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Unleashing the Guarantee Clause Against the Spirit of Innovation

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UNLEASHING THE GUARANTEE CLAUSE AGAINST THE SPIRIT OF INNOVATION

Ricardo N. Cordova*

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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 completely 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

* Staff Attorney, Nevada Supreme Court; JD, Drake University Law School (2010); BS, University of New Mexico (2007). The views in this Article are my own and should not be construed as representing those of the Nevada Supreme Court. This Article is dedicated to my parents. Special thanks to the members of the *William & Mary Bill of Rights Journal* for their edits and feedback.

¹ WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 49 (1972).

² *Id.*

³ *THE FEDERALIST* NO. 62, at 332 (James Madison) (J. R. Pole ed., 2005).

⁴ U.S. CONST. art. IV, § 4.

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.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.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 [ma]n ever did or ever will.”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]onstrutions upon it as different as light and darkness.”⁸ Others have noted that “it could be argued that the Clause is nothing but a Rorschach test.”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.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.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

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).

⁶ See *id.*

⁷ Letter from John Adams to Mercy Otis Warren (July 20, 1807), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-02-02-5195> [<https://perma.cc/AF8W-GDMT>].

⁸ *Id.*

⁹ Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1436 (2009).

¹⁰ *Baker v. Carr*, 369 U.S. 186, 210, 223, 300 (1962); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 118–19 (1912); *Luther v. Borden*, 48 U.S. 1, 42–43 (1849).

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.

¹² THOMAS PAINE, *RIGHTS OF MEN: PART THE SECOND. COMBINING PRINCIPLE AND PRACTICE* 8 (London 1792).

¹³ GORDON S. WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 281 (2011) [hereinafter WOOD, *THE IDEA OF AMERICA*].

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.

¹⁶ Letter from Thomas Jefferson to William Johnson (June 12, 1823), in *FOUNDERS ONLINE*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-3562#:~:text=I> [https://perma.cc/Q8NS-MLN6].

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.”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.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 [b]ody which prepared [and] the [a]uthorities which accepted it.”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.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.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.²² Such innovations, especially when implemented under the auspices of an emergency, were strongly

¹⁷ Letter from George Washington to Alexander Hamilton (Aug. 28, 1788), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/04-06-02-0432> [<https://perma.cc/S4UL-MUFF>].

¹⁸ Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007).

¹⁹ Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-03-02-0470> [<https://perma.cc/97AR-RQSM>].

²⁰ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 759 (1994).

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?”).

²² See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1799–1800 (2008) [hereinafter Stinneford, *Original Meaning of “Unusual”*].

disfavored under the common law tradition.²³ 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.²⁴ 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.²⁵ The common law grew organically by identifying widely and long-established principles of justice and applying them to specific controversies.²⁶ 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.”²⁷ 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.²⁸

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 [dross] 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 [dangerous]; 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 [danger] . . . 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

²⁹ EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND*, reprinted in 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 740 (Steve Sheppard ed., 2003) [hereinafter *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE*].

³⁰ Stinneford, *The Original Meaning of “Unusual,”* *supra* note 22, at 1775–76.

³¹ EDWARD COKE, *THE FOURTH PART OF THE REPORTS OF EDWARD COKE* (London 1604).

³² Stinneford, *The Original Meaning of “Unusual,”* *supra* note 22, at 1777 (quoting *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE*, *supra* note 29, at 907).

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.³⁸ Parliament's repeated abrogation of established customs would eventually become one of the primary motivations for the American Revolution.³⁹

Although William Blackstone was a Tory and opposed American independence, he was even more influential on American thought than Coke.⁴⁰ Like Coke, Blackstone distrusted innovations in the law.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."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.'"⁴³

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.⁴⁴ In the British tradition, the Americans colonists generally accepted only time-tested ideas.⁴⁵ As popular historians have noted, innovations were "horribly objectionable to Americans, who paradoxically were very conservative about such things."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.⁴⁷ Further, the colonies adhered to the English conception of constitutionalism under which a measure was constitutional only if it comported with long usage.⁴⁸ Thus, Americans considered innovative or unusual governmental acts to be presumptively unconstitutional.⁴⁹ But beginning in the 1760s, Parliament asserted

³⁸ *Id.* at 1785–86.

³⁹ *Id.* at 1786.

⁴⁰ RUSSELL KIRK, RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION 106–07 (Mitchell S. Muncy ed., 1997) [hereinafter KIRK, RIGHTS AND DUTIES].

⁴¹ Stinneford, *The Original Meaning of "Unusual,"* *supra* note 22, at 1788–89.

⁴² See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765).

⁴³ Stinneford, *The Original Meaning of "Unusual,"* *supra* note 22, at 1788–89.

⁴⁴ *Id.* at 1790.

⁴⁵ DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 158 (1958) [hereinafter BOORSTIN, THE COLONIAL EXPERIENCE].

