. Putnam’s Sons 1910).

<sup>111</sup> *THE FEDERALIST* NO. 10 (James Madison); see also NEDELSKY, *PRIVATE PROPERTY*, *supra* note 20, at 28–30.

<sup>112</sup> NEDELSKY, *PRIVATE PROPERTY*, *supra* note 20, at 25–28, 40–42.

<sup>113</sup> James Madison, Speech to Virginia Constitutional Convention on the Power of the Judiciary (June 20, 1788), in 5 *THE WRITINGS OF JAMES MADISON* 216, 225 (Gaillard Hunt ed., G.P. Putnam’s Sons 1904). Madison’s precise topic was the Constitution’s creation of federal diversity jurisdiction in Article III, but as usual, Madison saw the issue in broader terms. *Id.* at 217.

<sup>114</sup> The problem of how to safeguard fundamental rights from legislative fiat was a central problem for eighteenth century American political thought. See WOOD, *THE CREATION*, *supra* note 16, at 273–82. Wood analyzes the problem as rooted in an ambiguity in the concept of law that existed among Americans of the period. See *id.* at 291–94. A “confusion” existed between “the colonists’ resort to written documents and charters as the best means of defending liberties” and an older conception of law as “those rights which we are entitled to by the eternal laws of right reason.” *Id.* at 292–94. Madison certainly retained this older notion of fundamental law in his account of property and contract rights, and, as we will see, it also played a major role in the formation of the constitutional Full Faith and Credit Clause.

<sup>115</sup> Madison, Letter to Washington, *supra* note 26, at 346.

Madison's view, the interests of the nation as a whole were always for the protection and fair and uniform enforcement of contract and property rights, giving the federal government power to foster protection of such rights, and depriving states of the power to interfere with them, would be a major achievement. Not only did he expect the federal government to preserve these existing rights, including the obligation on the part of each state to enforce the debt obligations created in other states in accordance with their terms, but they could even be empowered to improve the efficiency and consistency with which those rights were enforced by providing for the execution of judgments obtained in one state in the courts of another.<sup>116</sup>

D. *Full Faith and Credit and the Structure of the New Federal Union*

Although inconsistent debt enforcement was the practical problem Madison associated most closely with the constitutional Full Faith and Credit Clause, Madison did not view the Clause, or the relationship among states generally, solely from a narrow economic perspective. Rather it was part of a broader effort to foster "harmony and proper intercourse among the states."<sup>117</sup> By the time of the Convention, Madison had developed fairly specific proposals to remedy the defects of the Articles of Confederation.<sup>118</sup> To prevent the states from "molesting" one another and other detrimental effects of ill-advised state laws, Madison proposed a simple but powerful solution—a federal "negative," a federal veto power over any and all state legislation.<sup>119</sup> An important justifi-

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<sup>116</sup> See discussion *infra* Part II.

<sup>117</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>118</sup> Banning comments that Madison was the "best prepared of all who gathered for the Federal Convention." BANNING, *supra* note 15, at 115; see also WOOD, THE CREATION, *supra* note 16, at 472.

<sup>119</sup> Letter from James Madison to Thomas Jefferson (Mar. 19 [18], 1787), in 2 THE WRITINGS OF JAMES MADISON 324, 327 (Gaillard Hunt ed., G.P. Putnam's Sons 1901) [hereinafter Madison, Letter to Jefferson]. While this may seem like a vast expansion of federal power relative to the states, Madison saw it as limited, defensive and necessary. In a letter to George Washington dated April 16, 1787, Madison laid out a vision of a newly created federal government whose positive lawmaking powers would only be expanded to "all cases which require uniformity" such as regulation of foreign trade and naturalization, but which would have the power to exercise a negative "in all cases whatsoever on the legislative acts of the states, as heretofore exercised by the kingly prerogative." Madison, Letter to Washington, *supra* note 26, at 345 (emphasis in original).

Madison states this would be "absolutely necessary" but also the "least possible encroachment on the State jurisdictions." *Id.*; see also BANNING, *supra* note 15, at 117–18. Madison made similar arguments in a speech to the Constitutional Convention on June 8, 1787. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 164 (Max Farrand ed. 1911) [hereinafter 1 Farrand]. He reasoned that this was a merely "defensive power" but one without which "[t]he states will continue to invade the National jurisdiction, to violate treaties and the law of nations & harass each other with rival and spiteful measure . . ." Madison, Letter to Washington, *supra* note 26, at 345.

cation for this proposal was Madison's belief that the federal government could function as a neutral arbiter among interests and factions, both within and among the states.<sup>120</sup> Madison's concept of a "federal negative" did not survive beyond the early weeks of the Constitutional Convention,<sup>121</sup> but his vision of the federal government as a neutral arbiter among the states remained.

The concerns of small states that they would be dominated by the larger ones developed into the central problem of the Convention.<sup>122</sup> In his efforts to convince the smaller states that a large, proportionately-based national government was in their own best interests, Madison expanded on his idea of a federal government, with concurrent powers derived from the people,<sup>123</sup> as a neutral arbiter among states. Perhaps the most dramatic events of the Convention came on June 18 and 19, 1787, in response to the recently proposed "New Jersey Plan."<sup>124</sup> Alexander

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<sup>120</sup> As he stated in a letter to George Washington:

The great desideratum which has not yet been found for Republican Governments seems to be some disinterested & dispassionate umpire in disputes between different passions & interests in the State. The majority who alone have the right of decision, have frequently an interest, real or supposed in abusing it. In Monarchies the sovereign is more neutral to the interests and views of different parties; but unfortunately he too forms interests of his own repugnant to those of the whole. Might not the national prerogative here suggested be found sufficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from the pursuit of interests adverse to those of the whole Society. There has not been any moment since the peace at which the representatives of the Union would have given an assent to paper money or any other measure of a kindred nature.

*Id.* at 346–47. We see here a slight modification of Madison's argument for a large republic. Rather than simply argue that such a government will be too varied and diverse to be easily captured by any one faction, Madison here argues that the national government, by its very nature, will tend toward a neutral and positive role in resolving conflicts among factions and smaller political entities. As he says, a national government will be "disinterested" on "local questions of policy" and would therefore exercise a veto power only when it benefited the interests of "the whole Society" such as to prevent his old bugaboo, the institution of paper money. See BANNING, *supra* note 15, at 141 (Madison recognized need to defend "peaceable relations between the states from independent, countervailing state decision").

<sup>121</sup> On June 8 and 9, 1787, a proposal to expand the power of the federal negative from state laws contravening the articles of union or treaties made under them to "all laws which to them shall appear improper" was defeated, primarily by opposition of the smaller states. 1 Farrand, *supra* note 119, at 162–68. Madison's protestations notwithstanding, it seemed to most delegates an enormous and potentially unrestrained expansion of national power at the expense of the states, particularly the smaller states, and it certainly did not help that it was strongly reminiscent of a power previously exercised by the English monarch.

<sup>122</sup> See BANNING, *supra* note 15, at 145–57; MILLER, *supra* note 16, at 67–73; RAKOVE, MADISON, *supra* note 17, at 65, 69.

<sup>123</sup> A central organizing principle that developed in the early days of the Convention was that the powers of the national government should be derived from the people through an electoral process, not, as with the Articles, indirectly through the action of state governments. See 1 Farrand, *supra* note 119, at 21; see also BANNING, *supra* note 15, at 119.

<sup>124</sup> The New Jersey Plan, proposed by Robert Paterson of New Jersey in opposition in to the Virginia Plan, basically called for an expanded version of the Articles of Confederation government, with some expansion of federal powers, but preserving the one state–one vote rule for the national assembly. See BANNING, *supra* note 15, at 149.

Hamilton, giving his first significant speech of the Convention, argued, in effect, for the abolition of state sovereignty.<sup>125</sup>

After Hamilton's radical proposal, Madison's remarks the following day seem conciliatory and moderate. He focused again on the inadequacies of the current confederation, including its failure to prevent the "trespasses of the states on each other,"<sup>126</sup> but warned that a failure of the Convention to preserve the union would result in far greater calamity to the smaller states, who would then be at the mercy of their larger neighbors.<sup>127</sup>

Here again we see Madison's belief that a national government would have an "equal interest" in protecting every part of the nation against every other. The argument may have backfired, however, with some delegates who interpreted it as meaning the national government would be indifferent to individual states and state boundaries, viewing them as "mere counties" with few rights or interests of their own.<sup>128</sup> While this is a misreading of Madison's position, the element of truth in it is the association in Madison's mind of two concepts: the functioning of the states as administrative units of the national government and the national government's neutrality among those states.<sup>129</sup>

These broader structural concerns underlie Madison's proposals for the specific language of the Full Faith and Credit Clause and particular-

<sup>125</sup> 1 Farrand, *supra* note 119, at 283 (speech of Alexander Hamilton on June 18, 1787, stating he was "fully convinced, that no amendment of the confederation, leaving the States in possession of their sovereignty could possibly answer the purpose [of the Convention]"). Hamilton suggested that "great economy" could be obtained by substituting a general government for those of the states, whose form might be maintained solely for the purpose of "local" "tribunals" and similar subordinate functions. *Id.* at 287; see also RAKOVE, MADISON, *supra* note 17, at 68.

<sup>126</sup> 1 Farrand, *supra* note 119, at 317.

<sup>127</sup> If the union dissolved he asked, "would the small States be more secure agst. the ambition & power of their larger neighbours, than they would be under a general Government pervading with equal energy every part of the Empire, and having an equal interest in protecting every part agst. every other part?" 1 Farrand, *supra* note 119, at 320.

<sup>128</sup> This is how Madison's remarks of June 28, 1787, were sometimes understood, as he argued again in defense of a proportionately elected national government:

In a word; the two extremes before us are a perfect separation & a perfect incorporation, of the 13 States. In the first case they would be independent nations subject to no law, but the law of nations. In the last, they would be mere counties of one entire republic, subject to one common law. In the first case the smaller states would have every thing to fear from the larger. In the last they would have nothing to fear. The true policy of the small States therefore lies in promoting those principles & that form of Govt. which will most approximate the States to the condition of Counties.

1 Farrand, *supra* note 119, at 449. Of course, Madison is speaking here of an "extreme" position, not the one he was actually advocating.

<sup>129</sup> The more states promote "principles" which cause them to approximate "the condition of Counties," the more equally and neutrally state borders will be treated by the national government and the less they will have to fear from the larger states. Although Madison had not completely abandoned his hope for a federal negative on state legislation, he was relying more and more on the concept of concurrent jurisdiction to justify independent assertions of federal power and exclude state participation in enforcement of federal laws. See 1 Farrand, *supra* note 119, at 447; BANNING, *supra* note 15, at 155.

ly his insistence on the powers granted in the second sentence of the Clause, the part that made it an “improvement” over the Articles’ clause.<sup>130</sup> This was not, as some have recently suggested, simply a matter of “punting the ball” to the federal legislature in the face of some disagreement over the proper interpretation of legal terms.<sup>131</sup> Rather, it was a grant of federal power designed by Madison and his allies to achieve very specific ends, the creation of far greater interstate deference obligations, such as interstate execution of judgments, than existed under current law or could appropriately be set forth as constitutional mandates. Because a high degree of interstate deference, protection of vested property and contract rights from state interference, and a uniform and effective system for enforcement of such rights were all, in Madison’s view, clearly in the national interest, a grant of power to the federal legislature to define and enforce the full faith and credit obligation would necessarily lead to a strengthening and expansion of that obligation.<sup>132</sup> How Madison sought to draft the new Full Faith and Credit Clause to bring about such results is the subject of the next section.

## II. CREATION OF THE CONSTITUTIONAL FULL FAITH AND CREDIT CLAUSE

### A. *Sources of the Clause*

On July 24, 1787, the Constitutional Convention appointed a five-man Committee of Detail to prepare a draft constitution that encompassed the results of deliberations up to that point.<sup>133</sup> The Committee of Detail was chaired by John Rutledge of South Carolina, and also included Edmund Randolph of Virginia, Oliver Ellsworth of Connecticut, James Wilson of Pennsylvania, and Nathaniel Gorham of Massachusetts.<sup>134</sup>

There is no indication that any discussion of the full faith obligation took place at the Convention prior to that time, nor is it mentioned in the hotly debated proposals that became known as the Virginia and

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<sup>130</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>131</sup> See Engdahl, *supra* note 1, at 1623–24.

<sup>132</sup> See discussion *supra* notes 12–13 and accompanying text. While historians still debate the extent to which Madison in 1787 sought to transform the United States into a cohesive national entity at the expense of the states, it is clear that he expected the new national government to make many changes to strengthen the national interest. See RAKOVE, MADISON, *supra* note 17, at 76–77.

<sup>133</sup> 2 Farrand, *supra* note 1, at 97.

<sup>134</sup> *Id.*; 1 Farrand, *supra* note 119, at xxii.

New Jersey Plans.<sup>135</sup> Rather, it appears to have made its way to the Committee of Detail through the alternative proposal by Charles Pinckney of South Carolina, who submitted a plan to the Convention on May 29, 1787,<sup>136</sup> which had a significant number of borrowings from the Articles of Confederation, and which appears, based on notes and papers of James Wilson,<sup>137</sup> to have been taken up and considered in the work of the Committee of Detail.<sup>138</sup>

A version of the Full Faith and Credit Clause was in the draft constitution submitted to the Convention by the Committee on Detail on August 6,<sup>139</sup> although the Convention did not get around to discussing it until August 29.<sup>140</sup> Given this delay, and the carefully drafted alternative proposals submitted on August 29, it seems likely that the draft was subject to substantial informal discussions by delegates in the three weeks prior to its formal consideration.<sup>141</sup>

Proposed Article XVI of the draft stated, “[f]ull faith shall be given in each State to the acts of the Legislatures, and to the records and judi-

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<sup>135</sup> See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 593–94, 611–16 (Max Farrand ed. 1911) [hereinafter 3 Farrand].

<sup>136</sup> 1 Farrand, *supra* note 119, at 16.

<sup>137</sup> A copy of what appears to have been the Pinckney Plan was found among James Wilson's papers relating to the work of the Committee on Detail. 2 Farrand, *supra* note 1, at 134–35, 134 n.3. In its outline of proposed articles for the new constitution it included as point 3, “Mutual Intercourse — Community of Privileges — Surrender of Criminals — Faith to Proceedings &c.” *Id.* at 135. These subjects, substantially elaborated, appear to have formed the basis for Articles XIII through XVI of the draft constitution presented by the Committee on Detail on August 6, 1787. See *id.* at 183–88.

<sup>138</sup> Alexander Hamilton also submitted a constitutional plan on June 18, 1787, in conjunction with his controversial speech. The eleven points of that proposal and its variants do not mention a full faith and credit obligation. See VARIANT TEXTS OF THE PLAN PRESENTED BY ALEXANDER HAMILTON TO THE FEDERAL CONVENTION – TEXT. A, [http://avalon.law.yale.edu/18th\\_century/hamtexta.asp](http://avalon.law.yale.edu/18th_century/hamtexta.asp) (last visited July 25, 2011); VARIANT TEXTS OF THE PLAN PRESENTED BY ALEXANDER HAMILTON TO THE FEDERAL CONVENTION – TEXT. B, [http://avalon.law.yale.edu/18th\\_century/hamtextb.asp](http://avalon.law.yale.edu/18th_century/hamtextb.asp) (last visited July 25, 2011); VARIANT TEXTS OF THE PLAN PRESENTED BY ALEXANDER HAMILTON TO THE FEDERAL CONVENTION – TEXT. C, [http://avalon.law.yale.edu/18th\\_century/hamtextc.asp](http://avalon.law.yale.edu/18th_century/hamtextc.asp) (last visited July 25, 2011); VARIANT TEXTS OF THE PLAN PRESENTED BY ALEXANDER HAMILTON TO THE FEDERAL CONVENTION – TEXT. D, [http://avalon.law.yale.edu/18th\\_century/hamtextd.asp](http://avalon.law.yale.edu/18th_century/hamtextd.asp) (last visited July 25, 2011); VARIANT TEXTS OF THE PLAN PRESENTED BY ALEXANDER HAMILTON TO THE FEDERAL CONVENTION – TEXT. E, [http://avalon.law.yale.edu/18th\\_century/hamtexte.asp](http://avalon.law.yale.edu/18th_century/hamtexte.asp) (last visited July 25, 2011). However, an expanded version of Hamilton's plan, recorded in Madison's notes as “communicated” to Madison by Colonel Hamilton, at “about the close of the Convention in Philadelphia, 1787” does contain such a provision, Article IX, Section 5, which states in part: “full faith and credit shall be given in each State to the public acts, records and judicial proceedings of another.” See 3 Farrand, *supra* note 135, at 617, 629. Given the timing and limitations on its distribution, it is hard to see how Hamilton's language could have influenced the drafting of the Clause at the Convention, except possibly indirectly through the comments of Madison himself.

