

A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause

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I. Introduction

A. *The Setting for Guarantee Clause Arguments Against Citizen Lawmaking*

Despite the public furor they generate,¹ initiatives and referenda² comprise but a tiny share of American legislative activity. Of the more than

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1. REPEATEDLY CITED WORKS: The sources listed in this footnote are cited repeatedly in this Article. Several may be unfamiliar to most legally trained readers. The editions and short citation forms used for these works are:

1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (Da Capo Press 1971) (1787) [hereinafter ADAMS] (only the first volume of this set had been published by the time of the Constitutional Convention)

ARISTOTLE, THE POLITICS (T.A. Sinclair trans., Penguin Books 1962) (circa 4th century B.C.) [hereinafter ARISTOTLE]. I have also consulted the Greek in the Loeb edition, ARISTOTLE, THE POLITICS (H. Rackham trans., Loeb Classical Library 1932) [hereinafter Rackham]

BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967)

Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167 (1974)

THE ANTIFEDERALIST PAPERS (Morton Borden ed., 1965) [hereinafter Borden]

MARCUS TULLIUS CICERO, DE RE PUBLICA, DE LEGIBUS (Clinton Walker Keyes trans., G.P. Putnam's Sons 1928) (1st century B.C.)

GEORGE M. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861 (1976)

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed., J.B. Lippincott 1941) (1836) [hereinafter Elliot]

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1937) [hereinafter Farrand]

THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST]

seventeen thousand laws adopted in 1996 in the twenty-four states allowing citizen initiatives, only forty-five were enacted by voter approval. More than 99.7% were enacted solely by state legislatures.³

Yet both supporters and opponents of citizen lawmaking consider it far more important than those numbers suggest. Advocates see it as a way to increase politicians' responsiveness, check their power, and accomplish necessary, but politically risky, reforms.⁴ They view citizen lawmaking as a valuable alternative to the legislature for issues where the legislature is more vulnerable to special interest pressure than is the electorate at large.⁵

ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE: 1787-1788 (Paul Leicester Ford ed., 1892) [hereinafter Ford, ESSAYS]

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE: 1787-1788 (Paul Leicester Ford ed., 1888) [hereinafter Ford, PAMPHLETS]

E. Christian Kopff, *Open Shutters on the Past: Rome and the Founders*, in VITAL REMNANTS: AMERICA'S FOUNDING AND THE WESTERN TRADITION 71 (Gary L. Gregg II ed., 1999)

FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985)

BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., J.V. Prichard ed., D. Appleton & Co. 1900)

THE OXFORD CLASSICAL DICTIONARY (2d ed. 1970) [hereinafter OCD]

POLYBIUS, THE RISE OF THE ROMAN EMPIRE (Ian Scott-Kilvert trans., Penguin Books 1979) (2nd century B.C.)

CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994)

FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter Sheehan]

THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) [hereinafter Storing]

PUBLIUS VERGILIUS MARO, OPERA (R.A.B. Mynors ed., Oxford Univ. Press 1969) (1st century B.C.) [hereinafter VIRGIL]

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

GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978)

2. An "initiative" is a law or constitutional amendment proposed by citizen petition that, with or without legislative consideration, will thereafter be voted on by the electorate. A "referendum" is a measure approved by the legislature, effective only upon approval by the electorate.

3. Jeff Jacoby, *Ballot Initiatives Keep Democracy on Track*, BOSTON GLOBE, June 5, 2000, 2000 WL 3328971. Even in California, sometimes cited as one of the more active initiative states, only 62 measures made it to the ballot during the 1990s. Peter Schrag, *Rule by Referendum*, AM. PROSPECT, July 17, 2000, at 38, LEXIS, News Library, AMPROS File. This comprises an insignificant portion of the measures heard by any state legislature.

4. See discussion *infra* note 11.

5. Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 622-35 (1998). Compare the discussion among the Framers that larger legislative bodies were less subject to outside "corruption" than smaller ones. Some modern commentators who focus on Madison's filtration/refinement theory seem to overlook that other Founders recognized a tradeoff between filtration/refinement and other values. See, e.g., 3 Elliot, *supra* note 1, at 125-26 (reporting Edmund Randolph's discussion, at the Virginia ratification convention, of the tradeoffs involved in fixing the size of the legislature); *id.* at 167 (Patrick Henry's mocking of the "refinement" theory); *id.* at 262-63 (describing the risk of bribery and corruption in small assembly).

Opponents span the political spectrum,⁶ and many tend to become hyperbolic when discussing the subject. Conservative opponents, for example, have assailed citizen lawmaking as socialistic.⁷ Liberal and progressive⁸ opponents have branded it as a tool whereby mean-spirited reactionaries can oppress minorities and reduce public services to “shambles.”⁹

But there also are more thoughtful opponents. They argue that electors rarely understand the implications of what they are voting on (while supporters rejoin that legislators often do not either) and that citizen lawmaking is inherently nondeliberative¹⁰ (while supporters contend that it offers, partly, a different quality of deliberation and, partly, nondeliberation

6. See Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 639 (“The intensity of the controversy depends in part on the political slant of the most recent spate of ballot votes.”).

7. WIECEK, *supra* note 1, at 260–63 (describing the conservatives’ arguments). As Wiecek notes, the claim that the United States is a “republic not a democracy” has been a staple of the John Birch Society. *Id.* at 263. See also John F. McManus, “A Republic, If You Can Keep It,” NEW AM., Nov. 6, 2000, available at http://www.thenewamerican.com/ina/2000/11-06-2000/vol16no23_republic.htm (last visited Jan. 7, 2002) (arguing that the Framers intended to create a republic, not a democracy). For a sample of a conservative attack on citizen lawmaking, see D.C. Lewis, *Arizona’s Constitution—The Initiative, the Referendum, the Recall—Is the Constitution Republican in Form?*, 72 CENT. L.J. 169, 169 (1911) (attacking initiatives as “Socialist Democracy”).

8. The provoking cause of much recent opposition has been the adoption of initiatives that limit taxes or spending, perpetuate exclusionary zoning, or repeal legislation granting privileges to particular groups. See, e.g., Julian N. Eule, *Crocodiles in the Bathub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998); Catherine A. Rogers & David L. Faigman, “And to the Republic for Which It Stands”: *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057 (1996); Debra F. Salz, Note, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993).

However, other left-of-center writers have remained advocates of citizen lawmaking. See, e.g., William T. Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 2D 269, 272 (1999); Gregory Kafoury, *Raiding the Initiative: Corporations vs. Citizens*, 34 WILLAMETTE L. REV. 729 (1998); Lloyd Marbet, “Democracy is Coming,” 34 WILLAMETTE L. REV. 741 (1998).

9. A left-of-center opponent attacked one initiative, California’s Proposition 13, as exciting “horror,” causing “devastation,” and leaving the economy and state services in “shambles.” Eule, *supra* note 8, at 733.

10. See, e.g., Frickey, *supra* note 8, at 435; Eric Lane, *Men Are Not Angels: The Realpolitik of Direct Democracy and What We Can Do About It*, 34 WILLAMETTE L. REV. 579 (1998); Hans A. Linde, *Taking Oregon’s Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391, 397–98 (1998) (quoting George Will); Rogers & Faigman, *supra* note 8, at 1063; Comment, *The Constitutionality of the Initiative and Referendum*, 13 YALE L.J. 248, 250 (1903); Philip J. Weiser, Note, *Ackerman’s Proposal for Popular Constitutional Lawmaking: Can It Realize His Aspirations for Dualist Democracy?*, 68 N.Y.U. L. REV. 907 (1993). The most celebrated recent charge is that money plays an untoward role in initiatives. See generally DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

where nondeliberation is a virtue).¹¹ But perhaps the most durable argument in opposition to citizen lawmaking is that it violates the Guarantee Clause of the U.S. Constitution, wherein the United States is to guarantee every state a “republican form of government.”¹² Republican lawmaking, the argument goes, is lawmaking only through legislative representatives.¹³ Lawmaking by plebiscite renders the government a democracy rather than a republic. Hence, opponents conclude, there is little constitutional place for citizen lawmaking in the American union.

B. Existing Case Law

Opponents have repeatedly raised the Guarantee Clause question in state and federal court. At the federal level, the Supreme Court erased the issue from the docket by deciding, in the 1912 case of *Pacific States Telephone & Telegraph Co. v. Oregon*,¹⁴ that whether citizen lawmaking violated the Guarantee Clause was a “political question” for Congress. This followed prevailing doctrine on the federal nonjusticiability of Guarantee Clause claims, a doctrine that the Supreme Court has confirmed several times since *Pacific States*.¹⁵ However, in recent years, legal commentators have

11. For an interesting defense of both the deliberative and nondeliberative aspects of initiatives, see Gillette, *supra* note 5, at 628–35. In response to opponents’ criticism of the “either-or/no amendments” choice presented to voters in citizen lawmaking, supporters respond that this can be one of the strengths of the process, because it offers an alternative for citizens seeking reforms that could not survive the legislature without being gutted—or made worse—by amendments. Admittedly, it is the rare measure that cannot be approved by amendment, but initiatives tend to involve rare measures. As Judge Robert Henry trenchantly puts it: “[S]ome issues do have simple answers.” Robert Henry, *Deliberations About Democracy: Revolutions, Republicanism, and Reform*, 34 WILLAMETTE L. REV. 533, 567 (1998).

It seems undeniable that open-ended deliberation is not always a virtue. In the Virginia ratifying convention, for example, Patrick Henry defended the indefensible scheme of requisitions under the Articles of Confederation by pointing out that requisitions were more *deliberative* than taxes. 3 Elliot, *supra* note 1, at 148–49. This excess of deliberation, of course, nearly destroyed the union. Good government sometimes depends on an end to deliberation.

12. Article IV, Section 4 of the Constitution states: “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.”

13. For example, in David Broder’s new book, the author repeatedly equates republicanism with representative government. BRODER, *supra* note 10, at 14–17, 21, 242–43. See also Steven William Marlowe, *Direct Democracy Is Not Republican Government*, 24 SEATTLE U. L. REV. 1035, 1047 & n.84, 1048 (stating that “[t]he plain meaning of ‘republican’ [as representative democracy rather than direct democracy] can be derived from any basic government textbook for high school students,” noting that the author “still has his government textbook from his junior year in high school,” and citing the same).

14. 223 U.S. 118 (1912).

15. The original case was *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). For subsequent cases, see, for example, *City of Rome v. United States*, 446 U.S. 156 (1980), and *Baker v. Carr*, 369 U.S. 186 (1962). But see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (reaching the merits of the

repeatedly urged the Court to abandon the nonjusticiability doctrine in Guarantee Clause cases.¹⁶

Opponents of citizen lawmaking have long maintained that, notwithstanding the position of the federal courts, state tribunals can and should invalidate at least some initiatives and referenda as “unrepublican.” With one exception—a Delaware case decided in 1847¹⁷—this argument has not been successful.

The best-known state case on the subject is the Oregon Supreme Court’s 1903 decision in *Kadderly v. City of Portland*.¹⁸

The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government. Cooley, Const. Lim. (7th Ed.) 45; 2 Story, Const. (5th Ed.) § 1815. But it does not forbid them from amending or changing their Constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed.¹⁹

State-court decisions sustaining initiatives and referenda tend to fall into three classes, defined by how categorically the court defends citizen lawmaking as a component of republican government. The Colorado cases make up the most favorable class, holding that initiatives and referenda are fundamental to republican government.²⁰ Cases in the second class avoid the implication that a government must allow citizen lawmaking in order to be

claim that a state’s denial of franchise to women violated the Guarantee Clause, and holding that there was no violation).

16. The renewed interest in judicial review under the Guarantee Clause is described in Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 850 n.4 (1994). See also Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887 (1994); Salz, *supra* note 8. But see Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881 (1994) (opposing judicial use of the clause).

17. *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847).

18. 74 P. 710 (Or. 1903).

19. *Kadderly*, 74 P. at 719. Other cases sustaining citizen lawmaking include *In re Pfahler*, 88 P. 270 (Cal. 1906) (upholding a local initiative law against a Guarantee Clause challenge, while implying that similar measures on the state level would be constitutional as well), *Cagle v. Qualified Electors of Winston Co.*, 470 So. 2d 1208 (Ala. 1985), *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), *McKee v. City of Louisville*, 616 P.2d 969 (Colo. 1980), *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974), *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281 (Cal. 1978) (requiring a two-thirds vote to raise local taxes), *Westerberg v. Andrus*, 757 P.2d 664 (Idaho 1988), *Oregon v. Montez*, 789 P.2d 1352 (Or. 1990), *Washington v. Davis*, 943 P.2d 283 (Wash. 1997), and *State ex rel. Billington v. Sinclair*, 183 P.2d 813 (Wash. 1947).

20. See *Margolis*, 638 P.2d at 297; *McKee*, 616 P.2d at 969; *Bernzen*, 525 P.2d at 416.

considered republican. But they do say that citizen lawmaking is consistent with republicanism because republicanism is popular government, and citizen lawmaking is fully consistent with popular government. Illustrative of this style of reasoning is *Hartig v. City of Seattle*,²¹ which the Washington Supreme Court decided in 1909:

[I]t can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people be made directly by their own acts or through representatives chosen by them is not material. The important consideration is a full expression.²²

Cases in the third class concede, at least for purposes of argument, that republican government is predominantly representative government. But these cases hold that the challenged institutions of citizen lawmaking are permissible because they do not displace representative institutions sufficiently to render the state "unrepublican." Illustrative of this third class is *Kadderly*, in which the court acknowledged that James Madison had described republican government as representative,²³ but stated:

Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place²⁴

As we shall see, the courts of the second class—those defending citizen lawmaking as consistent with, but not necessary to, republicanism—are closest to the correct position.

Given the lack of success of Guarantee Clause challenges to citizen lawmaking, one might have thought the issue was settled. However, over the past few years, both legal commentators²⁵ and litigants²⁶ have been

21. 102 P. 408 (Wash. 1909).

22. *Id.* at 409. See also *Hopkins v. City of Duluth*, 83 N.W. 536 (Minn. 1900).

23. The meaning of Madison's comments is explored *infra* section VI(B)(1).

24. *Kadderly*, 74 P. at 720. See also *In re Initiative Petition No. 348*, 820 P.2d 772 (Okla. 1991).

25. See, e.g., Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994). Justice Linde's and others' contentions along this line are discussed *infra* subpart VI(A). Cf. Ernest L. Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 LOY. L.A. L. REV. 1305 (1998) (urging the use of California's republican-form-of-government clause to strike down initiatives).

26. See, e.g., *Santa Clara County v. Guardino*, 902 P.2d 225 (Cal. 1995) (not reaching the contention); *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (finding the Guarantee Clause not justiciable, but noting that the court must consider possible congressional action in judging the effect of the initiative); *In re Initiative Petition No. 348*, 820 P.2d at 772 (upholding a

aggressively, and with growing frequency, pressing state courts to invalidate citizen lawmaking on Guarantee Clause grounds.

C. Existing Scholarship

Academic investigation of whether the Guarantee Clause allows citizen lawmaking has not heretofore settled the issue. The most careful author's verdict on the claim of the opponents is the Scottish one: "Not Proven."²⁷ Other commentators—on both sides of the issue—have been unpersuasive. I say this because most have based their arguments on evidence that is sparse, unsupportive of their conclusions, or distant from the Founding Era.²⁸ Some—also on both sides—have adopted as a starting point, without historical investigation, the premise that to be a republic, a state's lawmaking must be predominantly representative.²⁹ This is the wrong river fork, and its

mandatory referendum on tax increases because representative government remains, although restricted); Oregon *ex rel.* Huddleston v. Sawyer, 932 P.2d 1145 (Or. 1997) (holding that the Guarantee Clause is not justiciable); Lowe v. Keisling, 882 P.2d 91 (Or. Ct. App. 1994) (same); Washington v. Davis, 943 P.2d 283 (Wash. 1997).

In addition, the plaintiffs raised the issue at the trial level in a case in which I was a prevailing defendant, *Nicholson v. Cooney*, 877 P.2d 486 (Mont. 1994) (sustaining the petition referendum). The American Civil Liberties Union raised the issue as amicus in *Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999), which struck down on other grounds a constitutional initiative to require public votes on tax increases. Cf. *Morrissey v. Colorado*, 951 P.2d 911 (Colo. 1998) (invalidating, on the authority of Article V of the U.S. Constitution, a specific voter direction to state legislators to call for a federal constitutional convention, refusing to determine the justiciability of the Guarantee Clause issue, but stating in dicta that the direction violated that clause).

27. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994). Although other articles conclude with a vague feeling that some kinds of direct democracy violate the Guarantee Clause while others do not, they have marshaled little evidence to show where the dividing line should be. See, e.g., Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. COLO. L. REV. 741, 744–47 (1994); Eule, *supra* note 8, at 738.

28. See, e.g., T.A. Sherwood, *The Initiative and Referendum Under the United States Constitution*, 56 CENT. L.J. 247, 249–50 (1903) (citing works by nineteenth-century authors); Lewis, *supra* note 7, at 176 (same); Glenway Maxon, *Is the Referendum Anti-Republican?*, 72 CENT. L.J. 378 (1911) (same); Charles R. Brock, *Republican Form of Government Imperiled*, 7 A.B.A. J. 133 (1921); cf. *Hile v. City of Cleveland*, 141 N.E. 35 (1923), *dismissed per curiam*, 266 U.S. 582 (1924) (citing Abraham Lincoln and a nineteenth-century commentator while upholding a city-manager form of government).

29. See, e.g., Frickey, *supra* note 8, at 427, 446 (1998) (noting the purported "tension between direct democracy and republican government" and proposing limiting direct democracy procedurally and substantively); Hardy Myers, *The Guarantee Clause and Direct Democracy*, 34 WILLAMETTE L. REV. 659, 659 (1998) ("We can probably assume, based on the Federalist Papers if nothing else, that the critical component of a republican form of government is representative lawmaking."); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 542 (1994); Sirico, *supra* note 6, at 644–45, 649, 653–59 (stating that republican governments must be representative, that plebiscites are nonrepublican, and that therefore plebiscites must be merely "ancillary" to the legislative process if the state is to remain republican in form); W.A. Coumts, *Is a Provision of the Initiative and Referendum Inconsistent with the Constitution of the United States?*, 6 MICH. L. REV. 304, 306 (1907); Willis L. Hand, *Is the*

current drives them onto shoals of unanswerable questions: What forms of citizen lawmaking disqualify a state as republican? What subject matter is acceptable? How much citizen lawmaking is compatible with republicanism, and how much is too much? Often such inquiries boil down to the question, "How can we find a rule that upholds initiatives we like while striking down those we don't?"

