Unleashing the Guarantee Clause Against the Spirit of Innovation

Ricardo N. Cordova
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THE SPIRIT OF INNOVATION

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INTRODUCTION

According to the cherished historical anecdote, as Benjamin Franklin emerged
from the Philadelphia Convention, a passerby asked him, “Well [d]octor what have
we got a republic or a monarchy?”1 In a witty yet ominous reply, Franklin reportedly
quipped, “a republic . . . if you can keep it.”2 Indeed, although their original mandate
was merely to revise the Articles of Confederation, the delegates proposed a com-
pletely new government, one which James Madison described as a “compound
republic partaking both of the national and federal character.”3 A lesser-known fact
is that the delegates also adopted a provision that would guarantee a republican form
of government in each of the states. Ultimately, after debate and revision, the
Framers placed this provision—known today as the Guarantee Clause—in Article
IV, Section 4 of the Constitution, which reads: “The United States shall guarantee
to every State in this Union a Republican Form of Government, and shall protect
each of them against Invasion; and on Application of the Legislature, or of the
Executive (when the Legislature cannot be convened) against domestic Violence.”4

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University of New Mexico (2007). The views in this Article are my own and should not be
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2 Id.
4 U.S. CONST. art. IV, § 4.

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From the outset, however, the meaning of the Guarantee Clause proved elusive due to its lofty and undefined terms. Many divergent interpretations of the Clause sprouted during the ratification debates and continue to multiply.\textsuperscript{5} Today, there is near-universal agreement that a “Republican Form of Government,” at its core, is one in which power rests in citizens and is exercised through elected representatives in separate but coequal branches.\textsuperscript{6} Most scholars therefore believe that the Guarantee Clause prohibits, at minimum, a state from crowning a king or queen. Beyond those clear-cut cases, there is no consensus about what exactly the Guarantee Clause prohibits. Nor is there agreement as to who may enforce the Clause, much less how to do so.

Confounded by the murkiness of the Guarantee Clause, John Adams once claimed he “never understood” what the Clause meant and asserted “no other [man ever did or ever will.]”\textsuperscript{7} Adams felt that the word “Republican,” in particular, was “[s]o loose and [indefinite] that [s]uccessive [p]redominant [f]actions will put [g]losses and [c]onstructions upon it as different as light and darkness.”\textsuperscript{8} Others have noted that “it could be argued that the Clause is nothing but a Rorschach test.”\textsuperscript{9} For its part, the Supreme Court has largely refused to weigh in. Instead, for nearly two centuries, the Court has indicated that Guarantee Clause challenges to state action are embroiled in political questions that are beyond the purview of the federal judiciary.\textsuperscript{10} Congress, the only branch of the federal government to meaningfully enforce the Clause, has not invoked it since passing the Reconstruction Acts in the aftermath of the Civil War.\textsuperscript{11} So there the Guarantee Clause sits, like a lion on a leash, relegated to sporadic state court decisions and law review articles.

To be sure, interpreting the Guarantee Clause is a knotty task. And as Adams predicted, the Clause has proven enticing to many partisans. But these are far from compelling reasons to abandon a constitutional birthright. If the Guarantee Clause is to be scrapped, then it should be by dint of the Article V amendment process. Otherwise, at the risk of layering our own subjective glosses onto the clause, we have a duty to determine what it means.

Fortunately, the Guarantee Clause is not the indecipherable ink blot that some would have us believe. One of the main functions of the Clause was certainly to

\textsuperscript{5} See Jacob M. Heller, Note, Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions, 62 STAN. L. REV. 1711, 1718 (2010).
\textsuperscript{6} See id.
\textsuperscript{8} Id.
\textsuperscript{9} Kristin Feeley, Comment, Guaranteeing a Federally Elected President, 103 NW. U. L. REV. 1427, 1436 (2009).
\textsuperscript{11} WIECEK, supra note 1, at 247, 268–69.
prevent states from devolving into monarchies, which tended to be militaristic. As Thomas Paine put it when describing monarchies, “[w]ar is their trade, plunder and revenue their objects.” 12 Republics, Benjamin Rush said in contrast, were “peaceful and benevolent forms of government.” 13 For these reasons, the Founders believed that republics could not coexist with neighboring monarchies. 14 The Clause was understood, however, to do more than prevent a state from coronating a king and then declaring war on a neighboring state. Like the Constitution as a whole, the Guarantee Clause was a bundle of compromises between complicated individuals from many states facing many challenges. Understandably, then, the delegates built several functions into the Clause. Stated simply, the Guarantee Clause is not a one-trick pony.

The placement of the Clause alongside assurances against invasion and revolt strongly hints that the Clause was aimed at threats that could suddenly throw a state into disorder and jeopardize the union. With the embarrassment of Shays’ Rebellion fresh on their minds, the delegates undoubtedly designed the Guarantee Clause, in part, to prevent rebellion. 15 This was because the Founders feared that rebellion would quickly spiral into anarchy, which, by any definition, is antithetical to republicanism. As I will show, however, the Guarantee Clause was understood to guard against an additional peril—albeit one that is not expressly articulated in its text.

While I am reticent to search beyond constitutional text and chance wandering into fertile grounds for activism, the wording of the Guarantee Clause is inescapably ambiguous. Resort to Founding-era evidence is thus unavoidable. In such a situation, as Thomas Jefferson instructed, we should “carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was pas[sed].” 16 For those willing to look, a rich depository of Founding-era evidence sheds light on a forgotten function of the Guarantee Clause.

14 See THE FEDERALIST NO. 43, supra note 3, at 237 (James Madison) (“[G]overnments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature.”); see also THE FEDERALIST NO. 21, supra note 3, at 111 (Alexander Hamilton) (“Who can predict what effect a despotism established in Massachusetts, would have upon the liberties of New Hampshire or Rhode-Island; of Connecticut or New-York?”).
15 WIECEK, supra note 1, at 27–33.
As is often the case, an illuminating point of reference is *The Federalist Papers*, a source George Washington predicted “will merit the notice of [p]osterity.”\(^\text{17}\) In fact, *The Federalist Papers* are cited by jurists and scholars as evidence of the meaning of the Constitution more than any other historical source other than the Constitution itself.\(^\text{18}\) This is for good reason. *The Federalist Papers*, as Madison noted, “may fairly enough be regarded as the most authentic exposition of the text of the federal Constitution, as understood by the body which prepared [and] the authorities which accepted it.”\(^\text{19}\) Of special significance is Madison’s defense of the Guarantee Clause in *Federalist 43*, in which he argued that the Clause is intended to prevent “aristocratic or monarchical innovations” by the states.\(^\text{20}\) This phrase is a critical clue to uncovering the full meaning of the Guarantee Clause. Yet scholars have mentioned it only in passing and divorced from its historical context, as part of apocryphal claims that the Clause supports radical modern causes.\(^\text{21}\) This is unfortunate because Madison’s phrase, properly construed, speaks volumes.

Preliminarily, the phrase shows that the Guarantee Clause was originally understood to prevent changes of a monarchical or aristocratical nature—not just the extreme (and, today, unlikely) situation when a state formally establishes an aristocracy or monarchy. It should therefore be obvious that we need not wait until a state crowns a king to find that it has violated the Clause. But just what did Madison, not known to choose his words carelessly, mean by “innovations?” As used by the Founders, the word was a term of art usually understood to mean, quite pejoratively, novel changes to the structure of government.\(^\text{22}\) Such innovations, especially when implemented under the auspices of an emergency, were strongly


\(^\text{21}\) See, e.g., Francesca L. Procaccini, *Reconstructing State Republics*, 89 FORDHAM L. REV. 2157, 2171, 2230 (2021) (discussing the phrase, then arguing that “the new Democratic Congress” should invoke the Guarantee Clause to undertake “a large-scale reconstruction of our political economy at the state level” by, among other things, “abolishing the Electoral College [and] reconfiguring the Senate.”); Amar, *supra* note 20, at 759, 773 (acknowledging the phrase, then inquiring: “Are the extremes of wealth and poverty today—among equal citizens, equal voters—truly compatible with the spirit of Republican Government?”).

disfavored under the common law tradition. The Founding generation fully embraced this long-standing principle (which, for ease of reference, I will call the anti-innovation principle), including in the Declaration of Independence. Indeed, by 1787, the anti-innovation principle was deeply engrained in the American understanding of “Republican” government.

Viewed against this historical backdrop, a vital but long-neglected purpose of the Guarantee Clause comes into focus. As I will demonstrate, the Clause was originally understood to encompass the anti-innovation principle. This Article examines the evidence supporting this interpretation beginning, in Part I, with a review of the origins of the anti-innovation principle. Part II explores the refinement of the anti-innovation principle in the Colonial era. Part III turns to the emergence of a prototype of the Guarantee Clause in the Confederation era. Part IV discusses the drafting of the Guarantee Clause at the Philadelphia Convention. Part V brings us to the ratification debates relevant to the Guarantee Clause. The Conclusion sets forth my parting thoughts.

I. ORIGINS OF THE ANTI-INNOVATION PRINCIPLE

In the seventeenth and eighteenth centuries, the common law was not regarded as judge-made law, but rather the law of “long use” and long-standing custom. The common law grew organically by identifying widely and long-established principles of justice and applying them to specific controversies. To determine whether a governmental act comported with justice, judges determined whether the practice had continually been used throughout the jurisdiction for a very long period of time and thereby enjoyed “long usage.” In this way, the common law venerated the accumulated wisdom of past generations. Conversely, a practice that did not enjoy long usage was deemed “unusual” or an “innovation” and viewed with suspicion under the common law.