<sup>139</sup> 2 Farrand, *supra* note 1, at 176.

<sup>140</sup> *Id.* at 445.

<sup>141</sup> Engdahl makes a similar observation. See Engdahl, *supra* note 1, at 1622.

cial proceedings of the Courts and Magistrates of every other State.”<sup>142</sup> The language is close, but not identical to, the full faith and credit clause in the Articles of Confederation.<sup>143</sup> The major change is the extension of full faith not just to records and judicial proceedings but to “acts of the Legislatures.”<sup>144</sup> Moreover, the term “full faith and credit” in the Articles has been abridged to “full faith.”

### B. *Evidentiary vs. Substantive Deference and Beyond*

The discussion on August 29, 1787, began with a question by Williamson, a non-lawyer,<sup>145</sup> who, apparently happy with the Articles’ clause, wanted to know the meaning of the new proposed provision.<sup>146</sup> Wilson and Johnson, “expert lawyers” both,<sup>147</sup> replied in part that they “supposed the meaning to be that Judgments in one State should be the ground of actions in other States.”<sup>148</sup> This response, as prior commentators have noted, is almost as vague as the draft clause itself. It could be taken as a statement of a prima facie rule, a rule of substantive deference, or an indeterminate response vague enough to encompass either.<sup>149</sup> Wilson and Johnson’s statement does indicate, however, that the Clause was assumed to require that out-of-state judgments be given

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<sup>142</sup> 2 Farrand, *supra* note 1, at 188.

<sup>143</sup> *Cf.* ARTICLES OF CONFEDERATION of 1781, art. IV.

<sup>144</sup> The inclusion of records and judicial proceedings of “magistrates” as well as courts may have represented another expansion. While magistrates were often lower level court officers, like justices of the peace, the eighteenth century term was also used to refer to high officers of the executive branch charged with carrying out the laws. In the constitutional debates themselves, the term “chief magistrate” was often applied to the president and governors were also chief magistrates of their states. *See* WILLIAM WINSLOW CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 545–46 (1953). In any event, the term did not make it into the constitutional Full Faith and Credit Clause.

<sup>145</sup> Hugh Williamson of North Carolina was a physician with strong interests in the natural sciences. He was an ardent federalist, but had no legal training. *See* DELEGATES TO THE CONSTITUTIONAL CONVENTION: HUGH WILLIAMSON, <http://teachingamericanhistory.org/convention/delegates/williamson.html> (last visited July 26, 2011). Accordingly, it seems likely that his question and suggestion to retain the wording of the Articles was not based on any strong attachment to the Articles’ clause, but simply a reflection of his own curiosity (and seems to have been answered in that spirit).

<sup>146</sup> The statement in Madison’s notes is: “Mr. Williamson moved to substitute in place of it, the words of the Articles of Confederation on the same subject. He did (not) understand precisely the meaning of the article.” 2 Farrand, *supra* note 1, at 447.

<sup>147</sup> Nadelmann, *supra* note 3, at 56, 56 n.108.

<sup>148</sup> *Id.* at 54 (quoting 2 Farrand, *supra* note 1, at 447). According to Madison’s notes, Wilson and Johnson then added, “& that acts of the Legislatures should be included, [as they sometime serve the like purpose as act] for the sake of Acts of insolvency &c —.” 2 Farrand, *supra* note 1, at 447. The significance of the extension of the clause to legislative acts is discussed below.

<sup>149</sup> Given the nature of the debate that developed on this issue on August 29, I think it most likely that Wilson and Johnson intended to tentatively suggest a rule of substantive deference, at least in some cases, while recognizing the uncertainties and complications of existing law.

some effect in actual litigation, and therefore excludes a purely formal evidentiary meaning.

Although prior commentators have sought to find a basis for choosing between a prima facie and substantive interpretation of Wilson and Johnson's statement,<sup>150</sup> a vaguely ambiguous response most accurately reflected contemporary legal understandings.<sup>151</sup> Wilson and Johnson's use of the verb "supposed" is also interesting. It surely reflects, in part, these lawyers' recognition that the equivalent term in the Articles was uncertain and controversial, and thus, even expert lawyers could not state definitively what the term in the new Constitution would mean.<sup>152</sup>

Yet the controversy that actually arose on August 29, 1787, did not involve choosing between a rule of prima facie or substantive deference, but a choice between two versions of substantive deference obligations, one static and one dynamic. The dynamic conception of the rule was Madison's. He declared himself in favor of committing to the Article, but presented the Convention with a vision of a more integrated and tightly coordinated legal system for enforcement of out-of-state judgments. He "wished the Legislature might be authorized to provide for the *execution* of Judgments in other States, under such regulations as might be expedient" and argued that this was "justified by the nature of the Union."<sup>153</sup>

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<sup>150</sup> Whitten takes it as indicative of a non-conclusive (i.e., prima facie) rule. Whitten, *State-Court Jurisdiction*, *supra* note 3, at 549. He argues that since Wilson and Johnson viewed sister state judgments "only as grounds for action," not a conclusive basis for a judgment, their comment is more consistent with a prima facie rule, while admitting his conclusion is open to doubt. *Id.* at 549 (internal quotation marks omitted); *see also* Laycock, *supra* note 3, at 292 (referring to "Johnson's clear explanation"). Engdahl argues that Wilson and Johnson's statement "ought not to have troubled" those who understood the Clause as invoking only a prima facie rule, but acknowledges that a rule of substantive deference was "an arguable position" at this time and one that would "excite concern" if applied to statutes. Engdahl, *supra* note 1, at 1621.

<sup>151</sup> It is surely possible that, in response to a question from a non-lawyer, Wilson and Johnson felt no need to expand upon the technical controversies that had arisen regarding the precise meaning of the Articles' Clause, especially since Williamson's question appears to have been directed primarily at the big change from the Articles' clause, the inclusion of "acts of the legislatures" under the full faith obligation.

<sup>152</sup> It is also possible that Wilson and Johnson's statement (and perhaps even Williamson's seemingly naive question) had been prepared in advance to emphasize the indeterminate nature of both the Articles and proposed constitutional Clause. Note that the language of both alternative clauses proposed on August 29, Randolph's and Morris', provide different ways of dealing with the ambiguity of the Committee's proposed clause.

<sup>153</sup> 2 Farrand, *supra* note 1, at 448 (emphasis in original). The "Union" being referred to, of course, was the new federal union being created by the Constitution, and its "nature" was the Federalist principles on which that document was being created. Joseph Story made a similar argument in explaining why, in his view, substantive deference obligations were mandated by the constitutional Clause. Story based his explanation on the Founders' desire to "form a more perfect Union; and to give to each state a higher security and confidence in the others . . ." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1303 (1833) (internal quotation marks omitted).

Note that Madison avoids the debate over the Articles' meaning to focus instead on what the obligation should be in the new federal union. We have seen that one of Madison's main goals at the Convention was to prevent states from interfering with one another's economic interests and that he hoped to do this, in part, by making the federal government a neutral arbiter between states, as part of a coordinated system for the protection and enforcement of property and contract rights.<sup>154</sup> This also required the promotion of principles of administrative equality so that states would assume, at least for some purposes, the status of "mere counties" in a larger federal union.<sup>155</sup> Madison's proposal for interstate execution of judgments is an application of these general principles to the issue of state deference obligations for out-of-state judgments. It is a radical proposal,<sup>156</sup> and Madison does not suggest it as the constitutional standard. Rather, he proposes it as a desirable policy goal that Congress might be "authorized" to require in appropriate circumstances. What Madison was really proposing, therefore, was to authorize Congress to increase the interstate deference obligation well beyond any such obligation that currently existed under the Articles' clause or the law of nations.<sup>157</sup>

It is doubtful Madison would have made such arguments if he did not believe that the majority of delegates agreed with his normative principle—that the new federal union coming into being justified, and perhaps even required, greater levels of deference for out-of-state judgments.<sup>158</sup> By focusing on what the rule should be, rather than what it

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<sup>154</sup> See discussion *supra* notes 12–13 and accompanying text. As we have seen, Madison shared the general distaste of many at the Convention for the actions of state legislatures and the character of many of the men elected to them, which he saw as frequently trespassing on the rights of minorities as well as the rights and interests of other states. See WOOD, THE CREATION, *supra* note 16, at 476–83; see also THE FEDERALIST NO. 44 (James Madison) (defending the prohibition on ex post facto laws, bills of attainder and impairment of contracts).

<sup>155</sup> See discussion *supra* notes 128–129 and accompanying text.

<sup>156</sup> Yet it was not completely beyond the contemplation of contemporary judges construing the full faith and credit obligation. In *James v. Allen*, counsel for defendant had argued that the Articles' clause ratcheted up the deference obligation created under the law of nations, "if a Judgment . . . had not been evidence before, this provision . . . would have made it so—if it was only prima facie evidence before, this would render it conclusive." 1 Dall. 188, 190 (Pa. Ct. Com. Pl. 1786). The judge rejects this argument, stating, "[t]he Articles of Confederation . . . will not admit of the construction contended for, otherwise executions might issue in one State upon the judgments given in another . . ." *Id.* at 191–92. Since Judge Shippen believes the law of nations already requires substantive deference to foreign judgments in at least some cases, he is assuming that the only higher level of deference for such judgments would be a rule of execution, an absurd result under the Articles' clause.

<sup>157</sup> It is surely not a coincidence that Gouverneur Morris, in that same discussion, proposed an alternative draft to the Full Faith and Credit Clause, which contained just such authorizing language. 2 Farrand, *supra* note 1, at 448.

<sup>158</sup> A connection of this sort is suggested by the argument of Jared Ingersoll in *Phelps v. Holker*. 1 Dall. 261, 261 (Pa. 1788). Ingersoll, a delegate to the Convention, see MANN, *supra* note 94, at 184, represented the plaintiff in *Phelps* and argued for a substantive deference interpretation of the Articles' clause shortly after the Convention had ended. He noted that

was, Madison avoided arguments over the vague and “extremely indeterminate” language of the Articles’ clause.<sup>159</sup> Yet rather than clarify the precise parameters of the rule, Madison sought to use the vagueness to justify a broad grant of power to the federal legislature to define and enforce a stronger deference obligation. We have seen that Madison was willing to give the federal government power to curb improper or unwise state legislative action through a federal veto.<sup>160</sup> This proposal created a more limited federal power to constrain states’ refusals to enforce out-of-state judgments.

Moreover, giving power to Congress to define and expand the full faith and credit obligation obviated any need to clarify or resolve the raffined *prima facie* rule—substantive deference controversy in the Constitution itself. Madison had a number of good reasons not to clarify the language in the constitutional text. First, clearly defining the constitutional language—even as a rule of substantive deference—would make it harder, if not impossible, to later impose the execution rule that Madison really wanted.<sup>161</sup> Second, Madison was always concerned that any clear and limited statement of rights provided opportunities for evasion by the unscrupulous (in this case, state legislatures).<sup>162</sup> Moreover, in the political debates regarding ratification of the Constitution, Madison liked to argue (and may even have believed) that the Constitution did not grant many new powers to the federal government, but merely provided for more effective use of the powers granted under the Articles.<sup>163</sup> Retaining virtually identical language from the Articles’ clause for the first sentence of the Full Faith and Credit Clause provided support for such a position.<sup>164</sup> Finally, the grant of power to Congress obviated any

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[t]his then is a Union of which no precedent [sic] is to be found in any other part of the globe . . . and its design must certainly have been to form a stronger cement, than that by which the States themselves were hitherto connected, or by which they are, at this day, connected with other nations. . . . [I]f it is admitted that by this article, the authors of the system intended to make a Judgment in New Jersey as binding in Pennsylvania, as if it had been obtained in any County of this State, no other form of words, or mode of expression, could have been selected more clearly to convey that intention.

*Phelps*, 1 Dall. at 263. While admittedly an argument about the Articles’ clause, it is easy to see how Ingersoll’s references to the “stronger cement” now binding the states together and the analogy of states to counties reflect the broader federalist themes of the Convention and the belief that they require rules of substantive deference.

<sup>159</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>160</sup> See discussion *supra* notes 119–121 and accompanying text.

<sup>161</sup> Indeed, that seems to have been one of the main purposes of Randolph’s alternative proposal. See discussion *infra* Part II.B.

<sup>162</sup> See, e.g., 2 Farrand, *supra* note 1, at 440 (“Evasions might and would be devised [to the Contract Clause] by the ingenuity of the Legislatures—”); see also THE FEDERALIST NO. 44 (James Madison) (discussing the problem of enumeration of the powers granted by the necessary and proper clause).

<sup>163</sup> See, e.g., THE FEDERALIST NO. 41 (James Madison).

<sup>164</sup> BANNING, *supra* note 15, at 162 (“Madison repeatedly insisted that the Constitution should be understood less as a grant of new authority than as a means of rendering effective the powers

need to clarify the “full faith and credit” language. If the courts construing that language interpreted it as mandating a rule of substantive deference, that would be fine, but if not, the federal legislature would be clearly empowered to enact such a rule as a matter of statute.<sup>165</sup>

The existence of a normative consensus among the drafters in favor of a rule of substantive deference is borne out by the response to Madison’s proposal by his Virginia colleague Edmund Randolph, another experienced and highly esteemed attorney.<sup>166</sup> Randolph had no problem with a rule of substantive deference, but was repelled by Madison’s radical proposal for execution of sister state judgments, stating that “there was no instance of one nation executing judgments of the Courts of another nation.”<sup>167</sup> Randolph then presented to the Convention an alternative clause that laid out, in clear and precise detail, the full faith obligations states would have toward one another. It provided for both an evidentiary rule and a rule of substantive deference, making all state acts, “whether legislative executive or judiciary[,] . . . binding in every other State, in all cases to which it may relate,”<sup>168</sup> with appropriate lawyerly caveats about jurisdiction and similar matters.<sup>169</sup>

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that the central government had always had (at least on paper).”). One can imagine Madison believing that the confused and indeterminate case law decided under the Articles’ clause was simply another instance of states’ failing to carry out the mandate of the Articles’ which *should* have given rise to a rule of substantive deference required by a coordinated union of states, and that the constitutional Clause was simply a means of correcting that mistake. This is very close to the account Justice Story gives, in which the “amendment in the Constitution” (which Story believed mandated a rule of substantive deference) was, “without question, designed to cure the defects in the existing provision.” STORY, *supra* note 153, at § 1302.

<sup>165</sup> Given Madison’s concern over the capacities and political effectiveness of the courts, *see* discussion *infra* Part III, it is likely he anticipated such a definitive rule might have to be set forth by Congress.

<sup>166</sup> George Washington appointed him the first Attorney General of the United States in 1789. *See* USDOJ, EDMUND JENNINGS RANDOLPH, <http://www.justice.gov/ag/aghistpage.php?id=0> (last visited July 26, 2011).

<sup>167</sup> 2 Farrand, *supra* note 1, at 448.

<sup>168</sup> *Id.* at 445. The full text of the proposal reads:

Whosoever the act of any State, whether legislative executive or judiciary shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other State as full proof of the existence of that act—and it’s operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.