Fortunately, these questions need be neither asked nor answered—certainly not within anything approaching the current scope of citizen lawmaking—because there is a clear historical answer to the question of whether legislative plebiscites violate the Guarantee Clause. That answer is "no."

D. Nature and Results of this Study

This Article is neither an exhaustive treatment of all aspects of the Guarantee Clause nor a treatise on republican values or civic republicanism. It is an inquiry into whether the participants in the great constitutional debate of 1787–1789 thought that a "republican form of government" excluded citizen lawmaking.

What this Article does that no previous article has done is to examine a broad range of historical evidence. Only a few authors³⁰ have consulted more than a handful of the Framers' contemporary statements and writings on this aspect of the Guarantee Clause. No writers have discussed the then-standard literary works that informed the participants' understanding of "republic"—especially works by classical Greek and Roman authors.³¹

Based on the totality of the evidence, I conclude that:

- (1) Republican government has three "core requirements": (i) ultimate control by the citizenry (majority or plurality rule), (ii) absence of a king, and (iii) adherence to the rule of law.³²
- (2) Citizen lawmaking as practiced in the United States today does not violate the Guarantee Clause. On the contrary, a much broader realm for citizen lawmaking would be consistent with the republican form—

Initiative and Referendum Repugnant to the Constitution of the United States?, 58 CENT. L.J. 244 (1904). But see Mayton, *supra* note 8, at 272 (denying that there should be a constitutional "normative preference" against citizen lawmaking, at least if it is supplemental to representative lawmaking). This is the approach of the *Kadderly* line of cases. See *supra* notes 18–19, 23–24 and accompanying text.

30. The broadest treatments are in Amar, *supra* note 27, at 756–73, and in WIECEK, *supra* note 1, at 11–50.

31. Judge Robert Henry has referred to classical works in analyzing why the Framers adopted a purely representative form for the federal government. But this has not been done for the Guarantee Clause, which applies to state government, and is far less prescriptive as to the nature of the "republican form" required. Henry, *supra* note 11, at 564–72.

32. See *infra* subpart IV(B).

and was characteristic of most prior and existing governments that all participants in the constitutional debates agreed were republican in form.³³

(3) The Guarantee Clause *probably* does not require a state to have any representative legislature at all. In other words, when technology makes it feasible, a state probably will be able to abolish its legislature and allow the people to vote directly on all legislative issues, while still remaining “republican” for Guarantee Clause purposes. This does not mean that a state could abolish its executive and judicial bodies and remain republican.³⁴

II. The Classical Context

“Intellectually, the founding fathers knew the ancient world better perhaps than they knew the European or even the British world, better, in all likelihood, than they knew the American outside their own section.”³⁵

The classical heritage of Greece and Rome formed a central part of the learning of educated Americans during the eighteenth century, as it had been to the learning of educated people for many centuries previous.³⁶ All educated people studied and read ancient Greek and Latin.³⁷ Indeed, a boy entering college was expected to be able to translate Greek into Latin and to write both Latin prose and poetry.³⁸ All educated people were steeped in the history and literature of the ancient Mediterranean world. Although scholars differ on the extent to which the classical heritage influenced the fundamental patterns of our Founders’ thought,³⁹ all agree that the historical and literary tradition of the ancient world served as a fertile source of illustrations, lessons, ideas, ideals, and vocabulary.⁴⁰ The founding generation

33. See *infra* section V(A)(1).

34. See *infra* section VI(B)(1). This is, of course, a constitutional inquiry—I am not proposing that we test the proposition by abolishing state legislatures. The abolition of executive and judicial magistracies would institute what the Founders called “pure democracy” and would likely violate the republican form. *Id.*

35. RICHARD, *supra* note 1, at 1 (quoting Henry Steele Commager).

36. *Id.* at 12–38.

37. *Id.*; see also MCDONALD, *supra* note 1, at xi.

38. RICHARD, *supra* note 1, at 19.

39. *Id.* at 1–4; Kopff, *supra* note 1, at 71–73. Bailyn is more dismissive of the classical influence than more recent historians, but even he writes, “Most conspicuous in the writings of the Revolutionary period was the heritage of classical antiquity. Knowledge of classical authors was universal among colonists with any degree of education, and references to them and their works abound in the literature.” BAILYN, *supra* note 1, at 23–24.

40. This truth was rediscovered in the 1960s and 1970s, when scholars identified the “republican” ideas that pervaded the founding generation. For a summary of the constitutional implications of the work of scholars such as Bernard Bailyn, J.G.A. Pocock, Gordon Wood, Robert Shalhope, Garry Wills, Cass Sunstein, and others, see J. David Hoeveler, Jr., *Original Intent and the*

mined the classical lode for history, entertainment, philosophy, and writings on government. "In short, the classics supplied a large portion of the founders' intellectual tools."⁴¹

Because Americans of recent decades are not steeped in this classical learning,⁴² most of today's lawyers, judges, and law professors face two obstacles in attempting to interpret our founding documents. First, readers who do not understand Latin have trouble understanding eighteenth-century legal and political English, in which meaning, structure, and usage often followed Latin patterns.⁴³ As classicist E. Christian Kopff has stated, "We need to know Latin if we want to think like the Founders."⁴⁴ Second, the Founders' myriad classical references are lost on readers without classical educations. For example, a reader investigating the political life of George Washington needs to know something of the careers of Cincinnatus and Cato the Younger, both important figures in the history of the Roman Republic. The "American Cincinnatus" signified how many in the founding generation understood Washington—the farmer and statesman called from his plow to rescue his country from danger, thence speedily returning to the land once the danger was past. Cato was the model that Washington set for himself: the Stoic and principled foe of tyranny, unyielding to the last.⁴⁵

Several historians have discussed the pervasiveness of the classical tradition in the ideology of America's founding.⁴⁶ But another, simpler way to divine the classical influence in the constitutional debate is to count the classical citations in the surviving documents. The transcripts of the Constitutional Convention in Philadelphia contain scores of references to classical history, events, and philosophy. Delegates solemnly discussed ancient Greece in general and, more specifically, the governments and history of Athens, Sparta, the Achaean League,⁴⁷ and their (inaccurate)

Politics of Republicanism, 75 MARQ. L. REV. 863, 868–92 (1992). For an older view, see Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972).

41. RICHARD, *supra* note 1, at 8.

42. One measure of this development is the devastating drop in the number of American students studying high school Latin. From a peak of 702,000 in 1962, enrollment plummeted to only 150,000 in 1976. Editorial, *Latin Gains a New Life*, ST. PETERSBURG TIMES, Dec. 6, 1987, at 2D, LEXIS, News Library, STPETE File. Since that time, there has been a slow resurgence—to 164,000 in 1990 and 189,000 in 1994. See *Pop Ousts Classics to Give Latin a New Life*, DAILY TELEGRAPH, Nov. 28, 1998, at 18, 1998 WL 3062051.

43. On the Latinate English of the Framers, see MCDONALD, *supra* note 1, at xi, and WILLS, *supra* note 1, at 93.

44. Kopff, *supra* note 1, at 74.

45. On Washington as "Cincinnatus," see Kopff, *supra* note 1, at 77–78, and RICHARD, *supra* note 1, at 70–72. On Washington as "Cato," see MCDONALD, *supra* note 1, and RICHARD, *supra* note 1, at 58–60.

46. See, e.g., RICHARD, *supra* note 1; MCDONALD, *supra* note 1, at 67–68; Hoeveler, *supra* note 40, at 871.

47. RICHARD, *supra* note 1, at 109–12.

beliefs about the Amphictyonic League.⁴⁸ They commented on the history and governments of Carthage and devoted particular attention to Rome. They quoted Aristotle, Cicero, Plutarch, and Montesquieu, who in turn had relied extensively on classical works.⁴⁹ They also relied on a recent volume authored by John Adams, who had done likewise.⁵⁰

When the debate over the Constitution broke out in public, this pattern continued. Newspaper articles written by both Federalists and Anti-Federalists were replete with classical allusions, some obscure to the modern reader. The most famous collection of pro-Constitution tracts, now known as *The Federalist Papers*, included discussions of the governments of ancient Athens, Sparta, Crete, Rome, Carthage, and various Greek confederacies.⁵¹ Similarly, other Federalist writers, such as Noah Webster, the lexicographer, bolstered his work with classical references.⁵² Anti-Federalists responded in kind.⁵³

48. Richard tells the story of how the participants, particularly the Federalists, "did not forget the Amphictyonic League . . . nor would they allow anyone else to do so." *Id.* at 104–09. But the Founders were mistaken in believing the league to be a political confederacy; it was "a religious body, without any coercive power." *Id.* at 104–05. Nevertheless, Professor E. Christian Kopff shows that the adoption of two senators from each state likely was inspired by reputed Amphictyonic practice. Kopff, *supra* note 1, at 83.

49. Detailed citations would be merely tedious, especially because the reader may verify the truth of these statements by looking up these topics in the index to Farrand's *The Records of the Federal Convention of 1787*. For a few examples, see 1 Farrand, *supra* note 1, at 308 (Hamilton, citing Aristotle and Cicero), *id.* at 449 (Madison, citing Plutarch), *id.* at 143, 313, 319, 343 (references to the Achaean League), *id.* at 143, 285, 317, 320, 343, 441, 448, 454, 478 (references to the Amphictyonic League), and *id.* at 112, 135, 553 (references to Athens).

50. On Adams's influence, see *infra* text accompanying notes 73–77.

51. See, e.g., THE FEDERALIST, *supra* note 1, NO. 4, at 49 (John Jay) (referring to the history of ancient Greek states), NO. 6, at 54–55 (Alexander Hamilton) (discussing various Greek states), NO. 34, at 206 (Hamilton) (discussing the legislative system in the Roman Republic), NO. 38, at 231–33 (James Madison) (reviewing the foundation of Crete, the Locrians, Athens, Sparta, Rome, and the Achaean and Amphictyonic Leagues), NO. 41, at 257 (Madison) (discussing Rome's expansion), NO. 63, at 385–89 (probably Madison) (referring to the senates of Sparta, Rome, and Carthage and to putative representation in various ancient republics), NO. 70, at 423, 425 (Hamilton) (referring to Roman dictators and consuls), NO. 75, at 453 (Hamilton) (referring to the Roman tribuneship). This does not represent a complete list.

52. See, e.g., Ford, PAMPHLETS, *supra* note 1, at 29 (Noah Webster, mentioning two Roman kings, Romulus and Numa, as lawgivers), 31, 42–43 (referring to Roman popular assemblies), 35–37 (describing the Roman and British constitutions), 55–56 (discussing the Roman senate), 57–58 (discussing the Roman people's struggle for power and privilege). For other examples, see *id.* at 148 (Tench Coxe, mentioning the Greek and Roman "republics"), 171, 180, 188–90 (John Dickinson, referring to Rome and Athens); Sheehan, *supra* note 1, at 111 (William Duer, writing as "Philo-Publius," referring to Athens as both a republic and a democracy), 330 ("One of the Four Thousand," referring to Brutus's killing of Caesar), 332 (same, mentioning Caligula and Virgil), 338 (same, mentioning Philip of Macedon), 347 (a Federalist, "Cato," referring to Rome as a republic).

53. See *infra* notes 176–81 and accompanying text. See also "A FARMER," ANTIFEDERALIST NO. 3 (Cato, Rome, Sulla, Marius, Caligula, Nero, Elegabalus), PATRICK HENRY, ANTIFEDERALIST NO. 4 (ancient Greece and Rome), "AN OLD WHIG," ANTIFEDERALIST NOS. 18–20 (pt. 1) (ancient Rome), "A NEWPORT MAN" ANTIFEDERALIST NOS. 18–20 (pt. 2) (ancient Greece), "BRUTUS,"

Transcripts of the state ratifying conventions are displays of classical learning. Delegates on both sides enlisted the ancients to fight on their behalf. The Massachusetts debate was particularly notable in this regard: delegates contended on the floor with dueling references to the ancient cities of Asia Minor,⁵⁴ Athens,⁵⁵ and Sparta,⁵⁶ to ancient Greece generally;⁵⁷ to Rome;⁵⁸ to ancient republics generally;⁵⁹ and to particular institutions and historical episodes and ideas.⁶⁰ Massachusetts was in good company—delegates in many other states used similar allusions.⁶¹ Virginia, for

ANTIFEDERALIST NO. 25 (probably Robert Yates, writing of ancient Rome), ANTIFEDERALIST NO. 40 (a compilation of articles by "An American," who discusses Rome, and by "Centinel," who discusses Caesar, Rome, and changes in Roman government), "SYDNEY," ANTIFEDERALIST NO. 45 (Robert Yates, writing about Greece and Rome), "ARISTOCRATIS," ANTIFEDERALIST NO. 51 (Assyria, Persia, Macedon, Rome), "FEDERAL FARMER," ANTIFEDERALIST NOS. 55 (pt. 1) (Richard Henry Lee, writing of Sparta and Rome), 56 (pt. 2) (various aspects of the Roman constitution), 58 (pt. 4) (Roman senate), 69 (Roman consuls), "CINCINNATUS," ANTIFEDERALIST NO. 64 (pt. 3) (1787) (Roman *decemviri*), reprinted in Borden, *supra* note 1. See also Ford, ESSAYS, *supra* note 1, at 55 ("Agrippa," referring to Greece, Rome, and Carthage), 93–94 ("Agrippa," referring to Carthage), 256 (George Clinton, writing of Sparta and Athens in "Letters of Cato"), 267 (Clinton, referring to Caesar, Caligula, Nero, and "Domitain" [*sic*]), 278 (Clinton, writing of Philip of Macedon and Demosthenes). There are many other examples.

54. 2 Elliot, *supra* note 1, at 8 (Fisher Ames).

55. *Id.* at 16–17, 113 (Christopher Gore), 68 (Samuel Willard), 126 (James Bowdoin).

56. *Id.* at 68 (Samuel Willard).

57. *Id.* at 8 (Fisher Ames), 52 (Samuel Perley).

58. *Id.* at 10 (Fisher Ames), 16–17 (Christopher King), 52 (Samuel Perley), 62 (Major Kingsley), 68 (Samuel Willard), 75 (Thomas Jones), 143, 146 (Thomas Thacher), 160 (Nathaniel Barrell).

59. *Id.* at 55 (Rufus King), 66 (Christopher Gore), 69 (Nathaniel Gorham).

60. See, e.g., *id.* at 65, 69 (containing Christopher Gore's and James Bowdoin's references to the Roman *decemviri*), 71 (William Symmes, citing to Aristotle's "golden mean"), 136 (Samuel Nason, alluding to Caesar's crossing of the Rubicon), 148 (Reverend Backus, referring to Constantine's adoption of Christianity), 159 (Nathaniel Barrell, alluding to the oratory of Cicero and Demosthenes).

61. For Connecticut, see *id.* at 185 (Oliver Ellsworth, discussing the expansion of ancient Rome), 187 (Ellsworth, describing the Amphictyonic, Achaean, and Aetolian confederations), 198–200 (Governor Huntington, discussing the purported invention of representation only in modern times).

For New York, see *id.* at 214 (Robert R. Livingston, discussing ancient republics), 228 (Melancton Smith, describing ancient republics), 234–35 (Alexander Hamilton, mentioning the Lycian, Achaean, and Amphictyonic leagues), 248–49 (Smith, discussing "Grecian republics"), 254 (Hamilton, describing Sparta and Rome), 259 (Smith, discussing Sparta and Rome), 302 (Hamilton, discussing ancient republics), 352–53 (Hamilton, mentioning ancient independent cities), 395 (Livingston, alluding to the dying words of Caesar), 398 (Thomas Tredwell, mentioning Roman dictators), 402 (Tredwell, noting how Rome drew wealth from the provinces, and drawing a parallel to the prospective capital city).

For North Carolina, see 4 *id.* at 195 (James Iredell, alluding to Philip of Macedon's subversion of the Amphictyonic confederation).

For Pennsylvania, see 2 *id.* at 422 (James Wilson, mentioning the Achaean, Lycian, and Amphictyonic confederacies).

For South Carolina, see 4 *id.* at 293 (Robert Barnwell, discussing the Amphictyonic council), 312 (James Lincoln, describing the Roman senate).

example, whose deliberations in the committee of the whole were conducted under the eye of chairman and Roman law scholar George Wythe, rivaled or exceeded Massachusetts in the delegates' command of Greek and Roman lore.⁶²

In view of the founding generation's immersion in the classical heritage, and their frequent use of classical allusions during the constitutional debate, one seeking to understand America's founding documents must take account of that heritage. The entire founding generation considered the form of government in ancient Rome between 509 and 27 B.C. to have been republican. This form of government served as both a positive and a negative model for them. Indeed, the subject of Rome "gripped their minds, [it was] what they knew in detail, and what formed their view of the whole of the ancient world."⁶³ Their favorite survey of the history of that government was the *Ab Urbe Condita* of Titus Livius ("Livy").⁶⁴ Even more influential on their views of republicanism were three classical political theorists:

- Aristotle (384–322 B.C.), the Greek philosopher whose *Politics* classified different forms of constitutions, including democracies and mixed constitutions,⁶⁵
- Polybius (c. 200–post 118 B.C.), the expatriate Greek historian of the Roman Republic whose disquisition on the mixed constitutions was a favorite among the founding generation, and

On the participants' discussions of the Amphictyonic, Achaean, and Lycian Leagues, see RICHARD, *supra* note 1, at 104–14.