Edward Coke, one of the most influential English common law jurists of the seventeenth century, profoundly distrusted innovations in the law, writing, “when

23 See id. at 1745.
24 See id. at 1789–90.
25 Id. at 1768.
26 Id. at 1768–69.
27 Id. at 1745.
28 Id. A cousin of the anti-innovation principle is the doctrine of desuetude, under which a law or practice becomes unenforceable when it falls out of long usage, such that it is replaced by the custom of non-usage. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 96 (1990); see also John F. Stinneford, Death, Desuetude, and Original Meaning, 56 WM. & MARY L. REV. 531, 537 (2014). An infamous Colonial era example of this occurred when Parliamentary leaders attempted to abrogate the right to trial by jury by citing an obsolete act passed during the reign of Henry VIII. See EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC 1763–89, at 48 (3d ed. 1992).
any innovation or new invention starts up . . . [try] it with the [r]ules of the common [l]aw . . . for these be true [t]ouchstones to sever the pure gold from the [d]ross and sophistications of novelties and new inventions." 29 The primary innovation that concerned Coke was the importation of civil law practices from continental Europe into England, as he believed it would undermine the liberty of English subjects. 30 Coke explained that departing from the common law would not just be unwise, but dangerous:

For any [fundamental] point of the ancient [c]ommon laws and [customs] of the [realm], it is a [maxim] in [policy], and a [trial] by experience, that the [alteration] of any of them is most [dan-gerous]; For that which [has been] refined and perfected by all the wisest men in former succession of ages, and [proved] and approved by [continual] experience to be good [and] profitable for the common wealth, cannot without great hazard and [dan-ger] . . . be altered or [changed]. 31

In fact, Coke believed that supplanting the common law could destabilize the entire kingdom, noting, "[s]o dangerous a thing it is, to make or alter any of the rules or [fundamental] points of the [c]ommon law, which in truth are the [main] pillars, and supporters of the [fabric] of the [c]ommon-wealth." 32 Thus, Coke repeatedly asserted that Parliament lacked authority to deviate from the long-standing traditions embodied in the common law. 33 In 1628, Coke made similar assertions when he assisted in drafting the Petition of Right, which declared that King Charles had violated the rights of Englishmen under the Magna Carta and the common law. 34 This petition would later be modeled in the Declaration of Independence. 35

During the decades of political upheaval that followed the Glorious Revolution of 1688, the King and Parliament frequently made innovations, including to the structure of the government. 36 English subjects protested each innovation as contrary to long usage. 37 By the eighteenth century, Coke’s reasoning became a foothold for the notion that sovereign power was constrained by an unwritten constitution

33 Id. at 1778–81.
34 Id. at 1780–81.
35 Id. at 1781.
36 Id. at 1783.
37 Id.
exemplified by the principles of the common law.\textsuperscript{38} Parliament’s repeated abrogation of established customs would eventually become one of the primary motivations for the American Revolution.\textsuperscript{39}

Although William Blackstone was a Tory and opposed American independence, he was even more influential on American thought than Coke.\textsuperscript{40} Like Coke, Blackstone distrusted innovations in the law.\textsuperscript{41} As Blackstone wrote, albeit in softer tones than Coke, when a new act changes an established common law rule “the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.”\textsuperscript{42} Blackstone held the innovations of civil law in particular contempt, describing them as “an enslaving force that established a ‘new Roman empire’ over continental Europe and caused the people of Europe to lose their ‘political liberties.’”\textsuperscript{43}

\textbf{II. Refinement of the Anti-Innovation Principle in the Colonial Era}

Although the American colonists would come to vehemently disagree with Blackstone’s belief in parliamentary supremacy, they shared in his distrust of governmental innovations.\textsuperscript{44} In the British tradition, the Americans colonists generally accepted only time-tested ideas.\textsuperscript{45} As popular historians have noted, innovations were “horribly objectionable to Americans, who paradoxically were very conservative about such things.”\textsuperscript{46}

The American colonies were located on the periphery of the British Empire, but by the end of the eighteenth century they had universally adopted the English common law.\textsuperscript{47} Further, the colonies adhered to the English conception of constitutionalism under which a measure was constitutional only if it comported with long usage.\textsuperscript{48} Thus, Americans considered innovative or unusual governmental acts to be presumptively unconstitutional.\textsuperscript{49} But beginning in the 1760s, Parliament asserted

\begin{itemize}
  \item \textsuperscript{38} \textit{Id.} at 1785–86.
  \item \textsuperscript{39} \textit{Id.} at 1786.
  \item \textsuperscript{40} RUSSELL KIRK, \textit{RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION} 106–07 (Mitchell S. Muncy ed., 1997) [hereinafter KIRK, \textit{RIGHTS AND DUTIES}].
  \item \textsuperscript{41} Stinneford, \textit{The Original Meaning of “Unusual,” supra} note 22, at 1788–89.
  \item \textsuperscript{42} \textit{See} 1 \textit{WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND} 70 (1765).
  \item \textsuperscript{43} Stinneford, \textit{The Original Meaning of “Unusual,” supra} note 22, at 1788–89.
  \item \textsuperscript{44} \textit{Id.} at 1790.
  \item \textsuperscript{45} DANIEL J. BOORSTIN, \textit{THE AMERICANS: THE COLONIAL EXPERIENCE} 158 (1958) [hereinafter BOORSTIN, \textit{THE COLONIAL EXPERIENCE}].
  \item \textsuperscript{46} PAUL JOHNSON, \textit{A HISTORY OF THE AMERICAN PEOPLE} 133 (1st ed. 1997).
  \item \textsuperscript{47} Stinneford, \textit{The Original Meaning of “Unusual,” supra} note 22, at 1793.
  \item \textsuperscript{48} THOMAS E. WOODS, JR., \textit{NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY} 40 (2010) [hereinafter WOODS, \textit{NULLIFICATION}].
  \item \textsuperscript{49} Stinneford, \textit{The Original Meaning of “Unusual,” supra} note 22.
\end{itemize}
that its will, not custom and tradition, was the sole test of constitutionality. The practice, historians note, “always seemed to evolve to suit the interests and convenience of the British government.”

The colonists repeatedly decried Parliament’s acts as “innovations.” Consequently, they said that such acts violated the English constitution, which is an amalgamation of written and unwritten sources, including “charters, statutes, declarations, traditions, informal understandings, habits, and attitudes” that developed over the centuries. As James Wilson observed, Americans always considered the English constitution “the glorious [fabric] of Britain’s liberty,” “the monument of accumulated wisdom, and the admiration of the world.” John Adams described the English constitution as “the most perfect combination of human powers in society which finite wisdom has yet contrived and reduced to practice for the preservation of liberty and the production of happiness.” These inherited principles, according to Thomas Jefferson, could be traced back at least seven hundred years to the Saxon golden age. In the decade preceding Independence, Americans often characterized the conflict as a continuation of the historic struggle against royal prerogative power. Through it all, the patriots argued that they were “born the heirs of freedom” and assured themselves that “[they had] justice and the British constitution on [their] side.” And although the Founders would eventually come to abhor monarchy, they patterned the United States Constitution after the British constitution as closely as possible.
There were, however, many disparate sources of republican inspiration in the colonies. English Whig ideology, especially as articulated by Edmund Burke, was integral to the emerging corpus of American republicanism. Pamphlet after pamphlet cited European Enlightenment thinkers. Americans also drew deeply from their Christian convictions. As an exasperated Benjamin Franklin later asked when the Philadelphia Convention appeared deadlocked:

In this situation of this Assembly groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, [s]ir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings?

Indeed, the Bible accounted for thirty-four percent of the direct quotes of the Founding era—far more than any other single source. Classical antiquity was likewise highly influential, as reflected by the Greek and Latin phrases littered throughout colonial essays. The colonists’ writings frequently alluded to Homer, Plato, Aristotle, Plutarch, Cicero, Cato, Cincinnatus, and other authors and heroes of antiquity. They often referenced the Greek city-states and Rome as cautionary tales against decadence. Still, many aspects of the old Roman Republic were worth emulating. Romans enjoyed property protections and other immunities that were rare in the ancient world. Americans would imitate these and other time-tested Roman institutions like checks and balances and separation of powers. In a testament to the enduring influence of Rome, Joseph Warren

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60 KIRK, RIGHTS AND DUTIES, supra note 40, at 37.
62 See id. at 32–33.
63 Benjamin Franklin, Constitutional Convention Address on Prayer (June 28, 1787), in AM. RHETORIC: ONLINE SPEECH BANK (transcript available at https://www.americanrhetoric.com/speeches/benfranklin.htm [https://perma.cc/5WU3-A79C]).
65 See WOOD, AMERICAN REPUBLIC, supra note 54, at 49.
66 KIRK, RIGHTS AND DUTIES, supra note 40, at 69; BAILYN, supra note 61, at 23–24 (quoting Charles F. Mullett, Classical Influences on the American Revolution, 35 THE CLASSICAL J. 92, 93–94 (Nov. 1939)).
68 Id. at 102.
69 Id.
70 Id. at 101.
wore a toga when he addressed the public at the funeral of those killed in the Boston Massacre.\textsuperscript{71}

Until the completion of the bitter separation, though, “[t]he English constitution, properly understood and balanced, remained for the Americans . . . the model of how a government should be structured, ‘not so much from attachment by habit to such a plan of power . . . as from conviction that it was founded in nature and reason.’”\textsuperscript{72} Even the New York Sons of Liberty asserted they were “not attempting any change of Government . . . only a preservation of the Constitution.”\textsuperscript{73}

Meanwhile, for many, the British government seemed determined to subvert the constitution. Although Britain’s control of the American colonies had previously been lackadaisical, with royal governors generally beholden to the colonial assemblies, this began to change in 1763 when Britain won the French and Indian War.\textsuperscript{74} First, ministers of the crown started simultaneously serving in Parliament—a development the colonists decried as “corruption.”\textsuperscript{75} Then, pointing to the mountain of debt incurred in the war and the cost to maintain troops in the colonies, the British government implemented novel measures to extract revenue directly from Americans, even though they had no representatives in Parliament.\textsuperscript{76} During the ensuing debates over these measures, the British asserted that the colonists, without ever voting for anyone in Parliament, enjoyed “virtual representation.”\textsuperscript{77} Americans roundly rejected the specious new theory.\textsuperscript{78}

According to Edmund Burke, the Whig philosopher who was even more on the minds of the framers than John Locke,\textsuperscript{79} “a great spirit of innovation” had overtaken the British government.\textsuperscript{80} Burke defined an innovation as a drastic change that upended settled understanding and wisdom, engendering negative and unforeseeable consequences.\textsuperscript{81} This is not to say that Burke opposed change in and of itself. As he noted, “[a] state without the means of some change is without the means of its

\textsuperscript{71} WOOD, IDEA OF AMERICA, supra note 13, at 73.
\textsuperscript{72} WOOD, AMERICAN REPUBLIC, supra note 54, at 200 (quoting John Adams, Defence of the Constitutions of Government of the United States of America (1778), in THE WORKS OF JOHN ADAMS, supra note 55, at 300).
\textsuperscript{73} MAIER, FROM RESISTANCE TO REVOLUTION, supra note 59, at 96.
\textsuperscript{74} See JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPH AND TRAGEDIES AT THE FOUNDATION OF THE REPUBLIC 23 (1st ed. 2007) (explaining Britain’s need to enhance its management of the American colonies due to the “sheer scale” of the territory post-victory).
\textsuperscript{75} See WOOD, IDEA OF AMERICA, supra note 13, at 180.
\textsuperscript{76} KIRK, AMERICAN ORDER, supra note 67, at 310; see MORGAN, supra note 28, at 15–17 (explaining Britain’s “tightening up” of its customs service and enactment of the Sugar Act as some of the many methods designed to shift its financial burdens onto the colonies).
\textsuperscript{77} See WOOD, IDEA OF AMERICA, supra note 13, at 181–83.
\textsuperscript{78} See id. at 182–83.
\textsuperscript{79} KIRK, RIGHTS AND DUTIES, supra note 40, at vii–viii.
\textsuperscript{80} EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS 29 (1770).
\textsuperscript{81} See JESSE NORMAN, EDMUND BURKE: THE FIRST CONSERVATIVE 230 (2013).
conservation.**82 Crucially, Burke drew a sharp distinction between innovation and reform, noting that the latter is vital to good governance.**83 Burke explained that reform has seven key features, each of which shaped the contours of the anti-innovation principle in the eighteenth century. Specifically, a reform is: (1) made early; (2) proportionate to the problem to be addressed; (3) built on existing arrangements and reforms, drawing lessons from them; (4) measured, allowing those affected by it to adjust their behavior; (5) consensual to minimize conflict; (6) “cool in spirit” to maintain consensus; and (7) practical and achievable.**84