*Id.*

<sup>169</sup> Legal scholars then (and now) recognize that any rule of substantive deference for judicial or other state acts must be limited to circumstances where the state has valid power to act. *See* *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786); *see also* Laycock, *supra* note 3, at 298. The critical question is what determines such a finding of so-called “judicial jurisdiction.” James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 177–78 (2004) [hereinafter Weinstein, *Federal Common Law*]. On this point, Randolph’s proposed amendment’s conclusory reference to “cognizance and jurisdiction” might itself seem somewhat vague. Professor Weinstein, however, has argued that by the time of the Founding, there was already a fairly clear conception of the territorial competence of courts under international law. *See* James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 83–84 (1990)

Randolph's comment on Madison's proposal for sister-state execution of judgments suggests that Randolph's proposal was designed to be a more conservative, less controversial one, more in keeping with the law of nations.<sup>170</sup> The substance of Randolph's proposal shows that it was designed to clarify and delineate the obligations of states toward one another in the new federal union, while preventing any drift or development toward further integration.<sup>171</sup> It is surely indicative of the general attitude of the Founders toward the full faith obligation that even this conservative response to Madison's proposal contained a rule of substantive deference.<sup>172</sup>

In short, a fair reading of the notes of the August 29 meeting reveals that the primary dispute was not between proponents of an evidentiary reading of the Full Faith and Credit Clause and proponents of a rule of substantive deference. Rather, it was between proponents of a precisely delineated, lawyerly coherent, and static clause that would create and maintain a relatively clear set of obligations of deference between the states,<sup>173</sup> and a looser, vaguer, less clearly defined statement of those same obligations, whose content could be clarified and strengthened by subsequent acts of the national legislature.<sup>174</sup>

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[hereinafter Weinstein, *Dutch Influence*]. Randolph's comments at the Convention on August 29, 1787, can be read as implying that his proposed language, unlike that of Morris, was limited to what was in conformance to the law of nations. 2 Farrand, *supra* note 1, at 447.

<sup>170</sup> See discussion *infra* notes 221–222 and accompanying text.

<sup>171</sup> Most significantly, Randolph's proposal makes no provision for further elaboration of the deference obligation through federal lawmaking. While the clause, to modern eyes, seems to contain significant ambiguity in its limitation of the "binding" operation of an out-of-state act to "all cases to which it may relate, and which are within the cognizance and jurisdiction of the State," 2 Farrand, *supra* note 1, at 448, it seems probable that Randolph believed the existing law of nations supplied the necessary jurisdictional rules. See Weinstein, *Dutch Influence*, *supra* note 169, at 90 n.77. It also seems clear, based on his comments at the Convention, that Randolph, unlike Madison, did not believe that the federal legislature could or should be empowered to create a deference obligation greater than that required under the law of nations.

<sup>172</sup> Although Whitten tries to argue even here that the rule is not as conclusive as it appears, his argument here is much weaker and the word "binding" is fairly dispositive. See Whitten, *FF&C and DOMA*, *supra* note 3, at 289–92. Engdahl agrees that Randolph's proposal contained a rule of substantive deference. See Engdahl, *supra* note 1, at 1623.

<sup>173</sup> The Extradition and Fugitive Slave Clauses, which were approved by the Convention on August 28 and 29, 1787, the same session in which the Full Faith and Credit Clause was being considered, also impose obligations on states to defer to determinations of sister states. 2 Farrand, *supra* note 1, at 443, 453–54. Both were later incorporated into Article IV of the Constitution. See U.S. CONST. art. IV, § 2, cl. 2, 3. Indeed, they can be viewed as additional rules of substantive deference, since in both instances one state's determination of a person's legal status, as a felon or escaped slave, was made binding on all other states. In these clauses, however, there is no ambiguity regarding the states' obligations and no grant of federal power to define or enforce it. It seems clear that in these instances, unlike the broader obligations of the Full Faith and Credit Clause, the Founders wished to create precise and immutable rules of state conduct governing specific circumstances (to their eternal discredit with regard to fugitive slaves).

<sup>174</sup> 2 Farrand, *supra* note 1, at 445, 447–48. Randolph had rejected Madison's vision as impossible under the law of nations. For Madison, however, that was precisely the point. States would no longer relate to each other as independent nations with separate judicial systems, but as

That was the meaning and intent of the alternative proposal then submitted to the Convention by Gouverneur Morris,<sup>175</sup> which stated: “[f]ull 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>176</sup>

Accordingly, the two new proposals by Randolph and Morris, both probably drafted before the meeting on August 29, defined the poles of the debate regarding the Full Faith and Credit Clause.<sup>177</sup> It was not a debate between a *prima facie* rule and a rule of substantive deference. It was a debate between static and dynamic conceptions of the full faith obligation, but it was even more than that. It was a debate between two styles of constitutional rulemaking, two ways to deal with broad, potentially ambiguous rules. One response, that of Randolph, was to define and clarify the obligations being created as explicitly as possible.<sup>178</sup> The other, that of Morris and Madison, was to provide an authority for resolving such ambiguities as they arose.

### C. *Full Faith and Credit for Legislative Acts*

The most striking change between the Articles’ clause and the draft proposed on August 6, 1787, was the extension of the full faith obligation to “acts of the Legislatures.”<sup>179</sup> The reasons for this change are

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parts of a coordinated federal union, whose state governments would relate to each other, if not as “mere counties,” at least as subordinate parts of a larger federal union, which could prescribe rules of deference to out-of-state actions which were in the interests of the nation as a whole. To do this, one needed a looser, vaguer, less precise rule of substantive deference, with a grant of power to the federal government to prescribe the precise form that deference would take as time and circumstances warranted.

<sup>175</sup> *Id.* at 448.

<sup>176</sup> *Id.* (quotations omitted).

<sup>177</sup> *Id.* at 445, 448.

<sup>178</sup> *Id.* at 445. The advantages and disadvantages of stating legal norms as clear and precisely defined “rules” rather than vague but more flexible “standards” has been extensively analyzed in modern law reviews by commentators of many different political and methodological persuasions. See e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Eric A. Posner, *Standards, Rules and Social Norms*, 21 HARV. J.L. & PUB. POL’Y 101 (1997); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). The assumption of this literature that the form in which a norm is stated may reflect the underlying policy concerns of the drafter certainly seems to apply to the competing proposals of Randolph and Morris/Madison.

<sup>179</sup> See ARTICLES OF CONFEDERATION of 1781, art. V; 2 Farrand, *supra* note 1, at 188. It is possible to read the Articles’ clause as including statutes, if the term “Acts” is read broadly to include legislative acts and the phrase “of the courts and magistrates” as modifying only “judicial proceedings.” Yet this view is “questionable” at best. Engdahl, *supra* note 1, at 1620. It is also hard to reconcile such a reading with Wilson and Johnson’s comment that the legislative acts

even more obscure than usual because our primary source of information about such matters, Madison's notes, are not only sparse, but somewhat ambiguous due to Madison's own redaction. Madison recorded Wilson and Johnson's explanation that "acts of the Legislatures should be included, [as they sometime serve the like purpose as act] for the sake of Acts of insolvency &c—."<sup>180</sup>

Some scholars, noting that the line makes sense as written, ignore the redaction and assume that the purposes of the inclusion of legislative acts was primarily to insure deference to the relatively narrow class of legislative actions that function like adjudications, particularly insolvency statutes.<sup>181</sup> There are, however, significant problems with that assumption. First, Madison presumably deleted the phrase because he felt it was incorrect or misleading in some way. While it seems clear that state acts of insolvency were discussed (and Madison leaves the reference to such acts intact), he deletes the idea that they were included because they were viewed as similar in purpose to adjudication. At the very least, this should cast doubt on any explanation of inclusion of legislative acts in the clause that relies too heavily on that analogy.

Moreover, the clause itself was not limited to acts of the legislature that functioned like judgments, or acts relating to insolvency.<sup>182</sup> Quite the contrary, it initially extended to all "Acts of the legislatures" and was narrowed, in Morris' proposed draft of August 29, to "public acts," expressly excluding the private legislative acts most likely to function like judgments.<sup>183</sup> Finally, this discussion of full faith and credit in connection with acts of insolvency was immediately followed by a proposal from Charles Pinckney to give the federal government power to "establish uniform laws upon the subject of bankruptcies."<sup>184</sup> It seems clear that something led the delegates to perceive a substantial connection between the desirability of a federal bankruptcy power and the "interstate problems of full faith in the field of insolvency."<sup>185</sup>

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were included in the constitutional Clause for the sake of acts of insolvency. *See id.* at 1622 n.181

<sup>180</sup> 2 Farrand, *supra* note 1, at 447, 447 n.3. Bracketed words are crossed out, but legible, in the original. *Id.*

<sup>181</sup> Nadelmann, *supra* note 3, at 53–55. These acts functioned like court judgments because they purported to discharge claims against particular individuals, much as a verdict for defendant would. See argument of defendant in *James v. Allen*, discussed *supra* at note 68.

<sup>182</sup> It appears that the use of legislative acts to provide insolvency relief was not a very widespread practice. Mann tells us that at the time of the Constitutional Convention, Connecticut was the only state that "granted insolvency relief by legislative act rather than judicial decree." MANN, *supra* note 94, at 183.

<sup>183</sup> Crosskey argues that the exclusion of private acts from the operation of the Full Faith and Credit Clause and the limitation of the bankruptcy power to "uniform laws" shows that the Framers' reaction to these laws was strongly negative. CROSSKEY, *supra* note 144, at 544–45.

<sup>184</sup> 2 Farrand, *supra* note 1, at 445.

<sup>185</sup> Nadelmann, *supra* note 3, at 57.

In short, we can infer that on or before August 29, 1787, there were discussions<sup>186</sup> concerning extending interstate deference to statutes and acts of insolvency which (1) did not primarily rely on the argument that insolvency acts served the same purpose as judgments; and (2) inclined the Convention to support a federal power to establish uniform bankruptcy laws. It may also be noteworthy that such discussions would have taken place contemporaneously with the Convention's consideration and tentative approval of a number of measures designed to prevent state legislative interference with contract and property rights.<sup>187</sup>

It is likely that any such discussion involved some consideration of the recently decided case of *James v. Allen*,<sup>188</sup> and more generally of the obligation under the law of nations to recognize, and in certain circumstances to apply, the statutes of foreign states.<sup>189</sup> It also helps explain why the extension of the full faith obligation to statutes, which has puzzled many later scholars,<sup>190</sup> might not have appeared as significant or as surprising to lawyers at the time.<sup>191</sup>

In *James*,<sup>192</sup> as previously noted,<sup>193</sup> Judge Shippen recognized, in dicta, an obligation by courts in some circumstances to recognize and apply the legislative acts of foreign countries,<sup>194</sup> particularly statutes re-

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<sup>186</sup> By "discussion" I do not necessarily mean that all these issues were aired in unrecorded debates before the Convention itself. It is possible that many of these ideas were discussed informally by groups of delegates off the floor or during recesses, leaving us with the somewhat cryptic account of just the formal actions taken.

<sup>187</sup> The Convention had just approved an absolute prohibition on state laws providing for payment of debts in anything but specie, seeing in the words of one of its sponsors "a favorable crisis for crushing paper money," 2 Farrand, *supra* note 1, at 439 (statement of Roger Sherman), and also approved the Contract Clause, which Madison had somewhat ambivalently supported, while commenting that, "[e]vasions might and would be devised by the ingenuity of the [state] Legislatures." *Id.* at 440. The history of the Contract Clause is obscure, and Madison's initial support for it was ambivalent. See John W. Ely, Jr., *Origins and Development of the Contract Clause* 3-8 (Vanderbilt Pub. Law Research Paper No. 05-36, 2005), available at SSRN <http://ssrn.com/abstract=839904>. Madison "admitted that inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it." 2 Farrand, *supra* note 1, at 440. In *Federalist* 44, however, he describes laws impairing the obligation of contracts as "contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST NO. 44 (James Madison).

<sup>188</sup> See discussion *supra* notes 69-72 and accompanying text.

<sup>189</sup> Not only was it the only reported case at that time involving both insolvency statutes and full faith and credit obligations, but one of the lawyers who argued it, Jared Ingersoll, was a member of the Pennsylvania delegation to the Convention along with James Wilson. See MANN, *supra* note 94, at 184.

<sup>190</sup> See, e.g., Engdahl, *supra* note 1, at 1622-23; Nadelmann, *supra* note 3, at 73; Whitten, *State-Court Jurisdiction*, *supra* note 3, at 544.

<sup>191</sup> Engdahl, for example, observes that extension of the full faith obligation to statutes was such an "unsettling" prospect, that Williamson's "temperate response" is somewhat surprising. Engdahl, *supra* note 1, at 1622. Note: From context, the article's reference to "Dr. Wilkinson" appears to be a typographical error, and that the author intended to refer to Dr. Williamson. *Id.*

<sup>192</sup> *James v. Allen*, 1 Dall. 188, 191 (Pa. Ct. Com. Pl. 1786).

<sup>193</sup> See discussion *supra* notes 69-72 and accompanying text.

<sup>194</sup> Judge Shippen wrote,

lating to contract rights.<sup>195</sup> The reference to “foreign countries” makes it clear that Judge Shippen found the source of this obligation not under the Articles’ clause but pursuant to the law of nations.<sup>196</sup> There is general agreement among scholars that by the late eighteenth century, choice of law rules were seen as part of the law of nations, which had been incorporated into English and thereafter American law.<sup>197</sup> Under the then-prevailing “unilateralist” approach to conflict of laws, a single body of doctrine derived primarily from concepts of international comity and vested rights determined the law that would be applied to disputes with

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And not only the decisions of Courts, but even the Laws of foreign countries, where no suits have been instituted, would in some cases be taken notice of here; where such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties at the time of making them; as if the interest of money should be higher in a foreign country where the contract was made, than in that where the suit was brought, the foreign interest shall be recovered, as being understood to be part of the contract.

1 Dall. at 191.

<sup>195</sup> Mann explains the significance of statutory interest in the enforcement of debt instruments. MANN, *supra* note 94, at 12. Critically, Judge Shippen is making these comments and applying these doctrines under the Articles’ clause, which contained no full faith obligation for legislative acts. Accordingly the idea that foreign statutes should be given extraterritorial effect in appropriate cases was already an accepted concept in 1787, not an innovation of the Founders.

<sup>196</sup> Although Judge Shippen cites no authority in support of his statements, he quite possibly had in mind Lord Mansfield’s statement in *Robinson v. Bland*, which stated: “The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract.” (1790) 96 Eng. Rep. 129 (K.N.) 142 (quote not reported in case, see Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 808, 808 n.125 (1955)). Rheinstein notes that the reported citations to the argument by the attorneys for the debtor in *James v. Allen*, make reference to “those pages of Blackstone’s and Burrow’s Reports on which *Robinson v. Bland* is reported.” Rheinstein, *supra* at 808. A similar statement of the law can be found in John Marshall’s 1788 explanation to the Virginia Constitutional Convention that suits in Virginia on contracts made in Maryland must apply the interest specified by the law of Maryland, but he states this rule as a “principle in the jurisprudence of this commonwealth,” without mentioning the law of nations. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556–57 (Jonathan Elliot ed., 2d ed. 1831) [hereinafter 3 Elliot].

