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JUD CAMPBELL

Natural Rights and the First Amendment

ABSTRACT. The Supreme Court often claims that the First Amendment reflects an original judgment about the proper scope of expressive freedom. After a century of academic debate, however, the meanings of speech and press freedoms at the Founding remain remarkably hazy. Many scholars, often pointing to Founding Era sedition prosecutions, emphasize the limited scope of these rights. Others focus on the libertarian ideas that helped shape opposition to the Sedition Act of 1798. Still more claim that speech and press freedoms lacked any commonly accepted meaning. The relationship between speech and press freedoms is contested, too. Most scholars view these freedoms as equivalent, together enshrining a freedom of expression. But others assert that the freedom of speech, unlike press freedom, emerged from the legislative privilege of speech and debate, thus providing more robust protection for political speech.

This Article argues that Founding Era elites shared certain understandings of speech and press freedoms, as concepts, even when they divided over how to apply those concepts. In particular, their approach to expressive freedom was grounded in a multifaceted understanding of natural rights that no longer survives in American constitutional thought. Speech and press freedoms referred, in part, to natural rights that were expansive in scope but weak in their legal effect, allowing for restrictions of expression to promote the public good. In this respect, speech and press freedoms were equivalent concepts with highly contestable implications that depended on calculations of the public good. But expressive freedom connoted more determinate legal protections as well. The liberty of the press, for instance, often referred specifically to the rule against press licensing, while the freedom of speaking, writing, and publishing ensured that well-intentioned statements of one's views were immune from governmental regulation. In this respect, speech and press freedoms carried distinct meanings. Much of our modern confusion stems from how the Founders – immersed in their own constitutional language – silently shifted between these complementary frames of reference.

This framework significantly reorients our understanding of the history of speech and press freedoms by recognizing the multifaceted meanings of these concepts, and it raises challenging questions about how we might use that history today. Various interpretive theories – including ones described as "originalist" – might incorporate this history in diverse ways, with potentially dramatic implications for a host of First Amendment controversies. Most fundamentally, however, history undercuts the Supreme Court's recent insistence that the axioms of modern doctrine inhere in the Speech Clause itself, with judges merely discovering – not crafting – the First Amendment's contours and boundaries.



AUTHOR. Assistant Professor, University of Richmond School of Law. The author thanks Randy Barnett, Will Baude, Nathan Chapman, Saul Cornell, Jonathan Gienapp, Masha Hansford, Pam Karlan, Larry Kramer, Corinna Lain, Kurt Lash, Maeva Marcus, Michael McConnell, Bernie Meyler, Zach Price, Jack Rakove, Richard Re, Fred Schauer, Sid Shapiro, Larry Solum, Andrew Verstein, Kevin Walsh, the editors of the *Yale Law Journal*, and participants in the Federalist Society Junior Scholars Colloquium, the Georgetown Constitutional Law Colloquium, the Institute for Constitutional History Junior Scholars Seminar, the Loyola University Chicago Constitutional Law Colloquium, the Stanford Law School faculty workshop, the University of Richmond School of Law faculty workshop, the University of San Diego Originalism Works-in-Progress Conference, and the Wake Forest University School of Law faculty workshop.



ARTICLE CONTENTS

INTRODUCTION 249

I. STAKES AND IMPLICATIONS 257
- A. Scholarly Contribution 257
- B. Implications for Modern Doctrine 261

II. NATURAL RIGHTS AT THE FOUNDING 264
- A. Natural Rights and Expressive Freedom 268
- B. Inalienable Natural Rights and the Freedom of Opinion 280
- C. Common-Law Rights and the Freedom of the Press 287
- D. Nature and Law 290

III. EXPLICATING THE FIRST AMENDMENT 295
- A. Enumerating Expressive Freedoms 295
- B. Original Meanings 304

IV. USING HISTORY 313

CONCLUSION 318

INTRODUCTION

Governments need to restrict expression. Whether someone is falsely yelling "fire" in a crowded theater, lying on the witness stand, or conspiring to commit crimes, speech can be tremendously harmful. Yet communication is essential to human flourishing, and history has shown time and again that governments are prone to censorial abuse. An enduring challenge for any legal system is balancing these concerns.

In its role as constitutional mythologist, the Supreme Court often says that the First Amendment answers this challenge. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," the Court recently declared, concluding that neither politicians nor judges may "attempt to revise that judgment simply on the basis that some speech is not worth it."[1]

After a century of academic debate, however, the meanings of speech and press freedoms at the Founding remain remarkably hazy. "One can keep going round and round on the original meaning of the First Amendment," Rodney Smolla writes, "but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge."[2] Conventional wisdom holds that the freedom of speech and the freedom of the press were equivalent concepts, together comprising what we would now call a freedom of expression.[3] But another prominent view is that the freedom of speech, unlike the freedom of the press, emerged

1. United States v. Stevens, 599 U.S. 460, 470 (2010); *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("[T]he First [Amendment] . . . is the very *product* of an interest balancing by the people.").

2. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 1:11 (2016).