Jesse Norman, a biographer of Burke, has argued that the crisis in the American colonies is “a case study in inept political leadership” from a Burkean perspective.**85 As Norman notes, the crisis arose from a radical change in policy that the British did not implement gradually or with consensus.**86 Nor was the change “measured, proportionate, or cool in spirit.”**87 Not surprisingly, although Burke never expressly approved of American independence, he was sympathetic to moderate colonial complaints and urged a return to the practice of “salutary neglect” under which the British government largely treated the colonies as autonomous.**88 Burke recognized that “[t]he colonists [are] not only devoted to liberty, but to liberty according to English ideas, and on English principles.”**89 As historians have observed, in Burke’s view “[i]t was King George, with his stubborn insistence upon taxing the Americans directly, who was the innovator, the revolutionary.”**90 Burke argued that the only solution was to build “a rampart against the speculations of innovators” and adopt “a spirit of practicability, of moderation and mutual convenience.”**91 Unfortunately, the British government ignored Burke’s pleas.**92

This was not lost on Americans, who repeatedly maintained that they were adhering to the constitution, while the British government was betraying it.**93 John Dickinson, the “penman of the American Revolution,” saw that the “mother country [was] on the high road to ruin, oblivious of her ancestral liberties.”**94 In 1765, when

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82 Id. at 205 (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 19 (Frank M. Turner ed., 2003)).
83 See id. at 230–31.
84 Id. at 231.
85 Id. at 233.
86 Id.
87 Id.
89 NORMAN, supra note 81, at 252 (quoting EDMUND BURKE, SPEECH ON CONCILIATION WITH THE AMERICAN COLONIES 22 (London, J. Dodsley 1775)).
90 KIRK, RIGHTS AND DUTIES, supra note 40, at 51–52.
91 NORMAN, supra note 81, at 70 (quoting EDMUND BURKE, SPEECH ON AMERICAN TAXATION 51 (Bristol, W. Pine 1774)).
92 See id. at 81.
93 See MORGAN, supra note 28, at 89.
Parliament enacted the Stamp Act and claimed the power to bypass the colonial assemblies and directly tax the colonies, Dickinson and other Americans objected that it violated their traditional right of self-governance. 95  Dickinson, citing Coke, objected that the act was “an innovation; and a most dangerous innovation.” 96 As reflected by Dickinson’s objection, although the term “innovation” was generally defined neutrally in the late eighteenth century as “[c]hange by the introduction of novelty,” governmental innovations carried a profoundly pejorative meaning under the common law tradition. 97

Of course, identifying such innovations requires a good grasp of legal history. The revolutionary generation, while not without blemishes, was well-suited for the task. Together, the Founders comprised “one of the most remarkable group of men in history—sensible, broad-minded, courageous, usually well educated, gifted in a variety of ways, mature, and long-sighted, sometimes lit by flashes of genius.” 98 They had also read the same literature, legal sources, and histories as the English. 99 To wit, as Samuel Adams told his then-fellow Englishmen in 1767, “[w]e boast of our freedom . . . and we have your example of it. We talk the language we have always heard you speak.” 100

By 1775, Blackstone’s Commentaries on the Laws of England not only made the morass of English law understandable to anyone who was literate, but also sold almost as many copies in America as in England. 101 Justice Iredell later noted that Blackstone’s Commentaries “has been the manual of almost every student of law in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favorite reading of private gentlemen.” 102 This was fortunate for Americans. As Russell Kirk once argued, “Blackstone was a champion of ancient precedent and long-sanctioned usage” and had Americans not been guided by him, the “enduring value in the tested English rule of law might have been lost through ignorance or hasty improvisation.” 103

95  See WOODS, NULLIFICATION, supra note 48, at 103.
96  JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 18 (Phila. 1774).
100  Id.
101  See BOORSTIN, THE COLONIAL EXPERIENCE, supra note 45, at 201–02.
103  KIRK, AMERICAN ORDER, supra note 67, at 370.
Most Americans believed “what happened yesterday will come to pass again, and the same causes will produce like effects in all ages” because the laws of nature, in the words of the Son of Liberty James Otis, are “uniform and invariable.” As Montesquieu, according to George Bancroft, believed “[s]ociety, notwithstanding all its revolutions, must repose on principles that do not change.” It was the Founders’ awareness of the parallels in England’s past that made the actions of the British government so alarming. Any distinctions would be overshadowed by the cascading developments in the colonies—especially the quartering acts, the presence of standing armies, and the Boston Massacre. This much is clear from the patriots’ complaints, which dripped with references to analogous historical events, precedents, customs, and traditions. “I have but one lamp by which my feet are guided, and that is the lamp of experience,” Patrick Henry declared at the outset of the revolution. “Experience must be our only guide,” Dickinson would later argue during the Philadelphia Convention, because “[r]eason may mislead us.” Dickinson, perhaps more than any of the other Founders, revered custom and precedent. As historians have observed, in some of Dickinson’s works “the text disappears altogether in a sea of footnotes and footnotes to footnotes.”

The Founders, particularly those steeped in the law, also had a penchant for borrowing terms of art. And “clusters of words and ideas were, in the eighteenth century, sometimes shorthand clues to entire mind sets, and one can find them if one looks for them.” A good example is Americans’ repeated use of the term “innovations” to condemn the actions of Parliament and the King. Americans’ persistent use of the term not only reflects their suspicion of governmental innovations, but also of changes in language—which is itself an institution. When Noah Webster was accused of using linguistic novelties for the sake of simplicity, he defensively responded, “I do not innovate, but reject innovation,” and “I do nothing more than

104 Bailyn, supra note 61, at 85 (first quoting 10 THE PAMPHLETEER 115 (London, A. J. Valpy 1817); and then quoting JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES AGAINST THE ASPERSIONS OF THE HALIFAX GENTLEMAN IN HIS LETTER TO A RHODE-ISLAND FRIEND 1 (Boston, Edes & Gill 1765)).
106 See Bailyn, supra note 61, at 94–95.
107 See MAIER, FROM RESISTANCE TO REVOLUTION, supra note 59, at 192–95.
110 BAILYN, supra note 61, at 23.
111 See PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 57 (1997) [hereinafter MAIER, AMERICAN SCRIPTURE].
reduce the words to their original orthography, no other being used in our earliest
English books.”114 In fact, educated people disdained novelty.115 Achievement was
instead “in the creative adaptation of preexisting models to different circumstances,
and the highest of all praise went to imitations whose excellence exceeded that of
the examples that inspired them.”116

The anti-innovation principle was thus deeply engrained in virtually every facet
of American culture, law, and institutions. As alluded above, however, the British
government seemed increasingly determined to innovate on a whim. In 1766,
Parliament enacted the Declaratory Act, asserting the “full power and authority to
make laws and statutes of sufficient force and validity to bind the colonies and
people of America . . . in all cases whatsoever.”117 In 1767, Parliament threatened
to “suspend” the New York assembly until it agreed to provide housing, meals, and
other provisions to British troops stationed there under the Quartering Act.118 And
in 1774, as part of the Coercive Acts, Parliament abrogated the Massachusetts
charter and turned almost all positions in the colonial government into positions to
be appointed by the Governor, the King, or Parliament, effectively quashing the
colony’s right to self-governance.119 The same year, Parliament passed the Quebec
Act, extending Quebec’s boundaries and reinstating French civil law.120 Outraged
patriots repeatedly denounced these acts as “innovations.”121 Governmental innova-
tions were not only becoming closely associated with monarchy, but also among the
central evils enabled by the British system.

When the First Continental Congress convened in 1774, it alluded to the anti-
innovation principle, listing, among other complaints, that “[a]ssemblies have been
frequently dissolved, contrary to the rights of the people, when they attempted to de-
liberate on grievances.”122 Richard Henry Lee (the “Cicero of America”) noted that

114 BOORSTIN, THE COLONIAL EXPERIENCE, supra note 45, at 281.
115 See MAIER, AMERICAN SCRIPTURE, supra note 111, at 104.
116 Id.
117 Declaratory Act of March 18, 1766, reprinted in HANNIS TAYLOR, THE ORIGIN AND
GROWTH OF THE AMERICAN CONSTITUTION app. V, at 497 (1911).
121 See Stinneford, Original Meeting of “Unusual,” supra note 22, at 1800.
these rights were built on the “fourfold foundation” of natural law, the British constitution, the charters of the colonies, and “immemorial usage.”

James Duane of New York similarly argued that Americans should appeal to “the laws and constitution of the country from whence we sprung.” Unlike many of the French reformers of 1789, who “held precedent, prescription, and custom in contempt, as if such influences were the dead hand of the past,” American patriots “intended no radical break with the past [because] they thought of themselves as conservators rather than as innovators.” They emphasized that they were only acting “as Englishmen, their ancestors in like cases have usually done.” The colonists, according to Richard Henry Lee, sought “nothing more than a necessary assertion of social privileges founded in reason . . . and rendered sacred by a possession of near two hundred years.”

Even after the bloodshed at Lexington and Concord, Ticonderoga, and Bunker Hill, the colonists proceeded cautiously, hoping for compromise. In a last-ditch attempt at reconciliation, they sent the so-called Olive Branch Petition to the King. Although the petition professed allegiance to the King and blamed his “artful and cruel” advisors for the “new system of statutes and regulations adopted for the administration of the colonies,” American attitudes toward the King, in truth, had soured significantly by this time. Whereas they had once wishfully asserted that the King was acting under the influence of corrupt ministers, many Americans had come to believe that he was at the center of a tyrannical plot. Caution was nonetheless crucial for the colonists. Long-standing English precedents held that rebellion was a last resort, even when there was revolutionary consensus among the people. Prudence also dictated that if the “advantages hoped from the change, are not great enough to overbalance some terrible mischiefs” the people must “defer their designs to some more convenient opportunity.” There was good reason for deference given Britain’s status as the world’s strongest military and financial power.