<sup>197</sup> See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 594 (2003) (“Modern scholars agree that in the absence of statutory overrides, members of the founding generation expected the necessary choice-of-law rules to come from the general law of nations—a body of rules that (they believed) could be derived from the dictates of reason and from common consent manifested by international custom.” (citations omitted)). This line of argument was first developed by Max Rheinstein and William Crosskey, who argued that the constitutional Full Faith and Credit Clause was meant to incorporate conflict of laws concepts that were perceived as part of the *ius gentium* (law of nations) at the time. CROSSKEY, *supra* note 144, at 550; Rheinstein, *supra* note 196, at 808–12. While Crosskey argues that the first sentence of the constitutional Clause was intended to incorporate contemporary choice of law doctrine, CROSSKEY, *supra* note 144, at 550, Rheinstein is a little more tentative, saying only that given the “widely held opinion” among lawyers that the law of nations determined these issues, it is “no wonder” that the constitutional Clause was seen as creating obligations no greater than the law of nations. Rheinstein, *supra* note 196, at 808–09. Whitten takes issue with these claims, arguing that it is “textually unnatural,” and not a good fit with the “preconstitutional context,” yet concedes that it is a “plausible reading.” Whitten, *State-Court Jurisdiction*, *supra* note 3, at 546 (internal quotation marks omitted).

multistate aspects.<sup>198</sup> Statutes providing for payment of interest could be enforced extraterritorially since they formed part of the rights vested under the contract created in that state.<sup>199</sup> Significantly, in light of contemporary concerns, marriage was the other contractual relationship in which the eighteenth-century law of nations clearly stated that the rights of the parties were determined by the law of the place where the marriage took place.<sup>200</sup>

Although all scholars agree that the law of nations was part of American law at the time of the Founding,<sup>201</sup> they disagree over the extent to which that law was incorporated into the full faith and credit clauses of the Articles and of the Constitution. Indeed, the indeterminacy previously discussed concerning the Articles' clause can be seen as

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<sup>198</sup> According to historians of conflict of laws, the eighteenth century was the period when English common law courts began to recognize an *ius gentium* or law of nations, which was conceived as part of English law, enforceable in its courts. The rules governing such choice of law issues were derived from continental sources, primarily Ulrich Huber. Huber spoke of rights being acquired within a foreign territory, which rights were defined by the law of that place and then given effect in a domestic tribunal. See Friedrich K. Juenger, *A Page of History*, 35 *MERCER L. REV.* 419, 441 (1984); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 *AM. J. COMP. L.* 297, 306–08 (1953); see also Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 *ILL. L. REV.* 375, 376 (1918) (an English translation of Huber's *De Conflictu Legum* is provided in the article's appendix, *id.* at 401–18). This concept of vested rights not only underlay the judge's comments in *James v. Hall*, but the general attitude of Madison and other framers toward property rights as well. See discussion *supra* note 50 and accompanying text.

<sup>199</sup> Madison clearly favored such rules as necessary for the preservation and effective enforcement of property rights. See discussion *supra* notes 47–50 and accompanying text. Madison envisioned a system whereby judgments obtained in one state could be swiftly executed in another. An even more fundamental requirement, however, was that debts incurred in one state be enforced, in accordance with their terms, in another. Yet as Judge Shippen noted, the failure of one state's courts to give effect to the interest statutes in the state where the contract was made could devalue that debt just as effectively as the use of paper money. See *James v. Allen*, 1 *Dall.* 188, 191 (Pa. Ct. Com. Pl. 1786). Moreover, a statute lowering or abolishing the interest to be paid on foreign incurred debts is just the kind of ploy that might be attempted by ingenious state legislatures, unless blocked by a clear statement that such foreign statutes were subject to a full faith and credit obligation.

<sup>200</sup> See Ulrich Huber, *De Conflictu Legum*, translated in 13 *ILL. L. REV.* 375, 401, 401–11 (Ernest G. Lorenzen trans., 1918); Rheinstein, *supra* note 196, at 807 n.124; Alexander N. Sack, *Conflicts of Law in the History of English Law*, in 3 *LAW: A CENTURY OF PROGRESS 1835-1935* 342, 441, 449 (1937).

<sup>201</sup> This same concept of the law of nations was being used in American courts at the time of the Founding to deny full faith and credit to judgments entered by foreign courts, which were perceived as unable to create such vested rights. *Kibbe v. Kibbe*, 1 Kirby 119 (Conn. Super. Ct. 1786), discussed *supra* notes 73–75 and accompanying text, was the first American case that held that judgments rendered without personal service on defendant within the state were not enforceable in other states. While the decision cites no authority, Weinstein has argued that the concept that a court lacks power to adjudicate with regard to a defendant not found in its territory and that such judgments should be denied extraterritorial effect is a concept that can be found in Huber, and very likely known to judges in the post-revolutionary period. See Weinstein, *Dutch Influence*, *supra* note 169, at 79–85; see also Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 860–61 (1978) (American concept of unwritten fundamental law founded on “systematic treatises on the law of nature and nations”).

uncertainty over precisely this issue.<sup>202</sup> With regard to the Full Faith and Credit Clause, however, the record of the Convention debates strongly suggests that the delegates viewed the deference obligations created by the law of nations as at least a minimum statement of the interstate deference obligations created by the Clause, with the debate focusing on how and to what extent those minimums should be exceeded.<sup>203</sup> It is also very likely that Madison and his colleagues believed that certain basic principles of the law of nations constituted fundamental rules based on “rules of conduct which reason deduces,”<sup>204</sup> which could not be altered by statute.<sup>205</sup>

Insolvency statutes, however, were a relatively new type of legislation whose extraterritorial effects under the law of nations were far from clear. In *James*, Judge Shippen avoided this issue<sup>206</sup> by finding that the

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<sup>202</sup> Advocates of a purely evidentiary “authentication” reading of the Clause believe it did not incorporate any rules of the law of nations regarding the effects of foreign judgments (although such rules might then be applied by courts to the authenticated judgments). See Sachs, *supra* note 1, at 1226; Whitten, *State-Court Jurisdiction*, *supra* note 3, at 546. Advocates of a prima facie rule argued that the Clause embodies the preexisting English understanding of the law of nations on the subject, see Engdahl, *supra* note 1, at 1597–99, and advocates of substantive deference believed that the Clause required that the deference obligation among states to be something greater than the law of nations.

<sup>203</sup> Wilson and Johnson’s statement that the Clause made out-of-state judgments “grounds of actions” reflects, at least, the prima facie rule Lord Mansfield derived from the law of nations. Randolph’s comment that Madison’s proposed execution rule was “unheard of” among nations and his alternative proposal of a rule of substantive deference surrounded by jurisdictional restrictions indicates his view that the Clause should go to the outer limits of current understandings of the law of nations, but no further. Wilson’s comment that, without a Congressional right to declare the effect of sister state statutes the Clause will amount to no more than the rules currently existing among independent nations indicates his view that interstate deference obligations under the Clause should exceed those under the law of nations.

<sup>204</sup> James Madison, *An Examination of the British Doctrine Which Subjects to Capture a Neutral Trade Not Open in Time of Peace* (1806), in 7 THE WRITINGS OF JAMES MADISON 204, 238 (Gaillard Hunt ed., G.P. Putnam’s Sons 1908) (1787) (stating that the law of nations encompasses “those rules of conduct which reason deduces, as consonant to justice and common good, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent”).

<sup>205</sup> See Sherry, *supra* note 36, at 1137–38. Sherry shows that for lawyers of the Founders’ generation, the law of nations, or at least its most fundamental principles, was a well established part of a higher or more fundamental law with incorporated principles of the “law of nature” and “universal society” and which could be used to strike down validly enacted statutes which were contrary to its principles. *Id.* at 1137–39. This is also consistent with Gordon Wood’s observation that there was a “confusion” in the post-revolutionary period between indefeasible rights based on the “eternal laws of right reason” and “written charters” as safeguards of those rights. WOOD, THE CREATION, *supra* note 16, at 273–82. See generally Grey, *supra* note 200.

<sup>206</sup> In *James v. Allen*, the defendant argued that his discharge under the New Jersey insolvency act “so far as regards the imprisonment or detention as his person” was, in effect, an adjudication of the same debt sued on in Pennsylvania and should be applied to bar that suit. 1 Dall. 188, 189 (Pa. Ct. Com. Pl. 1786). In making that case, lawyers for the defendant argued that proceedings under the [New Jersey] Insolvent Act “amount to a judicial decision; for, they determine a debt, and give a remedy.” *Id.* Note the similarity to Madison’s stricken statement regarding the “like purpose” of insolvency acts and adjudications. If this is the argument Madison was recollecting, the strikethrough makes perfect sense, since it was an argument rejected explicitly in *James v.*

New Jersey statute “is a private act, made for that particular purpose; it is local in its nature, and local in its terms.”<sup>207</sup> Delegates could reasonably anticipate, however, that additional cases would arise based on broader insolvency acts that clearly purported to discharge out-of-state debts.<sup>208</sup> If the law of nations gave extraterritorial effect to a foreign statute *creating* contractual rights, what about a foreign statute *extinguishing* such rights?

Unlike the statutory debtor relief provisions Madison so adamantly opposed, which enabled all debtors to discharge their debts for a fraction of their value, a well-drafted and -administered general bankruptcy law would apply only to the more limited class of debtors who were actually insolvent and would ensure that all creditors were treated equitably. In the latter half of the eighteenth century the popular conception of debt was changing from a moral failing to an economic one.<sup>209</sup> Discharge of debts through bankruptcy was increasingly seen as a relatively efficient and effective alternative to debtors’ prison.<sup>210</sup> Madison’s views were certainly in line with this new thinking. His concerns were always with the economic effects of paper tender laws and other impairments of contract. Bankruptcy laws, he recognized, could be an important part of the regulation of commerce, benefiting creditors as well as debtors.<sup>211</sup> Although these were important considerations inclining the drafters to include bankruptcy statutes in the full faith obligation, probably the most important consideration was the economic harm likely to ensue if states could exclude their creditors from the operation of other state’s bankruptcy laws.

What emerged from the Convention on this question may be seen as a tentative and limited endorsement of the state legislatures’ powers to safeguard its debtors through bankruptcy laws. The full faith obligation would be extended to all “public acts” of the state legislatures, implicitly endorsing the holding of *James* and discouraging other private laws meant to benefit specific individuals. While the law of nations might provide some guidance as to when bankruptcy discharges pursuant to these statutes are to be given extraterritorial effect, the federal government was empowered to act as a neutral arbiter to prescribe the extraterritorial effects of such statutes. And, if the whole structure

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*Allen* and implicitly by the Full Faith and Credit Clause limitation to “public acts.”

<sup>207</sup> *Id.* at 191.

<sup>208</sup> It is likely many delegates knew of the pending case of *Millar v. Hall*, 1 Dall. 229 (Pa. 1788), which Jared Ingersoll was then preparing to argue. MANN, *supra* note 94, at 184. That case involved the extra-territorial effect of a discharge under the Maryland insolvency act, which the court later described as a “general bankrupt law” which purported to discharge all claims against the debtor.

<sup>209</sup> See generally *id.*

<sup>210</sup> See, e.g., *Millar*, 1 Dall. at 231.

<sup>211</sup> See THE FEDERALIST NO. 42 (James Madison).

proved too unwieldy or corrupt, the federal government had the power to supplant the whole thing with uniform federal laws.

D. *Mandatory and Discretionary Power Under the Full Faith and Credit Clause*

When the Committee on Detail issued its revised version of the Full Faith and Credit Clause on September 1, 1787, it accepted the basic framework of the Madison-Morris proposal of the week before.<sup>212</sup> The first sentence contained a broad, vague obligation on each state to give “full faith and credit” to “public acts, records and judicial proceedings” of the other states.<sup>213</sup> The second sentence gave the federal government power to prescribe the manner in which such acts, records, and proceedings could be proved, but significantly limited the federal government’s power to prescribe the effects of one state’s actions in another state to “judgments,” thereby depriving the federal government of the power to prescribe the effects of state legislative acts in other states.<sup>214</sup> This modification of Morris’s original proposal appears to have been intended as a compromise to appease Randolph, whose alternative, clearer, and more narrowly drafted proposal—which granted no express powers to the federal government<sup>215</sup>—the Committee had implicitly rejected.

This conflict became clear when the issue was debated on September 3. Morris moved to amend the language to reinstate his original proposal and give Congress power to prescribe the effects of legislative acts as well as judgments. James Wilson supported the amendment, stating that “if the Legislature were not allowed to declare the effect the provision would amount to nothing more than what now takes place among all Independent Nations.”<sup>216</sup>

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<sup>212</sup> 2 Farrand, *supra* note 1, at 483–84.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 445, 448.

<sup>216</sup> *Id.* at 488. Wilson’s comment is significant in a number of respects. It assumes, like Judge Shippen in *James v. Allen*, 1 Dall. 188, 191 (Pa. Ct. Com. Pl. 1786), that even independent nations have some obligation, under appropriate circumstances, to apply the legislative acts of other states to issues before them. Such obligations, however, were not seen as an infringement on sovereignty because the states themselves applied the principles of “comity” and vested rights that gave rise to such obligations. Again, the critical theoretical justification for the extra-territorial application of foreign law was Huber, who in his dissertation, *De conflictu legum diversarum in diversis imperiis*, sought to derive a conflicts system “directly from the notions of sovereignty and comity.” Juenger, *supra* note 198, at 434–35; *see also* Huber, *supra* note 200, at 401–18. Giving a different sovereign, i.e., the federal government, power to prescribe the effects of one state’s laws in the proceedings of another state, however, was very much a potential infringement on state sovereignty and independent decision-making. It gave the federal government power to modify the prevailing conflict rules then seen as part of the law of nations in favor of stricter deference obligations unique to the states of a federal union.

For Wilson, that was exactly the point. His comment assumes that the constitutional Full Faith and Credit Clause should impose on the states an obligation of interstate deference greater than that which then existed “among all independent nations.”<sup>217</sup> A major goal of the drafters of the new Constitution, as we have seen, was to limit state power to take actions deleterious to the sister states and the property interests of citizens of those states.<sup>218</sup> Having just restricted the rights of states to issue paper money and impair contract rights, it must surely have seemed appropriate to Wilson, Madison and others to further restrict a state’s power to deny effect of sister-state laws in appropriate cases.

The only way to ensure that such laws would be fairly and uniformly enforced, on this view, was to give the federal government power to prescribe and police the rules regarding such interstate deference. While this is an additional grant of power to the federal government, it is important to note that it is designed to achieve a particular substantive goal, a coordinated economic union, in which rights created in one state would be fairly and effectively enforced in all the others.<sup>219</sup> The allocation of power in the second sentence of the Clause was justi-

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<sup>217</sup> CROSSKEY, *supra* note 144, at 552 (internal quotation marks omitted). Crosskey makes a curious argument here, tying Wilson’s comment to a supposed “weakened” clause resulting from the substitution of “ought” for “shall” in the first sentence. This supposedly created a drafting dilemma for the Convention that “was anxious to make as certain as possible that the states were bound, whilst, at the same time, they made absolutely certain that plenary legislative power in the premises would belong to Congress.” *Id.* Crosskey argues that their first solution to this problem was the bizarre “mandatory direction to Congress to legislate comprehensively,” which was later solved by Madison’s more effective reversal of the mandatory and permissive tone of the two sentences of the clause. *Id.* at 552–53 (emphasis omitted); *see also* discussion *supra* note 197 and accompanying text. This argument seems to me to be fundamentally misguided. First, the debate at this point seems totally focused on extending congressional power to legislative acts, not the distinction between hortatory and mandatory. Indeed, Wilson’s comment speaks of “allowing” the legislature to declare the effects of legislative acts, not mandating that they do so, which is what the language at that point actually seemed to require. Moreover, if Crosskey is right, Madison’s changes actually altered the meaning of the clause significantly. Under Madison’s language, states are required to give full faith and credit to other states legislative acts, even when Congress has not acted (presumably according to the law of nations). Under the committee’s version, they were merely being urged to do so. I think it doubtful such a major change would have been adopted without discussion and by a unanimous vote. Finally, Crosskey’s claim that the Convention was concerned about insuring that Congress had “plenary legislative power” through constitutional drafting seems inconsistent with the general assumption of Madison and others of legislative supremacy. *See* discussion *infra* notes 253–55 and accompanying text. For reasons stated more fully below, I believe the awkward language in the Committee’s draft represents a certain clumsiness in drafting rather than any substantive effort to alter the mandatory nature of the states’ obligation or the plenary power of Congress.

<sup>218</sup> *See* Robertson, *supra* note 24, at 201–03; discussion *supra* notes 47–55 and accompanying text.