62. 3 Elliot, *supra* note 1, at 19 (Wilson Nicholas, discussing the expulsion of kings and the creation of consuls at Rome), 46 (Patrick Henry, describing the loss of liberty in Greece and Rome), 87 (Madison, explaining the causes of destruction of ancient and modern republics), 128 (Edmund Randolph, discussing ancient confederacies), 129–30 (Madison, discussing ancient confederacies, the Amphictyonic League, Philip of Macedon, and the Achaean League), 160 (Patrick Henry, explaining the Roman Republic's office of "dictator"), 162 (Patrick Henry, alluding to Cincinnatus), 181 (Lee of Westmoreland, alluding to the Amphictyonic League), 209–11 (James Monroe, discussing the Amphictyonic and Achaean leagues, Thebes, Athens, Sparta, and other states), 242 (Wilson Nicholas, discussing the republics of ancient Greece), 277 (William Grayson, referring to barbarian invasions of Rome), 278 (Grayson: "Thank God we have a Carthage of our own!"), 280 (Grayson, mentioning Roman dictators, *decemviri*, and Caesar), 282 (Grayson, referring to Rome), 308 (Madison, discussing the *decemviri*), 455 (John Tyler, discussing Athens, Rome, and Caesar), 491 (Grayson, mentioning Rome, consuls, and mixed government), 494 (George Mason, describing the trial of Milo at Rome), 530 (Mason, quoting from Virgil), 546 (Henry, referring to Roman law), 569 (Grayson, discussing the office of Roman dictator), 568 (Grayson, expounding upon the Roman institution of patron and client), 595 (Henry, discussing the Roman institution of the veto), 617 (Madison, referring to ancient confederacies).

63. BAILYN, *supra* note 1, at 25.

64. Livy was born in either 59 or 64 B.C. and died in either A.D. 12 or 17. He chronicled Roman history from its mythological beginnings to his own day. On Livy's influence, see *infra* text accompanying note 132.

65. Aristotle's life is summarized in the translator's introduction to *POLITICS*, *supra* note 1, at 9–11.

- Marcus Tullius Cicero (106–43 B.C.), the Roman statesman and political philosopher, and perhaps the most popular classical author of all.⁶⁶

III. The Central Secondary Sources

A. Montesquieu and Adams

For those in the constitutional debate whose knowledge of Cicero or Aristotle was a little rusty, extensive summaries, excerpts, and borrowings from the classics were available in widely read secondary sources. Among these, of course, was William Blackstone's *Commentaries*, then the all-important handbook on law.⁶⁷ But two eighteenth-century books, Baron Montesquieu's *Spirit of the Laws*⁶⁸ and John Adams's *Defence of the Constitutions of the United States*, more directly influenced the debate.

The records of the constitutional debates contain many references to "the celebrated Montesquieu"⁶⁹ or "the great Montesquieu."⁷⁰ One cannot immerse oneself in these documents without concluding that Montesquieu's influence was enormous. He is cited repeatedly by both sides in newspaper columns⁷¹ and in convention debates.⁷² Many of these authors noted

66. Historian Carl J. Richard tells us:

After the Stamp Act of 1765, many theses applied the political principles of Aristotle, Cicero, and Polybius to the debates concerning independence and the Constitution. Samuel Adams had anticipated these issues in his own master's thesis, delivered in flawless Latin in 1743. In answer to the title question "Whether It Be Lawful to Resist the Supreme Magistrate, if the Commonwealth Cannot Be Otherwise Preserved," Adams resoundingly asserted: absolutely!

RICHARD, *supra* note 1, at 24. He also notes that Cicero was a special favorite of James Wilson and John Adams. *See id.* at 61–63, 65, 175–78.

67. At the Virginia ratifying convention, several delegates resorted to Blackstone. 3 Elliot, *supra* note 1, at 501 (James Madison), 506 (George Nicholas), 544 (Patrick Henry). Blackstone's discussion of comparative forms of government drew heavily upon writings of the ancients. 1 WILLIAM BLACKSTONE, COMMENTARIES *49–50. Also popular at the time was Niccolo Machiavelli's *Discourses on Livy*, which employed classical concepts. *See* NICCOLO MACHIAVELLI, DISCOURSES ON LIVY (Harvey C. Mansfield & Nathan Tarcov trans., 1996) (1517).

68. Montesquieu relied heavily upon classical sources and discussed them extensively. By way of illustration, in Book 2 alone (his first substantive book), he refers to classical themes on pages 10 (Sparta, Rome, Libanius), 11 (Athens, Rome), 12 (Aristides, Xenophon, Rome, Livy, Dionysius Halicarnassus), 13 (Athens [twice], Dionysius, Aristotle's *Politics*); 14 (Cicero's *De Legibus*, Demosthenes), 15 (Rome, Athens), 16–17 (Rome), 18 (Athens, Diodorus). *See* 1 MONTESQUIEU, *supra* note 1. This chapter is not atypical.

69. THE FEDERALIST, *supra* note 1, NO. 47, at 301 (James Madison), NO. 78, at 466 (Alexander Hamilton). *See also* "BRUTUS," ANTIFEDERALIST NO. 54, reprinted in Borden, *supra* note 1; 2 Elliot, *supra* note 1, at 352 (Hamilton, speaking at the New York ratifying convention); 3 *id.* at 84 (Edmund Randolph, speaking at the Virginia ratifying convention); 3 *id.* at 247 (George Nicholas, speaking at the same convention); Storing, *supra* note 1, at 16 ("Centinel"); 3 *id.* at 212, 217.

70. 2 Elliot, *supra* note 1, at 340 (John Williams, speaking at the New York ratifying convention); 3 *id.* at 612 (John Dawson, speaking at the Virginia ratifying convention).

71. *See, e.g.*, THE FEDERALIST, *supra* note 1, NO. 9, at 73 (Alexander Hamilton), NO. 43, at 277 (James Madison), NO. 47, at 301 (James Madison), NO. 78, at 466 (Alexander Hamilton). *See also*

Montesquieu's doubts regarding whether a republic could govern a large territory, as well as his formula for a confederate republic. But there also are many references, attributed and unattributed,⁷³ to Montesquieu's division of governments into monarchies, despotisms, and republics—with democracies comprising a subset of the latter.

Montesquieu was dead by the time the Constitution was debated, but a living writer had an influence nearly as great: John Adams, the ambassador to Great Britain and future president. The power of Adams's work is not widely known, perhaps because we all learned in high school that he was in England during the debates. But his ideas inspired the delegates at Philadelphia during the convention and the state debates that followed.

Adams's spirit took the form of a remarkable book, *A Defence of the Constitutions of Government of the United States*, which discussed the existing constitutions of the states. Nominally a series of letters, the *Defence* is actually a compendium of historical extracts and commentary on the structures of past governments. The first and most important volume of the *Defence* was published shortly before the convention opened, and it was well-thumbed by the delegates in Philadelphia that summer.⁷⁴

WILLIAM GRAYSON, ANTIFEDERALIST NO. 2, "CATO," ANTIFEDERALIST NOS. 14, 67, "CENTINEL," ANTIFEDERALIST NO. 47, "BRUTUS," ANTIFEDERALIST NO. 54, "THE FEDERAL FARMER," ANTIFEDERALIST NOS. 55 (pt. 1), 61, "CINCINNATUS," ANTIFEDERALIST NO. 64 (pt. 3), "WILLIAM PENN," ANTIFEDERALIST NO. 73, *reprinted in* Borden, *supra* note 1; Ford, ESSAYS, *supra* note 1, at 256, 273 (George Clinton, writing "Letters of Cato"); Ford, PAMPHLETS, *supra* note 1, at 255 (Alexander Contee Hanson, writing as "Aristides"), 347 (James Iredell, writing as "Marcus").

72. For Massachusetts, see 2 Elliot, *supra* note 1, at 13 (Fisher Ames), 14 (same), 16–17 (Christopher Gore), 126–28 (James Bowdoin).

For New York, see *id.* at 224 (Melancton Smith).

For Pennsylvania, see *id.* at 421 (James Wilson), 482 (same).

For Virginia, see 3 *id.* at 84 (Edmund Randolph), 165 (Patrick Henry), 279 (William Grayson), 280 (same), 288 (same), 294 (Edmund Pendleton).

73. See, e.g., 3 *id.* at 30 (George Mason, speaking at the Virginia ratifying convention). Thus, Patrick Henry at the Virginia ratifying convention spoke of the resistance to despotism as coming from either "aristocratical" or "democratical" spirit. *Id.* at 51. He also discussed Switzerland as a confederation in which democratic and aristocratic republics co-existed in harmony. *Id.* at 62. Edmund Randolph also followed Montesquieu's division, *id.* at 84, as did George Mason, *id.* at 268 (stating that Holland was a republic irrespective of whether it was a democracy or an aristocracy).

74. See 3 Farrand, *supra* note 1, at 33 (quoting Benjamin Rush's letter to Richard Price, which noted that "Mr. Adams' book has diffused such excellent principles among us"); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 66 (1966); CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 11 (1966). See also Kopff, *supra* note 1, at 69 ("As Gilbert Chinard saw, 'Even a casual glance at the records of the Federal Convention will show that Adams' book was used as a sort of repertory by many speakers, who found in it a confirmation of their views, and chiefly convenient historical illustrations and precedents.'"). Other references to Adams's influence appear in various Anti-Federalist tracts. See, e.g., "ALFRED," ANTIFEDERALIST NO. 16, "JOHN HUMBLE," ANTIFEDERALIST NO. 27 (pt. 2), "CENTINEL," ANTIFEDERALIST NO. 47, *reprinted in* Borden, *supra* note 1.

IV. Defining Elements and Optional Characteristics in the "Republican Form"

A. *The Division*

Ascertaining the definition of "republican form" in the Guarantee Clause requires more than consulting a dictionary and snipping a few snatches from Madison and one or two other authors.⁷⁵ Instead, one must determine the community of understanding, if any, among those ratifying the Constitution when they used the word "republic." Evidence of the Framers' intent is, of course, legitimate evidence of that understanding. Even better evidence includes representations made by the Constitution's advocates to induce adoption, statements on the subject made at the ratification conventions, statements made in the public at large (*e.g.*, published opinion articles), and common assumptions gleaned from sources such as Adams, Montesquieu, and the educational canon of Greek and Roman authors. It is important to stress that what one must seek is a *definition* of "republican form." Characteristics that the participants liked or wanted to see in the American federal government were not necessarily part of their definition of republican government.

The historical record enables us to go a long way toward determining which institutions cited by the participants in their discussions of republicanism were *defining elements* of republics and which were *optional characteristics*. Defining elements were those without which a government was not republican. Optional characteristics might be considered very wise or very foolish, but their presence or absence did not determine whether a government was republican. Of course, the Guarantee Clause requires only that states retain the defining elements. Desirable optional characteristics are prescribed in other parts of the Constitution.

B. *Defining Elements*

Without much doubt, almost all of the participants agreed on these defining elements:

Adams's influence was also felt in the ratification debate. He was mentioned in Anti-Federalist literature. *See, e.g.*, Storing, *supra* note 1, at 15–16 ("Centinel") (asserting that in a republican form of government, the "people are the sovereign and their sense or opinion is the criterion of every public measure"); Ford, *ESSAYS*, *supra* note 1, at 117 (James Winthrop, writing as "Agrippa," citing ADAMS, *supra* note 1, on the subject of mobs). At the Massachusetts ratification convention, Christopher Gore respectfully referred to him as "Dr. Adams," and at the New York convention, Melancton Smith described him as a "natural aristocrat." 2 Elliot, *supra* note 1, at 17, 281.

75. This has been the predominant methodology in this area, especially among those claiming that citizen lawmaking is unrepublican. *See infra* subpart VI(B).

- Rule by the majority of participants—or, if there were more than two ballot choices, by either a majority or plurality,
- absence of a monarch; and
- the rule of law.

1. *Republicanism requires that the majority (or plurality) rule.*—One can translate the Latin phrase *res publica* in a number of ways, most of which capture the basic idea communicated to classically trained minds of the Framers: “the people’s affair,” “commonwealth,”⁷⁶ “popular government,”⁷⁷ or “the people’s (or popular) state.”⁷⁸ Because republican government rests in the people,⁷⁹ the participants repeatedly identified rule by the majority as central to republican government.⁸⁰ Majority rule pertained to both selection

76. Thus, James Harrington, a seventeenth-century writer widely read by the founding generation, employed the word “commonwealth” to describe what that generation would have called a democratic republic. See generally JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656). “Oceana” is a reference to Britain during the interregnum governance of the two Cromwells, who briefly ruled the nation as a republic. In his own influential work, John Adams relied on excerpts from *Oceana*. See ADAMS, *supra* note 1, at 127 (asserting that laws in a commonwealth must reflect the interest of the whole people), 138 (explaining the decision-making role of the people in a commonwealth), 159–69 (excerpting *Oceana*).

77. The influential philosopher-historian David Hume referred to republicanism in this sense. See DAVID HUME, *WHETHER THE BRITISH GOVERNMENT INCLINES MORE TO ABSOLUTE MONARCHY, OR TO A REPUBLIC* (1741), reprinted in *POLITICAL ESSAYS* 28–32 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (repeatedly contrasting “absolute monarchy” with “popular government,” and using “republic” as a synonym for popular government).

78. *New York Times* humorist Russell Baker, admittedly no Framers, once suggested: “the public thing.”

79. See 3 Elliot, *supra* note 1, at 298; Arthur E. Bonfield, *The Guarantee Clause of Article IV, §4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 527 (1962) (quoting from the 1786 edition of Samuel Johnson’s *Dictionary*, which defined “Republican” as “[p]lacing the government in the people”); HARRINGTON, *supra* note 76, at 24 (“[T]he interest of the commonwealth is in the whole body of the people.”); ADAMS, *supra* note 1, at xxi (“[A]nd the very name of a republic implies, that the property of the people should be represented in the legislature, and decide the rule of justice.”).

80. See, e.g., 2 Elliot, *supra* note 1, at 195–97 (Oliver Ellsworth, stating at the Connecticut ratifying convention that “[i]n republics, it is a fundamental principle that the majority govern, and that the minority comply with the general voice”); cf. 2 *id.* at 197 (equating veto by a single state to monarchy); 2 *id.* at 257 (Hamilton, stating that “the true principle of a republic is, that the people should choose whom they please to govern them . . . Representation is imperfect in proportion as the current of popular favor is checked.”); 4 *id.* at 237 (William R. Davie, who had been a constitutional-convention delegate, stating at the North Carolina ratifying convention, that “[a] majority is the rule of republican decisions”); 3 *id.* at 46 (Patrick Henry, stating at the Virginia ratifying convention that minority rule is inconsistent with republicanism). Thus, at the Virginia ratifying convention, Wilson Nicholas pointed out that the rules of suffrage were fundamental in republics. *Id.* at 8. Cf. *id.* at 489 (James Monroe, opining that it is unrepblican for each state to have one vote in electing the president in the House of Representatives because of the inequality of population among the states). See also WIECEK, *supra* note 1, at 69 (discussing James Wilson’s statement that broad suffrage is secured by the Guarantee Clause); Storing, *supra* note 1, at 16 (“Centinel”); Ford, PAMPHLETS, *supra* note 1, at 22 (Elbridge Gerry, stating that “it is a republican

of government officials (for short terms of office) and enactment of laws.⁸¹ When there were more than two choices or candidacies, plurality rule was acceptable.⁸² It is revealing that participants in the debate sometimes referred to their state republics as “democratic” or “democracies.”⁸³

2. *Republicanism precludes monarchy.*—Because the participants’ vision of republican government required majority (or plurality) decision-making, that vision was necessarily inconsistent with monarchy.⁸⁴ In the historical documents, monarchy is the form of government most often cited as the polar opposite of republicanism.⁸⁵ Indeed, it is likely that the principal

principle that the majority should rule”); *id.* at 54 (Noah Webster, stating that “[i]n a free government every man binds himself to obey the . . . opinions of a majority”). Professor Amar has argued that majority rule is the central meaning of “republicanism” for Guarantee Clause purposes. Amar, *supra* note 27, at 762–66. See also Comment, *The Constitutionality of the Initiative and Referendum*, 13 YALE L.J. 248 (1903).

81. 3 Elliot, *supra* note 1, at 39 (Edmund Pendleton, speaking at the Virginia ratifying convention about representatives); 3 *id.* at 396 (Patrick Henry, speaking at the same convention about representatives); 3 *id.* at 488–89 (James Monroe, speaking at the same convention, about the president); 3 *id.* at 536 (Madison, asserting that the people can select their own rulers); 3 *id.* at 597 (Patrick Henry, stating that compliance with the majority on issues is republican).

82. See, e.g., 2 *id.* at 246 (Melancton Smith, speaking at the New York ratifying convention); *id.* at 329 (Duane, mentioning at the New York convention that the plurality election is the usual result in New York).

83. See, e.g., 3 *id.* at 50 (Patrick Henry, speaking at the Virginia ratifying convention); cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *50 (using “republic” interchangeably with “democracy”).

84. See Chemerinsky, *supra* note 16, at 867–88; Bonfield, *supra* note 79, at 527 (quoting from the 1786 edition of Samuel Johnson’s *Dictionary*, which defined a “Republic” as “a state in which the power is lodged in more than one”). Giving too much power to the president was, therefore, inconsistent with republican principles. See, e.g., 3 Elliot, *supra* note 1, at 509–10 (George Mason, at the Virginia ratifying convention, praising the constitutional clause that requires the president to share the treaty-making power with the Senate); “PHILADELPHIENSIS,” ANTIFEDERALIST NO. 74 (probably Benjamin Workman, who titles the essay “The President as a Military King”), reprinted in Borden, *supra* note 1.

85. Examples from the ratifying conventions include: *Connecticut*: 2 Elliot, *supra* note 1, at 196 (Oliver Ellsworth); *Pennsylvania*: 2 *id.* at 421 (James Wilson), 428 (same), 433 (same); *Virginia*: 3 *id.* at 152 (Patrick Henry), 161 (same), 166 (same), 172 (same), 325 (same), 583 (same), 282 (William Grayson), 615 (same), 485 (George Mason), 497 (same).