⁴⁶ PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 133 (1st ed. 1997).

⁴⁷ Stinneford, *The Original Meaning of "Unusual,"* *supra* note 22, at 1793.

⁴⁸ THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 40 (2010) [hereinafter WOODS, NULLIFICATION].

⁴⁹ Stinneford, *The Original Meaning of "Unusual,"* *supra* note 22.

that its will, not custom and tradition, was the sole test of constitutionality.⁵⁰ This practice, historians note, “always seemed to evolve to suit the interests and convenience of the British [g]overnment.”⁵¹

The colonists repeatedly decried Parliament’s acts as “innovations.”⁵² 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.⁵³ 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.”⁵⁴ 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.”⁵⁵ These inherited principles, according to Thomas Jefferson, could be traced back at least seven hundred years to the Saxon golden age.⁵⁶ In the decade preceding Independence, Americans often characterized the conflict as a continuation of the historic struggle against royal prerogative power.⁵⁷ 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.”⁵⁸ And although the Founders would eventually come to abhor monarchy, they patterned the United States Constitution after the British constitution as closely as possible.⁵⁹

⁵⁰ See WOODS, NULLIFICATION, *supra* note 48.

⁵¹ THOMAS E. WOODS, JR., 33 QUESTIONS ABOUT AMERICAN HISTORY YOU’RE NOT SUPPOSED TO ASK 127 (1st ed. 2007).

⁵² See *id.* at 124–27.

⁵³ DANIEL J. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 406 (1965) [hereinafter BOORSTIN, THE NATIONAL EXPERIENCE].

⁵⁴ JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT, *reprinted in* 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 220 (Phila., Bird Wilson ed., 1804); GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 11 (1998) [hereinafter WOOD, AMERICAN REPUBLIC].

⁵⁵ John Adams, The Earl of Clarendon to William Pym, *in* 3 CHARLES F. ADAMS, THE WORKS OF JOHN ADAMS, THE SECOND PRESIDENT OF THE UNITED STATES 477 (Boston, Little, Brown, & Co. 1851) [hereinafter THE WORKS OF JOHN ADAMS].

⁵⁶ 2 THOMAS JEFFERSON, THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT 192–93 (Gilbert Chinard ed., 1926).

⁵⁷ WOOD, AMERICAN REPUBLIC, *supra* note 54, at 31.

⁵⁸ THE PETITION OF THE GRAND AMERICAN CONTINENTAL CONGRESS, TO THE KING’S MOST EXCELLENT MAJESTY 5 (Wash. Gov’t Printing Office 1905) (1774); ROBERT ROSS, A SERMON, IN WHICH THE UNION OF THE COLONIES IS CONSIDERED AND RECOMMENDED; AND THE BAD CONSEQUENCES OF DIVISIONS ARE REPRESENTED 13 (N.Y.C., John Holt 1775).

⁵⁹ FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 209 (1985) [hereinafter McDONALD, NOVUS ORDO]; see PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF

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.⁶⁰ Pamphlet after pamphlet cited European Enlightenment thinkers.⁶¹ Americans also drew deeply from their Christian convictions.⁶² 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?⁶³

Indeed, the Bible accounted for thirty-four percent of the direct quotes of the Founding era—far more than any other single source.⁶⁴

Classical antiquity was likewise highly influential, as reflected by the Greek and Latin phrases littered throughout colonial essays.⁶⁵ The colonists' writings frequently alluded to Homer, Plato, Aristotle, Plutarch, Cicero, Cato, Cincinnatus, and other authors and heroes of antiquity.⁶⁶ They often referenced the Greek city-states and Rome as cautionary tales against decadence.⁶⁷ Still, many aspects of the old Roman Republic were worth emulating.⁶⁸ Romans enjoyed property protections and other immunities that were rare in the ancient world.⁶⁹ Americans would imitate these and other time-tested Roman institutions like checks and balances and separation of powers.⁷⁰ In a testament to the enduring influence of Rome, Joseph Warren

AMERICAN OPPOSITION TO BRITAIN, 1765–1776, at 291 (1st ed. 1972) [hereinafter MAIER, FROM RESISTANCE TO REVOLUTION].

⁶⁰ KIRK, RIGHTS AND DUTIES, *supra* note 40, at 37.

⁶¹ See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26–27 (2d ed. 1967).

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>]).

⁶⁴ DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION 231–32 (5th ed. 2013).

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)).

⁶⁷ RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 51, 134 (4th ed. 2003) [hereinafter KIRK, AMERICAN ORDER].