<sup>219</sup> The implication of Wilson’s comment, after all, is that given this power, the federal legislature is likely to impose deference obligations on the states greater than those then existing “among all Independent Nations.”

fied as the best way of achieving the substantive goal of the first sentence.<sup>220</sup>

Edmund Randolph's statement in opposition to Morris's proposed amendment shows that he understood both his opponents' arguments and their strategy. Madison's notes state:

Mr. Randolph considered it as strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers. He was for not going farther than the Report, which enables the Legislature to provide for the effect of *Judgments*.<sup>221</sup>

Unlike Madison, Randolph's objection is based solely on the perceived infringement on state sovereignty, regardless of any beneficial results that might be achieved by such a redistribution of powers. He also recognizes that this aggrandizement of federal power has been achieved by his opponents through a "loose" definition of powers, like those in the first sentence of the Full Faith and Credit Clause, which could then be interpreted in expansive ways by subsequent federal legislation and imposed on the states under the Supremacy Clause.<sup>222</sup> Madison and his allies, however, saw things differently. They did favor a broad allocation of federal power to define and enforce the vague "full

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<sup>220</sup> In Madison's notes, Wilson's statement is preceded by a curious comment from George Mason that he "favored the motion [presumably, Morris' motion to amend], particularly if the 'effect' was to be restrained to judgments & Judicial proceedings." 2 Farrand, *supra* note 1, at 488. Since Morris' motion was for the exact opposite purpose, to extend the Federal government's power to declare the effect of legislative acts as well as judgments, prior commentators have assumed that Madison's notes were simply mistaken, or at least that Mason's comment was made at a different time in the debates. See Engdahl, *supra* note 1, at 1625 n.192. There is another way to understand Mason's comment, under which it makes sense in its actual placement. Mason might have supported extending the power of the federal government to prescribe the effect of out-of-state legislation, but only when the effect of such legislation was an issue in "judgments and judicial proceedings" sought to be enforced in another state. This would give the federal government power to prescribe rules for adjudicating cases involving contract or property rights created in other states, but would deny it a general power to make the laws of one state binding in the territory of another. This is somewhat consistent with the comment of Johnson immediately following Wilson's statement, that he "thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State." 2 Farrand, *supra* note 1, at 488. Such an interpretation is also consistent with a major theme of this section, that there was general agreement among the framers to create a substantive obligation among the states to enforce each others' contractual and property rights fairly and consistently, but that there was substantial disagreement over how much power the federal government should be given to define and expand that obligation.

<sup>221</sup> 2 Farrand, *supra* note 1, at 488–89 (emphasis in original).

<sup>222</sup> Randolph expanded on these concerns in his letter of October 10, 1787, to the Virginia state legislature, where he cited them as one of his primary reasons for seeking greater ease in amending the Constitution. 3 Farrand, *supra* note 135, at 123–27. As he stated, "I also fear more from inaccuracies in a constitution, than from gross errors in any other composition; because our dearest interests are to be regulated by it; and power, if loosely given, especially where it will be interpreted with great latitude, may bring sorrow in its execution." *Id.* at 126. These concerns about potential misuse of unchecked federal power ultimately led both Randolph and Mason to refuse to sign the Constitution. See BANNING, *supra* note 15, at 253.

faith and credit” obligation, but they saw this as the best means of protecting and enforcing rights created under sister-state law. The broad, vague mandate was necessary not to aggrandize federal power as an end in itself, but because of the myriad ways states might avoid or delay their obligations to enforce such rights. It was Madison’s “federal negative,” but limited to negating state interference with enforcement of other states’ vested rights. The vote was a disputed one, but Morris’s amendment was adopted, six states to three.<sup>223</sup>

At that point, Madison proposed two additional changes in the language of the Clause.<sup>224</sup> He suggested that the word “ought” in the first sentence be changed to “shall,” and “shall” in the second sentence changed to “may.”<sup>225</sup> These changes were adopted by the Convention “nem.con,”<sup>226</sup> i.e., unanimously.<sup>227</sup> Some scholars have argued that these last minute changes resulted in a significant alteration in the meaning of the Clause, either by creating a mandatory obligation on states through the first sentence<sup>228</sup> or by giving discretionary power to the federal legislature in the second.<sup>229</sup>

Such contentions seem at odds with the dynamics of the proceedings as set forth in the records of the Convention. The Committee had just gotten through a fairly acrimonious debate over whether to extend power to declare the effects of public acts to the federal legislature, a proposal that was passed in a sharply divided vote involving significant concerns about infringements on state sovereignty.<sup>230</sup> Why would the Convention then accept unanimously an alternative version of the Clause that either significantly increased the obligation of states or significantly altered the power granted to the federal legislature?

The most obvious answer is that Madison’s proposed wording changes were not designed to do anything of the sort. They simply improved the language and slightly clarified the meaning of the provision that had already been voted on and passed. With respect to the change in the first sentence, this is fairly obvious. The word “shall” had defined the states’ full faith obligation in the Articles and in the initial Commit-

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<sup>223</sup> 2 Farrand, *supra* note 1, at 489.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See 10 THE OXFORD ENGLISH DICTIONARY 313 (J.A. Simpson & E.S.C. Weiner eds., Clarendon Press 2d ed. 1989).

<sup>228</sup> See Laycock, *supra* note 3, at 292 (importance of change from precatory to mandatory language in first sentence); Nadelmann, *supra* note 3, at 71 (importance of “shall” in the first sentence of the Clause); see also Crosskey’s argument discussed *supra* note 217.

<sup>229</sup> Most recently, Professor Engdahl has argued that the addition of “may” in the second sentence of the clause, was designed to mollify Randolph, and that this converted the second sentence from an obligation to declare the effect of sister state judgments to a discretionary plenary power. Engdahl, *supra* note 1, at 1627.

<sup>230</sup> See discussion *supra* notes 209–218 and accompanying text.

tee draft of the constitutional Clause.<sup>231</sup> “Ought” had crept in as part of Gouverneur Morris’s proposed amendment.<sup>232</sup> Yet the prior debate had just made it clear that full faith and credit was to be a somewhat vague yet mandatory obligation on the states, an obligation that would be defined and enforced by federal legislation binding on the states under the Supremacy Clause.<sup>233</sup> Madison’s reinstatement of “shall” in the first sentence of the clause simply made it more accurate and removed a small potential ambiguity.

With respect to the second sentence, the substitution of “may” for “shall” was a reflection of political reality as Madison and others saw it. The Congress they were creating was to be the supreme lawmaking body of the nation, and such bodies, by their nature, must have plenary, discretionary power, at least with respect to legislative acts. Who, after all, could possibly enforce a requirement that Congress “shall” prescribe the effects of sister-state judgments if Congress chose not to do so?<sup>234</sup> Once Congress was given the power to prescribe effects, decisions as to how to exercise that power had to rest with it. “May” was simply a more accurate reflection of the realities of the grant of federal power than “shall.”<sup>235</sup> Moreover, as we have seen, Madison and others assumed that a federal legislature would have the appropriate incentives and perspectives to promote fair and consistent enforcement of the rights of out-of-state litigants.<sup>236</sup> With the acceptance of Madison’s changes, the constitutional Full Faith and Credit Clause was essentially complete.<sup>237</sup>

As the Constitutional Convention came to a close, Madison’s feelings about the work of the Convention were surprisingly negative. In a short letter to Thomas Jefferson dated September 6, 1787, Madison expressed his opinion that “the plan [i.e., the proposed Constitution], should it be adopted, will neither effectually answer its national object,

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<sup>231</sup> See ARTICLES OF CONFEDERATION of 1781, art. IV; 2 Farrand, *supra* note 1, at 489.

<sup>232</sup> 2 Farrand, *supra* note 1, at 489. While “ought” can be used to describe a somewhat weaker form of obligation than “shall,” it can also describe the same level of obligation with a more normative implication. (Consider a parent’s statement, “you ought to stop playing video games and start doing your homework right now.”) It is likely Morris had this increased normative obligation in mind when he changed “shall” to “ought.”

<sup>233</sup> *Id.* at 488.

<sup>234</sup> The relatively few mandatory provisions in the Constitution involving Congress, mostly in Article I, Section 9, all involve prohibitions on congressional action as does most of the Bill of Rights, which Madison famously first opposed. See U.S. CONST. art. I, § 9, amends. I–X. Such prohibitions might possibly be enforced through presidential veto and/or judicial action, although most likely, as we shall see, through legislative restraint. Creating an affirmative constitutional obligation on Congress to pass a particular type of law, however, would have appeared both unworkable and incoherent.

<sup>235</sup> It is also likely that Morris, in stating that Congress “shall by general laws” prescribe the rules for proof and effect of sister state laws and judgments, did not intend to impose any such mandate on Congress, but simply to exclude their power to act by anything other than general laws, that is, by private legislation.

<sup>236</sup> See discussion *supra* notes 26–27 and accompanying text.

<sup>237</sup> The only subsequent change was the substitution of the word “Congress” for legislature.

not prevent the local mischiefs which everywhere excite disgusts agst. the State Governments.”<sup>238</sup>

With respect to the Full Faith and Credit Clause, however, Madison never expressed anything but satisfaction and unqualified approval. He praised the “effects clause” in *Federalist No. 42* as a “marked improvement” over the Articles’ clause.<sup>239</sup> In the debates on the Constitution before the Virginia Legislature, Madison’s approval was even more emphatic. In response to a question from George Mason raising again the propriety of a clause that granted Congress power to declare the effect of one state’s acts in another state, Madison replied that in his opinion, “this is a clause which is absolutely necessary. I have never heard any objection to this clause before, and have not employed a thought on the subject.”<sup>240</sup>

Madison appears never to have perceived any potential conflict between the first and second sentences of the Full Faith and Credit Clause, and certainly makes no mention of it at this time or in his later writings. Why this should be so is the topic of the third and final part.

### III. MADISON, JUDICIAL REVIEW, AND THE NATURE OF CONSTITUTIONAL QUESTIONS

#### A. *The Ahistorical Question*

This Article began by pointing out the inconsistency between the first and second sentences of the Full Faith and Credit Clause. It is an

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<sup>238</sup> 3 Farrand, *supra* note 135, at 77. A month later, he expanded on those concerns in a longer letter to Jefferson, which bemoaned the absence of a “federal negative” in the proposed Constitution and expressed pessimism that the judiciary could effectively enforce the various constitutional prohibitions on state legislative misconduct that had been included or the separation of federal and state powers set forth in that document. Madison stated:

It may be said that the Judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which, in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.

*Id.* at 134 (Letter to Thomas Jefferson dated October 24, 1787).

<sup>239</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>240</sup> 3 Elliot, *supra* note 196, at 584–85. It is true that Madison’s support for the Full Faith and Credit Clause was expressed in public debate, while his misgivings about the Constitution as a whole were expressed privately in letters to friends. Nonetheless, it is significant that even in public debate, Madison appeared to believe that the Clause was a relatively uncontroversial part of the Constitution that needed little polemical support. In his private letters regarding the Constitution, he appears never to have found the Clause worth mentioning at all.

inconsistency that is readily apparent to all modern legal scholars, and most recent work on the Clause has been, at least in significant part, attempts to explain and resolve that inconsistency.<sup>241</sup> The currently prevailing view of the Clause's history (which this Article has largely rejected) is that the first sentence originally embodied a relatively modest evidentiary rule, requiring states only to recognize judgments of other states as official acts of those states, and to treat them as prima facie evidence of the underlying claim.<sup>242</sup> Even this reading does not remove the inconsistency between the first and second sentences of the Clause, however, since the plenary power granted in the second sentence would appear to give Congress power to authorize states to abrogate even a prima facie rule.

All such attempts to provide a correct historical understanding of the inconsistency in the Full Faith and Credit Clause are unsatisfactory because they are adopting an ahistorical perspective on the problem. They (and we, in the introduction to this Article) are seeking to provide a "legal" interpretation of the Clause, that is, the kind of interpretation a judge would arrive at if asked to determine the appropriate limits of the powers granted to Congress under the Clause. Interpreting the Clause in this "legal" way means adopting the perspective of a judge, a neutral, retrospective reviewer of congressional action, with the right to make the ultimate decision as to whether constitutional limits have been exceeded. We adopt such a perspective easily because we have been trained to view the Constitution primarily as a legal document, to be analyzed by methods similar to those utilized by the U.S. Supreme Court in its legal opinions. In this sense, the concept and practice of judicial review is critical to our modern understanding of the Constitution.

In recent years, there has been much important historical work done on the origins of the concept of judicial review.<sup>243</sup> That work has shed new light on the difference between the way the Constitution was perceived at the time of the Founding and in later periods. In *The People Themselves*, Larry Kramer has argued that the "modern under-

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<sup>241</sup> Commentators like Laycock and Tribe privilege the first sentence of the clause and believe it imposes significant constitutional limits on Congressional action. See 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (reprinting Letter from Laurence Tribe, Professor, Harvard Law Sch., and Ralph S. Taylor, Jr., Professor, Harvard Law Sch., to Edward M. Kennedy, U.S. Senator (May 24, 1996)); Laycock, *supra* note 3, at 297-305. Crane, in contrast, privileges the second sentence, reducing the first sentence to a default rule. Crane, *supra* note 3, at 323-34. Engdahl, Sachs and Whitten, by providing a narrower reading of the first sentence of the Clause, reduce its importance, but do not entirely remove the tension between the first and second sentences of the Clause. See discussion *supra* notes 3-7.

<sup>242</sup> See, e.g., Engdahl, *supra* note 1, at 1655; Sachs, *supra* note 1, at 1206; Whitten, *FF&C and DOMA*, *supra* note 3, at 257.

<sup>243</sup> See, e.g., KRAMER, *THE PEOPLE*, *supra* note 29; Rakove, *Origins*, *supra* note 29, at 1031; William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 457 (2005).

standing” of the Constitution as “a species of law” is “of surprisingly recent vintage.”<sup>244</sup> Kramer states that “[b]oth in its origins and for most of our history . . . [f]inal interpretive authority rested with ‘the people themselves,’ and courts no less than elected representatives were subordinate to their judgments.”<sup>245</sup> Jack Rakove and others have shown that while a concept of judicial review derived from the Supremacy Clause was a part of the original constitutional scheme (enacted in part as a more limited alternative to Madison’s “federal negative”), that concept of judicial review was effectively limited to policing state legislation that encroached on federal prerogatives, and was not expected to act as a constraint on federal legislative power.<sup>246</sup>

From this perspective, we can see that the question how Madison would have resolved the potential inconsistency between the first and second sentences of the Full Faith and Credit Clause (or even why he did not recognize it) are both ahistorical questions. The questions themselves presuppose a “legal” reading of the Constitution as a set of fundamental laws that constrain the actions of all branches of government. For Madison, the salient question was not whether the Constitution, as interpreted by the Supreme Court, should constrain Congress’ exercise of power under the Full Faith and Credit Clause (a possibility he viewed as both improper and unlikely), but whether Congress itself would act properly and constitutionally in exercising its powers under that and other clauses of the Constitution.

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<sup>244</sup> KRAMER, *THE PEOPLE*, *supra* note 29, at 7–8; *see also* SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 2 (1990) (early understanding of the Constitution as “a political instrument different in kind from ordinary law”).

<sup>245</sup> KRAMER, *THE PEOPLE*, *supra* note 29, at 8.

<sup>246</sup> *See* THE FEDERALIST NO. 39 (James Madison) (noting that “in controversies relating to the boundary between the two jurisdictions [state and federal], the tribunal which is ultimately to decide, is to be established under the general government”); *see also* Rakove, *Origins*, *supra* note 29, at 1047. Rakove argues that “[u]ndisputably, judicial review, conceived as a mechanism of federalism, was palpably and unequivocally a fundamental element of the original intention of the Constitution with the Supremacy Clause as its trumpet.” *Id.* Rakove goes on to show that “this was the dimension of judicial review that originally mattered most—as opposed to the rival (and theoretically more interesting) claim of judicial supremacy in the form of final review of national legislation.” *Id.* Gordon Wood similarly argued that Madison never viewed constitutional questions as ordinary law whose final adjudication was ultimately left to courts. Rather, “[b]oth Jefferson and Madison remained convinced to the end of their lives that all parts of America’s governments had equal authority to interpret the fundamental law of the Constitution . . . .” Wood, *Judicial Review Revisited*, *supra* note 12, at 796. Similarly, Sylvia Snowiss has argued that in the earliest periods of the republic, “judicial enforcement of the Constitution was an extraordinary political act, a judicial substitute for revolution” and was limited to the “concededly unconstitutional act.” SNOWISS, *supra* note 244, at 3, 34–44. More recently, Dean Treanor, in an exhaustive study of judicial review cases prior to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), found that cases enforcing such federalism constraints in this period invariably struck down state rather than federal legislation. Treanor, *supra* note 243, at 457; *see also* Jenna Bednar, *The Madisonian Scheme to Control the National Government*, in *JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT* 217, 223–24 (Samuel Kernell ed., 2003) (describing Madison’s objections to judicial review).