Cf. 2 *id.* at 648 (Zachariah Johnson, stating at the Virginia ratifying convention that during the interregnum, England was “a kind of republic”); see also THE FEDERALIST, *supra* note 1, NO. 6, at 56 (Hamilton); NO. 22, at 149 (Hamilton), NO. 34 (same); “A FARMER,” ANTIFEDERALIST NO. 3, PATRICK HENRY, ANTIFEDERALIST NO. 4, “CATO,” ANTIFEDERALIST NO. 14, “AN OLD WHIG,” ANTIFEDERALIST NO. 18 (pt. 1), reprinted in Borden, *supra* note 1. See also THURSTON GREENE, THE LANGUAGE OF THE CONSTITUTION 691–92 (1991) (quoting from Thomas Paine); HUME, *supra* note 77 (repeatedly contrasting “absolute monarchy” with “popular government” and using “republic” as a synonym for popular government); Sheehan, *supra* note 1, at 344 (“Atticus,” contrasting the possibilities of royal and republican government), 351 (“A Democratic Federalist,” contrasting royal and republican government); Ford, PAMPHLETS, *supra* note 1, at 7 (Elbridge Gerry, implying that one could not have a republic founded on monarchical principles), 130 (Pelatiah Webster, writing as “Finis,” that Rome lost republican government and instituted a monarchy).

purpose of the Guarantee Clause was to block creation of monarchy in one or more states.⁸⁶ One reason for this was a belief that the American federation might not survive if some states were monarchies because, as James Iredell declared at the North Carolina ratifying convention,

[i]f a monarchy was established in any one state, it would, endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. . . . The king of Macedon . . . got himself admitted a member of the Amphictyonic council, which was the superintending government of the Grecian republics; and in a short time he became master of them all. It is, then, necessary that the members of a confederacy should have similar governments.⁸⁷

Only John Adams, who used the term “republic” more loosely than almost any other Founder,⁸⁸ admitted the possibility of “monarchical republics,” at least where the monarchy was limited by legislative chambers representing the aristocracy and the people.⁸⁹

3. *Republicanism requires the rule of law.*⁹⁰—The participants often mentioned the rule of law, or some rough synonym, as essential to republics⁹¹

86. Such was the purpose stated by Edmund Randolph, the sponsor of the Virginia Plan, in which the first version of the Clause appeared. 1 Farrand, *supra* note 1, at 206 (Yates). Nathaniel Gorham recited the same purpose. 2 *id.* at 48. See also 3 *id.* at 548–49 (James Madison, reciting the dangers of monarchy).

87. 4 Elliot, *supra* note 1, at 195. “The king of Macedon” is King Philip, the father of Alexander the Great. See also 3 *id.* at 209–11 (James Monroe, speaking at the Virginia ratifying convention, making much the same point).

88. Adams both decried the misuse of the term “republic” and, at times, seemed to have acceded to it. He preferred the phrase “free republic” to define what American republics should be. ADAMS, *supra* note 1, at 87. Many years later, he sourly remarked that “the word *republic* as it is used, may signify anything, everything, or nothing.” He also stated that he “never understood” the Guarantee Clause, that the term *republic* was “fraudulent,” and that “successive predominant factions will put glosses and constructions upon it as different as light and darkness.” WIECEK, *supra* note 1, at 13, 72.

89. ADAMS, *supra* note 1, at xxii, 70. Although the other participants frequently referred to Adams’s book, none of them appear to have agreed with him on this point.

90. On this topic, see Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 567–69 (1984), and WIECEK, *supra* note 1, at 25.

91. See, e.g., 4 Elliot, *supra* note 1, at 111 (James Iredell, stating at the North Carolina ratifying convention that “in [a republican] government, the law is superior to every man”); 3 *id.* at 39 (Edmund Pendleton, speaking at the Virginia ratifying convention), 84 (Edmund Randolph, speaking at the Virginia ratifying convention), 295–96 (“In my mind the true principle of republicanism, and the greatest security of liberty, is regular government.”), 478 (Edmund Randolph, stating that “justice and honor” are cornerstones of republicanism), 649 (Zachariah Johnson, stating that republics have sanction of laws and legal authority); Sheehan, *supra* note 1, at 329 (“Atticus,” describing a republic as “a government of laws and not of men”), 351 (“A Democratic Federalist,” referring to “a genuine republic—which ought to be a government of laws”); Ford, PAMPHLETS, *supra* note 1, at 36–37 (Noah Webster, writing of “all free governments, that is, in all countries, where laws govern, and not men”); see also Bonfield, *supra* note 79, at 527–

or to those democracies that qualified as republics.⁹² Note that the participants did not treat “democracies” and “republics” as mutually exclusive categories.⁹³ “Pure democracy” (a technical term, discussed later,⁹⁴ for a corrupt form of democracy) was not considered to be republican because it did not follow the rule of law. Despotism, also called “tyranny,”⁹⁵ was excluded both because of its one-person government and because it, too, disregarded the rule of law. A government that arbitrarily attainted and punished a person did not follow the rule of law, and therefore was not republican.⁹⁶ Similarly, the use of force rather than peaceable processes to obtain money for the government was considered to be inconsistent with republicanism.⁹⁷

A list with only three defining elements on it is a pretty short one,⁹⁸ and I am not ruling out the possibility that the republicanism of the Guarantee

28 (explaining that republican governments must respect “natural justice,” which, however, from the examples given, seems much the same as the rule of law). Thurston Greene quotes John Adams as saying that “the very definition of a *republic* is, ‘an Empire of laws and not of men.’” GREENE, *supra* note 85, at 692. However, because Adams noted that the term “republic” has been used to identify even tyrannies, he argued that the rule of law is a defining characteristic only of “free republics.” ADAMS, *supra* note 1, at 87. But elsewhere, Adams makes the rule of law *the* defining characteristic of a republic. *Id.* at xxi–xxii. For a more extensive discussion by Adams of the “rule of law” criterion, see *id.* at 124, 128.

92. See, e.g., 3 Elliot, *supra* note 1, at 222–23 (John Marshall, at the Virginia ratifying convention, referring to the American states as democracies, and listing the maxims of democracy as observance of justice, good faith, and a steady adherence to virtue).

93. See, e.g., 2 *id.* at 352–53 (Hamilton, calling those “republics” with popular assemblies “democracies”); 3 *id.* at 211 (James Monroe, at the Virginia ratifying convention, asserting that state governments were “perfectly democratic”), 222 (John Marshall, referring to the government under the proposed Constitution as a democracy), 277 (William Grayson, calling Pennsylvania and Maryland “democratic states”), 310 (Madison, arguing against applying the example of Holland to America because “Holland is not a republic or a democracy”); Ford, ESSAYS, *supra* note 1, at 106 (James Winthrop, writing as “Agrippa,” dividing republics into democratic and aristocratic varieties), 251 (George Clinton in the “Letters of Cato,” writing of “democratic republics”); Ford, PAMPHLETS, *supra* note 1, at 206 (John Dickinson, writing as “Fabius” of the “democracy of The United States”); Sheehan, *supra* note 1, at 111 (William Duer, writing as “Philo-Publius,” calling ancient Athens both a democracy and a republic). See also BAILYN, *supra* note 1, at 282 (“‘Republic’ and ‘democracy’ were words closely associated in the colonists’ minds; often they were used synonymously.”).

94. See *infra* section VI(B)(2). See also G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 798 (1994) (arguing that the Guarantee Clause protects against “mobocracy” as well as monarchy and despotism).

95. On the identity of the terms among the participants, see 3 Elliot, *supra* note 1, at 117 (Edmund Randolph, using “despot” and “tyrant” interchangeably at the Virginia ratifying convention), 223 (John Marshall, referring to “tyranny” as a state without law), 293 (Edmund Pendleton). For the classical context, see Kopff, *supra* note 1, at 86–87.

96. 3 Elliot, *supra* note 1, at 66–67 (Edmund Randolph, speaking at the Virginia ratifying convention). See also *id.* at 223 (John Marshall).

97. *Id.* at 105–06 (Francis Corbin, speaking at the Virginia ratifying convention).

98. But it certainly suggests that the Guarantee Clause is not “indeterminate at [its] core.” Cf. White, *supra* note 94, at 803.

Clause includes other qualifying criteria.⁹⁹ But the defining elements had to be few in number because, as historian Forrest McDonald has observed, “though the Framers shared the commitment [to republicanism] in the abstract, they were far from agreed as to what republicanism meant, apart from the absence of hereditary monarchy and hereditary aristocracy.”¹⁰⁰ Professor McDonald’s observation actually overstates the level of agreement, because many Framers—perhaps most—believed that a republic could feature hereditary aristocracy,¹⁰¹ although by a separate constitutional provision they made sure that the American republic would not.¹⁰²

99. Moreover, the “rule of law” criterion no doubt has some specific content. See Bonfield, *supra* note 79, at 527–28 (advocating that federal courts enforce on states not merely traditional rights but also what appears to be the author’s social agenda). See also Chemerinsky, *supra* note 16, at 859–60, 864–66 (asserting that the Guarantee Clause should be used to protect individual rights).

100. McDONALD, *supra* note 1, at 5. See also John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, Or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 245–46 (1998).

101. Some leading figures held that aristocracy was inconsistent with republicanism. See, e.g., Ford, ESSAYS, *supra* note 1, at 390 (writing as “A Plain Dealer,” Spencer Roane contrasts a republic with aristocracy and monarchy); Sheehan, *supra* note 1, at 35 (“Philodemos,” describing orders of nobility as anti-republican), 94 (Tench Coxe, contrasting a republic with aristocracy, oligarchy, and monarchy); Storing, *supra* note 1, at 16 (“Centinel”) (positing that an aristocracy “will rise on [the] ruin” of a republican government when the people are no longer sovereign); 4 Elliot, *supra* note 1, at 195 (James Iredell, at the North Carolina ratifying convention, distinguishing republican government from both monarchy and aristocracy), 202 (William Lenoir, making the same distinction); 2 *id.* at 278 (Chancellor Livingston, at the New York ratifying convention, explaining that “[t]he truth is, in these republican governments, we know no such ideal distinctions. We are all equally aristocrats.” But admittedly he may have been talking only about the American republics.), 433 (James Wilson, speaking at the Pennsylvania convention). But see 2 *id.* at 483 (Wilson, referring to the “Dutch republic,” although that state was known to be an aristocracy).

However, the “celebrated Montesquieu” had treated aristocracy as a kind of republic. The great Roman Republic had been aristocratic, as was the Dutch state at the time. All participants treated Rome as a republic, and most also treated the Dutch state as a republic. 2 *id.* at 188 (Oliver Ellsworth, speaking at the Connecticut ratifying convention), 224 (Melancton Smith, speaking at the New York ratifying convention), 234 (Hamilton, speaking at the New York ratifying convention); 3 *id.* at 146–47 (Patrick Henry, speaking at the Virginia ratifying convention), 153 (same), 160 (same), 189, 200 (Edmund Randolph, identifying Holland as both an aristocracy and a republic), 268 (George Mason, recognizing Holland to be a republic irrespective of whether it is a democracy or an aristocracy), 275, 290 (William Grayson); WILLIAM GRAYSON, ANTIFEDERALIST NO. 2, reprinted in Borden, *supra* note 1; Ford, PAMPHLETS, *supra* note 1, at 351 (James Iredell, writing as “Marcus,” and referring to Holland as a “republic”). Although at the Virginia ratifying convention Madison objected to calling Holland a republic, at another point he did so himself. 3 Elliot, *supra* note 1, at 310, 394. An Anti-Federalist writer, “An Old Whig,” disputed Holland’s classification as a republic, not because it was an aristocracy, but because he thought it was a monarchy. “A NEWPORT MAN,” ANTIFEDERALIST NOS. 18–20 (pt. 2), reprinted in Borden, *supra* note 1. There are other statements suggesting that a republic could be aristocratic. See, e.g., 3 Elliot, *supra* note 1, at 565 (William Grayson, speaking at the Virginia ratifying convention); Ford, ESSAYS, *supra* note 1, at 106 (James Winthrop, writing as “Agrippa,” dividing republics into democratic and aristocratic varieties, following Montesquieu). See generally ADAMS, *supra* note 1, which discusses at length at least fifteen “aristocratical republics,” both ancient and contemporary.

C. *Optional Characteristics*

Participants in the constitutional debate expressed various beliefs regarding institutions and laws that would promote sound republicanism without contending that those institutions and laws were defining elements of republicanism. In other words, a state could be a republic, however well or badly governed, with or without them. Various participants advocated some of these optional characteristics as desirable for all republics, everywhere and always. They advocated others as desirable for American governments under the territorial, technological, and social conditions of the time.

One optional characteristic that the Framers probably considered desirable in all republics was a ban on paper money. Paper money was viewed as evil, and the participants spent much time inveighing against it.¹⁰³ But I have found only one suggestion that the issuance of paper money disqualified a government from being republican.¹⁰⁴ The new Constitution did specifically prohibit the states from “emit[ting] Bills of Credit”¹⁰⁵—an implicit admission that the Guarantee Clause would not do the job. But more important, although the Framers probably did not expect the federal government to issue paper money, they apparently did not bar it from doing so.¹⁰⁶ Both the federal and state governments were to be republican in form, but the rules written into the structure of one were not necessarily, or even

Although not probative on the original understanding, it is interesting that the U.S. Supreme Court has held that significant restrictions on the franchise are not per se violations of the republican form. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (upholding under the Guarantee Clause a state’s denial of the franchise to women). In any event, commentator Glenway Maxon clearly was in error when he wrote, “It is conceded by all that an aristocracy or a monarchy in any form would be anti-republic.” Maxon, *supra* note 28, at 378. Cf. WIECEK, *supra* note 1, at 42–50 (concluding that republicanism was seen to be contrary to monarchy and aristocracy, but citing only historical documents showing that republicanism was seen to be contrary to monarchy).

102. U.S. CONST. art. I, § 10.

103. See, e.g., *At the Constitutional Convention*: 1 Farrand 134 (George Mason), 137 (Charles C. Pinckney), 154–55, 165 (Elbridge Gerry), 288 (Alexander Hamilton).

Anti-Federalist Writing: Storing, *supra* note 1, at 180–81 (“Brutus”); Sheehan, *supra* note 1, at 332, 342 (“Atticus”); Ford, PAMPHLETS, *supra* note 1, at 283 (Richard Henry Lee, writing as the “Federal Farmer”).

Massachusetts Ratifying Convention: 2 Elliot, *supra* note 1, at 142–43 (Reverend Thomas Thacher), 171 (Charles Turner).

Virginia ratifying convention: 3 *id.* at 28, 78 (Edmund Randolph), 156, 163 (Patrick Henry), 179–80 (Lee of Westmoreland), 290–91 (William Grayson), 549 (Edmund Pendleton).

104. Sheehan, *supra* note 1, at 35 (“Philodemos,” identifying paper money as an “anti-republican distinction”).

105. U.S. CONST. art. I, § 10, cl. 1.

106. *The Legal Tender Cases*, 79 U.S. 457 (1870). See also Ford, PAMPHLETS, *supra* note 1, at 374 (David Ramsey, writing as “Civis,” notes: “For instance, the states cannot emit money: This is not intended to prevent the emission of paper money, but only of state paper money.”).

usually, imposed on the other.¹⁰⁷ The constitutional debates reveal a variety of other optional characteristics: a senate,¹⁰⁸ a qualified veto for the executive,¹⁰⁹ annual elections,¹¹⁰ the exclusive right of the lower house to initiate money bills,¹¹¹ separation of powers,¹¹² diffusion of land ownership,¹¹³ and term limits (“rotation in office”) coupled with state legislative recall for U.S. Senators.

The debate at the New York ratifying convention over a proposed amendment for recall and rotation of senators provides a good example of debate over an optional characteristic.¹¹⁴ Both sides supported their positions by appealing to republican principles. Melancton Smith argued that recall and rotation could prevent the unrepublican eventuality of a senate that was “a fixed and unchangeable body of men.”¹¹⁵ Robert R. Livingston countered that recall and rotation impaired republicanism because they abridged the people’s right to elect whomever they choose.¹¹⁶ But nobody claimed that

107. Thus, Professor Richard Collins writes: “The folks who adopted the Tenth and Eleventh Amendments would surely have allowed peaceful adoption of the initiative by a state, even if they thought it insufficiently republican for their own creations [*i.e.*, for the federal structure].” Richard Collins, *Initiative Enigmas*, 65 U. COLO. L. REV. 807, 808 (1994).

108. Thus, Madison earnestly contended for a senate, while acknowledging that republican governments had existed without one. THE FEDERALIST, *supra* note 1, NO. 63, at 385 (James Madison). See also 2 Elliot, *supra* note 1, at 301–02 (Hamilton, arguing for a senate at the New York ratifying convention).

109. 4 Elliot, *supra* note 1, at 74 (James Iredell, speaking at the North Carolina ratifying convention).

110. Thus, three Anti-Federalist writers made known their position in this way:

We suppose it next to impossible that every individual in this vast continental union, should have his wish with regard to every single article composing a frame of government. And therefore, although we think it more agreeable to the principles of republicanism, that elections should be annual, yet as the elections in our own state government are so, we did not view it so dangerous to the liberties of the people, that we should have rejected the constitution merely on account of the biennial elections of the representatives—had we been sure that the people have any security even of this.

CONSIDER ARMS, MALACHI MAYNARD & SAMUEL FIELD, ANTIFEDERALIST NO. 52, *reprinted in* Borden, *supra* note 1.

111. 4 Elliot, *supra* note 1, at 39 (James Iredell, at the North Carolina ratifying convention, calling it “one of the greatest securities in any republican government”).

112. See, e.g., 2 *id.* at 512 (James Wilson, at the Pennsylvania ratifying convention, speaking of separation of powers as being “so necessary to preserve the freedom of republics”). Only very rarely did a participant state that checks and balances or separation of powers were a defining element (as opposed to an optional characteristic) for a republican system. See, e.g., 3 *id.* at 54 (Patrick Henry, speaking at the Virginia ratifying convention). For the classical background of balance and separation of powers, see Kopff, *supra* note 1, at 78–84.

113. 3 Elliot, *supra* note 1, at 469 (James Wilson, speaking at the Pennsylvania ratifying convention).

114. See 2 *id.* at 288–325.

115. *Id.* at 310. Cf. 3 *id.* at 483–85 (George Mason, stating that rotation would further the republican principle of governmental responsibility to the people).