When the need for resistance became unmistakable, the colonists often cited religious justifications, as exemplified by Benjamin Franklin’s proposed national motto that “[r]ebellion to [t]yrants is [o]bedience to God.” This aligned neatly

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123 MCDONALD, NOVUS ORDO, supra note 59, at 57.
124 Id. at 58.
125 KIRK, RIGHTS AND DUTIES, supra note 40, at 41, 53.
126 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 122, at 67.
127 Unger, supra note 108, at 64.
129 Id. at 159–60.
130 See MAIER, FROM RESISTANCE TO REVOLUTION, supra note 59, at 237–40.
131 Id. at 35–36.
132 Id. at 38 (quoting FRANCIS HUTCHESON, 2 SYSTEM OF MORAL PHILOSOPHY 277 (1755)).
with classical Whig principles, according to which such resistance was not actually defiance of authority, but rather opposition to men pretending to possess authority that they had forfeited through their own lawlessness. Colonial writers therefore repeatedly denied that they were in rebellion, arguing that they were instead “taking up arms . . . against usurpation and tyranny” by rulers who had surrendered their authority. Under the Whig interpretation of history embraced by most patriots, “[i]f the events of 1688 and 1776 were revolutions at all, they were counter-revolutions, intended to restore the old constitutions of government.”

As you know, reconciliation with Britain would not be peaceful. The King refused to receive the Olive Branch Petition and proclaimed that the colonies were in open rebellion. The patriots were painfully learning that they not only needed to establish independent governments, but that they also needed to abolish monarchy and hereditary rule. Although the complex tapestry of American republicanism was still being woven, one thing was becoming plain: in America, as Thomas Paine declared in *Common Sense*, law should be the only king.

After the royal colonial governments collapsed, the Continental Congress called for the creation of provincial governments and constitutions. Many states turned to the British constitution as a model, seeking simply to “correct those errors and defects which are to be found in the most perfect constitution of government which ever the world has yet been blessed with.” While John Adams was exuberant that Americans had an opportunity “to form and establish the wisest and happiest government that human wisdom can contrive,” he advocated for the continuity of colonial governments in his widely circulated and influential pamphlet, *Thoughts on Government*. In it, he cautioned, “[a]t present it will be safest to proceed in all established modes, to which the people have been familiarised by habit.”

As historians have observed, “[a]t first it was only gradually and cautiously that the individual colonies refashioned their governments.” And “[i]n devising new governments for the states, the Americans built on deep colonial precedents and could act with a confidence born of experience.” Americans, though agitated by

134 See MAIER, FROM RESISTANCE TO REVOLUTION, supra note 59, at 40.
135 Id. at 245 (quoting *A Church of England Man*, N.Y. J., Nov. 10, 1774).
136 KIRK, RIGHTS AND DUTIES, supra note 40, at 50.
137 MORGAN, supra note 28, at 70.
138 See MAIER, FROM RESISTANCE TO REVOLUTION, supra note 59, at 287–91.
139 See id. at 296.
140 WOOD, AMERICAN REPUBLIC, supra note 54, at 202.
142 Id.
143 BOORSTIN, THE NATIONAL EXPERIENCE, supra note 53, at 407.
Britain’s innovations, were especially fond of its system of mixed government and thus created republican versions of it.\textsuperscript{145} The “fine design” of the British constitution, Richard Henry Lee remarked, had simply been “spoiled in the execution.”\textsuperscript{146}

In June 1776, Lee moved the Continental Congress to declare “that these united colonies are, and of right ought to be, free and independent states.”\textsuperscript{147} According to those supporting it, Lee’s resolution was merely to “declare a fact which already exists.”\textsuperscript{148} But if this was truly a modest resolution, then what are we to make of the Declaration of Independence and its highly abstract language about the right to alter or abolish any form of government? It must be remembered that the Declaration was, foremost, calculated to appeal to the French, from whom the patriots urgently needed aid.\textsuperscript{149} Moreover, the document was not as radical as might appear at first blush. The Declaration references a right to form an improved government, not uproot the state itself or transform society.\textsuperscript{150}

Nor did the document jettison bedrock doctrines like the anti-innovation principle. In fact, the Declaration gives a nod to the anti-innovation principle in its list of grievances, citing “taking away our [c]harters, abolishing our most valuable [l]aws, and altering fundamentally the [f]orms of our [g]overnments.”\textsuperscript{151} Referencing the Quebec Act, the Declaration also faults Parliament “[f]or abolishing the free [s]ystem of English [l]aws in a neighbouring [p]rovince, establishing therein an [a]rbitrary government, and enlarging its [b]oundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these [c]olonies.”\textsuperscript{152}

Even so, Jefferson and the other Founders sensed the tension between declaring independence and the anti-innovation principle, noting:

\begin{quote}
Prudence, indeed, will dictate that [g]overnments long estab-
lished should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably
\end{quote}

\textsuperscript{145} See WOOD, IDEA OF AMERICA, supra note 13, at 191; WOOD, AMERICAN REPUBLIC, supra note 54, at 201–02.
\textsuperscript{146} Letter from Richard Henry Lee to Edmund Pendleton (May 12, 1776), in \textsc{1 The Letters of Richard Henry Lee, 1762–1778}, at 190–91 (James C. Ballagh ed., 1911), https://babel.hathitrust.org/cgi/pt?id=coo1.ark%3A%2F13960%2Ft4rj51s0v&seq=10 [https://perma.cc/F2VJ-TNUS].
\textsuperscript{147} ELLIS, supra note 74, at 53 (quoting Richard Henry Lee).
\textsuperscript{148} MAIER, AMERICAN SCRIPTURE, supra note 111, at 42 (quoting George Wythe).
\textsuperscript{149} See KIRK, RIGHTS AND DUTIES, supra note 40, at 57.
\textsuperscript{150} See KIRK, AMERICAN ORDER, supra note 67, at 411.
\textsuperscript{151} THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
\textsuperscript{152} Id.
the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.\textsuperscript{153}

Applying this rubric, they concluded that declaring independence did not violate the anti-innovation principle:

Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states.\textsuperscript{154}

The patriots held a fascinating duality of thought in this. For although they were technically revolutionaries, they were conservatives in a more fundamental sense. As Professor John F. Stinneford astutely observed in his examination of the original meaning of the Eighth Amendment, “[t]he American Revolution is perhaps unique among the revolutions of modern times, in that those who conducted it saw themselves as fighting to preserve, rather than throw off, the legal traditions of the government against which they rebelled.”\textsuperscript{155}

Many historians have made similar observations. Edmund Morgan noted that “[t]hroughout the war and after, Americans maintained that they were preserving the true tradition of English history, a tradition that had been upset by forces of darkness and corruption in England itself.”\textsuperscript{156} Daniel Boorstin found that “[t]he most obvious peculiarity of our American Revolution is that, in the modern European sense of the word, it was hardly a revolution at all.”\textsuperscript{157} H. Trevor Colbourn observed that “[i]n insisting upon rights which their history showed were deeply embedded in antiquity, American Revolutionaries argued that their stand was essentially conservative; it was the corrupt mother country which was pursuing a radical course of action, pressing innovations and encroachments upon her long-suffering colonies.”\textsuperscript{158}

Russell Kirk likewise recognized that patriots “thought of themselves as conservators rather than as innovators,” and “as the defenders of a venerable constitution, not

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Stinneford, \textit{The Original Meaning of “Unusual,”} supra note 22, at 1792.
\textsuperscript{156} MORGAN, supra note 28, at 7.
\textsuperscript{157} DANIEL BOORSTIN, THE GENIUS OF AMERICAN POLITICS 68 (1953).
as marchers in the dawn of a Brave New World."\textsuperscript{159} Kirk thus concluded that "it was a revolution not made, but prevented."\textsuperscript{160}

Although some like Charles Beard have maligned the motives of the Founders, most historians have recognized that the Founders’ intentions were conservative.\textsuperscript{161} Even historians who emphasize the radical ideas of the American Revolution largely concede this point. Bernard Bailyn admitted that:

\textbf{[T]he primary goal of the American Revolution, which transformed American life and introduced a new era in human history, was not the overthrow or even the alteration of the existing social order but the preservation of political liberty threatened by the apparent corruption of the constitution, and the establishment in principle of the existing conditions of liberty.]\textsuperscript{162}}

Building on Bailyn’s research, Pauline Maier recognized that the American Revolution “was conservative since it sought to preserve Britain’s historic system of governance.”\textsuperscript{163} Gordon S. Wood conceded that the American Revolution was hardly revolutionary when compared to those of figures like Robespierre, Lenin, and Mao.\textsuperscript{164} Wood further noted that the Founders’ reverence for legal custom “was what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it.”\textsuperscript{165} Although he ultimately dismissed this a “superficial gloss,” Wood has acknowledged that “[Americans’] repeated insistence that they were the true guardians of the British constitution, even enjoying it ‘in greater purity and perfection’ than Englishmen themselves, lent a curious conservative color to the American Revolution.”\textsuperscript{166}

What did the Founders say for themselves on the subject? When the last Royal Governor of Virginia, Lord Dunmore, proclaimed the colony to be in rebellion, Americans replied that he was the rebel, and they were the defenders of the constitution.\textsuperscript{167} John Adams declared that the “republican spirit, which is a spirit of true virtue, and honest independence” was “so far from being incompatible with the British constitution, that it is the greatest glory of it.”\textsuperscript{168} Edmund Burke would later

\begin{footnotes}
\item\textsuperscript{159} Kirk, Rights and Duties, supra note 40, at 53–54.
\item\textsuperscript{160} Id. at 60.
\item\textsuperscript{161} See Colbourn, supra note 158; see also Maier, American Scripture, supra note 111, at 30.
\item\textsuperscript{162} Bailyn, supra note 61, at 19.
\item\textsuperscript{163} Maier, American Scripture, supra note 111, at 30.
\item\textsuperscript{164} See Wood, American Revolution, supra note 99, at 3–4.
\item\textsuperscript{165} Wood, American Republic, supra note 54, at 10.
\item\textsuperscript{166} Id. at 12–13.
\item\textsuperscript{167} See Clinton Rossiter, Seedtime of the Republic 395 (1953).
\item\textsuperscript{168} John Adams, The Letters of Novanglus (1775), in 2 Papers of John Adams 278 (Robert J. Taylor et al. eds., 1977).
\end{footnotes}
recount that he had several conversations with Benjamin Franklin in London and “in
none of which, soured and exasperated as his mind certainly was, did he discover
any other wish in favour of America than for a security to its ancient condition.”