For Madison in 1787, there was only a small and somewhat theoretical distinction between unwise or improper actions by Congress and unconstitutional ones. The Constitution was intended to influence and constrain the federal legislature, giving them an additional reason to do what Madison hoped their national perspective and concern for political virtue would already incline them to do: abjure “faction” and pass laws in the national interest. We do not see Madison worrying about the precise limits of congressional constitutional powers because these concerns are part of his broader worry (which we see manifested often) that the entire plan for a federal union may fail.<sup>247</sup>

Nonetheless, Madison’s statements also show that he hoped and expected that the Constitution would constrain congressional action to some degree, even if the constraints were only internal appeals to right action. It is also clear that Madison viewed the grant of power to Congress under the Full Faith and Credit Clause as designed to achieve a particular result: to promote “harmony and proper intercourse” among the states.<sup>248</sup>

With this in mind, it is possible to refashion the question regarding Madison’s original understanding of the Full Faith and Credit Clause into a historically coherent one, by asking to what extent did Madison expect and hope that the Clause (or other binding constraints presupposed by the Clause, such as the law of nations<sup>249</sup>) would constrain the exercise of power granted to Congress under the Clause. On this point, the historical evidence points strongly to the conclusion that Madison did not believe that the power to be exercised by Congress would be unconstrained. Rather, it would be limited by the law of nations, by the “indeterminate” (but far from meaningless) first sentence of the Clause, which at least mandated the deference required by the law of nations, and quite possibly even more substantive levels of deference, and finally, by the “nature of the Union” itself,<sup>250</sup> which could justify lawmaking that strengthened the federal union and promoted harmony among states well beyond any that had previously existed under the Articles of Confederation.<sup>251</sup> In short, the Clause fit perfectly with Madison’s broader constitutional plan. Congress would be acting both properly and constitutionally when it enacted laws which promoted deference and harmony among the states, but would be acting both improperly and unconstitutionally if it passed laws that permitted states to ignore or abrogate judgments or laws of sister states.

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<sup>247</sup> See Madison, Letter to Jefferson, *supra* note 119, at 326; see also 3 Farrand, *supra* note 135, at 85 (Benjamin Franklin’s comment, “[a] republic . . . if you can keep it.”).

<sup>248</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>249</sup> See Sherry, *supra* note 36, at 1137–39.

<sup>250</sup> 2 Farrand, *supra* note 1, at 448.

<sup>251</sup> See THE FEDERALIST NO. 8 (Alexander Hamilton); THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 42 (James Madison).

Accordingly, the power granted to Congress in the second sentence of the Full Faith and Credit Clause is “plenary” only in the very limited sense that Madison believed that no other political institution (including the Supreme Court) could or should constrain congressional lawmaking powers. But Madison believed and hoped that powerful legal, moral, political, and constitutional constraints were being created by the new plan of government that would prevent Congress from making laws that violated the mandate of the first sentence of the Full Faith and Credit Clause.

The following two sections provide the historical bases for these conclusions, focusing first on Madison’s views on the institutional or external constraints of Congressional action and then on the internal constraints on such actions.

B. *Constitutional Interpretative Authority and Institutional Constraints on Congressional Lawmaking Power*

To understand the Full Faith and Credit Clause as Madison understood it, we must jettison the idea that the Constitution is primarily a species of law, subject to comprehensive judicial interpretation, and view it rather, as Madison did, as a “plan” for a new government.<sup>252</sup> Understanding the “plan” of the Full Faith and Credit Clause requires resolving two rather different issues, one involving federalism and the other separation of powers. The federalism question was whether states or the federal government would have the power to define, specify, and enforce the requirement of interstate deference set forth in the Clause. The second sentence of the Clause definitively resolved that issue by expressly giving power to the federal legislature to “prescribe” the “effects” of state judgments and legislative acts in other states. We have seen that this was a somewhat controversial position, won only after substantial debate, yet one that Madison believed made the Clause an “evident and valuable improvement” over its predecessor.<sup>253</sup>

Yet the reason for that anticipated improvement was that Madison hoped and expected the federal legislature to effectively enforce and strengthen the requirements of interstate deference set forth in the first section of the Clause.<sup>254</sup> He expected them to act that way in accordance

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<sup>252</sup> In the period after the Constitutional Convention, Madison frequently used the term “plan” to refer to the proposed Constitution in both his public and private writings. *See, e.g.*, 3 Farrand, *supra* note 135, at 98 (Madison’s letter to Edmund Pendleton dated Sept. 20, 1787); *id.* at 135–36 (Madison’s letter to Thomas Jefferson dated Oct. 24, 1787); *id.* at 361 (Madison’s statement in House of Representatives dated Apr. 22, 1790); THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 42 (James Madison); THE FEDERALIST NO. 45 (James Madison).

<sup>253</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>254</sup> *See id.* It should be noted that the one “improvement” Madison envisions in *Federalist*

with his elaborate theory of the federal government acting in the national interest and as a neutral arbiter among states. He certainly hoped they would act that way, but did he think they were constitutionally required to act that way? This raises the second, separation of powers question: Does the Constitution itself, particularly the first sentence of the Full Faith and Credit Clause, impose any limits on federal lawmaking power regarding interstate deference?

This question, which looms so large today, would have appeared to Madison to be so abstract and impractical as to be almost unanswerable. The important institutional fact for Madison was that Congress had both the political power and normative right to determine the propriety and the constitutionality of their actions without any second-guessing by the Supreme Court. Asking whether they were constrained by the Constitution, therefore, was a little like asking the same question today regarding the Justices of the Supreme Court.<sup>255</sup>

As Rakove notes, “[f]or Madison in the 1780s, the political superiority of the legislature—and especially the lower house—was the dominant fact of republican government, and all calculations about the capacities of other institutions were the dependent variables of this fact.”<sup>256</sup>

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42—more effective enforcement of claims against those who have “suddenly and secretly translated” their property (“effects liable to justice”) across the “borders of contiguous states”—involves greater harmony and coordination between the legal systems of different states. *Id.* Whether this will be the result of a law requiring enforcement of the judgments of one state in those of others or some less drastic Congressional action is unclear. What is clear is that Madison saw the grant of power to Congress in the second sentence of the Clause, not as an improvement in itself, but as a means of improving harmony and coordination among state legal systems.

<sup>255</sup> In this regard, it is worth considering whether we would describe the Supreme Court’s decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), as “unconstitutional.” On the one hand, we now recognize the Supreme Court’s plenary power, as an unreviewable decision-maker, to make whatever decision it wants with respect to a case that falls within its jurisdiction. Yet we also believe that the Supreme Court is normatively obligated to follow the Constitution, and, I assume, most of us hold a view of the Constitution and the Fourteenth Amendment, even as it was understood at the time *Plessy* was decided, which would lead us to conclude that, we, if we had been on the Supreme Court, we would have felt constitutionally obligated to rule the other way. We might try to square the circle by saying something like “*Plessy v. Ferguson* is inconsistent with the proper understanding of the constitutional norms embodied in the Fourteenth Amendment.”

I submit that Madison might well have answered a question about congressional passage of a law abolishing existing obligations of sister state deference in much the same way. He would have recognized that under the second sentence of the Clause, Congress had power, “jurisdiction” one might say, to make such a law, but would also assert Congress’ normative obligation to pass laws consistent with the first sentence of the Clause. See KRAMER, THE PEOPLE, *supra* note 29, at 137 (discussion of the Revolution of 1800); discussion *supra* notes 28–32 and accompanying text.

<sup>256</sup> Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1531 (2002) [hereinafter Rakove, *Judicial Power*]. In his analysis of Madison’s political thought at the time, Rakove shows that Madison was deeply pessimistic that the judiciary could act as an effective means of curbing state legislative abuses. See John Ferejohn, *Madisonian Separation of Powers*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 126, 132 (Samuel Kernell ed., 2003) (“[Madison] regarded the legislative power as difficult or impossible to place under external limitations.”). Rakove shows that as

Madison anticipated that the new government would have radically different methods for resolving questions regarding the constitutionality of state laws and those enacted by the federal government. While Madison had pragmatic and political doubts about the judiciary being able to fulfill its constitutionally anticipated role in enforcing federal superiority against contrary state laws, there is no doubt they had been given that role.<sup>257</sup> With respect to determinations of the constitutionality of federal laws, however, where the judiciary had no specified constitutional role,<sup>258</sup> Madison had principled as well as pragmatic concerns about the judiciary taking for itself the role of final arbiter of the constitutionality of actions by coordinate branches of the federal government.

Recent scholarship has shown that in its inception, and for many years thereafter, the “American doctrine of judicial review was far more concerned with federalism than with separation of powers,” and that

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early as 1785, Madison’s writings imply that “fundamental violations of a constitutional scheme would not be amenable to judicial correction in the ordinary course of things” and that “the judiciary had no special duty or capacity to maintain constitutional norms.” *Rakove, Judicial Power*, *supra* note 256, at 1518.

Madison’s work in drafting the Constitution did not improve his view concerning the effectiveness of the judicial branch. He continued to believe it was a mistake to reject his idea of a Congressional “negative” on state legislation and to leave it to the judiciary, acting through the Supremacy Clause, to police the boundary between constitutional and unconstitutional state legislative acts. His concerns were two-fold. *See* 3 Farrand, *supra* note 135, at 133–34 (Madison’s letter to Thomas Jefferson dated October 24, 1787). First, the very nature of judicial process meant that challenges to state legislation could only arise in an uncertain, haphazard, and belated manner, when an aggrieved but well funded individual chose to pursue a judicial remedy through the appellate process. *Id.* at 134. He doubted that the mere possibility of such *ex post* challenges would exert much restraint on state legislatures. *Id.*

An even greater problem, however, was that the judicial branch had no political means of enforcing its rulings on the states. As Madison noted,

[A] State which would violate the Legislative rights of the Union, would not be very ready to obey a judicial decree in support of them, and that a recurrence to force, which, in the event of disobedience would be necessary, is an Evil which the new Constitution meant to exclude as far as possible.

*Id.* at 134. As Rakove states, “[Madison’s] reservations were pragmatic. Judicial power will simply be too weak to provide a satisfactory solution to the challenges to national supremacy he still expected the states to mount.” Rakove, *Judicial Power*, *supra* note 256, at 1525.

<sup>257</sup> This is not to say that Madison and the other founders were unaware of the theoretical power of courts to declare legislative acts, particularly state legislative acts, invalid as violative of the Constitution. This is the doctrine of “repugnancy” which, in a recent article, Mary Bilder has argued was imported from English corporate law doctrines into the basis for American judicial review. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502, 502 (2006). While Madison and the other founders were certainly aware of this concept as a mode of argument, he seems to have little confidence that a judicial declaration of repugnancy or invalidity could be an effective check on legislative misconduct, even with respect to federalism concerns where he argued, at least to the public, that the courts could adequately prevent overreaching by state legislatures. *See* THE FEDERALIST NO. 44 (James Madison).

<sup>258</sup> *See* KRAMER, THE PEOPLE, *supra* note 29, at 77–78; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962); Kramer, *We the Court*, *supra* note 41, at 5; Rakove, *Origins*, *supra* note 29, at 1036. *But see* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 *U. CHI. L. REV.* 887, 894–913 (2003) (arguing that judicial review is implicit in the constitutional text).

there was a strong presumption against judicial invalidation of federal legislation.<sup>259</sup> For Madison, this was a normative as well as a pragmatic concern. He believed the judicial branch should have no greater right to determine the ultimate meaning of the Constitution than the other two branches of the federal government. He made this point explicitly in his 1788 comments on Jefferson's "draught" of a state constitution:

In the State Constitutions & indeed in the Fed'l one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making [their] decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dep't paramount in fact to the Legislature, which was never intended and can never be proper.<sup>260</sup>

As Rakove points out, Madison's main objection to this arrangement is that it seems to give the judiciary the final say in an act's constitutionality as a matter of "inadvertent final decision," not on the basis of any constitutional plan or principle.<sup>261</sup>

As a matter of normative political principle, Madison believed that all three branches of government "had equal authority to interpret the fundamental law of the Constitution."<sup>262</sup> Ideally, the ultimate decision should be left to the people through some form of "popular constitutionalism."<sup>263</sup>

<sup>259</sup> Rakove, *Origins*, *supra* note 29, at 1034; *see also* Wood, *Judicial Review Revisited*, *supra* note 12, at 798 (judicial declaration of a law's invalidity was "an extraordinary and solemn political action" done only when there was a "clear and unequivocal breach of the constitution"); Treanor, *supra* note 243, at 458–59 (arguing that different standards of review were applied by courts to federalism and separation of powers issues).

Describing cases in which the federal courts review the constitutionality of state legislation as involving "federalism" and those involving review of federal legislation as involving "separation of powers" as Rakove frequently and Treanor sometimes does, can be somewhat misleading. Questions involving the constitutionally valid scope of federal lawmaking authority, what we might properly call "federalism" issues can be raised in challenges to either federal or state statutes. Questions involving the federal judiciary's power to invalidate federal legislation, which we might call "separation of powers" issues, can only arise in review of federal legislation, but may also involve federalism questions (as when the challenged legislative act is claimed to be within an area of exclusive state lawmaking power). While there is some dispute in the recent historical work as to how frequently and easily courts invalidated state statutes as unconstitutional, *compare* Wood, *Judicial Review Revisited*, *supra* note 12, at 796–97 with Treanor, *supra* note 243, at 457–58, there is a general consensus that successful judicial challenges to federal statutes were controversial and extremely rare. *See* Treanor, *supra* note 243, at 457–58; Wood, *Judicial Review Revisited*, *supra* note 12, at 796–97, 803–07.

<sup>260</sup> James Madison, *Observations on the "Draught of a Constitution for Virginia."* (Aug. 1788), in 5 THE WRITINGS OF JAMES MADISON 294 (Gaillard Hunt ed., G.P. Putnam's Sons 1904) [hereinafter Madison, *Observations*].

<sup>261</sup> Rakove, *Judicial Power*, *supra* note 256, at 1530.

<sup>262</sup> Wood, *Judicial Review Revisited*, *supra* note 12, at 796.

<sup>263</sup> Rakove, *Judicial Power*, *supra* note 256, at 1529. This is a modern term for the historical concept that authoritative determination of Constitutional meaning ultimately rests with the people, not the Supreme Court. *See generally* KRAMER, THE PEOPLE, *supra* note 29, at 8; Kramer, *We the Court*, *supra* note 41, at 162. Madison set forth one version of "popular constitution-

In writing about the role of the people in countering legislative abuses, Madison made some distinction between laws passed by the legislature that are “precipitate” or “unjust” and those that are “unconstitutional,” but not that much of a distinction.<sup>264</sup> For Madison, the point is that the legislature remains the ultimate arbiter of the constitutionality of its own lawmaking, with the only effective check on it being the popular electoral process itself.

With respect to the constitutionality of state laws under the Supremacy Clause, the Constitution clearly did make the Supreme Court the ultimate arbiter of such matters,<sup>265</sup> and Madison, in public, defended its capacity to fulfill that role, while expressing his own doubts in private.<sup>266</sup> We have seen, however, that Madison was normatively opposed to any “inadvertent” procedures that might give the judiciary the final say on the constitutionality of federal legislation, believing that the people themselves, through the electoral process, could be the only legitimate arbiters of ultimate constitutional meaning.<sup>267</sup>

Gordon Wood has argued that in order for judicial power to review the constitutionality of federal legislation to emerge and be accepted in the United States, there had to be changes from the time of the Found-

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nalism” in his 1788 comments to Jefferson’s draft of a state constitution. There, Madison proposed that a “Council of Revision” could act as a “check to precipitate, to unjust, and to unconstitutional laws.” Madison, *Observations*, *supra* note 260, at 293–94. Legislative acts would be communicated to the judicial and executive branches and if either objected, such objections could only be overruled by a supermajority vote of the legislature. *Id.* If the objection were based on the law’s perceived unconstitutionality, however, even a supermajority vote would not suffice. Rather, the law would be “suspended . . . until there shall have been a subsequent election of the [House of Delegates]” and then the requisite supermajority vote by that newly elected assembly. *Id.* at 294. Once such approval had been achieved, however, “it [should] not be allowed the Judges or [the] Executive to pronounce a law thus enacted [unconstitutional] & invalid.” *Id.*; *see* Bednar, *supra* note 246, at 227–28.