3. *See, e.g.*, WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT 15-30 (2016); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 170-71 (1985); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 & n.39 (1993); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1289, 1292 (1998); Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 180, 204 (1984); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640-41 (1975); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1079-83 (2009). The term "freedom of expression" was rarely used in the eighteenth century but is used here for simplicity. *But see Answer of the Senate of Pennsylvania to Governor Mifflin's Speech*, DUNLAP & CLAYPOOLE'S AM. DAILY ADVERTISER (Philadelphia), Dec. 14, 1795, at 3 ("The communication of sentiment, with temper and decency, is a right which never should be impaired: Freedom of expression will only be abused by those who wish to conceal, or pervert, the truth.").

from the legislative privilege of speech and debate,[4] thus providing robust protection for political speech.[5] Still more scholars conclude that "freedom of speech, unlike freedom of the press, had little history as an independent concept when the first amendment was framed."[6] And while some scholars espouse "little doubt that the First Amendment was meant . . . to forbid punishment for seditious libel,"[7] debates among the Founders on that topic would seem to belie any broadly shared original understanding of speech and press freedoms.[8] No wonder so many commentators have given up the search for original meaning, with some concluding that the First Amendment was simply "an aspiration, to be given meaning over time."[9]

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4. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 168 (2012); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 46-47 (1985); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 73 & n.44 (1999); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 292 (1996).

5. *See, e.g.*, GEORGE ANASTAPLO, REFLECTIONS ON FREEDOM OF SPEECH AND THE FIRST AMENDMENT 66 (2007); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 34-37 (1960); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 815 (1999).

6. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983); *see also* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 793 (2008) (agreeing with Anderson); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 17 (2011) (same).

7. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1198 (4th ed. 2013); *see also, e.g.*, AKHIL REED AMAR, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA 7 (2016) ("The Sedition Act of 1798 was clearly unconstitutional . . . .").

8. Scholars who emphasize the indeterminacy of original meaning typically highlight the clashing views over sedition. *See, e.g.*, SMOLLA, *supra* note 2, at § 1:11. By contrast, those who take sides often argue that the opposing view was not prevalent until the late 1790s. *Compare* LEVY, *supra* note 3, at xii ("[T]he theory of freedom of political expression remained quite narrow until 1798 . . . ."), *with* Anderson, *supra* note 6, at 521 ("The Federalists who sought to prevent criticism of government by passing the Sedition Act were not the Framers, nor did they share the Framers' views."). For other key works, see BIRD, *supra* note 3; PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW (2010); Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109; David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983); Hamburger, *supra* note 3; Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225 (1985); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985); and Stephen A. Smith, *The Origins of the Free Speech Clause*, 29 FREE SPEECH Y.B. 48 (1991).

9. Geoffrey R. Stone, *The Story of the Sedition Act of 1798: "The Reign of Witches," in* FIRST AMENDMENT STORIES 13, 23 (Richard W. Garnett & Andrew Koppelman eds., 2012). For others who

But perhaps this indeterminacy stems from our own interpretive approach. "[T]he first key to understanding the American Founding," historian Jonathan Gienapp cautions, "is appreciating that it is a foreign world," filled with many concepts that bear only a deceptive resemblance to modern ideas.[10] Perhaps, then, we have been looking for original meaning in the wrong way, instinctively trying to fit the historical evidence to our own conception of constitutional rights.

Modern lawyers tend to view constitutional phrases like "the freedom of speech" as terms of art, sparking searches for those terms in eighteenth-century legal sources. In the context of speech freedom, that effort produces sparse and inconsistent results. Americans, it turns out, rarely ever used the term "freedom of speech." Meanwhile, the Founders frequently mentioned press freedom, but they did so in seemingly conflicting ways. The liberty of the press, William Blackstone famously insisted, "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."[11] Founding Era commentaries about press freedom, however, routinely ventured beyond the topic of press licensing.[12]

Proposing a paradigm shift, this Article argues that Founding Era elites shared certain understandings of speech and press freedoms at a more abstract, conceptual level even though they disagreed about how to apply those concepts to particular constitutional controversies. The contested *implications* of speech and press freedoms at the Founding, in other words, have obscured their more widely shared *meanings*. To comprehend these meanings, however, we must step

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emphasize a lack of consensus at the Founding, see, for example, DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 210 (2009); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 70 (1986); Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 837; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 748-54 (2013); and Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 326-34 (2011) [hereinafter Cornell, *The People's Constitution vs. The Lawyer's Constitution*].

10. Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 942 (2015).

11. 4 WILLIAM BLACKSTONE, COMMENTARIES *152.