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.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.’”⁷² Even the New York Sons of Liberty asserted they were “not attempting any change of Government . . . only a preservation of the Constitution.”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.⁷⁴ First, ministers of the crown started simultaneously serving in Parliament—a development the colonists decried as “corruption.”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.⁷⁶ During the ensuing debates over these measures, the British asserted that the colonists, without ever voting for anyone in Parliament, enjoyed “virtual representation.”⁷⁷ Americans roundly rejected the specious new theory.⁷⁸

According to Edmund Burke, the Whig philosopher who was even more on the minds of the framers than John Locke,⁷⁹ “a great spirit of innovation” had overtaken the British government.⁸⁰ Burke defined an innovation as a drastic change that upended settled understanding and wisdom, engendering negative and unforeseeable consequences.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

⁷¹ WOOD, *IDEA OF AMERICA*, *supra* note 13, at 73.

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).

⁷³ MAIER, *FROM RESISTANCE TO REVOLUTION*, *supra* note 59, at 96.

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).

⁷⁵ See WOOD, *IDEA OF AMERICA*, *supra* note 13, at 180.

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).

⁷⁷ See WOOD, *IDEA OF AMERICA*, *supra* note 13, at 181–83.

⁷⁸ See *id.* at 182–83.

⁷⁹ KIRK, *RIGHTS AND DUTIES*, *supra* note 40, at vii–viii.

⁸⁰ EDMUND BURKE, *THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS* 29 (1770).

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

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.*

⁸⁸ *See* KIRK, RIGHTS AND DUTIES, *supra* note 40, at 51–52, 113–14.

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.

⁹⁴ H. Trevor Colbourn, *John Dickinson, Historical Revolutionary*, 83 PA. MAG. HIST. & BIOGRAPHY 271, 271, 283 (1959).

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).

⁹⁷ See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH WORDS ARE DEDUCED FROM THEIR ORIGINALS (6th ed. London 1785); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. London 1789).

⁹⁸ JOHNSON, *supra* note 46, at 127–28.

⁹⁹ GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 110 (1991) [hereinafter WOOD, AMERICAN REVOLUTION].

¹⁰⁰ *Id.*

¹⁰¹ See BOORSTIN, THE COLONIAL EXPERIENCE, *supra* note 45, at 201–02.

¹⁰² BARTON, *supra* note 64, at 223 (quoting Charge to the Grand Jury in Case of Fries, Fed. Case No. 5, 126 at 4 (C.C.D. Pa. 1799) (Iredell, J.), in THE UNIV. OF CHI. PRESS, https://press-pubs.uchicago.edu/founders/documents/amendI_speeches22.html [https://perma.cc/D3JE-ENXC]).

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.”¹⁰⁴ As Montesquieu, according to George Bancroft, believed “[s]ociety, notwithstanding all its revolutions, must repose on principles that do not change.”¹⁰⁵ It was the Founders’ awareness of the parallels in England’s past that made the actions of the British government so alarming.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ “Experience must be our only guide,” Dickinson would later argue during the Philadelphia Convention, because “[r]eason may mislead us.”¹⁰⁹ 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.”¹¹⁰

The Founders, particularly those steeped in the law, also had a penchant for borrowing terms of art.¹¹¹ 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.”¹¹² A good example is Americans’ repeated use of the term “innovations” to condemn the actions of Parliament and the King.¹¹³ 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)).

¹⁰⁵ 5 GEORGE BANCROFT, HISTORY OF THE UNITED STATES, FROM THE DISCOVERY OF THE AMERICAN CONTINENT 24 (Boston, Little, Brown, & Co. 1852).

¹⁰⁶ See BAILYN, *supra* note 61, at 94–95.

¹⁰⁷ See MAIER, FROM RESISTANCE TO REVOLUTION, *supra* note 59, at 192–95.

¹⁰⁸ Patrick Henry, Speech Before the Secondary Revolutionary Convention of Virginia (Mar. 23, 1775), in LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION app. A, at 280 (Harlow G. Unger ed., 2010).

¹⁰⁹ John Dickinson, Address (Aug. 13, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 278 (Max Farrand ed., 1911) [hereinafter 2 FARRAND’S RECORDS].

¹¹⁰ BAILYN, *supra* note 61, at 23.

¹¹¹ See PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 57 (1997) [hereinafter MAIER, AMERICAN SCRIPTURE].

¹¹² McDONALD, NOVUS ORDO, *supra* note 59, at xi.

¹¹³ See Stinneford, *Original Meaning of “Unusual,” supra* note 22, at 1794–96.

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 innovations 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]sssemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate 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).

¹¹⁸ *See The New York Suspending Act (1767)*, TEACHING AM. HIST., <https://teachingamericanhistory.org/document/the-new-york-suspending-act/> [<https://perma.cc/N96M-L7L4>] (last visited Dec. 4, 2023).

¹¹⁹ *See The Massachusetts Government Act (1774)*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/primary-sources/massachusetts-government-act-may-20-1774#:~:text=The> [<https://perma.cc/8JQA-PYUQ>] (last visited Dec. 4, 2023).