116. 2 *id.* at 291–93. See also 2 *id.* at 301–02 (Hamilton, opposing recall because of the unfortunate fate of republics that lacked independent senators).

the resulting government would not be a republic if his position was defeated.¹¹⁷

D. Constitutional Authorization to Change Optional Characteristics

The drafting history and subsequent debate on the Guarantee Clause shows that it was designed to allow the states great flexibility to alter their optional characteristics. The first draft of the Clause was rejected precisely because it could be read to freeze existing state forms and laws into the U.S. Constitution. At the Constitutional Convention, William Houston objected to any clause that might perpetuate the existing constitution of Georgia;¹¹⁸ Gouverneur Morris similarly objected to perpetuation of the laws of Rhode Island.¹¹⁹ Accordingly, the delegates adopted language that made it clear that the states had the right to adopt new institutions.¹²⁰ As Madison later pointed out:

As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. *Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter.*¹²¹

Other participants in the constitutional debate also emphasized the states' flexibility under the Guarantee Clause to adopt new institutions, so long as those institutions were republican.¹²²

117. Perhaps the most famous example of someone who failed to receive much of what he wanted, but nevertheless recognized the final product as republican, was Alexander Hamilton. Hamilton, of course, favored a constitution far more "high toned" than the version eventually adopted, yet he clearly viewed the final draft as republican. See 1 Farrand, *supra* note 1, at 291-93, for Hamilton's proposed version of the Constitution.

118. 2 *id.* at 48. For additional information on the drafting and ratification process, see Jonathon K. Waldrop, Note, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 272-77 (1999).

119. 2 Farrand, *supra* note 1, at 47.

120. WIECEK, *supra* note 1, at 58, 62. This appears to be the only book-length treatment devoted solely to the Guarantee Clause. Unfortunately, as is true of other writings on the subject, it does not treat fully the Greco-Roman classical context, although the importance of that context had already been rediscovered by historians. See *supra* Part II.

121. THE FEDERALIST, *supra* note 1, NO. 43, at 275 (James Madison) (emphasis added).

122. See, e.g., 2 Elliot, *supra* note 1, at 168 (Delegate Stillman, stating that "each state shall choose such republican form of government as they please"); 4 *id.* at 195 (James Iredell, speaking at the North Carolina convention); cf. 3 *id.* at 469-70 (Edmund Randolph, discussing the Guarantee Clause and the common law at the Virginia ratifying convention); *id.* at 427 (George Nicholas, stating that "[a]s to the 4th article, it was introduced wholly for the particular aid of the states. A republican form of government is guaranteed, and protection is secured against invasion and domestic violence on application. Is not this a guard as strong as possible? Does it not exclude the unnecessary interference of Congress in business of this sort?"); *id.* at 424-25 (James Madison).

V. Citizen Lawmaking as “Republican”

A. *Explicit Statements*

The participants’ community of understanding on whether a republic could feature citizen lawmaking is revealed in part by their explicit statements on the subject. These statements, all of which recognized citizen lawmaking to be consistent with republicanism, fall into two categories: statements in the literary canon relied on by the participants in the constitutional debate, and explicit statements by the participants themselves. There were also many implicit statements, which will be considered later.¹²³

1. *Explicit Statements in the Contemporary Literary Canon.*—The Greek political theorists who most influenced the participants were Aristotle and Polybius. Aristotle did not speak of citizen lawmaking in a “republic,” because that word, being a Latin derivative, was unknown to him. However, I mention Aristotle at this point for the sake of completeness, because in his *Politics* he used the word *politeia*, which was regularly translated into Latin as *res publica*, just as the title of Plato’s most famous work, *Politeia*, came to be called “The Republic.”¹²⁴ Aristotle used *politeia* to mean several different things, one being a mixture of oligarchy and democracy, which was one of his favorite forms of government.¹²⁵ That *politeia* allowed for citizen lawmaking is certain, because Aristotle cites Sparta as an example; there, as the participants in the constitutional debates knew, citizens cast direct popular votes on *all* proposed laws.¹²⁶

Polybius was a Greek historian writing in the second century B.C. His purpose was to educate his fellow Greeks about how the Roman state had risen to world power in such a short period of time. Because he believed the key to Roman success lay in the excellence of the Roman constitution, he dwells for some time on that subject. In the course of his treatment, he discusses citizen lawmaking in the Roman Republic.

Polybius—like the other political theorists whom the Framers studied (Aristotle, Montesquieu, Cicero, and Adams, for example)—greatly admired the notion of a “mixed” constitution: a constitution containing monarchical,

123. See *infra* subpart V(B).

124. 1 PLATO, THE REPUBLIC 2–3 (Paul Shorey trans., G.P. Putnam’s Sons 1930) (circa 4th century B.C.). The translation of *politeia* as “republic” results from translations into the Latin *res publica*. See H.D.P. Lee, *Translator’s Introduction to PLATO, THE REPUBLIC* 26 (H.D.P. Lee trans., Penguin Books 1955). More recently, *politeia* has been translated as “polity” or “constitutional government.” ARISTOTLE, *supra* note 1, at 71 *et passim* (translating *politeia* as “polity”); Rackham, *supra* note 1, at 319 (translating the same term as “constitutional government”).

125. ARISTOTLE, *supra* note 1, at 71–73.

126. ADAMS, *supra* note 1, at 254.

aristocratic, and democratic elements.¹²⁷ Many modern writers forget that citizen lawmaking can be part of a “mixed government,” and that the Roman Republic was, to the founding generation, an excellent example. Polybius described the democratic segment of Rome’s government as being primarily of the direct, rather than the representative, variety. Executive magistrates (and the senate, which was fundamentally an executive branch agency in Polybius’s day) possessed a limited power to issue decrees, whereas formal legislation came out of the popular assemblies, in which citizens voted in person.¹²⁸ Indeed, wrote Polybius, if one focused on the awesome power of the popular assemblies, “from this point of view one could reasonably argue that the people have the greatest share of power in the government, and that the constitution is a democracy.”¹²⁹

At the Virginia ratifying convention, James Monroe, later President of the United States, read aloud from Polybius to the other delegates.¹³⁰ He then offered his view that Rome exemplified the mixed constitution:

What was the object of the distribution of power in Rome? It will not be controverted, that there was a composition or mixture of aristocracy, democracy, and monarchy, each of which had a repellent quality which enabled it to preserve itself from being destroyed by the other two; so that the balance was continually maintained.¹³¹

Two of the founding generation’s most beloved Latin authors were Livy and Cicero. The influence of Livy’s *Histories* was primarily as a source of stirring stories of republican virtue and valor. However, Livy’s writings also contain frequent references to the popular assemblies of the Roman *res publica*, some of which were reproduced in Adams’s book.¹³² By contrast, Cicero’s influence was more intellectual. At the time the Constitution was written, most of his *De Re Publica* was still lost, but the Founders studied its

127. POLYBIUS, *supra* note 1, at 312–18; *see also* RICHARD, *supra* note 1, at 125–26.

128. For a description of the popular assemblies, *see infra* notes 187–91 and accompanying text. Some modern historians argue that the senate was the real power at Rome. *See, e.g.*, DONALD R. DUDLEY, *THE CIVILIZATION OF ROME* 38–39 (1962); RICHARD, *supra* note 1, at 126–27. The historians whom the Framers read, however, did not share this viewpoint.

129. POLYBIUS, *supra* note 1, at 315. This quotation is reproduced in a slightly different translation in ADAMS, *supra* note 1, at 173.

130. 3 Elliot, *supra* note 1, at 210.

131. *Id.* at 218.

132. A particularly good translation of those “stirring stories” in the early part of Rome’s history is TITUS LIVY, *THE EARLY HISTORY OF ROME* (Aubrey De Selincourt trans., 1960) (1st century A.D.). It explains much about Patrick Henry to know that, after reading Livy in Latin at the age of 15, he reread that author’s works in their entirety in translation every year. RICHARD, *supra* note 1, at 31. Adams’s treatment of the Roman Republic’s political history, which relies on Livy and other historians, appears in ADAMS, *supra* note 1, at 334–61.

available fragments.¹³³ They also read the sequel, *De Legibus* (On The Laws), and Cicero's orations. *De Legibus* includes a collection of proposed laws for Cicero's ideal republic and incorporates Roman practices of citizen lawmaking in popular assemblies.¹³⁴ As for his orations, Cicero delivered several of these before Roman popular assemblies acting in their legislative capacity.¹³⁵

As noted above,¹³⁶ two eighteenth-century political theorists, Montesquieu and Adams, directly influenced the American constitutional debate. Both of those authors acknowledged on multiple occasions that direct citizen lawmaking could take place in republics.

Montesquieu's discussion of constitutions relied heavily on Aristotle's *Politics*. Montesquieu distinguished three kinds of government: monarchies, despotisms, and republics. Both monarchies and despotisms were characterized by the rule of one person. What distinguished them was that monarchy honored the rule of law, while despotism did not.¹³⁷ Republics were governments in which the whole people, or a part thereof, held the supreme power. Republics governed by merely a part of the people were aristocracies. Republics governed by the people as a whole were democracies.

Like Madison, Montesquieu preferred purely representative government to citizen lawmaking.¹³⁸ However, most of the states that he identified as republics authorized their citizens to make or approve all or most laws. He discussed their institutions. He opined that, in ancient times, legislative representation was unknown outside of confederate republics.¹³⁹ "The Republics of Greece and Italy were cities that had each their own form of government, and convened their subjects within their walls."¹⁴⁰ Indeed, on repeated occasions, Montesquieu specifically identified Athens—the exemplar of citizen lawmaking—as a republic.¹⁴¹ Montesquieu described the

133. See, for example, John Adams's use of extracts from *De Re Publica* in ADAMS, *supra* note 1, at xix–xxii. Much more of the text of *De Re Publica* was rediscovered in 1820. Clinton Walker Keyes, *Introduction to MARCUS TULLIUS CICERO, DE RE PUBLICA*, in CICERO, *supra* note 1, at 9.

134. See, e.g., MARCUS TULLIUS CICERO, *DE LEGIBUS*, reprinted in CICERO, *supra* note 1, at 464–65 (Law 3.3.8, declaring that the people set rules for praetors), 468–69 (Law 3.3.10, stating that commands of the assembly of the plebs are binding, and referring to legislative, judicial, and elective acts of the people).

135. For example, one of my personal favorites, *De Imperio Pompei*, urges a popular assembly to pass a statute (*lex*) authorizing a foreign command for the Roman general Pompey.

136. See *supra* Part III.

137. MONTESQUIEU, *supra* note 1, at 8.

138. *Id.* at 186.

139. *Id.* at 196.

140. *Id.* Those republics did have executive and judicial magistrates.

141. See, e.g., *id.* at 46 n.25 (reporting that Aristotle wrote of a law "formerly at Athens, that artisans should be slaves to the republic"), 57 ("In Greece, there were two sorts of republics: the one

constitution of the Roman Republic¹⁴² in great detail because “[i]t is impossible to be tired of so agreeable a subject as ancient Rome.”¹⁴³ He also classified Sparta¹⁴⁴ and Carthage¹⁴⁵ as well-run republics, even though they utilized direct citizen lawmaking.

In his *Defence*, Adams defined a republic—or at least a free republic—as any government ruled in accordance with laws for the benefit of the people, and, quoting Cicero, declared that *res publica res est populus*: “the republic is the affair of the people.”¹⁴⁶ Adams was a strong supporter of the mixed constitution,¹⁴⁷ arguing that a republic should feature a separation of powers—legislative, executive, and judicial—and elements of monarchy, aristocracy, and democracy. Hence, he opposed unchecked democracy just as he opposed unchecked aristocracy or monarchy. But far from arguing that republics had to be wholly representative, he specifically cited multiple examples of republics with direct citizen lawmaking. His most important example was the Roman Republic, during the discussion of which he reproduced in his volume Polybius’s essay on the Roman constitution.¹⁴⁸

The following is a more complete list from Adams’s catalogue of republics, which in turn showed up in the subsequent constitutional debate:

- The Roman Republic, with its popular assemblies enjoying lawmaking power,¹⁴⁹
- the Carthaginian Republic, which Adams labeled “the most democratical republic of antiquity”¹⁵⁰ because, among other reasons, any one senator could send any measure directly to the people for resolution,¹⁵¹

military, like Sparta; the other commercial, as Athens.”), 78 n.57 (“They seem to have been too fond of confiscations in the republic of Athens.”).

142. *Id.* at 206–19.

143. *Id.* at 201.

144. *See id.* at 146 (asserting that “[t]he long duration of the republic of Sparta was owing to her having continued in the same extent of territory after all her wars. The sole aim of Sparta was liberty; and the sole advantage of her liberty, glory.”).

145. *Id.* at 145, 167.

146. ADAMS, *supra* note 1, at xxi–xxii.

147. Richard states that Adams’s book “remains the fullest exposition of mixed government theory by an American.” RICHARD, *supra* note 1, at 133. Adams was preceded in his thoughts, and in his admiration of the “mixed” British system, by Blackstone. 1 WILLIAM BLACKSTONE, COMMENTARIES *52.

148. ADAMS, *supra* note 1, at 171–75. *See also* THE FEDERALIST, *supra* note 1, NO. 63, at 389 (James Madison) (citing Polybius).

149. ADAMS, *supra* note 1, at 348 (listing three of the four assemblies, and noting the independent lawmaking power of the plebs); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *94, *159.

150. ADAMS, *supra* note 1, at 214.

151. *Id.* at 213.

- the Athenian Republic,¹⁵² and
- Laecedaemon (Sparta), which although classified as an “aristocratical republic,” still gave citizens the direct power to vote “yes” or “no” on proposed laws in the style of the modern referendum.¹⁵³

Adams’s work was distinctive in that he discussed contemporary as well as ancient examples. These included San Marino, whose democratic assembly (the *arengo*) admittedly had withered,¹⁵⁴ but also the following Swiss regions:

- The Canton¹⁵⁵ of Underwald, where sovereignty rested in an assembly of all males fifteen years of age or older,¹⁵⁶
- the Canton of Glaris, where a similarly constituted assembly laid taxes, made law and peace, and ratified all laws,¹⁵⁷
- the Canton of Zug, where a similarly constituted assembly enacted laws,¹⁵⁸ and
- the Republic of the Three Leagues of the Grisons, which also had a diet, but whose “government resides sovereignty in the commons, where every thing is decided by the plurality of voices.”¹⁵⁹

No participant in the constitutional debate who paid the least attention to sources such as Aristotle, Polybius, Cicero, Livy, Montesquieu, and Adams could come away with the notion that a republic must exclude direct citizen lawmaking. On the contrary, it was clear from the examples given that republics could choose, however unwisely, to legislate exclusively by plebiscite, dispensing with any need for a representative assembly at all.

152. *Id.* at 260–85.

153. *Id.* at 254.

154. *Id.* at 11. Edmund Randolph, speaking at the Virginia ratifying convention, also identified San Marino as a republic. 3 Elliot, *supra* note 1, at 72; *see also* “AN OLD WHIG,” ANTIFEDERALIST NO. 18 (describing San Marino as a republic), *reprinted in* Borden, *supra* note 1.

155. Other participants also classified the Swiss cantons as republics. *See, e.g.*, 2 Elliot, *supra* note 1, at 188 (Oliver Ellsworth, speaking at the Connecticut ratifying convention); 3 *id.* at 130 (Madison, speaking at the Virginia ratifying convention), 143 (Patrick Henry, speaking at the Virginia ratifying convention); “AN OLD WHIG,” ANTIFEDERALIST NO. 18 (pts. 1, 2), *reprinted in* Borden, *supra* note 1.

156. ADAMS, *supra* note 1, at 26.

157. *Id.* at 29–30.

158. *Id.* at 31. In later volumes of the same work, Adams cited further examples, including Neuchatel, a “monarchical republic” in which “[t]he legislative authority resides conjunctively in the prince, the council of state, and the town or people, each of which has a negative.” 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 416, 450 (Da Capo Press 1971) (1787).

159. ADAMS, *supra* note 1, at 21.

2. *Explicit Statements by Participants.*—Several participants in the constitutional debate explicitly said that republics could feature citizen lawmaking. Like the written sources, these comments state, or can be read as stating, that government can be “republican” yet lack a representative legislature.

The Anti-Federalist author “Federal Farmer,” for example, resorted to the Celebrated One to make his point:

Add to this Montesquieu’s opinion, that “in a free state every man, who is supposed to be a free agent, ought to be concerned in his own government: therefore, *the legislative should reside in the whole body of the people, or their representatives.*”¹⁶⁰

Several important advocates of the Constitution took the same view. John Adams, for example, was not merely an author, but also a participant-from-afar. As already noted,¹⁶¹ his compendium of republics presented various examples of states with citizen lawmaking, and even without representative legislatures.¹⁶² Similarly, at the Pennsylvania ratifying convention, James Wilson distinguished “three simple species of government,” monarchy, aristocracy, and “a republic or democracy, where the people at large *retain* the supreme power, and act either collectively or by representation.”¹⁶³ Charles Pinckney, who had been a leading delegate at the U.S. Convention, distinguished three kinds of government during the South Carolina ratification convention: despotism, aristocracy, and “[a] republic, where the people at large, *either collectively or by representation*, form the legislature.”¹⁶⁴

Adams, Wilson, and Pinckney all knew what they were talking about. Adams, a former Latin master, overcame what he considered to be an

160. Storing, *supra* note 1, at 75 (emphasis added).

161. See *supra* section V(A)(1).

162. Cf. ADAMS, *supra* note 1, at xxi (quoting Cicero as stating that “[r]es publica res est populi, cum bene ac juste geritur, sive ab uno rege, sive a paucis optimatibus, sive ab universo populo”). This may be translated as, “A republic is an affair [property] of the people, when well and legally [justly] administered, whether by one king or by a few of the better sort, or by the people as a whole.” As noted above, none of the other participants in the constitutional debate seem to have agreed that a republic could be governed by a monarch. See *supra* notes 84–89 and accompanying text.