By blaming the King for their grievances, Americans even adhered to the customary manner that the English announced rebellion. As Russell Kirk once explained, separation was “a hard necessity” and “was meant not as a repudiation of their past, but as a means for preventing the destruction of their pattern of politics by King George’s presumed intended revolution of arbitrary power.” Thomas Jefferson best relayed Americans’ reluctantly revolutionary mood when he explained that the goal of the Declaration of Independence was

[n]ot to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before, but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion.

Although the Declaration of Independence is often portrayed as the sole embodiment of thought that filled the air, Jefferson borrowed liberally from other sources. Decades later, John Adams alleged that there was “not an idea in it, but what had been [hackneyed] in Congress for two years before.” (In fact, Adams went to his grave insisting that a resolution he drafted and introduced to Congress in May 1776 was the real declaration of independence.) And to Jefferson’s dismay, Congress rewrote, deleted, and moderated large swaths of the rough draft of the Declaration he prepared with the Committee of Five.

Albeit overshadowed by the Declaration, there were at least 90 state and local resolutions on independence, many of which are arguably better reflections of why

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169 EDMUND BURKE, AN APPEAL FROM THE NEW TO THE OLD WHIGS 26 (1791).
170 See MAIER, AMERICAN SCRIPTURE, supra note 111, at 38.
171 KIRK, RIGHTS AND DUTIES, supra note 40, at 58.
173 See KIRK, AMERICAN ORDER, supra note 67, at 401; MAIER, AMERICAN SCRIPTURE, supra note 111, at 98–99, 124.
175 ELLIS, supra note 74, at 50.
176 MAIER, AMERICAN SCRIPTURE, supra note 111, at 143, 145, 148–49.
the American people finally chose separation. While these resolutions eagerly authorized independence, they often balked at reforming their governments. Connecticut, for example, readily assented to declaring independence and making plans for a confederation, but added the provision that “the administration of [g]overnment and the power of forming [g]overnments . . . ought to be left and remain to the respective [c]olonial [l]egislatures.” Pennsylvania enthusiastically agreed to “declaring the United Colonies free and independent [s]tates, provided the forming the [g]overnment, and the [r]egulation of the internal [p]olice of this Colony be always reserved to the [p]eople of the said Colony.”

Topsfield, Massachusetts, is representative of the many localities that declared independence (or passed resolutions authorizing such declarations). Topsfield unreservedly approved a declaration of independence, yet hesitated as to reorganizing its government, citing the anti-innovation principle:

As innovations are always dangerous, we heartily wish that the ancient rules in the Charter, which this Province has been so much contending for, might be strictly adhered to, until such time as the whole of the people of this Colony have liberty to express their sentiments in respect to that affair as fully as they have in the case of independence.

In sum, even in the ostensibly radical act of founding new and independent republics, Americans had held fast to the anti-innovation principle.

III. EMERGENCE OF THE GUARANTEE CLAUSE IN THE CONFEDERATION ERA

Having mutually pledged their lives, fortunes, and sacred honor to achieving independence, the Founders were not about to trade one type of tyranny for another. As Richard Henry Lee once told Samuel Adams, Americans had not fought the British only to be “brought under the despotic rule under the notion of ‘[s]trong government,’ or in the form of elective despotism: [c]hains still being [c]hains, whether made of gold or iron.” It is thus understandable why Americans established a weak central government in the Articles of Confederation. But not all was well in young America. Among other challenges, America faced a postwar economic

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177 See id. at 48–49.
178 Delegates of Connecticut in Congress Instructed to Propose to that Body to Declare the United Colonies Free and Independent States, N. ILL. UNIV. DIGIT. LIBR. (June 14, 1776), https://digital.lib.niu.edu/islandora/object/niu-amarch%3A96689 [https://perma.cc/6SR2-69UV].
180 Instructions to Mr. John Gould, N. ILL. UNIV. DIGIT. LIBR. (June 21, 1776), https://digital.lib.niu.edu/islandora/object/niu-amarch%3A86051 [https://perma.cc/ZQ7G-H8XF].
181 MAIER, RATIFICATION, supra note 144, at 67 (quoting Richard Henry Lee).
downturn and endemic political unrest. George Washington seemed to speak for many when, in 1786, he told John Jay that America was “tottering.”

A near-tipping point came later that year when, partly under the command of Daniel Shays (who Alexander Hamilton dubbed a “desperate debtor” in Federalist 6), mobs of impoverished Massachusetts farmers obstructed tax collection and foreclosures and prevented the courts from sitting. Thereafter they reorganized into a paramilitary force. According to some reports, the insurgents wished to “annihilate all debts public [and] private” and believed “the property of the United States, has been protected from confiscation of Britain by the joint exertions of all, and therefore ought to be the common property of all.” Congressman Henry Lee asserted that the mobs not only wished to erase debts and redistribute property, “but to reunite with Britain.” Unlike much of the frenzied rhetoric about the uprising, Lee’s claim was believable. After all, the British were stirring discontent among the Native Americans on the frontier. The British were also occupying forts in the Northwest in anticipation of America’s demise (not to mention in defiance of the 1783 Treaty of Paris). Making matters worse, Spain was squeezing the Southwest. Before the Revolutionary War began, John Dickinson warned that victory would only earn “[a] multitude of [c]ommonwealths, [c]rimes and [c]alamities, [c]enturies of mutual [j]ealousies, [h]atreds, [w]ars of [d]evastation; till at last the exhausted [p]rovinces shall sink into [s]lavery under the yoke of some fortunate [c]onqueror.”

Unable to rely on militia or afford to raise a special force to quell Shays’ Rebellion, the Massachusetts state government found itself in an embarrassing predicament. Congress was equally helpless because the Articles of Confederation did not

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182 WIECEK, supra note 1, at 28–31.
184 THE FEDERALIST No. 6, supra note 3, at 21–26 (Alexander Hamilton).
185 MAIER, RATIFICATION, supra note 144, at 15.
186 WIECEK, supra note 1, at 31.
188 MAIER, RATIFICATION, supra note 144, at 16.
189 Id. at 17.
190 Id.
191 See MORGAN, supra note 28, at 135.
192 Id.
193 Id. (quoting John Dickinson).
194 Id.
195 See WIECEK, supra note 1, at 31.
give it clear authority to suppress domestic uprisings.\footnote{196} Henry Lee told Washington, “we are all in dire apprehension that a beginning of anarchy with all its calamity has approached, [and] have no means to stop the dreadful work.”\footnote{197} Ultimately, Major General Benjamin Lincoln had to appeal to wealthy Bostonians to fund a mercenary force to suppress the uprising.\footnote{198}

In response to the ordeal, Thomas Jefferson famously quipped, “I like a little rebellion now and then,” and “the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”\footnote{199} The other Founders were not so sanguine. Unlike the Sage of Monticello, they were aghast at Shays’ Rebellion and the fissures it exposed in the confederation.\footnote{200} In a letter to Madison, Henry Lee lamented “[t]he United States who ought to be able to aid the government of particular states in distresses like these are scarcely able to maintain themselves.”\footnote{201} Madison carried this theme into his pamphlet, Vices of the Political System of the United States, the sixth of which was the “[w]ant of Guaranty to the states of the Constitutions [and] laws against internal violence.”\footnote{202}

For Madison, the abuses of state governments were the most troubling.\footnote{203} He witnessed such abuses firsthand while he was a member of the Virginia House of Delegates, which passed legislation that hurt creditors and violated property rights.\footnote{204} Disillusioned by this experience, Madison complained that the states had passed “vicious” laws whose “multiplicity,” “mutability,” and “injustice” called “into question the fundamental principle of republican [g]overnment, that the majority who rule in such [g]overnments, are the safest [g]uardians both of public [g]ood and private rights.”\footnote{205} Madison and other nationalists feared that such turmoil invited rebellion, rebellion produced anarchy, and once anarchy prevailed, order could only be restored through a counterrevolution or military coup, either of which might end

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\begin{itemize}
  \item \footnote{196} Id. at 34–35.
  \item \footnote{197} MAIER, RATIFICATION, supra note 144, at 16 (quoting Henry Lee).
  \item \footnote{198} Id.
  \item \footnote{200} WIECEK, supra note 1, at 33.
  \item \footnote{201} Id. at 39 (quoting Henry Lee).
  \item \footnote{202} James Madison, Vices of the Political System of the United States (Apr. 1787), in FOUNDERS ONLINE, NAT’L ARCHIVES, https://founders.archives.gov/documents/Madison/01-09-02-0187 [https://perma.cc/33J7-LNGC].
  \item \footnote{203} GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 157 (2006).
  \item \footnote{204} JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 59 (Mark C. Carnes ed., 3d ed. 2007).
  \item \footnote{205} Madison, supra note 202; see RAKOVE, supra note 204, at 50.
\end{itemize}
in monarchy.206 Thus, their concern was not just monarchy, but also the ingredients that might brew one.

In preparation for the Philadelphia Convention, Madison began scouring the history of ancient and contemporary confederacies and republics.207 (This, per historians, was “characteristically Madisonian behavior,” as he often compensated for his deficiencies as an orator by being more prepared than his opponents.208) Madison summarized his findings in Notes on Ancient and Modern Confederacies, which historian Douglass Adair argued was “the most fruitful piece of scholarly research ever carried out by an American.”209 Having identified the defects of confederacies, Madison applied his findings in Vices and began preparing the famous Virginia Plan.210 A few months before the convention assembled, Madison wrote a letter to Virginia Governor Edmund Randolph outlining the Virginia Plan, which included a prototype of the Guarantee Clause.211 In his letter, Madison emphasized the need to “expressly guarantee[] the tranquility of the [s]tates against internal as well as external dangers,” adding that “unless the Union be organized efficiently [and] on [r]epublican [p]rinciples, innovations of a much more objectionable form may be obtruded, or in the most favorable event, the partition of the Empire into rival [and] hostile confederacies, will ensue.”212

Madison’s mention of “innovations of a much more objectionable form” was a reference to rumors of a conspiracy to install a monarch in America.213 One of these rumors was that Nathaniel Gorham, president of the Confederation Congress, was so distraught over Shays’ Rebellion that he solicited Prince Henry of Prussia to serve as king of the United States.214 Although evidence of this alleged plot is inconclusive, James Monroe later alleged that Gorham told Prince Henry about “his fears that America could not sustain her independence, and asked the prince if he could be induced to accept regal power on the failure of our free institutions.”215 Once verboten, gossip of an American regency had become so pervasive by 1786 that George Washington remarked, “I am told that even respectable characters speak of a monarchical form of government without horror.”216