¹²⁰ *See The Quebec Act (1774)*, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/18th_century/quebec_act_1774.asp [<https://perma.cc/7DF2-4DGG>] (last visited Dec. 4, 2023).

¹²¹ *See* Stinneford, *Original Meeting of “Unusual,”* *supra* note 22, at 1800.

¹²² *Declaration and Resolves of the First Continental Congress on Oct. 14, 1774*, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 66 (Worthington C. Ford ed., 1904) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

these rights were built on the “fourfold foundation” of natural law, the British constitution, the charters of the colonies, and “immemorial usage.”¹²³ James Duane of New York similarly argued that Americans should appeal to “the laws and constitution of the country from whence we sprung.”¹²⁴ 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.”¹²⁵ They emphasized that they were only acting “as Englishmen, their ancestors in like cases have usually done.”¹²⁶ 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.”¹²⁷

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.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.”¹³² 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.”¹³³ This aligned neatly

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.

¹²⁸ *See generally* *Petition to the King*, in 2 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 158–72 (1905).

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)).

¹³³ Letter from John Adams to Abigail Adams (Aug. 14, 1776), in *FOUNDERS ONLINE*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-02-02-0059> [<https://perma.cc/79S4-4H99>].

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.¹³⁴ 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.¹³⁵ 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.”¹³⁶

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.¹³⁷ 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.¹³⁸ 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.¹³⁹

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.”¹⁴⁰ 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*.¹⁴¹ 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.”¹⁴²

As historians have observed, “[a]t first it was only gradually and cautiously that the individual colonies refashioned their governments.”¹⁴³ 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.”¹⁴⁴ 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.

¹⁴¹ John Adams, *Thoughts on Government* (Apr. 1776), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004> [<https://perma.cc/6VP7-KZFB>].

¹⁴² *Id.*

¹⁴³ BOORSTIN, THE NATIONAL EXPERIENCE, *supra* note 53, at 407.

¹⁴⁴ PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 17 (2010) [hereinafter MAIER, RATIFICATION].

Britain's innovations, were especially fond of its system of mixed government and thus created republican versions of it.¹⁴⁵ The "fine design" of the British constitution, Richard Henry Lee remarked, had simply been "spoiled in the execution."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."¹⁴⁷ According to those supporting it, Lee's resolution was merely to "declare a fact which already exists."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.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.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."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."¹⁵²

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

Prudence, indeed, will dictate that [g]overnments long established 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

¹⁴⁵ See WOOD, *IDEA OF AMERICA*, *supra* note 13, at 191; WOOD, *AMERICAN REPUBLIC*, *supra* note 54, at 201–02.

¹⁴⁶ Letter from Richard Henry Lee to Edmund Pendleton (May 12, 1776), in 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>].

¹⁴⁷ ELLIS, *supra* note 74, at 53 (quoting Richard Henry Lee).

¹⁴⁸ MAIER, *AMERICAN SCRIPTURE*, *supra* note 111, at 42 (quoting George Wythe).

¹⁴⁹ See KIRK, *RIGHTS AND DUTIES*, *supra* note 40, at 57.

¹⁵⁰ See KIRK, *AMERICAN ORDER*, *supra* note 67, at 411.

¹⁵¹ *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

¹⁵² *Id.*

the same [o]bject evinces a design to reduce them under absolute [d]espotism, it is their right, it is their duty, to throw off such [g]overnment, and to provide new [g]uards for their future security.¹⁵³

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

Such has been the patient sufferance of these [c]olonies; and such is now the necessity which constrains them to alter their former [s]ystems of [g]overnment. 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 [t]yranny over these [s]tates.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.”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.”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.”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.”¹⁵⁸ Russell Kirk likewise recognized that patriots “thought of themselves as conservatives rather than as innovators,” and “as the defenders of a venerable constitution, not

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Stinneford, *The Original Meaning of “Unusual,” supra* note 22, at 1792.

¹⁵⁶ MORGAN, *supra* note 28, at 7.

¹⁵⁷ DANIEL BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* 68 (1953).

¹⁵⁸ H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 190 (1965).

as marchers in the dawn of a Brave New World.”¹⁵⁹ Kirk thus concluded that “it was a revolution not made, but prevented.”¹⁶⁰

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

[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.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.”¹⁶³ Gordon S. Wood conceded that the American Revolution was hardly revolutionary when compared to those of figures like Robespierre, Lenin, and Mao.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.”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.”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.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.”¹⁶⁸ Edmund Burke would later

¹⁵⁹ KIRK, RIGHTS AND DUTIES, *supra* note 40, at 53–54.

¹⁶⁰ *Id.* at 60.

¹⁶¹ See COLBOURN, *supra* note 158; see also MAIER, AMERICAN SCRIPTURE, *supra* note 111, at 30.

¹⁶² BAILYN, *supra* note 61, at 19.