163. 2 Elliot, *supra* note 1, at 433. Compare the comment by loyalist Samuel Seabury:

The position, that we are bound by no laws to which we have not consented *either by ourselves or our representatives* is a novel position unsupported by any authoritative record of the British constitution, ancient or modern. *It is republican in its very nature.*

Quoted in Bruce Frohnen, *Revolutions, Not Made, But Prevented: 1776, 1688, and the Triumph of the Old Whigs*, in VITAL REMNANTS: AMERICA’S FOUNDING AND THE WESTERN TRADITION 275, 295 (Gary L. Gregg II ed., 1999) (emphasis added).

164. 4 Elliot, *supra* note 1, at 328 (emphasis added). Also see “A NEWPORT MAN,” ANTIFEDERALIST NOS. 18–20 (pt. 2), reprinted in Borden, *supra* note 1, which maintains, with Rousseau, that “the people should examine and determine every public act themselves.”

inadequate classical education to develop a lifelong love of Greek and Roman authors.¹⁶⁵ As for Wilson and Pinckney,

Charles Pinckney was a star pupil at the rigorous Westminster School, where the only subjects were classics and religion. Having immersed himself in Ovid, Homer, and Virgil there, Pinckney went on to Oxford University. Born in Scotland, James Wilson received a thorough grounding in the classics at Cupar Grammar School and at the University of St. Andrews. While at the university he attended the optional, as well as the required, classes on ancient history.¹⁶⁶

All three would have learned thereby about citizen lawmaking and the absence of representative legislatures in ancient republics.

Other participants, including Alexander Hamilton, John Marshall, and Christopher Gore, averred that representative legislatures were unknown to ancient “republics,”¹⁶⁷ clearly implying that citizens in those republics made laws in person.¹⁶⁸ They made these statements when pressing the point that, because of the development of representative institutions, America could adopt the republican form without the disadvantages of mass popular assemblies. A striking feature in their comments is their implicit recognition that legislative representation, far from being a defining element of republican government, was a modern innovation and something of an anomaly in the republican context.

B. *Implicit Statements*

The historical record is flooded with statements in which participants implicitly assume that republics may employ direct citizen lawmaking. As already noted, many in the founding generation followed the taxonomy of Montesquieu, in which both aristocracies and democracies—expressly including those with citizen lawmaking—constituted subspecies of republics.¹⁶⁹ At least as significant are the writings and speeches of participants who identified particular governments with citizen lawmaking as “republics.” Although Federalists and Anti-Federalists disagreed about the

165. RICHARD, *supra* note 1, at 21.

166. *Id.* at 24.

167. *I.e.*, not just ancient “states,” “cities,” or “governments.”

168. *See* THE FEDERALIST, *supra* note 1, NO. 6, at 56–57 (Alexander Hamilton) (questioning the effectiveness and value of popular assemblies); 2 Elliot, *supra* note 1, at 352–53 (Hamilton, arguing at the New York ratifying convention that what some of his peers referred to as “republics” should really be termed “democracies” because of their popular assemblies); 3 *id.* at 232 (Marshall, speaking at the Virginia ratifying convention), 17 (Gore, speaking at the Massachusetts ratifying convention), 225 (Melancton Smith, noting at the New York ratifying convention that ancient republics used a combination of representative and direct lawmaking).

169. *See supra* note 73 and accompanying text.

Constitution, they did not differ materially (for this purpose) about the governments they deemed to be republics.¹⁷⁰

Thus, at the Constitutional Convention, both George Mason and Alexander Hamilton referred to the ancient "Grecian republics."¹⁷¹ In *Federalist Number 6*, Hamilton stated that "Sparta, Athens, Rome, and Carthage were all republics. . . ."¹⁷² In *Federalist Number 63*, Madison listed five republics: Sparta, Carthage, Rome, Athens, and Crete.¹⁷³ In his Anti-Federalist writings, "Brutus"—probably Robert Yates, a convention delegate from New York—stated that "the various Greek polities"¹⁷⁴ and Rome¹⁷⁵ were republics. Anti-Federalist author "Agrippa" (John Winthrop of Massachusetts) identified Carthage, Rome, and the ancient Greek states as republics.¹⁷⁶ The Anti-Federalist "Federal Farmer" spoke of the "republics of Greece,"¹⁷⁷ and Anti-Federalists "A Farmer" and "An Old Whig" discussed the Roman Republic.¹⁷⁸ An anonymous Anti-Federalist writer, lacking even a pseudonym, spoke of the "Grecian republics."¹⁷⁹ (This list is not exhaustive as to either Federalist or Anti-Federalist authors.¹⁸⁰) Similarly, in the state ratifying conventions, the participants of all political stripes made numerous references to these and other ancient governments as "republics."¹⁸¹

170. John Adams seems to have been a minority of one in placing certain hereditary monarchies on his list of republics. A more significant division occurred over whether aristocracies were republics. See *infra* note 101 and accompanying text.

171. 1 Farrand, *supra* note 1, at 112, 307.

172. THE FEDERALIST, *supra* note 1, NO. 6, at 57 (Alexander Hamilton). Cf. *id.* NO. 70, at 423 (Alexander Hamilton) (describing Rome as a republic).

173. *Id.* NO. 63, at 385–89 (James Madison).

174. Storing, *supra* note 1, at 113 (noting that the "Grecian republics were of small extent").

175. *Id.* at 158 (referring to Rome before the rise of Julius Caesar as a "free republic").

176. *Id.* at 230.

177. *Id.* at 89. See also "THE FEDERAL FARMER," ANTIFEDERALIST NOS. 63 (pt. 2), 69, reprinted in Borden, *supra* note 1.

178. "A FARMER," ANTIFEDERALIST NO. 3, "AN OLD WHIG," ANTIFEDERALIST NOS. 18–20 (pt. 1), reprinted in Borden, *supra* note 1.

179. "JOHN DE WITT," ANTIFEDERALIST NO. 28 (pt. 3), reprinted in Borden, *supra* note 1.

180. See, e.g., "AN OLD WHIG," ANTIFEDERALIST NO. 49 (pt. 1) (the "celebrated" Spartan republic), reprinted in Borden, *supra* note 1; Storing, *supra* note 1, at 230 ("Agrippa," writing of the "republics" of Greece, Rome, and Carthage); Ford, ESSAYS, *supra* note 1, at 256 (George Clinton, writing "Letters of Cato," refers to the "republic of Sparta" and Athens); Ford, PAMPHLETS, *supra* note 1, at 31 (Noah Webster, writing of the Roman Republic), 130 (Pelatiah Webster, citing Rome and Carthage as republics), 148 (Tench Coxe, referring to the Roman and Greek republics), 190 (John Dickinson as "Fabius," describing both Athens and Rome as republics); Sheehan, *supra* note 1, at 347 (a Federalist, "Cato," referring to Rome as a republic). People in the founding generation who spoke of the Roman Republic and the republics of Greece are in accord with Blackstone. 1 WILLIAM BLACKSTONE, COMMENTARIES *94 (Roman Republic), *159 (direct democracy in the "petty republics of Greece").

181. For Massachusetts, see 2 Elliot, *supra* note 1, at 68 (Willard, describing Sparta, Athens, and Rome as "republics"), 69 (Bowdoin, mentioning "ancient republics"), 136 (Nason, referring to Caesar's Rome as a "republican government").

The participants well knew that all of these republics prominently featured citizen lawmaking—more citizen lawmaking than even the most fervent modern advocate could desire.¹⁸² For example, all laws adopted in Sparta had to be approved by an assembly of citizens—in other words, all laws, not just a few, were subject to a form of referendum,¹⁸³ while in Athens an assembly of all citizens over eighteen years of age both approved and initiated laws.¹⁸⁴ In Carthage, as John Adams noted, the people initiated laws when their magistrates were not unanimous.¹⁸⁵

In the founding generation, pre-imperial Rome was on everyone's list of republics, and its ideals and constitution were uniquely influential among the participants.¹⁸⁶ As they understood,¹⁸⁷ the sovereign power of the Roman state—the *Res Publica Populi Romani*—was in the *populus Romanus*. This was the whole body of citizens,¹⁸⁸ acting without representation, through

For New York, see *id.* at 214 (Robert R. Livingston, mentioning “ancient republics”), 228 (Melancton Smith, same), 235 (Hamilton, identifying the Amphictyonic and Achaean leagues as “republics”), 302 (Hamilton, mentioning “ancient and modern republics”).

For North Carolina, see 4 *id.* at 195 (Iredell, mentioning “Grecian republics”).

For Virginia, see 3 *id.* at 192 (Edmund Randolph, identifying Rome and Sparta [the latter by reference to its lawgiver, Lycurgus] as republics), 242 (George Nicholas, mentioning “Grecian republics”).

182. See, e.g., 3 *id.* at 210 (James Monroe, stating, “Thebes was a democracy, but on different principles from modern democracies. Representation was not known then. Athens, like Thebes, was generally democratic, but sometimes changed. In these two states, the people transacted their [public] business in person.”); *id.* at 199 (Edmund Randolph, noting that representation was fully understood only recently and referring to the alternative as a system in which “laws are to be made by the people themselves”); *id.* at 232 (John Marshall, meeting the objection that America was too large to be a republic by noting that representation did not exist in certain ancient republics); Ford, PAMPHLETS, *supra* note 1, at 31, 42–43 (Noah Webster, writing of popular assemblies in the Roman Republic); see also *infra* note 188 and accompanying text.

183. See OCD, *supra* note 1, at 79 (defining *appellai* as a Spartan procedure for convening a citizens’ assembly that had the sole authority to approve changes in the law); see also *id.* at 272 (defining *comitia* as a meeting of the Roman citizens’ assembly that had sole authority to approve changes in the law).

184. See *id.* at 376–77 (defining *ekklesia* as an assembly of adult male citizens with lawmaking authority in ancient Greece).

185. ADAMS, *supra* note 1, at 214.

186. BAILYN, *supra* note 1, at 25. McDonald contains extensive discussions of the impact of Roman Republican ideals on the Framers. See, e.g., MCDONALD, *supra* note 1, at 67–68.

187. See, e.g., THE FEDERALIST NO. 34, *supra* note 1, at 206 (Alexander Hamilton) (referring to two of the assemblies of the Roman Republic, the *comitia centuriata* and the *comitia tributa*, where the Roman people directly voted on laws, judicial decisions, and other matters); 3 Elliot, *supra* note 1, at 175–76 (Patrick Henry, discussing voting in the same two assemblies during the Virginia ratifying convention). Actually, there were four assemblies of citizens, each apportioned under different principles and serving different purposes. OCD, *supra* note 1, at 272 (describing the four types of *comitias*—or citizens’ assemblies—in ancient Rome).

188. Countless books discuss the structure of Roman government. For a scholarly survey and definitions of the different types of Roman assemblies, see OCD, *supra* note 1, at 272. For a focus on the republic at its height, see DUDLEY, *supra* note 128, at 37–39. A classic book-length treatment is A.H.J. GREENIDGE, ROMAN PUBLIC LIFE (1970).

their popular assemblies. Major legislation was enacted on the recommendation of either the presiding magistrate or the senate.¹⁸⁹ The assemblies also possessed the power to declare war; additionally, one assembly, the *comitia centuriata*, could hear certain judicial appeals. Citizens elected magistrates to exercise the executive power (such as consuls and *aediles*), magistrates to represent the people's interest against the senate (tribunes), treasury officials (*quaestors*), and judges (*praetors*).

Each of the assemblies had different—although sometimes overlapping—jurisdiction, and different voting rules. In 287 B.C., the *concilium plebis*, an assembly consisting exclusively of the commons (plebs) and excluding the nobles (patricians), was granted coextensive lawmaking power with other assemblies. One of the annually elected “tribunes of the people” presided over this body, and its decisions were called *plebis scita*—roughly, Acts of the People.

The modern *plebis scitum* is, of course, the plebiscite. It is one of the delicious oddities of legal literature, born clearly of historical ignorance, that some legal writers continue to contend earnestly that all or certain plebiscites are not “republican.”¹⁹⁰ Yet plebiscites originated in the state that the Founders viewed as the grandest republic of all!¹⁹¹ One might as well contend that pizza is not Italian.

VI. Examining the Guarantee Clause Argument Against Citizen Lawmaking

A. *The Basis of the Argument*

There actually are two related versions of the “republican form” argument against citizen lawmaking. The older, “strong” version of the argument seems to have been invented initially to justify suppression of Dorr’s Rebellion, a popular uprising in Rhode Island during 1841 and 1842.¹⁹² As expounded by various commentators—and, in 1847, by the

189. See GREENIDGE, *supra* note 188, at 238–60 (summarizing the power of the popular assemblies).

190. See, e.g., Charlow, *supra* note 29, at 542 (stating the plebiscites are “constitutionally problematic” if one believes that the Guarantee Clause is supposed to ensure that state governments resemble the federal government’s republican form); Linde, *supra* note 25, at 712 (arguing that certain “plebiscites” violate the republican form); see also Choper, *supra* note 27, at 746 (drawing a distinction between constitutional amendment procedures with “appropriate safeguards,” such as state constitutional conventions, and amendment by plebiscite); Sirico, *supra* note 6, at 649 (“The crucial characteristic of the [plebiscite] is its non-republican nature.”); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, U. CHI. L. REV. 208 (1987) (seeking to divide republican from nonrepublican plebiscites).

191. Cf. RICHARD, *supra* note 1, at 77–78 (quoting Adams’s encomium to Rome).

192. The “Dorr War,” as historian George M. Dennison has tagged it, was an effort at a peaceful, grassroots coup resulting from the Rhode Island political establishment’s refusal to abandon the state’s pre-Revolutionary War charter for a more modern constitution. From this incident arose the case of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in which the U.S. Supreme

Delaware Supreme Court in *Rice v. Foster*¹⁹³—the strong version holds that lawmaking is republican only if it is *wholly* representative. The theory behind this contention is that when the people establish a republican form of government, they delegate all of their sovereign power to state officials and retain only the power to change those officials and the power to make revolution. The legislative power, in particular, is granted wholly to elected lawmakers. Any direct exercise of legislative authority by the people is, therefore, unconstitutional and revolutionary.¹⁹⁴

Weaker versions of this argument concede that some reserved legislative power can remain in the people. But almost as many weaker versions exist as there are commentators to expound them, for no two can agree on the powers the people retain. One author, for example, would permit referenda and initiatives first presented to the legislature, while disallowing the more common initiative procedure, which bypasses the legislature.¹⁹⁵ Others, after examining the content of initiatives, would permit some while prohibiting others.¹⁹⁶ In reading these commentaries, one gets the impression that the weaker versions arise more from irritation with particular initiatives than from coherent underlying principles. Moreover, all the weaker versions are essentially unhistorical. Weaker version advocates cite the same historical material that advocates of the strong version cite, but

Court held the Guarantee Clause to be nonjusticiable in federal courts. *See generally* DENNISON, *supra* note 1; WIECEK, *supra* note 1, at 86–129.

193. 4 Del. (4 Harr.) 479, 485–87 (1847). *Rice* appears to have reflected the legal climate of the time: “In the wake of the Dorr War and the national reaction to it, American constitutional thought veered sharply to the right, and institutionalism won acceptance within the nation at large.” DENNISON, *supra* note 1, at 128. More modern “strong version” writings include Rogers & Faigman, *supra* note 8, at 1066–72 (concluding that all state initiatives are unconstitutional), Salz, *supra* note 8, at 104 (“Thus, it is apparent that the defining characteristic of republicanism is government through representation . . .”), and Brock, *supra* note 28, at 133 (equating republican with representative government). *See also* notes 195–200 and accompanying text.

194. *Rice*, 4 Del. at 488 (“Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution, and a dissolution of the government.”). George Dennison has aptly described this approach as a “Triumph of Institutionalism.” George M. Dennison, *The Dorr War and the Triumph of Institutionalism*, SOC. SCIENCE J., Apr. 1978, at 39. To be sure, there is the germ of this idea in the writing of one Founder: Benjamin Rush. *See* Sheehan, *supra* note 1, at 3 (claiming that the people possess their sovereign power only on election day and that “[a]fter this, it is the property of their rulers, nor can they exercise or resume it, unless it is abused. It is of importance to circulate this idea, as it leads to order and good government.”). Despite Rush’s wish that the idea be circulated, I have not found that it had much currency in the constitutional debate. On the contrary, the theoretical basis for the ratification by state conventions was exactly the opposite. *See infra* notes 210–12 and accompanying text.

195. Hand, *supra* note 29, at 246–48.

196. *See, e.g.*, Linde, *supra* note 25, at 725 (“The guarantee precludes initiatives to enact laws that would be valid if enacted by a legislature.”); Choper, *supra* note 27, at 746 (opposing “constitutional amendment by plebiscite”).

identify little or nothing in the drafting and ratification history to justify the concessions they have made.

As Professor Akhil Reed Amar has pointed out, even the historical justification for the strong version is tenuous.¹⁹⁷ It rests on four historical props:

- The Framers' hostility to excessive democracy and their preference for checks and balances,¹⁹⁸
- James Madison's personal preference for republics purely representative,¹⁹⁹
- some nineteenth-century documents, such as statements by Daniel Webster, court cases, and dictionary definitions,²⁰⁰ and
- a very few contemporary documents, or rather fragments of documents, authored primarily by Hamilton and Madison, that, when excerpted out of context,²⁰¹ seem to exclude citizen lawmaking from republican governments.

I already have dealt with the first two props.²⁰² Although it is undoubtedly true that some Framers wanted America to be less democratic and that Madison preferred the wholly representative form (at least for day-to-day business),²⁰³ the participants in the constitutional debate did not view

197. Amar, *supra* note 27, at 756 ("The foundation of this claim is remarkably slender, consisting of 'law office history' based on a brief passage in Madison's *Federalist* Number 10 and a cross reference back to this passage in his Number 14, which served as a sequel.")

198. See, e.g., Rice, 4 Del. at 486–87 (citing antidemocratic comments by Elbridge Gerry, Roger Sherman, James Madison, and Edmund Randolph); Rogers & Faigman, *supra* note 8, at 1060 ("Indeed, some historians contend that the delegates at the Constitutional Convention were more concerned about an excess of populism in the state governments than they were about the weakness of the Articles of Confederation."); see also Linde, *supra* note 25, at 719–21 (relying on the preference of James Wilson and James Madison for representative government). But Wilson is on record as stating explicitly, and Madison conceded implicitly, that republican governments may engage in direct citizen lawmaking. See *supra* note 163 and accompanying text.