<sup>264</sup> *Id.* at 293. In his comments on Jefferson’s draft state constitution, Madison sees the role of the council of revision for both unjust and unconstitutional laws as simply to delay enactment and force legislative reconsideration and a supermajority vote, the sole difference being that allegedly unconstitutional laws would be reconsidered by a newly elected legislature, *id.* at 293–94, after an election in which the disputed constitutional questions would, presumably, have been a matter of public debate. *See* 2 Farrand, *supra* note 1, at 73; Sherry, *supra* note 36, at 1159 (discussing comment made by Wilson at the Convention that “laws may be unjust, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect.”). Sherry argues that this notion of a “continuum of unconstitutionality coinciding with a continuum of injustice” reflects an older view of the constitution as including all fundamental law. *Id.* at 1159. It should also be noted that the concept of a “continuum of unconstitutionality” is also very different from modern “legal” notions of the Constitution.

<sup>265</sup> *See* U.S. CONST. art. III, § 2.

<sup>266</sup> THE FEDERALIST NO. 39 (James Madison); *see also* Rakove, *Judicial Power*, *supra* note 256, at 1524–28.

<sup>267</sup> THE FEDERALIST NO. 49 (James Madison). Contrast this with Hamilton’s position in *Federalist* 78, THE FEDERALIST NO. 78 (Alexander Hamilton), and Madison’s willingness in permit some interpretive work in his letter to Roane. *See* James Madison, Letter to Spencer Roane (June 29, 1821), in 9 THE WRITINGS OF JAMES MADISON 66–67 (Gaillard Hunt ed., G.P. Putnam’s Sons 1910) [hereinafter Madison, Letter to Roane].

ing in popular attitudes toward the Constitution itself, as well as toward federal judges and federal legislators.<sup>268</sup> To understand Madison's view of the constitutional constraints on federal legislation at the time of the Founding, it is necessary to revert to all these earlier positions. For Madison in 1787 and 1788, the Constitution was not law in the ordinary sense, but the fundamental plan for the organization of government, to be read and interpreted with equal authority by all three branches of the federal government, but whose final meaning could only be established by the will of the people.<sup>269</sup> Judges had not the power, authority, nor expertise to be its final arbiters. But the federal legislature, Madison "hoped against hope,"<sup>270</sup> would be composed of impartial and disinterested men who would function as "dispassionate umpires" in conflicts between different interests.<sup>271</sup> In short, while unconstitutional state laws could and should be invalidated through normal and well-established judicial procedures, allegedly unconstitutional actions by the federal legislature were best corrected by the political process itself, preferably through periodic debate and elections.<sup>272</sup>

It is against this institutional background that we must consider Madison's likely understanding of the Full Faith and Credit Clause. Note first that the distinction just outlined between the procedures for constraining unconstitutional state laws and unconstitutional federal action is reflected in the language of the Clause itself. We have seen that for Madison, the primary purpose of the Clause was its effect on states, to inhibit their "trespasses" against each other, and to provide for their "harmony and proper intercourse."<sup>273</sup> From this perspective, the Clause was well drafted to accomplish its purpose. It established a broad area of federal lawmaking power, where Congress could prescribe and de-

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<sup>268</sup> See generally Wood, *Judicial Review Revisited*, *supra* note 12. Wood argues that a radical reconceptualization of political legitimacy took place in the late eighteenth and early nineteenth century. The Constitution, originally conceived as embodying fundamental principles so different from ordinary law that its invocation by a court to nullify validly enacted legislation was "an extraordinary, even revolutionary, expression of public authority," a rare event regarded by the founders with "a sense of awe and wonder," *id.* at 796, had to become "the kind of law that an ordinary court system could expound and construe." *Id.* at 799. The judiciary, disparaged in the revolutionary period as "appendages or extensions of royal authority," *id.* at 789-90, came to be seen as another type of agent of the people, carrying out the people's will by, among other things, keeping legislators "within the limits assigned to their authority." *Id.* at 794 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)). Legislators, in turn, rather than being viewed as the unique representatives of the people, were merely one of the people's agents, prone to faction and majoritarian overreaching. They would have to come to be regarded, in short, as mere politicians. Wood, *Judicial Review Revisited*, *supra* note 12, at 808-09; see also Rakove, *Origins*, *supra* note 29, at 1051-60 (arguing that a change in the perception of legislation led to increased acceptance of the idea of the judiciary as a check on legislative power).

<sup>269</sup> Wood, *Judicial Review Revisited*, *supra* note 12, at 796.

<sup>270</sup> *Id.* at 792.

<sup>271</sup> *Id.*

<sup>272</sup> See KRAMER, THE PEOPLE, *supra* note 29, at 84-85.

<sup>273</sup> THE FEDERALIST NO. 42 (James Madison).

scribe the rules for interstate deference, and, as federal law, those rules would become binding on all states under the Supremacy Clause<sup>274</sup> and enforceable in the federal courts. With respect to the federal legislature, however, the first sentence of the Clause imposes no express obligations (it mandates deference only by states) and only confers power in the second sentence, which Congress may or may not exercise.<sup>275</sup> These different approaches to the exercise of state and federal power were epitomized by Madison's final amendments to the Clause, where the state's obligations were expressed by the mandatory "shall," the federal government's by the discretionary word "may."<sup>276</sup>

I argued previously that the unanimous approval of these changes by the Committee, particularly after substantial disagreement over the language of the second sentence, suggests that they were viewed as clarifying rather than substantive amendments.<sup>277</sup> The discussion in this section has indicated why that was so. Madison and many others expected that the constitution they were drafting would apply very differently to the states and to the federal legislature. For states, it would be mandatory and the source of external constraints, giving the federal government, in certain areas, power to invalidate state law and compel obedience to its higher authority. For the branches of the federal government created and empowered by that constitution, however, there were no external constraints, and that was particularly true of the federal legislature, which had both the most direct popular support and the broadest political power. Clearly, there was no agency of government that could compel Congress to pass any laws its members did not want to pass, and it was far from clear whether any such agency could prohibit Congress from acting in the few areas where the Constitution expressly forbid such action.<sup>278</sup> Accordingly, it made sense to describe their legislative power in terms of laws they "may" choose to make.

Note that, as far as the states are concerned, there is no conflict between the first and second clauses of the Full Faith and Credit Clause. States are obligated to obey whatever deference rules federal courts derive from the first sentence of the Clause as well as any laws promulgated by Congress under the second sentence.<sup>279</sup> Madison thereby made use of the judiciary's power to enforce and perhaps strengthen existing

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<sup>274</sup> U.S. CONST. art. VI, § 1, cl. 2.

<sup>275</sup> U.S. CONST. art. IV, § 1.

<sup>276</sup> See 2 Farrand, *supra* note 1, at 489.

<sup>277</sup> See discussion *supra* Part II.D.

<sup>278</sup> See U.S. CONST. art. I, § 9.

<sup>279</sup> Under the constitutional plan, the obligation of state legislatures to obey deference obligations set forth both in the Constitution, as interpreted by the federal judiciary, and by the federal legislature, is clear. A problem arises only if the Supreme Court and Congress disagree as to the nature of that deference obligation. That is not a problem of federalism, but of separation of powers, the very problem that is the subject of this section.

“indeterminate” case law under the Articles’ clause while providing a congressional power to alter any unfortunate decisions by an unreliable judiciary and to increase the deference obligation over time.<sup>280</sup> If the judiciary chose to interpret the obligations of the first sentence as a strong rule of substantive deference, there would be less need for congressional action. If the courts caved in to state interests, congressional power was clearly available to correct such “mistakes.”

It is only the federal legislature whose powers might be viewed inconsistently under the Clause, seemingly constrained by the first sentence and unconstrained by the second. We have seen, however, that this is an ahistorical way to look at the Clause.

We perceive the potential conflict between the first and second sentence because we view ourselves as neutral arbiters of its meaning, trying to understand how much power it actually gives to Congress. In short, we put ourselves in the role of the Supreme Court, viewing the Constitution as a species of law. Such a perspective would have been alien to Madison, who assumed that legislative actions by Congress were effectively unreviewable by the Supreme Court or any other agency of government.<sup>281</sup> The broad power given under the second sentence of the Clause would not have seemed inconsistent with the constraints of the first from a perspective of congressional supremacy. The first sentence defined the goal or purpose of the grant of congressional power, in much the way the copyright and patent powers were granted “to promote the progress of science and the useful arts,” or the way the broad grant of power to prescribe the time, place, and manner of electing representatives was not inconsistent with the mandatory guarantee of a republican form of government.<sup>282</sup>

Put another way, from Madison’s 1787 perspective, what appears to us to be a mandatory limitation on congressional power in the first sentence of the clause would have appeared more like guidance or instruction to an essentially unreviewable legislative body. And, what appears to us as a grant of plenary lawmaking power in the second sentence would have appeared to Madison as simply recognition of existing political reality. It becomes easier to understand, therefore, why the apparent conflict between the first and second sentences of the Clause

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<sup>280</sup> Madison privately expressed doubts that the judiciary would resist state interests in enforcing the Constitution. 3 Farrand, *supra* note 135, at 134 (Letter to Thomas Jefferson dated October 24, 1787); see also Rakove, *Judicial Power*, *supra* note 256, at 1523–25.

<sup>281</sup> See discussion *supra* notes 26–32 and accompanying text.

<sup>282</sup> U.S. CONST. art. I, § 7. Crosskey argues that the draftsmanship of the Full Faith and Credit Clause is somewhat similar to the Time, Place and Manner Clause of Article I, Section 4. CROSSKEY, *supra* note 144, at 553 & n.†. This is significant because Crosskey also argues that the Republican Government Clause limits the Time, Place and Manner Clause. *Id.* at 524. I have argued here that the first sentence of the Full Faith and Credit clause places a similar limitation on the powers granted Congress in the second sentence of the Clause.

would not have seemed troubling to Madison and possibly not even noticeable.

Furthermore, as we have seen, the distinction between an unwise, improper, and unconstitutional law was not nearly as great for Madison as it is for us now. This was in part because Americans, like English lawyers of Madison's time, viewed various fundamental natural law doctrines as constitutional constraints on legislative power.<sup>283</sup> Probably more significant from Madison's perspective, however, was that as a practical political matter, he believed the only remedy for unconstitutional lawmaking was the same as for unwise or improper laws, a repudiation and unseating of the erring legislature through the democratic process.<sup>284</sup>

Although Madison viewed the distinction between unconstitutional laws and unwise ones as far less significant than we do, he nonetheless recognized the distinction, primarily because he thought unconstitutionality provided stronger normative grounds for rejecting bad legislation, both as an electoral issue and in the process of internal deliberation among legislators. Accordingly, the question whether a federal law permitting states to abrogate existing requirements of interstate deference was unconstitutional or merely unwise was a question he would have understood, although might not have viewed as particularly important. Given the centrality of that question to contemporary legal debates regarding the DOMA, however, it is worth examining in some detail in the final section of this Article.

### C. *The Constitution as Internal Constraint on Federal Lawmaking*

Madison was famously concerned with the problem of "faction," the "dangerous vice" "under which popular governments everywhere have perished."<sup>285</sup> His hoped-for solution, or at least amelioration of the problem, rested with his belief that a large republic, whose lawmakers would consist of both directly and indirectly elected representatives of

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<sup>283</sup> See Sherry, *supra* note 36, at 1137–39; see also discussion *supra* notes 34–36 and accompanying text. A case frequently discussed in this connection is *Trevett v. Weeden*, an unreported 1786 Rhode Island case striking down a Rhode Island statute that required acceptance of paper currency as satisfaction of debts. The law was struck down, probably because it explicitly denied defendants a right to jury trial, even though the jury trial right was not mentioned in Rhode Island's founding charter and Rhode Island, at the time, had no written constitution. See SNOWISS, *supra* note 244, at 20–22; Sherry, *supra* note 36, at 1138–41.

<sup>284</sup> See discussion *supra* notes 253–54 and accompanying text; see also KRAMER, THE PEOPLE, *supra* note 29, at 48–49.

<sup>285</sup> THE FEDERALIST NO. 10 (James Madison).

various states, would be better able to resist the dangers of faction than had most of the doomed republics of history.<sup>286</sup>

Madison conceived the effect of this large, representative republic as combating faction in two quite different ways. The first was by creating a nation and a government sufficiently large and diverse that no single faction could easily come to dominate it or even control a majority of its members, thereby making it “less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”<sup>287</sup> The natural impediments that a large republic posed to the development of factions was buttressed in the Constitution by the numerous institutional checks and balances created to further impede any single religious persuasion, economic interest, or regional alignment from gaining control of the government. These checks and balances were based on a pessimistic view of human nature, which assumed that politicians frequently acted out of narrow self-interest, or at least frequently persuaded themselves that the interests of themselves or their group of supporters were also the best interests of the nation. Madison hoped to cancel the deleterious effects of such self-interest by setting various modes of self-interested conduct in opposition to each other.

But there was another side to Madison's plan to combat faction, one based on a more optimistic view of human nature. Madison believed that elected representatives could act out of more than just self-interested or partisan motives. They could be “representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice,”<sup>288</sup> who would be “proper guardians of the public weal,” and whose decisions “will be more consonant to the public good than if pronounced by the people themselves.” The Constitution provided institutional means to promote this defense to faction as well: the indirect election of representatives through “the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>289</sup>

These two different means of combating the problem of faction were not at all inconsistent, but rather reflect a subtle and sophisticated understanding of psychology and political theory on the part of Madison. Recognizing that politicians can, at various times and under various circumstances, act out of narrow self-interest or unselfish concern for the public good, Madison sought to create a system which he hoped

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<sup>286</sup> RAKOVE, MADISON, *supra* note 17, at 49–57; Strahan, *supra* note 18, 75–84.

<sup>287</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

would reduce incentives for the former and multiply instances of the latter.<sup>290</sup>

In considering the extent to which Madison expected the Constitution to restrain and direct the actions of the legislature, we should consider its effects on the legislators he hoped for, those of “enlightened views and virtuous sentiments,” not the factional rabble rousers he feared. One of the most important values Madison hoped for in a legislator was impartiality. As Gordon Wood explains, “[Madison] hoped against hope that the new, elevated federal government might assume a judicial-like character and become a disinterested and dispassionate umpire in disputes between different interests within the individual states.”<sup>291</sup>

That Madison sought “judicial-like” virtues in his ideal legislators is not surprising given that he viewed the art of governing itself as a large, complex, and never-ending adjudication of the aggregate claims of innumerable groups and interests within the polity. While we can find this point made in Madison’s private writings,<sup>292</sup> he makes it most clearly and powerfully in *Federalist No. 10*:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?<sup>293</sup>

Such impartial, judicious, and public-minded legislators would nonetheless be, and feel themselves to be, bound by the Constitution. In the first place, the people themselves ratified the Constitution, in their various state conventions, and we have seen that for Madison, the people themselves were the ultimate source of constitutional authority. Legislators who adhered to the constitutional plan were following the will of the people, but in a manner that was “more consonant to the public good” than that of politicians who appealed to the baser instincts of the public. Madison expected Congress to stay within the powers granted by the Constitution to the federal government, which, he noted,

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<sup>290</sup> Robertson, *supra* note 24, at 200–01 (“Madison in effect proposed to reconstitute the national government so that the national policy-makers’ ambitions would be driven by a material concern for national advantage.”); Strahan, *supra* note 18, at 63.