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206 WIECEK, supra note 1, at 49–50.
208 ELLIS, supra note 74, at 101.
211 WIECEK, supra note 1, at 41.
213 WIECEK, supra note 1, at 42 (quoting James Madison).
214 Id. at 45.
215 MCDONALD, NOVUS ORDO, supra note 59, at 181 (quoting James Madison).
216 WIECEK, supra note 1, at 47.
Relapse into monarchy was a constant fear for the Founders. Republics, prone to “inner convulsions and outer pressures,” were historically rare and notoriously fragile.\(^\text{217}\) The only eighteenth century examples of European republics were the Swiss cantons, the Italian city-states, and the Dutch provinces—each of which were tiny and in varied degrees of decline.\(^\text{218}\) Even expansive and virtuous ancient republics had collapsed.\(^\text{219}\) England’s sole experiment with republicanism was disastrous, leading to a dictatorship and restoration of the monarchy.\(^\text{220}\) As the ordinarily optimistic Thomas Jefferson cautioned in 1776, “[r]emember how universally the people run into the idea of recalling Charles the 2d. after living many years under a republican government.”\(^\text{221}\) Alexander Hamilton later predicted a “dismemberment of the Union and monarchies in different portions of it” if the Constitution were not ratified.\(^\text{222}\)

IV. DRAFTING THE GUARANTEE CLAUSE

In May 1787, delegates arrived at a convention in Philadelphia to revise the Articles of Confederation.\(^\text{223}\) (Only twelve states sent delegates; Rhode Island sat out, citing “fear . . . of making innovations on the rights and liberties of the citizens at large.”\(^\text{224}\)) What followed was “one of the most brilliant displays of learning in political theory ever shown in a deliberative assembly.”\(^\text{225}\) By this time, most Americans had come to the realization that republicanism, not monarchy, “embodied the ideal of the good society as it had been set forth from antiquity through the eighteenth century.”\(^\text{226}\) Yet gossip was circulating that the convention was negotiating to crown a king.\(^\text{227}\)

Rumors of an American regency were so rampant that the delegates felt it necessary to deny that they were conspiring to establish a monarchy.\(^\text{228}\) These rumors, coupled with the humiliation of Shays’ Rebellion, reinforced the growing sentiment

\(^{217}\) Bailyn, supra note 61, at 281.
\(^{218}\) Wood, Idea of America, supra note 13, at 58.
\(^{219}\) See Wood, American Republic, supra note 54, at 92.
\(^{220}\) See id.
\(^{223}\) See Forrest McDonald, E Pluribus Unum: The Formation of the American Republic 1776–1790, at 162–66 (2d prtg. 1965) [hereinafter McDonald, E Pluribus Unum].
\(^{225}\) McDonald, E Pluribus Unum, supra note 223, at 166.
\(^{226}\) Wood, American Republic, supra note 54, at 59.
\(^{227}\) McDonald, Novus Ordo, supra note 59, at 79.
\(^{228}\) Wieck, supra note 1.
that some assurance of republican government was necessary. Madison asserted that the convention would “decide forever the fate of republican government.” As the convention was called to order, Madison and the other members of the Virginia Delegation were busily working out the details of the Virginia Plan, their blueprint for the Constitution. Section 11 of the plan, which Randolph presented to the convention on May 29, provided: “Resd. that a [r]epublican [g]overnment [and] the territory of each [s]tate, except in the instance of a voluntary junction of [g]ov-
ernment [and] territory, ought to be guaranteed by the United States to each [s]tate.” But when small-state delegates bristled at the overall influence allotted to large states under the Virginia Plan, debate on the Clause was postponed.

A few weeks later, Madison proposed the following amendment: “[T]hat a republican [Constitution and] its existing laws ought to be guaranteed to each state by the [United] States.” Randolph seconded the amendment, as New York delegate Robert Yates observed, “because a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy.” This version was approved, but further action was tabled for several weeks as the delegates hammered out a compromise between the small and large states on the pivotal question of representation in Congress.

When debate on the Guarantee Clause resumed, Gouverneur Morris of Pennsylvania pointed out that as the Clause was drafted, the federal government would have to guarantee “such laws as exist in [Rhode] Island,” a result he found undesirable. (At that time, Rhode Island was the only state without a constitution and was still operating under a charter granted by King Charles II in 1663.) James Wilson, another renowned delegate from Pennsylvania, responded that “[t]he object is merely to secure the States [against] dangerous commotions, insurrections and rebellions.” George Mason (who later swore he would “sooner chop off [my own] right hand than put it to the Constitution [as it stood]” due, among other things, to the inclusion of provisions that he felt would “afford precedents for other innovations”),

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229 Id. at 49–50.  
230 See Chernow, supra note 222, at 227 (quoting James Madison).  
231 See Wiecek, supra note 1, at 51.  
232 Resolutions Proposed by Mr. Randolph in Convention (Madison’s Notes, May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20, 22 (Max Farrand ed., 1911).  
233 Id. at 204–06 (Yates’s Notes, June 11, 1787).  
234 Id. at 202 (Madison’s Notes, June 11, 1787).  
235 Id. at 206 (Yates’s Notes, June 11, 1787).  
236 Wiecek, supra note 1, at 56–57.  
237 2 FARRAND’S RECORDS, supra note 109, at 47 (Madison’s Notes, July 18, 1787).  
239 2 FARRAND’S RECORDS, supra note 109, at 47 (Madison’s Notes, July 18, 1787).  
240 THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE
similarly argued that the Clause was to protect against sedition.241 Randolph was adamant, however, that while this was certainly one of its purposes, the provision also needed “to secure [r]epublican [g]overnment.”242

Madison then proposed another formula, melding the Clause together with express assurances against invasion and domestic violence: “[T]hat the Constitutional authority of the States shall be [guaranteed] to them respectively [against] domestic as well as foreign violence.”243 This amendment drew two main objections. First, other delegates felt that it might interfere with the ability of the people to make any changes to their existing governments and constitutions.244 For example, William Houston of New Jersey “was afraid of perpetuating the existing [c]onstitutions of the [s]tates” because “[t]hat of Georgia was a very bad one, and he hoped it would be revised . . . .”245

The second objection to Madison’s amendment was that it did not condemn monarchy.246 Despite his once-rumored monarchical inclinations, Nathaniel Gorham warned that:

[A]n enterprising Citizen might erect the standard of Monarchy in a particular State, might gather [partisans] from all quarters, might extend his views from State to State, and threaten to establish a tyranny over the whole [and] the [general government] be compelled to remain an inactive witness of its own destruction.247

To alleviate these concerns, James Wilson proposed this amendment: “[T]hat a [r]epublican (form of [government] shall) be [guaranteed] to each [s]tate [and] that each [s]tate shall be protected [against] foreign [and] domestic violence.”248 The Committee of the Whole approved this iteration of the clause and sent it to the Committee of Detail, where Wilson was instrumental in restyling the Clause, along with the rest of Article IV, Section 4, into their present formulation.249
V. Ratification of the Guarantee Clause

After the Philadelphia Convention adjourned, representatives assembled in Congress to decide what to do with the proposed constitution. Ultimately, Congress approved a resolution transmitting the constitution to the state legislatures for submission to conventions of delegations chosen by the people in each state. Fueled by the proliferation of printing and paper, the ensuing debates between advocates of the constitution (“Federalists”) and those opposed to it (“anti-Federalists”) resulted in “one of the greatest outpourings of political writings in American history.” And the anti-Federalists’ attacks, and the Federalists’ defenses, are rife with references to the anti-innovation principle.

Writing under the pseudonym “Centinel,” Samuel Bryan, the twenty-eight-year-old son of Pennsylvania Supreme Court Justice George Bryan, penned eighteen essays attacking the proposed constitution. (Publishing under a pseudonym was common practice, especially among anti-Federalists, as a means of personal protection and concisely conveying the writer’s viewpoints.) In his first and most widely circulated essay, Centinel relied heavily on the anti-innovation principle, disputing that there was truly a crisis necessitating a new constitution. Centinel claimed that those urging ratification were gripped by a “frenzy of enthusiasm” rather than “a rational investigation into its principles.” He therefore called for the proposed constitution to be “dispassionately and deliberately examined.” In one of Centinel’s most stinging charges, he argued:

If it were not for the stability and attachment which time and habit gives to forms of government, it would be in the power of the enlightened and aspiring few, if they should combine, at any time to destroy the best establishments, and even make the people the instruments of their own subjugation.

The late revolution having effaced in a great measure all former habits, and the present institutions are so recent, that there exists

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250 MCDONALD, E PLURIBUS UNUM, supra note 223, at 209.
251 Id. at 209–10.
252 MAIER, RATIFICATION, supra note 144, at 69; JOHNSON, supra note 46, at 191–92.
253 MAIER, RATIFICATION, supra note 144, at 75–76.
254 See id. at 71; MCDONALD, NOVUS ORDO, supra note 59, at 68.
255 MAIER, RATIFICATION, supra note 144, at 76.
257 Id.
not that great reluctance to innovation, so remarkable in old communities, and which accords with reason, for the most comprehensive mind cannot foresee the full operation of material changes on civil polity; it is the genius of the common law to resist innovation.\textsuperscript{258}

Centinel’s arguments were clearly compelling. But perhaps the most sophisticated, coherent, and admired anti-Federalist essays were those of “Federal Farmer,” widely believed to be the pseudonym of either Melancton Smith or Richard Henry Lee.\textsuperscript{259} Originally published in New York and circulated in newspapers in several neighboring states, Federal Farmer pointed to the time-tested lessons of history, arguing that the people of England had secured their liberties by “abolish[ing] innovations upon the government.”\textsuperscript{260} In contrast, Federal Farmer noted, the people were subject to torture and arbitrary acts wherever the civil law was adopted.\textsuperscript{261} Opining on the proposed constitution, the Federal Farmer expounded that:

The system proposed is untried: candid advocates and opposers admit, that it is, in a degree, a mere experiment, and that its organization is weak and imperfect; surely then, the safe ground is cautiously to vest power in it, and when we are sure we have given enough for ordinary exigencies, to be extremely careful how we delegate powers, which, in common cases, must necessarily be useless or abused, and of very uncertain effect in uncommon ones.\textsuperscript{262}

Although the opponents of the constitution rarely spoke with one voice, the anti-innovation principle became a centerpiece of their arguments. In a letter to the Massachusetts Convention, “Agrippa” (an allusion to the Greek skeptic, and widely believed to be the pseudonym of James Winthrop), wrote:

Let us then cherish the old confederation like the apple of our eye. Let us confirm it by such limited powers to Congress, and such an enlarged intercourse, founded on commerce and mutual want with the other states, that our union shall outlast time itself.