¹⁶³ MAIER, AMERICAN SCRIPTURE, *supra* note 111, at 30.

¹⁶⁴ See WOOD, AMERICAN REVOLUTION, *supra* note 99, at 3–4.

¹⁶⁵ WOOD, AMERICAN REPUBLIC, *supra* note 54, at 10.

¹⁶⁶ *Id.* at 12–13.

¹⁶⁷ See CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 395 (1953).

¹⁶⁸ John Adams, The Letters of Novanglus (1775), in 2 PAPERS OF JOHN ADAMS 278 (Robert J. Taylor et al. eds., 1977).

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.”¹⁶⁹

By blaming the King for their grievances, Americans even adhered to the customary manner that the English announced rebellion.¹⁷⁰ 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.”¹⁷¹ 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.¹⁷²

Although the Declaration of Independence is often portrayed as the sole embodiment of thought that filled the air, Jefferson borrowed liberally from other sources.¹⁷³ Decades later, John Adams alleged that there was “not an idea in it, but what had been [hackneyed] in Congress for two years before.”¹⁷⁴ (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.¹⁷⁵) 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.¹⁷⁶

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

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.

¹⁷² Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in TEACHING AM. HIST., <https://teachingamericanhistory.org/document/letter-to-henry-lee/>.

¹⁷³ See KIRK, AMERICAN ORDER, *supra* note 67, at 401; MAIER, AMERICAN SCRIPTURE, *supra* note 111, at 98–99, 124.

¹⁷⁴ Letter from John Adams to Timothy Pickering (Aug. 6, 1822), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-02-02-7674> [https://perma.cc/YQ2J-A9RN].

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.¹⁷⁷ 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.”¹⁷⁸ 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.”¹⁷⁹

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.¹⁸⁰

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.”¹⁸¹ 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

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>].

¹⁷⁹ PROCEEDINGS OF THE PROVINCIAL CONFERENCE OF COMMITTEES OF THE PROVINCE OF PENNSYLVANIA 25 (Phila., W. & T. Bradford 1776).

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.¹⁸² George Washington seemed to speak for many when, in 1786, he told John Jay that America was “tottering.”¹⁸³

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),¹⁸⁴ mobs of impoverished Massachusetts farmers obstructed tax collection and foreclosures and prevented the courts from sitting.¹⁸⁵ Thereafter they reorganized into a paramilitary force.¹⁸⁶ 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.”¹⁸⁷ Congressman Henry Lee asserted that the mobs not only wished to erase debts and redistribute property, “but to reunite with Britain.”¹⁸⁸ Unlike much of the frenzied rhetoric about the uprising, Lee’s claim was believable.¹⁸⁹ After all, the British were stirring discontent among the Native Americans on the frontier.¹⁹⁰ 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).¹⁹¹ Making matters worse, Spain was squeezing the Southwest.¹⁹² 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.”¹⁹³ His warning must have seemed prophetic during the Confederation era.¹⁹⁴

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.¹⁹⁵ Congress was equally helpless because the Articles of Confederation did not

¹⁸² WIECEK, *supra* note 1, at 28–31.

¹⁸³ Letter from George Washington to John Jay (May 18, 1786), in FOUNDERS ONLINE, NAT’L ARCHIVES, [https://founders.archives.gov/?q=letter%20from%20george%20washington%20to%20john%20jay%20may%2018%2C%201786%20Author%3A%22Washington%2C%20George%22&s=1111311111&r=7&sr=\[https://perma.cc/3JTR-VBBL\]](https://founders.archives.gov/?q=letter%20from%20george%20washington%20to%20john%20jay%20may%2018%2C%201786%20Author%3A%22Washington%2C%20George%22&s=1111311111&r=7&sr=[https://perma.cc/3JTR-VBBL]).

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.

¹⁸⁷ Letter from George Washington to James Madison (Nov. 5, 1786), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/04-04-02-0299> [https://perma.cc/J8PV-BXKQ].

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.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.”¹⁹⁷ Ultimately, Major General Benjamin Lincoln had to appeal to wealthy Bostonians to fund a mercenary force to suppress the uprising.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.”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.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.”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.”²⁰²

For Madison, the abuses of state governments were the most troubling.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.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.”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

¹⁹⁶ *Id.* at 34–35.

¹⁹⁷ MAIER, RATIFICATION, *supra* note 144, at 16 (quoting Henry Lee).

¹⁹⁸ *Id.*

¹⁹⁹ Letter from Thomas Jefferson to Abigail Adams (Feb. 22, 1787), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-07-02-0187>; Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-12-02-0348> [<https://perma.cc/UCN4-X7EB>].

²⁰⁰ WIECEK, *supra* note 1, at 33.

²⁰¹ *Id.* at 39 (quoting Henry Lee).

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>].

²⁰³ GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 157 (2006).

²⁰⁴ JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 59 (Mark C. Carnes ed., 3d ed. 2007).