<sup>291</sup> Wood, *Judicial Review Revisited*, *supra* note 12, at 792 (quoting Letter from James Madison to George Washington (Apr. 16, 1787)) (internal quotation marks omitted).

<sup>292</sup> See Madison, Letter to Washington, *supra* note 26, at 346; Wood, *Judicial Review Revisited*, *supra* note 12, at 809.

<sup>293</sup> THE FEDERALIST NO. 10 (James Madison).

were “few and defined,” yet he also argued that in any contest for the people’s loyalty, it was the states who were far more likely to encroach on federal prerogatives than the opposite. Popular preference for the federal government could only be won by “manifest and proofs of a better administration” and such superior administration was possible, Madison asserted, “only within a certain sphere.”<sup>294</sup>

Able and conscientious legislators, therefore, would seek to stay within their designated constitutional role even without any external constraint. They would do so because (1) it was their democratic duty, as representatives of the people, to carry out the people’s will as expressed in the Constitution; (2) as prudential legislators, they would recognize that the national government can only effectively administer within a limited sphere; and (3) the Constitution would itself “acquire by degrees the character of fundamental maxims of free Government.”<sup>295</sup>

With respect to the Full Faith and Credit Clause, Madison consistently described the grant of federal power there as an obvious instance where federal lawmaking would be superior to that of the states. This was because the states had already proven themselves inadequate to the task by “trespassing” on each other’s rights and because the national interest was so clearly in favor of promotion of interstate harmony by requiring state deference to other state’s laws and judicial proceedings, in a neutral and disinterested manner. Madison’s few public statements concerning the constitutional grant of such power to Congress shows that he viewed Congress’s superior ability to act in this area to be obvious and indisputable.<sup>296</sup> Note, however, that Madison’s presumption of the superiority of federal lawmaking in this area is premised on his assumption that such lawmaking will be directed toward a particular

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<sup>294</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>295</sup> James Madison, Letter to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 273 (Gaillard Hunt ed., G.P. Putnam’s Sons 1904). Madison made this point as one of the primary arguments in favor of a bill of rights. Madison seriously waffled on the question whether a bill of rights would be necessary or beneficial. He opposed it in the Federalist as unneeded. See THE FEDERALIST NO. 38 (James Madison); THE FEDERALIST NO. 44 (James Madison); THE FEDERALIST NO. 46 (James Madison); THE FEDERALIST NO. 48 (James Madison); see also LABUNSKI, *supra* note 31, at 62. But Madison later changed his mind for what appear to be primarily prudential political reasons. See *id.* at 62–63, 159.

In the above letter, however, Madison tells Jefferson, he “has always been in favor of a bill of rights” as something that “might be of use” but had not “viewed it in an important light.” Madison, Letter to Jefferson, *supra* note 119, at 271. Although Madison expressed doubts, based on historical experience, that a bill of rights could protect effectively against “overbearing majorities” or, on occasion, by “a succession of artful and ambitious rulers.” *Id.* at 273. Nonetheless, many of Madison’s arguments both for and against the bill of rights assume that the Constitutional constraints it contains will be followed most of the time by conscientious lawmakers. That is why he is so concerned that prohibitions on federal lawmaking not be enumerated in such a way as to give the federal government either too much power or too little.

<sup>296</sup> THE FEDERALIST NO. 42 (James Madison); 3 Elliot, *supra* note 196, at 584–85 (“Statement during Debates on Virginia’s Ratification of the Constitution”).

and obviously beneficial purpose: promotion of interstate harmony and economic stability through deference by states to each other's laws and judicial proceedings.

We have seen that Madison preferred Morris's vague yet potentially expandable version of the first sentence of the Clause to Randolph's clearer, more detailed, but static rule that included substantive deference, because Madison "wished the Legislature might be authorized to provide for the execution of Judgments in other States, under such regulations as might be expedient" and believed this was "justified by the nature of the Union."<sup>297</sup> The call that any subsequent exercise of legislative power be "authorized" by the Constitution again demonstrates Madison's assumption that the Congress, even if not subject to judicial review, would operate under constitutional constraints.

What were those constitutional constraints that limited Congressional power to make laws under the Full Faith and Credit Clause? The first, and perhaps most interesting, is the one Madison expressly appealed to at the Convention, the "nature of the [federal] union."<sup>298</sup> It was on this ground that Madison believed a law providing for interstate execution of judgments was "justified."<sup>299</sup> For Madison, then, the nature of the Union itself provided some constraint on the kind of actions Congress could legitimately take. Increased obligations of interstate deference were consistent with the new "more perfect" union<sup>300</sup> that the framers were creating. If the nature of the federal union could provide justification for legislative actions that created stronger interstate deference obligations, the nature of the union could also provide a powerful argument against any legislative actions that would weaken existing interstate deference obligations. In this way the full faith and credit obligation was tied, for Madison, to a fundamental constitutional principle—that the Constitution had created an indissoluble federal union

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<sup>297</sup> 2 Farrand, *supra* note 1, at 448.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Madison's argument here clearly invokes reference to the Preamble to the Constitution (drafted by the Committee on Style of which Madison was a member). The qualitatively "more perfect" union referred to there is universally (or at least judicially) assumed to draw comparison with the less perfect union that had previously existed under the Articles of Confederation. *See Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) ("[W]hen these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained to form a more perfect Union") (internal quotation marks removed), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885); *see also United States v. Cruikshank*, 92 U.S. 542, 549–50 (1876). In this sense, the two unions are directly analogous to the two full faith and credit clauses of the Articles and Constitution respectively, with that latter being an "evident and valuable improvement" on the former, because it authorizes Congress to make laws clarifying and strengthening the deference obligations set forth in the clause. THE FEDERALIST NO. 42 (James Madison). Laws that weakened or abrogated existing deference obligations would obviously not constitute such improvements and would not be consistent with the "more perfect union" the framers were seeking to create.

that could not be weakened or eroded by the actions of individual states.<sup>301</sup>

We have seen that Madison always viewed the Full Faith and Credit Clause as an obvious and unproblematic case for the exercise of federal power.<sup>302</sup> Randolph and other Virginians thought giving the federal government power to determine the effects of one state's law in another was a vast and unjustified expansion of federal power. Why did Madison not view it the same way? Unlike Hamilton, he was no ardent advocate of federal power who wished to see the states wither away. He was a disciple of Jefferson, an advocate of a strong but limited federal government, which he felt should take on only those "limited powers" that could be well administered by the federal government. Promotion of interstate deference was clearly such a power for Madison because (1) it had already been set forth as a national concern in the Articles of Confederation and (2) the federal government could function effectively as a dispassionate promoter of interstate harmony in a way the states could not. Madison viewed the grant of federal legislative power in the Full Faith and Credit Clause as a limited and uncontroversial power needed to promote interstate deference and harmony and thereby strengthen the Union. Use of that power to abrogate existing interstate deference obligations would not only be unwise and shortsighted but inconsistent with the constitutional justifications for granting such power.

The constitutional obligation of interstate deference came from two main and somewhat overlapping sources: the clause in the Articles of Confederation and the law of nations. There is no indication in any document of the time that the second sentence of the Full Faith and Credit Clause was intended to empower Congress to displace or abrogate the interstate deference obligations that existed under the Articles' clause and continued under the first sentence of the Constitution's clause.<sup>303</sup>

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<sup>301</sup> See Madison, Letter to Roane, *supra* note 267, at 65. Madison's correspondence with Spencer Roane (Patrick Henry's son-in-law and a strong states rights proponent, see Rakove, *Judicial Power*, *supra* note 256, at 1533) are the clearest statements we have of Madison's continued commitment to Federalist principles in the face of a rising tide of concern in southern states over perceived federal incursions on state sovereignty. In that letter, Madison, while sympathetic to many of Roane's critiques of particular Supreme Court actions, strongly defends the federal (as opposed to the state) judiciary's role as ultimate arbiters of the boundaries of federal power. Madison, Letter to Roane, *supra* note 267, at 66–67. Madison argued that if individual states were allowed to decide such constitutional questions for themselves the degree of sovereignty retained "might become different in every state" and that this would destroy "the vital principle of equality, which cements their Union." *Id.* at 66. It is easy to imagine Madison making a similar argument if presented with a proposal to allow each state to decide how much deference to give to other states' judgments. For a detailed discussion of the Roane correspondence, see Rakove, *Judicial Power*, *supra* note 256, at 1534–42.

<sup>302</sup> See THE FEDERALIST NO. 42 (James Madison); 3 Elliot, *supra* note 196, at 584–85 ("Statement during Debates on Virginia's Ratification of the Constitution").

<sup>303</sup> The only support for such a view derives from a strained ahistorical reading of the second sentence of the Clause which not only puts it in conflict with the first sentence, but which I have

While those obligations were admittedly somewhat vague, they included at least, most scholars agree, a prima facie rule of validity regarding most out-of-state judgments, and very likely a rule of substantive deference regarding admiralty judgments, and perhaps other out-of-state judgments as well.<sup>304</sup> The ongoing disputes regarding the Articles' clause, as the more legally sophisticated of the Framers well understood, was whether the Articles' clause embodied only the same deference obligations that existed among independent states under the law of nations, or whether it strengthened and increased those obligations. We have seen that Madison had good reasons for wanting to give Congress the power to eliminate this uncertainty by legislating stronger deference obligations, but there is no indication that either Madison or his opponents believed they were thereby also giving Congress a right to abrogate the deference obligations that then existed among the states.<sup>305</sup>

This conclusion becomes even stronger if we accept the arguments of Crosskey, Sherry, and others that the constitutional constraints on federal lawmaking envisioned by the Framers also included the fundamental principles of the law of nations. Such arguments are consistent with the concern for vested rights that pervades much of Madison's thinking and writing during this period, not only with respect to the Full Faith and Credit Clause, but also regarding paper currency, enforcement of contracts, and a whole panoply of constitutional limitations and restrictions on debt obligations. It is hard to imagine that the man who advocated so strongly for all of those restrictions would have also advocated a Clause that he believed gave the federal legislature the right to relieve states of their obligations to enforce the debts or other vested rights incurred or declared in sister states.<sup>306</sup> Accordingly, it appears

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shown to be the product of a mistakenly "legalistic" approach to constitutional interpretation which was not part of Madison's original intent. We have seen that in a period without substantial judicial review of congressional lawmaking, the second sentence looks less like a "legal" grant of absolute discretionary power (and therefore insulated from judicial review) and more like a simple allocation of power to Congress rather than the states to carry out the purposes set forth generally in the first sentence of the Clause.

<sup>304</sup> See Engdahl, *supra* note 1, at 1584; Sachs, *supra* note 1, at 1224–26; Whitten, *FF&C and DOMA*, *supra* note 3, at 282. Whitten states that substantive deference was also applied to defensive uses of foreign judgments under English law and there was at least a serious argument that the Articles' clause and the first sentence of the constitutional clause embodied a rule of substantive deference for all sister state judgments. Whitten, *State-Court Jurisdiction*, *supra* note 3, at 534.

<sup>305</sup> Randolph's objection to the effects clause was not that it gave Congress new or unprecedented powers, but that it "usurp[ed]" existing state powers. 2 Farrand, *supra* note 1, at 488–89. It is unlikely that Randolph thought that state legislatures had the power to abrogate the deference obligations that existed under the Articles' clause or the law of nations. Accordingly, neither would the federal legislature.

<sup>306</sup> The hardest question that can be raised with respect to this line of argument is whether there were some questions that were so potentially divisive among the states that Madison would have recognized a power to abrogate the full faith and credit obligation with respect to such issues. It is worth noting that the one issue that might have caused such division, slavery, was ac-

quite likely that to Madison, any law enacted by Congress that diminished rather than strengthened the existing interstate full faith and credit obligation would have been a violation of the Constitution.

#### CONCLUSION

This Article is intended as a work of history, an inquiry into the way Madison's arguments and writing in connection with the Full Faith and Credit Clause fit into his broader views regarding fundamental constitutional questions. It has shown that the debate about the Full Faith and Credit Clause at the Constitutional Convention was not primarily about evidentiary versus substantive rules, but between advocates of a substantive but static and limited rule of deference clearly set out in the constitutional text, and those, like Madison, who favored a more vague but more dynamic rule of substantive deference that could be enforced and strengthened by congressional enactment. It has also shown that the Clause was part of a broader plan by Madison and others to curb the ability of states to take actions that were harmful to one another and to the nation as a whole. Madison was particularly concerned with state actions that he felt interfered with vested contractual rights created or enforced in other states, thereby jeopardizing the country's economic well being. In this way, the Full Faith and Credit Clause was closely tied to other provisions seeking to prevent states from infringing vested rights, like the contract and bankruptcy clauses.

Most centrally, however, this piece has been concerned with how Madison would have viewed the Full Faith and Credit Clause and the apparent conflict between the first and second sentences that looms so large in contemporary debates about the meaning of the Clause. We have seen that for Madison, viewing the issue not from the perspective of a court engaged in judicial review, but as a legislator, seeking to act within constitutional limits, the conflict largely disappears. The power granted to Congress in the second sentence is discretionary to reflect the fact that Congress, as the supreme lawmaking power of the nation, not only cannot be forced to take action, but would also be, Madison expected, the final arbiter of its own obligations under the Constitution.

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tually removed from the full faith and credit obligation and made the subject of a constitutional rule of substantive deference beyond the power of Congress to alter. *See* U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause). Even this disgraceful part of constitutional history, however, reflects the Founders' belief that it was deference to each other's laws that would bind the states together. Surely Madison would have been highly skeptical of any claim that it was necessary for a harmonious union that one state abrogate rights created under the laws of a sister state. In light of recent events like the federal government's suspension of "Don't Ask, Don't Tell" and refusal to enforce Section 3 of DOMA, it is certainly hard to imagine an argument that Section 2 of DOMA is necessary to preserve the Union.

Those obligations, however, would still include promotion of interstate harmony and the deference to each other's laws and judicial proceedings set forth in the first sentence of the clause. Laws that violated such obligations might not be unenforceable in Madison's political model, but they would be unconstitutional.

The interest in these issues, of course, is strongly influenced by current debates regarding the DOMA and the Full Faith and Credit Clause. The historical arguments made in this Article might be used to justify any of three rather different positions in that debate. First, one might argue that the Madisonian conception of the Full Faith and Credit Clause differs so dramatically from our own—colored as it is by 200 years of Supreme Court interpretive glosses that Madison might well have viewed with suspicion but that have now hardened into authoritative “law”—that analysis of Madison's thought, as well as other attempts to ascertain the original intent of the Framers, can provide little useful guidance on the contemporary legal issue of the constitutionality of DOMA. This is a respectable position, and one that implicates a large and ever-growing literature on the role of original intent in contemporary Constitutional interpretation.<sup>307</sup> I do not intend to add to it here.

A second position would be to emphasize Madison's 1787 belief in legislative supremacy and argue that as a practical, if not a normative matter, Madison believed that Congress under the new Full Faith and Credit Clause would be free to pass any law it liked regarding the effects of out-of-state judgments without fear of any institutional interference from the other branches of government, and that this justifies a reading of the second sentence of the Clause as a grant of “plenary” power. This strikes me as a disingenuous reading of Madison's thought, focusing only on practical political concerns and not on his broader normative vision. Moreover, it is inaccurate even as a statement of Madison's political theory, because while Madison recognized that Congress might have the power to act without effective constraint, he did not hope or believe that they would do so.

Finally, the third, and I think strongest, argument is that the core Madisonian conception of the Full Faith and Credit Clause required that states recognize and give substantial deference to the judgments and other official acts of sister states, particularly when they involved vested contract and property rights, including the contractual and property rights created by marriage. For Madison this obligation of sister-state deference was an obvious and necessary corollary to the creation of a federal union. While Madison acknowledged that the precise form and degree of that deference was somewhat uncertain, and he specifically sought to give the federal legislature power to define and strengthen that

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<sup>307</sup> See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

deference obligation over time, he hoped and believed that the legislators were constrained by fundamental constitutional norms from abrogating existing sister-state deference obligations. Accordingly, any law, like DOMA, which purports to leave states free to ignore important marital and other contractual rights granted pursuant to the laws and legal proceedings of sister states is a violation of that original Madisonian intent.