\textsuperscript{258} Id. at 567.
\textsuperscript{259} MAIER, RATIFICATION, supra note 144, at 82–83.
\textsuperscript{260} Federal Farmer, Letter VIII (Jan. 3, 1788), in AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 66 (Greenleaf prtg. 1788) [hereinafter LETTERS FROM THE FEDERAL FARMER].
\textsuperscript{261} Id.
\textsuperscript{262} Federal Farmer, Letter No. XVII (Jan. 23, 1788), in LETTERS FROM THE FEDERAL FARMER, supra note 260, at 162.
It is easier to prevent an evil than to cure it. We ought therefore to be cautious of innovations.263

Similarly, in a letter to the people of Virginia, “Impartial Examiner,” whose identity remains unknown, cautioned that

[t]he best regulated governments have their defects, and might perhaps admit of improvement: but the great difficulty consists in clearly discovering the most exceptionable parts and judiciously applying the amendments. A wise nation will, therefore, attempt innovations of this kind with much circumspection. They will view the political fabric, which they have once reared, as the sacred palladium of their happiness; they will touch it, as a man of tender sensibility toucheth the apple of his own eye,—they will touch it with a light, with a trembling— with a cautious hand,—lest they injure the whole structure in endeavoring to reform any of its parts. In small and trivial points alterations may be attempted with less danger; but—where the very nature, the essence of the thing is to be changed: when the foundation itself is to be transformed, and the whole plan entirely new modelled;—should you not hesitate, O Americans? Should you not pause— and reflect a while on the important step, you are about to take?264

Luther Martin, a leading anti-Federalist who attended the Philadelphia Convention but refused to sign the Constitution, explained in an address to the people of Maryland that he had found no reason
to warrant or countenance the motley mixture of the system proposed: a system which is an innovation in government of the most extraordinary kind; a system neither wholly federal, nor wholly national—but a strange hotch-potch of both—just so much federal in appearance as to give its advocates in some measure, an opportunity of passing it as such upon the unsuspecting multitude, before they had time and opportunity to examine it . . . .265

This polemic reached its pinnacle during the Virginia Ratifying Convention. There, as detailed by historians, Patrick Henry gave “the most dazzling performance

265 Luther Martin, Address to the General Assembly of Maryland (1788), as reprinted in 2 THE COMPLETE ANTI-FEDERALIST 80 (Herbert J. Storing & Murray Dry, eds., 1981).
of his life” and “held the field for twenty-three days against future presidents, chief justices, cabinet officers, senators, [and] diplomats.”  

266 Henry had refused to attend the Philadelphia Convention, remarking that he “smell[ed] a rat,” and emerged as a formidable anti-Federalist.  

268 At the Virginia Ratifying Convention, Henry argued that there were “no dangers, no insurrection or tumult” that would justify the proposed constitution, which he called a “perilous innovation.”  

269 Henry therefore urged the delegates to  

[c]onsider what you are about to do before you part with the government. Take longer time in reckoning things; revolutions like this have happened in almost every country in Europe; similar examples are to be found in ancient Greece and ancient Rome—instances of the people losing their liberty by their own carelessness and the ambition of a few.  

270 Building on this theme, Henry characterized the constitution as a haphazard experiment:  

If we recollect, on last Saturday, I made some observations on some of those dangers which these gentlemen would fain persuade us hang over the citizens of this commonwealth, to induce us to change the government, and adopt the new plan. Unless there be great and awful dangers, the change is dangerous, and the experiment ought not to be made.  

271 Henry drove this point home, arguing:  

I shall take leave of this political anatomy, by observing that it is the most extraordinary that ever entered into the imagination of man. If our political diseases demand a cure this is an unheard of medicine. The honorable member, I am convinced, wanted a name for it. Were your health in danger, would you take new medicine? I need not make use of these exclamations: for every
member in this committee must be alarmed at making new and unusual experiments in government.272

Henry was so persuasive that one spectator “involuntarily felt his wrists to assure himself that the fetters were not already pressing his flesh.”273 Plainly, the anti-innovation principle was among the anti-Federalists’ best attacks on the Constitution, perhaps eclipsed only by their objections to the omission of a bill of rights or the degree of power vested in the presidency. But did the anti-Federalists’ arguments have any actual influence? In a word, yes. As William North, a New York Federalist, complained to Henry Knox, “[t]he centinel, the farmers letters, [and] every other publication against the Constitution are scattered all over the County, while the federalist remains at New York, [and] not a single [piece] (of which there are many more intelligible to the common people) is sent abroad.”274

This must have been frustrating for the Federalists because, in their view, the anti-Federalists had it all wrong. James Wilson had argued at the Pennsylvania Convention the state governments were the greatest threat to popular sovereignty.275 Henry Knox stated that “the vile [s]tate governments” were the true “sources of pollution.”276 The state legislatures, in particular, had lost the confidence of many leading citizens by the time the Philadelphia Convention convened.277 James Iredell called the laws passed by the North Carolina legislature “the vilest collection of trash ever formed by a legislative body.”278 Judge Alexander Hanson of Maryland wrote that “the acts of almost every legislature have uniformly tended to disgust its citizens, and to annihilate its credit.”279 Joining this chorus, Robert Livingston asserted that the New York legislature was “daily committing the most flagrant acts of injustice.”280 George Washington, ever the diplomat, simply stated that the problem was state legislators’ “want of disposition to do justice.”281

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272 Patrick Henry, Speech to the Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT’S DEBATES, supra note 269, at 171–72.
275 WIECEK, supra note 1, at 69.
277 MORGAN, supra note 28, at 127.
278 Letter from James Iredell to Hannah Iredell (May 18, 1780), in 1 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 446 (1857).
279 ALEXANDER HANSON, POLITICAL SCHEMES AND CALCULATIONS, ADDRESSED TO THE CITIZENS OF MARYLAND, at v (Annapolis, F. & S. Green 1784).
281 Letter from George Washington to John Jay (May 18, 1786), in FOUNDERS ONLINE,
Similarly, Madison felt that the anti-Federalists’ fears of governmental innovations should be redirected at the state governments. As he argued at the Philadelphia Convention, “if no effectual check be devised” to restrain the “encroachments” of state legislatures, “a revolution of some kind or other would be inevitable.”

Gouverneur Morris agreed, stating that he “was as little a friend to monarchy as any gentleman,” and “the way to keep out monarchical [government] was to establish such a [republican government] as wd. make the people happy and prevent a desire for change.”

Today, for good reason, Madison is widely regarded as “the most profound, original, and far-seeing among all his peers.” To his great credit, Madison had the humility to decline the title, “father of the Constitution,” remarking that the document was the work of “many heads [and] many hands.”

Even so, Madison was undoubtedly instrumental to the drafting of the proposed constitution. Biographer Jack N. Ravoke noted that “[n]one of the fifty-five members of the Federal Convention contributed more to the framing of the Constitution than James Madison.”

Russell Kirk similarly noted that “Madison’s mind, more than any other man’s, gave shape to the Constitution.” Madison was not only a priceless member of the Philadelphia Convention, but he also stood out among the Constitution’s supporters during ratification.

As noted by observers of the Virginia Ratifying Convention, Madison was “the one who, among all the delegates, carried the vote of the two parties,” and he “was always clear, precise and consistent in his reasoning, and always methodical and pure in his [l]anguage.”

Early
in George Washington’s presidency, he often consulted Madison for the authoritative interpretation of the Constitution.\footnote{WILLS, supra note 210, at 36.}

Most important, Madison was the architect, or at least the predominant one, of the Guarantee Clause.\footnote{Ryan C. Williams, The “Guarantee” Clause, 132 HARV. L. REV. 603, 647 (2018).} As others have observed, it is fortuitous that “the drive behind this constitutional provision came almost entirely from one person, and indeed from one who so thoroughly and intelligently explained the elements of his political theory in writing.”\footnote{Jonathan Toren, Note, Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4, 2 N.Y.U. J.L. & LIBERTY 371, 374 (2007).} Thus, despite their limited circulation outside of New York at the relevant time, it is apropos that special attention be paid to the Federalist Papers, which, along with Alexander Hamilton and John Jay, Madison wrote under the pen name “Publius.”\footnote{CHERNOW, supra note 222, at 248.} (This pseudonym was an allusion to the legendary Publius Valerius, who was credited with establishing the foundations of the Roman republic after the dictatorship of Tarquin.\footnote{See J. R. Pole, Introduction to THE FEDERALIST, supra note 3, at xix.})

In Federalist 14, Madison began to unravel the anti-Federalists’ arguments about the anti-innovation principle:

Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish. No my countrymen, shut your ears against this unhallowed language. Shut your hearts against the poison which it conveys; the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defence of their sacred rights, consecrate their union, and excite horror at the idea of their becoming aliens, rivals, enemies. And if novelties are to be shunned, believe me the most alarming of all novelties, the most wild of all projects, the most rash of all attempts, is that of rending us in pieces, in order to preserve our liberties and promote our happiness. But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the

knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favor of private rights and public happiness. 297

In short, for Madison, the past should be held in high regard but it should not be blindly worshiped. Echoing a timeless Burkean insight, Madison felt that while it is prudent to view governmental innovations with skepticism, genuine reform should not be invalidated. 298

It can also be gleaned from Madison’s description of the anti-Federalists’ arguments as “petulant,” “unhallowed,” and “poisonous” that they had struck a nerve in the ordinarily temperate Virginian. It is easy to see why. Although he was bookish, Madison usually praised experience over abstraction, once writing that “[e]xperience is the oracle of truth and where its responses are unequivocal, they ought to be conclusive and sacred.” 299 Besides, he believed, the history of confederacies proved that it was not the Federalists that Americans had to fear, but the “encroachments” of unchecked states. 300 Prior to 1776, few Americans could have imagined that state legislatures might be as tyrannical as the crown. 301 John Adams, for instance, argued that “democratic despotism is a contradiction in terms.” 302 But following independence, as historians have noted, “state assemblies began legislating—making and changing law—as never before.” 303 Madison observed that the state legislatures had enacted more laws in the short period following independence than in the entire Colonial era. 304 “The legislative department is everywhere extending the sphere of its activity,” Madison fretted, “and drawing all power into its impetuous vortex.” 305

According to Madison, “[i]n republican government the legislative authority necessarily predominates.” 306 But abuses by parochial state legislatures—often called the “excesses of American democracy”—were rampant. 307 Madison felt that this, rather than the perceived weaknesses of the Articles of Confederation, was the primary impetus for the Constitution. 308 As Madison told Thomas Jefferson, the

297 THE FEDERALIST NO. 14, supra note 3, at 73 (James Madison).
298 See id.
299 THE FEDERALIST NO. 20, supra note 3, at 109 (James Madison); see also KIRK, RIGHTS AND DUTIES, supra note 40, at 91.
300 RAKOVE, supra note 204, at 70, 73.
301 WOOD, IDEA OF AMERICA, supra note 13, at 301.
302 Id.
303 Id.
304 Id. at 302.
305 THE FEDERALIST NO. 48, supra note 3, at 268 (James Madison).
306 THE FEDERALIST NO. 51, supra note 3, at 282 (James Madison).
307 WOOD, IDEA OF AMERICA, supra note 13, at 131.
308 See id.
“flagrant” and “frequent” abuses of the state legislatures had “contributed more to the uneasiness which produced the Convention, and prepared the public mind for a general reform, than those . . . from the inadequacy of the Confederation and its immediate objects.” Although Madison would later become a states-rights theorist, the state legislatures had such a dismal record in 1787 that he argued at the Philadelphia Convention that they should be denied a role in the appointment of national officers, and he even proposed a federal “negative” that would have given Congress authority to veto state laws.