²⁰⁵ Madison, *supra* note 202; see RAKOVE, *supra* note 204, at 50.

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

²⁰⁶ WIECEK, *supra* note 1, at 49–50.

²⁰⁷ Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 479 (1988).

²⁰⁸ ELLIS, *supra* note 74, at 101.

²⁰⁹ DOUGLASS ADAIR, *James Madison*, in FAME AND THE FOUNDING FATHERS 124, 134 (Trevor Colbourn ed., 1st ed. 1974).

²¹⁰ See GARRY WILLS, JAMES MADISON 26–27 (Arthur M. Schlesinger, Jr., ed., 1st ed. 2002).

²¹¹ WIECEK, *supra* note 1, at 41.

²¹² Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-09-02-0197> [<https://perma.cc/8CXX-9U7R>].

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.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.²¹⁸ Even expansive and virtuous ancient republics had collapsed.²¹⁹ England’s sole experiment with republicanism was disastrous, leading to a dictatorship and restoration of the monarchy.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.”²²¹ Alexander Hamilton later predicted a “dismemberment of the Union and monarchies in different portions of it” if the Constitution were not ratified.²²²

IV. DRAFTING THE GUARANTEE CLAUSE

In May 1787, delegates arrived at a convention in Philadelphia to revise the Articles of Confederation.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.”²²⁴) What followed was “one of the most brilliant displays of learning in political theory ever shown in a deliberative assembly.”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.”²²⁶ Yet gossip was circulating that the convention was negotiating to crown a king.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.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.*

²²¹ Letter from Thomas Jefferson to Edmund Pendleton (Aug. 13, 1776), in 1 *THE PAPERS OF THOMAS JEFFERSON, 1760–1776*, at 491–94 (Julian P. Boyd ed., 1950).

²²² RON CHERNOW, *ALEXANDER HAMILTON* 246 (2004) (quoting Alexander Hamilton).

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*].

²²⁴ Robert C. Cotner, *Introduction* to THEODORE FOSTER, *THE MINUTES OF THE RHODE ISLAND CONVENTION OF MARCH 1790*, at 1, 11 (1929).

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 WIECEK, *supra* note 1.

that some assurance of republican government was necessary.²²⁹ Madison asserted that the convention would “decide forever the fate of republican government.”²³⁰ 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.²³¹ 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]overnment [and] territory, ought to be guaranteed by the United States to each [s]tate.”²³² But when small-state delegates bristled at the overall influence allotted to large states under the Virginia Plan, debate on the Clause was postponed.²³³

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.”²³⁴ 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.”²³⁵ 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.²³⁶

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.²³⁷ (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 1663.²³⁸) James Wilson, another renowned delegate from Pennsylvania, responded that “[t]he object is merely to secure the States [against] dangerous commotions, insurrections and rebellions.”²³⁹ 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”²⁴⁰),

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).

²³⁸ Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 103–04 (2004).

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

CONSTITUTION OF THE UNITED STATES OF AMERICA: REPORTED BY JAMES MADISON 500 (Gaillard Hunt & James Brown Scott eds., Int’l ed. 1920); George Mason, *Objections to the Proposed Federal Constitution 1787*, in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 446 (1971).

²⁴¹ 2 FARRAND’S RECORDS, *supra* note 109, at 47 (Madison’s Notes, July 18, 1787).

²⁴² *See id.*

²⁴³ *Id.* at 47–48 (Madison’s Notes, July 18, 1787).

²⁴⁴ *See* WIECEK, *supra* note 1, at 57–58.

²⁴⁵ 2 FARRAND’S RECORDS, *supra* note 109, at 48 (Madison’s Notes, July 18, 1787).

²⁴⁶ WIECEK, *supra* note 1, at 58.

²⁴⁷ 2 FARRAND’S RECORDS, *supra* note 109, at 48 (Madison’s Notes, July 18, 1787).

²⁴⁸ *Id.* at 48–49 (Madison’s Notes, July 18, 1787).

²⁴⁹ *See id.* at 49 (Madison’s Notes, July 18, 1787).

V. RATIFICATION OF THE GUARANTEE CLAUSE

After the Philadelphia Convention adjourned, representatives assembled in Congress to decide what to do with the proposed constitution.²⁵⁰ 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.²⁵¹ 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.”²⁵² 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.²⁵³ (Publishing under a pseudonym was common practice, especially among anti-Federalists, as a means of personal protection and concisely conveying the writer’s viewpoints.²⁵⁴) 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.²⁵⁵ Centinel claimed that those urging ratification were gripped by a “frenzy of enthusiasm” rather than “a rational investigation into its principles.”²⁵⁶ He therefore called for the proposed constitution to be “dispassionately and deliberately examined.”²⁵⁷ 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

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.