199. See, e.g., THE FEDERALIST, *supra* note 1, NO. 63, at 386–87 (James Madison).

200. See, e.g., Sherwood, *supra* note 28, at 249–51 (citing works by nineteenth-century authors); Lewis, *supra* note 7, at 170–77 (same); Maxon, *supra* note 28, at 379–80 (same).

201. See, e.g., Rogers & Faigman, *supra* note 8, at 1060–61 (characterizing a few ambiguous quotations from Madison and an arguably irrelevant quotation from Hamilton as "a consensus among the Framers: a republican [by which the authors mean a "wholly representative"] form of government was the best 'safeguard against the tyranny of [majoritarian] passions.' Representative decisionmaking was considered so critical that it was not only instituted at the federal level but guaranteed at the state level."); see generally subpart VI(B). Sometimes an author just misses something. See, e.g., Rogers & Faigman, *supra* note 8, at 1061 (citing THE FEDERALIST NO. 63 (James Madison), without recognizing its admission that most ancient republics were not primarily representative); see also Salz, *supra* note 8, at 104 (quoting Charles Pinckney to the effect that in republics, "the people at large, either collectively or by representation, form the legislature," and then jumping to the non sequitur that republican government had to be representative).

202. See *supra* Part IV.

203. See THE FEDERALIST, *supra* note 1, NO. 63, at 387 (James Madison).

those proposals as defining characteristics of republicanism,²⁰⁴ even if some viewed them as very wise policy.²⁰⁵

The third prop relies on historical “evidence” that has virtually no probative value because it consists of documents drafted and statements made decades after the Founding, and years after nearly all of the Founders had moved to a higher plane.²⁰⁶ Some material in this category, such as the U.S. Supreme Court case of *Minor v. Happersett*,²⁰⁷ dates from nearly a century after the Founding.

This leaves only the fourth prop: the cited fragments from the constitutional debate of 1787–1789. These fragments—as just mentioned above and as I will demonstrate below—have frequently been cited out of context.

204. See *supra* subpart IV(B).

205. See *supra* subpart IV(C); cf. 2 WILLIAM BLACKSTONE, COMMENTARIES *158–59 (explaining that the extended nature of modern states, as contrasted with the small size of the “petty republics of Greece,” made representation desirable). In this light, the approach of *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847) is jarring. The opinion in *Rice* by Chief Justice Booth is, as far as I can tell, almost the only argument against the republicanism of citizen lawmaking that actually contains some reference to classical republics as republics. But the opinion then proceeds to sweep aside the implications of that reference:

In the debates on the federal constitution in the Virginia convention, Mr. Madison, always the advocate of popular rights, subject to the wholesome restraints of law, remarked, “that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions; and that these in republics, more frequently than any other cause, have produced despotism.” “If,” he observes, “we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes” To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people. *The characteristic which distinguishes it from the miscalled republics of ancient and modern times*, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the constitution.

Rice, 4 Del. at 487 (emphasis added and omitting a portion of the Madison quote at the ellipsis).

After reproducing Madison’s own acknowledgment that these ancient republics were “republics,” the court dismisses the acknowledgment by labeling them “miscalled republics.” It cites no source for its conclusion that those entities were truly not republics or that Madison and other participants in the constitutional debate would not have considered them republics. The entire gist of the *Rice* opinion is that the preferences of the Framers (and of the court) for the federal government’s organization were imposed on the states—even though the Framers’ own statements about the Guarantee Clause made it clear that this was not their intent. See *supra* Part V.

206. See, e.g., Maxon, *supra* note 28, at 379 n.2, 380 (referring, *inter alia*, to writings by Daniel Webster and to the sole case holding that citizen lawmaking is “unrepublican,” *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847), both published in the wake of the “Dorr War”). Webster’s view of the matter was hardly based on historical scholarship. As secretary of state under President John Tyler, Webster was involved in the president’s intervention against the Dorrists. DENNISON, *supra* note 1, at 81; WIECEK, *supra* note 1, at 103. He was also legal counsel for Borden—i.e., for the Rhode Island political establishment—in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), which arose out of the Dorr War. See DENNISON, *supra* note 1, at 158–68; WIECEK, *supra* note 1, at 116.

207. 88 U.S. (21 Wall.) 162 (1874). In any event, it does not support the contention made. See *infra* notes 243–46 and accompanying text.

B. Contemporary Documentation in Support of the Argument

1. Federalist Number 10.—The strongest evidence that the opponents of citizen lawmaking offer, and that they invariably do offer, is an excerpt from Madison's *Federalist Number 10*, which they construe to mean that republican lawmaking must be wholly representative.²⁰⁸ The relevant passage is as follows:

... a pure democracy [is] a society consisting of a small number of citizens, who assemble and administer the government in person

....

A republic [is] a government in which the scheme of representation takes place Let us examine the points in which it varies from pure democracy

....

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.²⁰⁹

208. See, e.g., Rogers & Faigman, *supra* note 8, at 1059; Sherwood, *supra* note 28, at 249; Lewis, *supra* note 7, at 170–71; Maxon, *supra* note 28, at 379; Edward C. Gottry, *Is Republican and Representative Government Synonymous?*, 73 CENT. L.J. 222 (1911); BRODER, *supra* note 10, at 14–17; Marlowe, *supra* note 13, at 1048.

209. THE FEDERALIST, *supra* note 1, NO. 10, at 81–82 (James Madison). To my knowledge, opponents of citizen lawmaking have not cited any other isolated quotations that, when taken out of context, suggest that the Guarantee Clause requires exclusively representative lawmaking. One is a comment by “Brutus,” an Anti-Federalist New Yorker, who may well have been Robert Yates, a delegate who attended the Constitutional Convention but left early. See Storing, *supra* note 1, at 103. The comment reads:

In a pure democracy the people are the sovereign, and their will is declared by themselves; for this purpose they must all come together to deliberate, and decide

....

In a free republic, although all laws are derived from the consent of the people, yet the people do not declare their consent by themselves in person, but by representatives, chosen by them.

Id. at 114. However, “Brutus” later acknowledges that Rome and the “Grecian” states were republics, and that they had citizen lawmaking. *Id.* at 113, 158. When those states grew in size, “their governments were changed from that of free governments to those of the most tyrannical that ever existed in the world.” *Id.* at 113.

At one point in the Virginia ratification convention, Patrick Henry said, “The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government.” 3 Elliot, *supra* note 1, at 396. But the context shows that Henry’s point is that in a republic the people rule, not the representatives, and that the latter are subject to obligations of responsibility.

One could not, in any event, always expect precision in the heat of the moment. At the New York ratifying convention, Hamilton referred to “democracies, where the whole body of the people meet to transact business, and where representation is unknown,” but also described purely

To the untrained modern reader, it seems credible that this passage utterly excludes citizen lawmaking from republican government, and that the delegation of legislative power to representatives is total. But the passage is also susceptible to another interpretation: that in a republic the people must have only *some* elected officials—perhaps legislative representatives to complement citizen lawmaking, perhaps administrative officials—but in any event enough to carry on day-to-day business so that it is unnecessary for “a small number of citizens . . . [to] assemble and administer the government in person.”²¹⁰

Advocates of the first interpretation must, but generally do not, deal with two immediate problems. The first problem is that if Madison and other participants believed that the people’s delegation to their representatives was complete and irrevocable except by revolution,²¹¹ then how can one explain their choice of method for ratifying the Constitution? Ratification was not to be through representatives in the state legislatures—to whom the people, under the first interpretation, had relinquished all their legislative powers—but through ad hoc conventions.²¹² This method makes sense only if the people had not delegated all their legislative power to their elected representatives, but instead had retained enough to trim back considerably the power of those representatives. Madison’s defense of the chosen system is revealing:

Should all the states adopt [the Constitution], it will then be a government established by the thirteen states of America, not through the intervention of the legislators, but by the people at large The existing system [i.e., the Articles of Confederation] has been derived from the *dependent derivative authority of the legislatures of the states; whereas this is derived from the superior power of the people.*²¹³

It is, of course, this very “superior power of the people” to wire around their legislatures that provides the theoretical basis for the initiative and the referendum.

representative governments as democracies. In the first reference, he is obviously speaking of pure democracies, but then implies that even such democracies are republics. 2 *id.* at 352–53.

210. Cf. ADAMS, *supra* note 1, at 7 (identifying as a “simple and perfect democracy” one in which all citizens gather to perform all functions—legislative, executive, and judicial).

211. See the argument in *Rice v. Foster*, 4 Del. (4 Harr.) 479, 488 (1847) (“Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it.”).

212. U.S. CONST. art. VII. How this came about is discussed in BOWEN, *supra* note 74, at 228–33.

213. 3 Elliot, *supra* note 1, at 94 (Madison, speaking at the Virginia ratifying convention) (emphasis added). For another contemporary exposition of the same theory, see Sheehan, *supra* note 1, at 91 (Tench Coxe, writing as “A Freeman”).

Another immediate problem with interpreting Madison to mean that republicanism excludes citizen lawmaking is that if free governments consist only of pure democracies and of purely representative republics, then where on Madison's spectrum are governments with mixed constitutions whose democratic parts employ citizen lawmaking? Was the Roman "republic" a republic or a pure democracy? It was neither wholly representative nor "administered solely and in person by the entire citizenry." What of the forty-nine American states that now feature both representative institutions and citizen lawmaking?²¹⁴ Certainly, none of them are "administered solely and in person by the entire citizenry"—not even tiny Rhode Island. If they are neither democracies nor republics, what are they? Or, more precisely, how would Madison have classified them?²¹⁵

Fortunately, when one reads *Federalist Number 10*, not as a modern reader but as an educated eighteenth-century American, this ambiguity pretty much disappears. Madison could have expressed himself with more clarity, but his contemporaries did not require it. The proper interpretation is the second one.

A very good reason for adopting the second interpretation is that the first would leave Madison at odds with the way that the rest of his contemporaries used the term "republic." But there are other reasons as well. We can begin to explore these by observing that on two of the occasions in *Federalist Number 10* when Madison used the term "democracy," he qualified it with the adjective "pure." Madison did not invent the term "pure democracy." He got it from Aristotle.

As one may discern from his writings, Madison's classical education had been excellent.²¹⁶ He was competent in both Greek and Latin. Madison had read Aristotle²¹⁷ and was, in particular, a great admirer of his *Politics*. In

214. Twenty-four states allow initiatives, twenty-four allow referenda on citizen petition, and forty-nine (all but Delaware) provide for legislative referenda. M. Dane Waters, *A Century of Citizen Lawmaking: An American Experiment in Self-Governance*, in *A CENTURY OF CITIZEN LAWMAKING: INITIATIVE AND REFERENDUM IN AMERICA* 5-6 (Initiative & Referendum Inst. ed., 1999).

215. Only one article contending that citizen lawmaking violates the Guarantee Clause attempts to address this issue:

A representative democracy cannot be crossed with an "absolute" democracy, and still the hybrid resultant from such copulative conjunction [!] prove to be, and constitute, "a government republican in form." Clay and iron cannot in such case be welded together, any more than they could in the feet of the image which Daniel saw in his vision.

Sherwood, *supra* note 28, at 250 (exclamation point added). For those with no taste for suspense, the answer to the questions in the text is that Madison would have classified both Rome and the American states as republics. He might also have called the American states "democracies," although not pure ones. See *infra* text accompanying notes 226-27.

216. RICHARD, *supra* note 1, at 18.

217. See, e.g., *id.* at 25.

fact, in 1783, as a member of Congress charged with recommending “books for congressional use, he had placed Aristotle’s *Politics* at the top of his list of works concerning political theory.”²¹⁸

Aristotle’s *Politics* is a book about constitutions. By temperament or by dint of his biological studies, Aristotle was a ferocious classifier, and most of the *Politics* is devoted to classifying the many constitutions he had examined. Aristotle did not treat all democracies alike; rather, he distinguished and classified them. Some, in his view, were better than others.²¹⁹ One of his taxonomies consisted of these four classes:

- Democracies governed by boards or by selected citizens chosen by lot (what we would call purely representative democracies),
- democracies in which all citizens gathered together to make laws, elect officials, decide on war and peace, and review official conduct, but delegated other (presumably administrative) functions to officials,
- democracies similar to the second category, except the lawmaking function was delegated to elected officials, and
- democracies in which the people delegated no power whatsoever to officials. Such democracies represented a corruption of the form and were susceptible to demagogues. Hence, they did not honor the rule of law.²²⁰

Aristotle called the fourth, corrupt, class of democracy *teleutaia demokratia*. We can translate the phrase as “ultimate democracy,” “extreme democracy,”—or, more metaphorically,—“pure democracy.”²²¹ John Adams described the same concept as “simple and perfect democracy.”²²²

Montesquieu relied on this taxonomy in discussing how republics become corrupted. Just as aristocratic republics become despotisms if the

218. *Id.* at 140. Madison referred to Aristotle’s political philosophy, with attribution, in at least one later public paper. *Id.* at 156.

219. Thus, it is not quite accurate to say, as Judge Henry does, that Aristotle “disdained democracy.” Henry, *supra* note 11, at 547. It is more accurate to say that Aristotle disdained *pure* democracy.

220. ARISTOTLE, *supra* note 1, at 159–64; *see also id.* at 240–44 (listing the categories of democracies in which the final class is similar to the final class defined in the text).

221. Given the connection between *teleutaia* and the Greek word for “end” (*telos*), the best translation is probably “ultimate democracy.” *See* HENRY GEORGE LIDDELL & ROBERT SCOTT, AN INTERMEDIATE GREEK-ENGLISH LEXICON 798 (Oxford Univ. Press, 7th ed. 1980) (1889) (defining *teleutaios* as “last” or “the endings or terminations”). For the insight of “pure democracy” as metaphorical, I am indebted to James M. Scott, Professor of Foreign Languages (and a teacher of classical Greek) at the University of Montana.

222. ADAMS, *supra* note 1, at 7. In eighteenth-century usage, “perfect” usually meant “complete.” Adams declared that the concept was so impractical that it had “never yet existed among men.” *Id.*

rulers do not restrain themselves by following the law,²²³ so democratic republics become corrupt if the people do not restrain themselves—if they abandon virtue, seize complete administration of affairs, follow demagogues, and lose order.²²⁴ This explains why, in the view of Montesquieu, Madison, and others, *teleutaia demokratia* was not republican: the disqualifying fact was not ordinary citizen lawmaking, but direct mob control of *all* arms of the state, ungoverned by law.²²⁵ Other, more restrained forms of democracy were republican. Indeed, Madison and his contemporaries often used the term “democracy” to refer to a popular republic,²²⁶ even of a purely representative kind.²²⁷

It is true that in parts of *Federalist Number 10*, and more consistently in *Federalist Number 14*, Madison neglected to insert the adjective “pure” before the noun “democracy” when he discussed those democracies that did not qualify as republics.²²⁸ This was likely mere carelessness. Madison himself may have recognized it as such, because when he penned *Federalist Number 39*, he wrote with more precision:

[W]e may define a republic to be, *or at least may bestow that name on*, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.²²⁹

In other words, a representative government was a republic, but republics were not necessarily representative.

In the eighteenth-century context, the novel point was not that citizen lawmaking could be republican: it was that representative lawmaking could also be republican. Recall that virtually all previous republics had relied on direct citizen lawmaking rather than on representative assemblies, and that many writers had asserted that in ancient republics, representative assemblies

223. 1 MONTESQUIEU, *supra* note 1, at 137.

224. *Id.* at 133–37.

225. Cf. ADAMS, *supra* note 1, at 7 (describing a “simple and perfect democracy” as one in which citizens “exercis[e] all the legislative, executive, and judicial powers, in public assemblies of the whole”). This is inconsistent with the rule of law because, for example, if the mob tries to run the courts and police force directly, the rule of law is impossible. Incidentally, Montesquieu also said that monarchies can be corrupted for the same reason: lawless monarchy is despotism. 1 MONTESQUIEU, *supra* note 1, at 139.

226. See, e.g., 2 Elliot, *supra* note 1, at 352–53 (Hamilton, speaking at the New York ratifying convention); Sheehan, *supra* note 1, at 111 (William Duer as “Philo-Publius,” referring to Athens as both a republic and a democracy).

227. See *supra* note 93; cf. 3 *id.* at 642 (Adam Stephen, opining at the Virginia ratifying convention that of the three elements of monarchy, aristocracy, and democracy in a mixed government, democracy should be the strongest).

228. THE FEDERALIST, *supra* note 1, NO. 14, at 100–01 (Alexander Hamilton).

229. *Id.* at 241 (emphasis added).

had been unknown. Until the American states obtained their independence, representative lawmaking was identified more closely with limited monarchies such as Poland and England than with republics.²³⁰ Therefore, when participants in the debate such as James Wilson, James Monroe, Christopher Gore, Charles Pinckney, and Alexander Hamilton said that republican government rested either on direct or representative lawmaking,²³¹ the easy part was acknowledging that citizen lawmaking was republican. The hard part was the assertion that representative lawmaking could be republican, too.

It is in that setting that Madison (if he is the author) wrote *Federalist Number 63*. Much of that essay was a defense of the unusual claim, first made in *Number 10*, that representation of some sort characterizes all republics. Madison based his defense on a broader than usual understanding of the term “representation.” When Montesquieu, for example, wrote that representation was unknown in ancient republics, he was speaking of *legislative* representation.²³² Madison’s usage broadened the term to mean any kind of representation—including executive or judicial—sufficient to prevent the government from being a *teleutaia demokratia* in which “a small number of citizens . . . assemble and administer the government in person.”²³³ The definition thus expanded, he looked for and found such representation in ancient republics. He began with Athenian-style republicanism:

In the most pure democracies [the term here is used in a relative rather than absolute sense]²³⁴ of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and *representing* the people in their *executive* capacity.²³⁵

He then turned to the republics of Sparta, Rome, and Crete. Although he found no representative legislatures there, he claimed that the Roman

230. For Adams’s extensive discussion of Poland, see ADAMS, *supra* note 1, at 72–90.

231. See *supra* section V(A)(2).

232. 1 MONTESQUIEU, *supra* note 1, at 196.