With the foregoing in mind, Madison would not be cornered by the anti-Federalists, arguing in Federalist 43:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained.

As Madison recognized, by the time the Constitution was drafted American republicanism had ripened, fully encompassing the anti-innovation principle. And by welding the Guarantee Clause to the anti-innovation principle, Madison brilliantly parried one of the anti-Federalists’ best weapons. But he was far from done in Federalist 43. After citing historical examples in which “governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature,” Madison turned to a subject that he knew would resonate with eighteenth century Americans—human nature.

With few exceptions, the founding generation “shared a distinctly bearish view of human nature.” This stemmed from the biblical concept that man naturally drifts toward depravity. The views of revolutionary-era historian Mercy Otis Warren are demonstrative. She wrote that “when we look over the theatre of human action, scrutinize the windings of the heart, and survey the transactions of man from the earliest to the present period, it must be acknowledged that ambition and avarice are

310 See RAKOVE, supra note 204, at 67, 221, 233.
311 THE FEDERALIST NO. 43, supra note 3, at 237 (James Madison).
312 Id.
313 MORGAN, supra note 28, at 7.
314 See BARTON, supra note 64, at 221.
the leading springs which generally actuate the restless mind."[^315] "[T]hese primary sources of corruption," Warren argued, led to "all the rapine and confusion, the depredation and ruin, that have spread distress over the face of the earth from the days of Nimrod to Cesar, and from Cesar to an arbitrary prince of the house of Brunswick."[^316]

Having extensively studied political theory, history, philosophy, and theology, Madison no doubt knew a thing or two about the subject.[^317] It is likely for this reason that Madison was pessimistic about America’s future—though, in fairness, scarcely any of the Founders’ views can be reduced to “any simple formula.”[^318] Madison’s views on self-interestedness were heavily influenced by Scottish philosopher David Hume and are manifested both in the federal constitution and the *Federalist Papers*.[^319] A classic in this regard is *Federalist 51*, where Madison reasoned that checks and balances—and government itself—are only necessary because men are not angels.[^320] (Hence the oft-quoted Madisonian prescription that “[a]mbition must be made to counteract ambition.”[^321])

Also illustrative is *Federalist 10*, one of the most exalted documents in American political theory.[^322] The prevailing belief at the time, articulated most notably by “the celebrated Montesquieu,” was that republics had to be small, homogenous, and comprised of virtuous citizens who would not exploit each another.[^323] Madison rejected this premise in *Federalist 10*.[^324] Appearing to draw from one of Hume’s books (which was included among the trunks of “literary cargo” Jefferson sent to Madison from abroad[^325]), Madison reasoned that although self-interestedness is “sown into the nature of man,” in a large republic “[t]he influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other states.”[^326] In other words, interests would be so numerous and diffused in a large republic that no single faction could dominate. The Constitution, Madison thus explained, was “a republican remedy for the diseases most incident to republican government.”[^327] Once again, we see that Madison’s notions of republicanism were conservative, having matured with his conceptions of human nature.

[^316] Id.
[^317] See Rakove, supra note 204, at xii, 3, 51.
[^318] See Morgan, supra note 28, at 133.
[^319] See Kirk, Rights and Duties, supra note 40, at 106.
[^321] Id.
[^324] The Federalist No. 10, supra note 3, at 51 (James Madison).
[^325] Ellis, supra note 74, at 106.
[^326] The Federalist No. 10, supra note 3, at 49, 54 (James Madison); see Rakove, supra note 207, at 477.
[^327] The Federalist No. 10, supra note 3, at 54 (James Madison).
Madison painted in these hues in Federalist 43, rhetorically asking, “[W]ho can say what experiments may be produced by the caprice of particular states, by the ambition of [enterprising] leaders, or by the intrigues and influence of foreign powers?” But since any manner of experiments may be fueled by such things, does this mean the Guarantee Clause “evolves” with the times—indeed, independent of the amendment process? Folks in the “living constitution” camp certainly believe it does. In Professor Wiecek’s otherwise meticulous examination of the Guarantee Clause, he posited that the Clause is “fluid” and that “every generation must formulate for itself the fundamental aspirations in America’s revolutionary promise.”

Professor Bonfield has similarly argued that a key attribute of republicanism is “natural justice,” and because that concept evolves, then so, too, does the Clause.

Such notions, and the mischief engendered by them, would have been repugnant to the Founders. As Madison reminded Congress in 1817, the Constitution “providently marked out in the instrument itself a safe and practicable mode of improving it as experience might suggest.” Madison later reiterated, “I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation,” and “[i]n that sense alone it is the legitimate Constitution.”

What a metamorphosis would be produced in the code of law, he cautioned, “if all its ancient phraseology were to be taken in its modern sense.” Like Madison, Jefferson famously explained that the Constitution is not “a mere thing of wax” that may be twisted and shaped into any form. Despite his infamous proclivity toward imperialistic constitutional interpretations, even Hamilton noted that original intent controls over any “pretension” or “novelty reserved for the crooked ingenuity of after discoveries.”

As we are often reminded, the Guarantee Clause was ratified at a time when nearly every state (along with most of the rest of the world) permitted slavery—yet each state was deemed sufficiently republican to be admitted into the Union. And

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328 THE FEDERALIST NO. 43, supra note 3, at 237 (James Madison).
329 WIECEK, supra note 1, at 242.
333 Id.
334 Id.
335 Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910).
336 Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 15 THE PAPERS OF THOMAS JEFFERSON 17 (J. Jefferson Looney et al. eds., 2018).
although Madison had personal misgivings as to how a society that permitted slavery could be regarded as a republic, he insisted in Federalist 43 that the Clause presupposed that all existing states had republican governments. In fact, as Professor Wiecek is quick to point out, “defenders of slavery” once argued that the Clause guarantees the status quo. The insinuation is clear: what sort of slack-jawed extremist could possibly doubt Wiecek’s claim that “the standards of republicanism evolve”?

Nearly all prominent Founders realized that slavery contradicted the principles of the American Revolution. Undeniably, however, their definition of republicanism accommodated the odious and ubiquitous practice of slavery. While it is easy to deride them for it today, this was the terrible price of maintaining the Union due to the gritty realities of the late eighteenth century. As commentators have noted, Madison recognized that “republican government, with all its flaws and indeed because of its flaws, requires protection.” Significantly, those flaws were corrected through several constitutional amendments—not an amorphous evolution of republicanism discovered by willful and adventurous jurists.

This said, the Founders understood that the Guarantee Clause had to be given enough teeth to fend off aristocratic and monarchical innovations. I submit that this is the best explanation why broad, albeit elusive, language like “Republican Form of Government” is featured yet nowhere defined in the Guarantee Clause. Indeed, when contextualized, the murkiness of the Clause hardly seems accidental. As you know, Madison ultimately carried the day with the ratification of the Constitution in New York, a nerve center in the ratification debates. Crucially, it was on the terms that he used to defeat the anti-Federalists.

Are not we now told, however, that the Federalist Papers were mere propaganda? Those making such claims must wrestle with the continuity between Madison’s essays in the Federalist Papers and the other historical evidence outlined above. What, then, of Alexander Hamilton’s view of the Clause? Didn’t Hamilton claim in Federalist 21 that the “guarantee could only operate against changes to be effected by violence”? Hamilton indeed did so, but Madison’s views are more probative for several reasons, including because he played a far greater role in the Clause’s creation, and it developed more along the lines he envisioned. In short,
despite Hamilton’s many contributions to the American cause, he misunderstood the Clause.348 (And this was hardly the only time Hamilton was out of step with the other Founders.349) It is therefore Madison’s exegesis in Federalist 43 that best captures the full meaning of the Guarantee Clause.

Any doubt as to how deeply the anti-innovation principle infused American republicanism is dispelled by reference to George Washington’s farewell address, which historians regard as “transcendental” and “a seminal statement of America’s abiding principles.”350 The following passage from the address is instructive:

Towards the preservation of your government and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts . . . . In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of governments as of other human institutions, that experience is the surest standard, by which to test the real tendency of the existing constitution of a country, that facility in changes upon the credit of mere hypotheses and opinion exposes to perpetual change from the endless variety of hypotheses and opinion . . . .351

Construing the Guarantee Clause to encompass the anti-innovation principle is not only supported by overwhelming Founding-era evidence, but it also coincides with the overarching nature of the Constitution. As Forrest McDonald once observed, the Constitution “marked the culmination of a tradition of civic humanism that dated back more than two millennia and of a common-law tradition that dated back many centuries.”352 Unlike many of the Jacobins of 1789, who “demanded the establishing of an earthly paradise . . . [but] soon perished in an earthly hell,” Americans “were not marching to Zion” and they created the Constitution as a bulwark against innovation.353 Thus, although the framers designed the Constitution to permit gradual change with high regard for continuity, they never intended it to

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348 Id. at 67.
349 See Woods, Nullification, supra note 48, at 25–26; see also Chernow, supra note 222, at 260.
352 McDonald, Novus Ordo, supra note 59, at 291.
353 Kirk, Rights and Duties, supra note 40, at 6, 17, 35, 54.
be “all sail and no anchor.” As we have seen, it is in this very vein in which they drafted the Guarantee Clause.

I recognize that the animating ideas of this Article diverge from those of the modern intelligentsia. But what do you, dear reader, believe is more likely: that the Founders, deeply suspicious of novelties, designed the Guarantee Clause as a repository of socialistic fantasies? Or that the Clause was understood to encompass the anti-innovation principle, a core tenet of American republicanism?

CONCLUSION: THE BOTTOM LINE

It seems most fitting to conclude this Article as it began: with a beloved anecdote about Benjamin Franklin. On the final day of the Philadelphia Convention, as the last delegates were signing the Constitution, Franklin looked at the golden sun carved into the back of the presiding officer’s armchair. Noting that painters had often struggled to distinguish a rising sun from a setting sun in their art, Franklin said:

I have . . . often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting Sun.

Franklin was of course hinting that he was optimistic about the trajectory of America as a whole. Yet a similar sentiment could easily be made about the Guarantee Clause, if only we remember its original meaning. Indeed, it may only be through the light cast by the Clause that we can navigate the tempest of innovations facing us today.

354 Id. at 7–8, 27.
355 MORGAN, supra note 28, at 143.
356 Id. at 143–44.