²⁵⁶ Letters of Centinel, No. I (Oct. 5, 1787), *reprinted in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 565, 566 (John B. McMaster & Frederick D. Stone eds., 1888).

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.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.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."²⁶⁰ In contrast, Federal Farmer noted, the people were subject to torture and arbitrary acts wherever the civil law was adopted.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.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.

²⁵⁸ *Id.* at 567.

²⁵⁹ MAIER, RATIFICATION, *supra* note 144, at 82–83.

²⁶⁰ Federal Farmer, Letter VIII (Jan. 3, 1788), in AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 66 (Greenleaf prtq. 1788) [hereinafter LETTERS FROM THE FEDERAL FARMER].

²⁶¹ *Id.*

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

²⁶³ Agrippa, Essays VII, IX, XII, XIV (Dec. 18, 1787–Jan. 18, 1788), *reprinted in* THE ESSENTIAL ANTIFEDERALIST 238 (W. B. Allen & Gordon Lloyd eds., 1985).

²⁶⁴ The Impartial Examiner, Essay No. I (Feb. 20, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 174 (Herbert J. Storing ed., 1981).

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,”²⁶⁷ 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

²⁶⁶ McDONALD, *E PLURIBUS UNUM*, *supra* note 223, at 225.

²⁶⁷ ELLIS, *supra* note 74, at 119.

²⁶⁸ *See id.* at 119–20.

²⁶⁹ Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 4, 1788), in 3 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 23 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 3 *ELLIOT’S DEBATES*].

²⁷⁰ Patrick Henry, Speech to the Virginia Ratifying Convention (June 5, 1788), in 3 *ELLIOT’S DEBATES*, *supra* note 269, at 46.

²⁷¹ Patrick Henry, Speech to the Virginia Ratifying Convention (June 9, 1788), in 3 *ELLIOT’S DEBATES*, *supra* note 269, at 150–51.

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

²⁷² Patrick Henry, Speech to the Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 269, at 171–72.

²⁷³ McDONALD, E PLURIBUS UNUM, *supra* note 223, at 225–26.

²⁷⁴ Letter from William North to Henry Knox (Feb. 13, 1788), in GILDER LEHRMAN COLLECTION, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/collection/glc0243703796> [<https://perma.cc/A67L-AU4V>].

²⁷⁵ WIECEK, *supra* note 1, at 69.

²⁷⁶ Letter from Henry Knox to Rufus King (July 15, 1787), in GILDER LEHRMAN COLLECTION, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/collection/glc0243703605> [<https://perma.cc/RYX4-WHF3>].

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).

²⁸⁰ GEORGE DANGERFIELD, CHANCELLOR ROBERT R. LIVINGSTON OF NEW YORK, 1746–1813, at 107 (1st ed. 1960).

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."²⁸² "The preservation of Republican Govt.," Madison explained, "required some expedient for the purpose, but required evidently at the same time that in devising it, the genuine principles of that form should be kept in view."²⁸³ 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."²⁸⁴

Today, for good reason, Madison is widely regarded as "the most profound, original, and far-seeing among all his peers."²⁸⁵ 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."²⁸⁶ Even so, Madison was undoubtedly instrumental to the drafting of the proposed constitution. Biographer Jack N. Rakove noted that "[n]one of the fifty-five members of the Federal Convention contributed more to the framing of the Constitution than James Madison."²⁸⁷ Russell Kirk similarly noted that "Madison's mind, more than any other man's, gave shape to the Constitution."²⁸⁸ Madison was not only a priceless member of the Philadelphia Convention, but he also stood out among the Constitution's supporters during ratification.²⁸⁹ 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."²⁹⁰ Even James Monroe, who envied Madison, reported that "Madison took the principle share in the debate . . ."²⁹¹ Early

NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/04-04-02-0063> [<https://perma.cc/8SPT-X67B>].

²⁸² 2 FARRAND'S RECORDS, *supra* note 109, at 35–36 (Madison's Notes, July 17, 1787).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ MICHAEL KAMMEN, A SEASON OF YOUTH: THE AMERICAN REVOLUTION AND THE HISTORICAL IMAGINATION 72 (1976).

²⁸⁶ Letter from James Madison to William Cogswell (Mar. 10, 1834), in FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/99-02-02-2952#:~:text=Your> [<https://perma.cc/98XX-EDPT>].

²⁸⁷ RAVOKE, *supra* note 204, at 61.

²⁸⁸ KIRK, RIGHTS AND DUTIES, *supra* note 40, at 67.

²⁸⁹ MAIER, RATIFICATION, *supra* note 144, at 310.

²⁹⁰ *Id.*

²⁹¹ Letter from James Monroe to Thomas Jefferson (July 12, 1788), in FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-13-02-0256> [<https://perma.cc/7WTC-BAVU>].

in George Washington's presidency, he often consulted Madison for the authoritative interpretation of the Constitution.²⁹²

Most important, Madison was the architect, or at least the predominant one, of the Guarantee Clause.²⁹³ 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."²⁹⁴ 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."²⁹⁵ (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.²⁹⁶)

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

²⁹² WILLS, *supra* note 210, at 36.