233. THE FEDERALIST, *supra* note 1, NO. 10, at 81 (James Madison) (emphasis added).

234. Interpreting the phrase “pure democracies” here in the absolute sense used in *Federalist Number 10*—that is, in opposition to republics—would contradict *Number 10*, because the democracies referred to in *Number 63* have executive magistrates. It also would contradict Aristotle. That Madison was using a relative rather than an absolute definition of pure democracy is further suggested by the wording “[i]n the most pure democracies”—meaning the most nearly pure democracies—“of Greece.”

235. THE FEDERALIST, *supra* note 1, NO. 63, at 386 (James Madison). We can try to equate the two uses of “pure democracy” only if we assume that, in his view, pure democracies have no legislative representation but can have executive magistrates. The latter view would seem to be at odds with the taxonomy of Aristotle and Montesquieu and also with the views of other participants, such as James Wilson and Charles Pinckney. See *supra* section V(A)(2).

tribunes represented the people in their “*plenipotentiary* capacity.”²³⁶ That being enough to show some sort of representation, he continued:

[I]t is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American [state] governments lies in the *total exclusion of the people in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the former.²³⁷

To undercut the “strong version” of the argument against citizen lawmaking, it is sufficient that Madison conceded that republics did not need to be *exclusively* representative. He may, indeed, have been thinking of citizen lawmaking when, at the Virginia ratifying convention, he denied that Holland was a republic because “[T]he people have no agency, *mediate or immediate*, in their government.”²³⁸ In any event, it is extraordinary that in the 150-year-old debate over whether citizen lawmaking can be “republican,” the true import of *Federalist Number 63* has never been discussed. Far from arguing that citizen lawmaking was excluded from the republican form, Madison actually was asserting that a government could be representative without losing its republican character.

2. *Other Documents from the Constitutional Debate.*—Authors contending that citizen lawmaking violates the Guarantee Clause cite a few other contemporary documents, particularly portions of *The Federalist*. But these documents do not support that conclusion unless one resorts to ellipses. For example, Judge T.A. Sherwood wrote an early (1903) article on the subject²³⁹ which quoted *Federalist Number 39*. That number, as we have seen, contained Madison’s retreat from an earlier suggestion that republican government must be wholly representative.²⁴⁰ Sherwood concealed the retreat by deleting from his quoted extract the qualifying language “or at least bestow that name on,” rendering the passage materially misleading.²⁴¹

236. THE FEDERALIST, *supra* note 1, NO. 63, at 387 (James Madison).

237. *Id.*

238. 3 Elliot, *supra* note 1, at 310 (emphasis added). “Mediate” agency would mean that the people elect officials to conduct public business. “Immediate” agency means that they conduct it themselves—*e.g.*, citizen lawmaking.

239. Sherwood, *supra* note 28, at 249.

240. See *supra* note 229 and accompanying text.

241. That is, Sherwood deleted the bracketed words in the following extract: “We may define a republic to be [or at least may bestow that name on] a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.” Cf. THE FEDERALIST, *supra* note 1, NO. 39, at 241 (James Madison).

In 1911, Edward C. Gottry penned an article in which he quoted the part of *Federalist Number 43* which states that existing republican forms were protected by the Guarantee Clause.²⁴² However, he carefully omitted the subsequent qualifying phrase that assures states that they may change their constitutions to other republican forms and claim the guarantee for the latter²⁴³—thereby implying that only the existing forms were entitled to constitutional protection.

Much more recently, Ernest L. Graves has claimed that:

A growing body of opinion holds that the initiative process in California and other states violates the Guarantee Clause of the United States Constitution A considerable amount of historical literature supports this theory²⁴⁴

But the accompanying footnote on the “considerable amount of historical literature” cites only three numbers of *The Federalist*. These are Madison’s *Number 10*, which I have already discussed; Madison’s *Number 51*, which does not discuss the nature of republican government; and Hamilton’s *Number 9*, which actually suggests the contrary: namely, while it recommends representative lawmaking over citizen lawmaking, it explicitly acknowledges representative lawmaking to be a “wholly new discover[y]” not existing in earlier “republics.”²⁴⁵ Graves’s article also contains a number of other dubious assertions.²⁴⁶

Similarly, in a 1999 Montana Supreme Court case,²⁴⁷ the author was surprised to see opponents of a challenged initiative cite *Federalist Number*

242. Gottry, *supra* note 208.

243. *Id.* at 224. Thus, the author reproduces the following extract without the bracketed language: “As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. [Whenever the states may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter].” Cf. THE FEDERALIST, *supra* note 1, NO. 43, at 275 (James Madison).

244. Graves, *supra* note 25, at 1305.

245. THE FEDERALIST, *supra* note 1, NO. 9, at 72 (Alexander Hamilton). Thus, it appears that in Hamilton’s view also, a state could (much as Hamilton might deplore it) be a republic with *no legislative representation at all*.

246. For example, he alleges that *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), “concluded that the term ‘Republican’ . . . meant representative government,” although in fact, *Minor* held only that the thirteen original states were republican even though they did not give women the franchise. Graves, *supra* note 25, at 1311. Graves further alleges that *In re Pfahler*, 88 P. 270 (Cal. 1906), “distinguished, under the Guarantee Clause, between allowable direct democracy at the local or municipal level of government and the representative democracy required at the state level.” Graves, *supra* note 25, at 1311. But he fails to note that the court also strongly intimated that direct democracy was also valid at the state level—as that court subsequently has ruled. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978).

247. *Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999). The brief was an amicus brief filed by the American Civil Liberties Union of Montana, seeking judicial overthrow of a successful initiative requiring public votes on tax increases.

63, which, as we have seen, acknowledges the then-universal view that republics may feature citizen lawmaking. The opponents dealt with this problem by piecing together excerpted snippets out of context, effectively inverting the meaning of *Number 63*.²⁴⁸

3. *The Argument from Then-Existing State Constitutions*.—A few authors have suggested that only wholly representative states are republican in form because, at the time of the Constitution's adoption, all state governments were wholly representative.²⁴⁹ The usual authority cited for this proposition is the Supreme Court's 1874 decision in *Minor v. Happersett*.²⁵⁰ In *Happersett*, a woman sought to be enrolled as a voter because, she contended, the state's denial of the right of women to vote violated the Guarantee Clause. The court ruled against her, pointing out that votes for women could not have been a requirement of the Clause because when its language became operative, women had no votes.²⁵¹ The gist of *Happersett*, then, is that if a state becomes part of the union while operating under a particular, unchallenged constitution, that constitution should be deemed republican. *Happersett* certainly does not hold that a state is *prohibited* from adopting a new constitution. Such a construction would contradict the drafting and ratification history of the Guarantee Clause.²⁵²

C. "A Feeling Akin to Horror"?

Behind the argument that state legislative institutions existing in 1787 should be frozen into permanent constitutional requirements lies an assumption that the Framers would be horrified by modern citizen lawmaking. That assumption needs to be examined.

Here, again, the lens of Greco-Roman history can help us see more clearly. To Madison and his contemporaries, "citizen lawmaking" meant all free male citizens huddling together in the Forum or Agora, often unable to deliberate meaningfully, most unable to hear the speakers, without the benefit of newspapers or other media, often without the benefit of time, subject to the constant bribery of food and entertainment, and buffeted by the winds of rumor and the squalls of disorder. Both classical literature²⁵³

248. Amicus Brief of the American Civil Liberties Union of Montana at 4–5, *Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999) (No. 98-706).

249. See, e.g., Gottry, *supra* note 208, at 225; Graves, *supra* note 25, at 1311.

250. 88 U.S. (21 Wall.) 162 (1874).

251. *Id.* at 175–76.

252. See *supra* subpart IV(D). On *Happersett*, see also Coutts, *supra* note 29, at 313.

253. See, e.g., VIRGIL, *supra* note 1, at 107 (comparing a storm at sea with a mob).

and the Framers²⁵⁴ depicted the results by resorting to metaphors of waves and storms. It is enough to imagine the setting to know that legislating under such conditions must have been challenging indeed. Moreover, even if (as was almost invariably true) the state was not a “pure democracy”—that is, it had magistrates with real power—the legal checks and balances on the instincts of the crowd were often insufficient.

The Framers’ writings make it clear that they were unwilling to recreate that sort of republic in eighteenth-century state and federal constitutions, first, because conditions in America would not support it—even the smallest state was too big—and second, because the intervening years had improved political technology. As Hamilton wrote:

The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times.²⁵⁵

Yet there is no evidence that the founding generation wanted to freeze matters there; in fact, the preadoption amendment of the Guarantee Clause to allow for change demonstrates the contrary. The Founders lived in a creative time. They knew that novel discoveries and new technology might reveal different ways of conducting republican government.²⁵⁶

Thus, it is relevant that citizen lawmaking is conducted under quite different conditions today than it was in ancient times, or than it could have been conducted in 1787. Modern citizen lawmaking is subject to the checks and balances provided by a mixed constitution—including specified drafting procedures, legislative preapproval or a burdensome petitioning process in lieu of legislative preapproval, and judicial review. Robert Henry points out that “most modern advocates of expanded use of direct democracy, especially those who are politically conservative, do not desire to eliminate many of these and other countermajoritarian protections”²⁵⁷ Far from representing the impulse of the moment, a single citizen enactment can consume months, even years, of deliberation, drafting, campaigning, and

254. See, e.g., *THE FEDERALIST*, *supra* note 1, NO. 9, at 71 (Alexander Hamilton) (“If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed.”).

255. *THE FEDERALIST*, *supra* note 1, NO. 9, at 72 (Alexander Hamilton).

256. Cf. *THE FEDERALIST*, *supra* note 1, NO. 43, at 275 (James Madison) (contemplating change in state institutions under the Guarantee Clause).

257. Henry, *supra* note 11, at 552.

judicial examination.²⁵⁸ Sources of information are far more readily available to modern voters than to voters in ancient times or in 1787. Fundraising and spending is often subject to full public disclosure. Campaigning occurs not in transitory mobs but among a dispersed citizenry over an extended period of time. On Election Day, people vote in separate localities possessing little of the physical immediacy or “turbulence”²⁵⁹ of the ancient forum. The electorate is likely to enjoy, in the aggregate, more information and more time for consideration than legislators possess, and to be less subject to pressures from lobbyists and special interests. Finally, of course, unlike the citizens of Sparta or Athens, American citizens do not vote on every law, but on only a tiny fraction of the total legislation considered every year.²⁶⁰

Such differences would have been important to the Framers.²⁶¹ While it makes no *constitutional* difference whether particular Framers would have approved of the modern process because, by their lights, it is clearly

258. For example, the author was involved in a successful petition referendum process that lasted from May 1993 through November 1994—a period of over eighteen months. The time was consumed by (1) debates among the sponsoring group and with other interested citizens as to how the referendum should be presented, (2) qualifying the wording of the referendum with state authorities, (3) distributing petitions and gathering signatures from nearly a quarter of the electorate, (4) endlessly debating the issue in the press, (5) negotiating the ballot’s language with the attorney general, (6) writing two arguments for the voter information pamphlet, (7) participating in two levels of judicial review, *Nicholson v. Cooney*, 877 P.2d 486 (Mont. 1994), and (8) waging an election campaign. The episode was the single most talked-about political event in the state during 1993 and received significant attention in 1994. I was also involved in a constitutional initiative effort for which the basic research began in 1994, followed by public hearings, a lengthy official drafting process, a hotly contested campaign, voter adoption in 1998, and judicial review in 1999—a period of nearly five years. *Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999). Few legislative bills are considered so deliberately.

It is therefore substantially inaccurate to say that “no matter how creative the suggestions from defenders of pure democracy, the simple truth is that representative lawmaking includes, as part of its process, formal deliberation and debate . . . [while the] state initiative process does not.” Rogers & Faigman, *supra* note 8, at 1063.

259. THE FEDERALIST, *supra* note 1, NO. 10, at 81 (James Madison) (using the word “turbulence,” from the Latin noun *turba*, to mean “a disturbance in a crowd of people”).

260. See *supra* note 3 and accompanying text.

261. Particularly significant to the Framers would have been the fact that modern citizen lawmaking occurs not in a single place but in disparate locations. See, e.g., THE FEDERALIST, *supra* note 1, NO. 63, at 385 (James Madison):

It may be suggested that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show that it is one of the principal recommendations of a confederated republic.

See also *id.* NO. 68, at 412 (Alexander Hamilton) (citing as a principal advantage of the electoral college system the fact that each state’s electors will vote in separate locations so that “this detached and divided situation will expose them much less to heats and ferments”). Other participants in the debate expressed similar sentiments. Ford, PAMPHLETS, *supra* note 1, at 172 (John Dickinson, writing as “Fabius”), 233 (Alexander Contee Hanson, writing as “Aristides”).

republican, we cannot assume reflexively that they would have “looked upon such a scheme ‘with a feeling akin to horror.’”²⁶²

VII. Conclusion

Anti-Federalist charges that the Constitution was “aristocratic” or “non-republican”²⁶³ sound peculiar and mistaken to the modern reader. But, in context, one can see why such charges were leveled. Unlike the constitutions of previous popular republics, the charter of the new federal government, like those of the original state governments, excluded the people from exercising direct legislative powers. The fact that many people assumed that citizen lawmaking was inherent in popular republics is shown by the frequency with which they cited Montesquieu’s dictum that republicanism is feasible only in a small territory.²⁶⁴ The purely representative scheme, on the other hand, was associated with limited monarchy, not with the popular republic.²⁶⁵

To be sure, the loss of citizen lawmaking was easier to swallow on the state than the federal level. The drafters of state constitutions had constructed them to replicate popular republicanism. State legislatures were quite large relative to the size of the voting population. Virginia, for example, had about two hundred legislative delegates representing a free population of about 352,000.²⁶⁶ Delegates were selected for very short terms, usually for only one year. Upper houses, with the exception of the Maryland senate, were almost as democratic as the lower houses.²⁶⁷ Pennsylvania and Georgia were unicameral. Executives were usually term-limited, elected annually, and second-guessed by a council selected by the legislature. In New England, citizen lawmaking survived in local town meetings.

But on the federal level, how different it was to be! A remote and aristocratic Senate—an exceedingly small House of Representatives²⁶⁸—and a “great and mighty President, with very extensive powers—the powers of a king.”²⁶⁹ All were separated from the people by vast distances and relatively

262. Cf. Rogers & Faigman, *supra* note 8, at 1061 (quoting a purported statement by Charles Beard).

263. Banning, *supra* note 1, at 170 (“Most Antifederalists denied that America could support a republican government of national extent. Many of them wondered whether the new Constitution was genuinely republican at all.”).

264. See, e.g., 3 Elliot, *supra* note 1, at 30 (George Mason, speaking at the Virginia ratifying convention).

265. See *supra* text accompanying note 231; cf. Banning, *supra* note 1, at 171 (asserting that a renewed mixed monarchy was one Anti-Federalist fear).

266. 3 Elliot, *supra* note 1, at 395 (Patrick Henry, speaking at the Virginia ratifying convention). Most of these were in the lower house. *Id.* at 320.

267. Maryland senators were indirectly elected for five-year terms. MD. CONST. OF 1776 art. XIV.

268. Banning, *supra* note 1, at 175.

269. 3 Elliot, *supra* note 1, at 56 (Patrick Henry, speaking at the Virginia ratifying convention).

long terms of office and protected from popular outrage by the forbidding boundaries of the Ten Miles Square.²⁷⁰ If a republic entailed popular government, how could this new constitution be republican?

I recite the foregoing not to show that the Anti-Federalists were right, but to show that it is more plausible to depict the *absence* of citizen lawmaking as “unrepublican” than its presence. The Guarantee Clause was inserted to protect popular rights, not to restrict them. Using it to oppose citizen lawmaking stands the Clause on its head. Professor William Wiecek summarized the shift in perspective that made the argument against citizen lawmaking sound plausible:

To the liberal thinkers of the late eighteenth century who advocated representative government as opposed to autocracy, it was a means of assuring the people a voice in law-making through control of those whom they chose to represent their interests. But the idea at least partly atrophied in the following century so that it came to mean that the people surrendered their sovereign legislative power to their representatives²⁷¹

Yet the history of the American constitutional debate tells us that republicanism, as the participants understood it, does not require either the presence or absence of representation or of citizen lawmaking. The basic elements of republicanism are (i) control by the citizenry, (ii) the absence of a monarch, and (iii) the rule of law. If those elements are present, the government is republican for constitutional purposes, whether the legislative power is vested in representatives exclusively, in the people exclusively, or, as is the case in most states today, in some combination thereof.

The Framers and Ratifiers of the Constitution chose a purely representative system for the federal government. But they did not mandate that system for the states. They recognized existing state constitutions as “republican,” but they did not prescribe freezing them into place. In essence, they told the states: “With respect to republicanism, choose the form you wish, so long as your governments are controlled by your citizens, have no kings (or, by another clause, no titled nobility), and honor the rule of law.”

The Guarantee Clause argument against citizen lawmaking is profoundly unhistorical—so much so, as we have seen, that its promoters often feel forced to selectively edit or otherwise distort the few documents that they claim support their position. The courts have rejected such

270. The Anti-Federalists seem to have had a great deal of fun mocking the Ten Miles Square—the eventual District of Columbia—which would, they predicted, become the locale of all sorts of scandals and the refuge of all sorts of scoundrels. See, e.g., *id.* at 431 (George Mason, speaking at the Virginia ratifying convention), 436 (Patrick Henry, speaking at the same convention). And who are we to assert with confidence that they were wrong?

271. WIECEK, *supra* note 1, at 263.

arguments with rare unanimity. Now is the time for the courts to put them to rest for good and, if necessary and after fair warning, to impose appropriate sanctions on the parties who persist in raising them. It is also time for judges, lawyers, and legal commentators to recognize that the Constitution was crafted, debated, and adopted by citizens immersed in the classical Greek and Roman tradition, and that reliable constitutional interpretation is impossible unless we revisit that tradition—as the Founders themselves had done, and their ancestors before them, for a span of more than fifty generations.