²⁹³ Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 603, 647 (2018).

²⁹⁴ 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).

²⁹⁵ CHERNOW, *supra* note 222, at 248.

²⁹⁶ See J. R. Pole, *Introduction* to THE FEDERALIST, *supra* note 3, at xix.

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 every where 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.”³⁰⁹ 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.³¹⁰

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.³¹¹

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.³¹²

With few exceptions, the founding generation “shared a distinctly bearish view of human nature.”³¹³ This stemmed from the biblical concept that man naturally drifts toward depravity.³¹⁴ 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

³⁰⁹ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-12-02-0274> [<https://perma.cc/8MYL-JMMX>].

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 abroad³²⁵), 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.

³¹⁵ 1 MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 2 (Boston, Manning & Loring 1805).

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.

³²⁰ THE FEDERALIST NO. 51, *supra* note 3, at 281 (James Madison).

³²¹ *Id.*

³²² THE FEDERALIST NO. 10, *supra* note 3, at 48 (James Madison).

³²³ WOOD, IDEA OF AMERICA, *supra* note 13, at 68, 237; RAKOVE, *supra* note 204, at 54.

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?”³²⁸ But since any manner of experiments may be fueled by such things, does this mean the Guarantee Clause “evolves” with the times—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.”³²⁹ 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.³³⁰

Such notions, and the mischief engendered by them, would have been repugnant to the Founders.³³¹ 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.”³³² 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.”³³³ “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.”³³⁴ Like Madison, Jefferson famously explained that the Constitution is not “a mere thing of wax” that may be twisted and shaped into any form.³³⁵ 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.”³³⁶

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.³³⁷ And

³²⁸ THE FEDERALIST NO. 43, *supra* note 3, at 237 (James Madison).

³²⁹ WIECEK, *supra* note 1, at 242.

³³⁰ Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 528 (1962).

³³¹ See WOODS, NULLIFICATION, *supra* note 48, at 39–40.

³³² James Madison, Veto Message (Mar. 3, 1817), in 8 THE WRITINGS OF JAMES MADISON 388 (Gaillard Hunt ed., 1908).

³³³ Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910).

³³⁴ *Id.*

³³⁵ 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).

³³⁶ Alexander Hamilton, The Examination No. XV (Mar. 3, 1802), in SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 495 (Morton J. Frisch ed., 1985).

³³⁷ David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 713–14 (2020).

although Madison had personal misgivings as to how a society that permitted slavery could be regarded as a republic,³³⁸ he insisted in *Federalist* 43 that the Clause presupposed that all existing states had republican governments.³³⁹ In fact, as Professor Wiecek is quick to point out, “defenders of slavery” once argued that the Clause guarantees the status quo.³⁴⁰ The insinuation is clear: what sort of slack-jawed extremist could possibly doubt Wiecek’s claim that “the standards of republicanism evolve”?³⁴¹

Nearly all prominent Founders realized that slavery contradicted the principles of the American Revolution.³⁴² 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.³⁴³ As commentators have noted, Madison recognized that “republican government, with all its flaws and indeed *because* of its flaws, requires protection.”³⁴⁴ 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?³⁴⁵ 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”?³⁴⁶ 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.³⁴⁷ In short,

³³⁸ RAKOVE, *supra* note 204, at 229.

³³⁹ THE FEDERALIST NO. 43, *supra* note 3, at 238 (James Madison).

³⁴⁰ WIECEK, *supra* note 1, at 85.

³⁴¹ *Id.* at 128.

³⁴² ELLIS, *supra* note 74, at 10.

³⁴³ Jonathan E. Maddison, *House of Cards: How Rediscovering Republicanism Brings It Crashing Down*, 64 CATH. U. L. REV. 649, 664–65 (2015).

³⁴⁴ Toren, *supra* note 294, at 379.

³⁴⁵ Dan T. Coenen, *A Rhetoric for Ratification: The Argument of The Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 527–28 (2006).

³⁴⁶ THE FEDERALIST NO. 21, *supra* note 3, at 111 (Alexander Hamilton).

³⁴⁷ WIECEK, *supra* note 1, at 64.

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 opinion³⁵¹

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

³⁴⁸ *Id.* at 67.

³⁴⁹ See WOODS, NULLIFICATION, *supra* note 48, at 25–26; see also CHERNOW, *supra* note 222, at 260.

³⁵⁰ JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 122 (1st ed. 2000).

³⁵¹ George Washington, Washington's Farewell Address, *as reprinted in* S. Doc. No. 106–21, at 15 (2d Sess. 2000).

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.”³⁵⁴ 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.³⁵⁵ 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.³⁵⁶

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.