12. *See* Wendell Bird, *Liberties of Press and Speech: 'Evidetestnce Does Not Exist To Contradict the . . . Blackstonian Sense' in Late 18th Century England?*, 36 OXFORD J. LEGAL STUD. 1 (2016).

back from the nitty-gritty details of legal doctrine and grapple with the conceptual foundations of the First Amendment, starting with the largely forgotten language of Founding Era rights discourse.[13]

For American elites, rights were divided between *natural rights*, which were liberties that people could exercise without governmental intervention, and *positive rights*, which were legal privileges or immunities defined in terms of governmental action or inaction, like the rights of due process, habeas corpus, and confrontation.[14] Consequently, distinguishing natural rights from positive rights was simple. "A *natural* right is an animal right," Thomas Paine succinctly explained, "and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals."[15] Natural rights, in

13. The intellectual foundation of this language was social-contract theory. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)). Founding Era discussions of social-contract theory and natural rights were common. *See, e.g.*, JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 6 (Philadelphia, Hall & Sellers 1787); 1 WILLIAM BLACKSTONE, COMMENTARIES *47; ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 88 (Harold C. Syrett ed., 1961); James Madison, Essay on Sovereignty (1835), *in* 9 THE WRITINGS OF JAMES MADISON 568, 570 (Gaillard Hunt ed., 1910); Gouverneur Morris, Political Enquiries (1776), *in* TO SECURE THE BLESSINGS OF LIBERTY: SELECTED WRITINGS OF GOUVERNEUR MORRIS 5, 9 (J. Jackson Barlow ed., 2012); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 16 (Windham, John Byrne 1795); RICHARD WOODDESON, ELEMENTS OF JURISPRUDENCE: TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAWS OF ENGLAND 22 (London, T. Payne & Son 1783).

14. *See* Congressional Debates (June 8, 1789) (statement of Rep. James Madison), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 811, 822 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS]; Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), *in* 18 THE PAPERS OF THOMAS JEFFERSON 131, 132 (Julian P. Boyd ed., 1971); *An Old Whig IV*, INDEP. GAZETTEER (Philadelphia), Oct. 27, 1787, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 497, 501 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION]. The Founders sometimes referred to positive rights as *adventitious* rights or *social* rights. *See The Impartial Examiner 1*, VA. INDEP. CHRON. (Richmond), Feb. 20, 1788, *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra*, at 387, 390 (1988); [GEORGE LOGAN], LETTERS ADDRESSED TO THE YEOMANRY OF THE UNITED STATES . . . 39 (Philadelphia, Eleazer Oswald 1791); *Philanthropos*, NEWPORT HERALD, June 17, 1790, *reprinted in* 26 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra*, at 1051, 1051 (John P. Kaminski et al. eds., 2013).

15. Common Sense [Thomas Paine], *Candid and Critical Remarks on Letter 1, Signed Ludlow*, PA. J. & WKLY. ADVERTISER, June 4, 1777, at 1; *see also* 1 THOMAS RUTHERFORD, INSTITUTES OF NATURAL LAW 36 (Cambridge, J. Bentham 1754) ("Another division of our rights is into natural and adventitious. Those are called natural rights, which belong to a man . . . originally, without the intervention of any human act."); Hamburger, *supra* note 3, at 919 ("[Americans]

other words, were those that did not depend on the existence of a government. Speaking, writing, and publishing were thus readily identifiable as natural rights.

Though easy to identify, natural rights at the Founding scarcely resembled our modern notion of rights as determinate legal constraints on governmental authority. Rather, Americans typically viewed natural rights as aspects of natural liberty that governments should help *protect* against private interference (through tort law, property law, and so forth) and that governments themselves could *restrain* only to promote the public good and only so long as the people or their representatives consented.[16] And assessing the public good—generally understood as the welfare of the entire society—was almost entirely a legislative task, leaving very little room for judicial involvement.[17] Natural rights thus powerfully shaped the way that the Founders thought about the purposes and structure of government, but they were not legal "trumps" in the way that we often talk about rights today.

By the late eighteenth century, however, expressive freedom also connoted a variety of more determinate legal protections. The liberty of the press, for instance, often referred specifically to the rule against press licensing; by prohibiting prior restraints on the press, this rule put juries in charge of administering governmental restrictions of expression through criminal trials. Meanwhile, the freedom of speaking, writing, and publishing ensured that well-intentioned statements of one's views were immune from regulation. In this limited way, expressive freedom entailed legal "trumps." Much of our modern confusion about the history of speech and press freedoms stems from the way that the Founders—immersed in their own constitutional language—silently shifted between these two dimensions of expressive freedom.

Indeed, Founding Era rights discourse featured a symbiotic relationship between natural rights and legal rules.[18] In part, the common law indicated the scope of natural rights both because of a presumed harmony between the common law and natural law and because common-law rules were presumptively based on popular consent and consistent with the public good. At the same time, the Founders sometimes used natural law—the law of reason—to help shape their understandings of positive law. To recognize a natural right, in other words, implied recognition of its customary legal protections, and vice versa.[19]

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understood natural liberty to be the freedom an individual could enjoy as a human in the absence of government.").

16. *See* Campbell, *supra* note 13, at 92-98.

17. *See id.* at 96-98.

18. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 10 (1969); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 581 (2006).

19. *See infra* Section II.D.

The Founders, however, often disagreed about the precise relationship between natural rights and the common law, leading to a confusing array of statements about expressive freedom. In general, Federalists based their views about natural rights on legal authority, not practical experience or abstract reasoning, making judicial accounts of the common law decisive. But an opposing interpretive tradition championed "popular" understandings of constitutional and legal commands.[20] Advocates of this view, Saul Cornell explains, were "deeply suspicious of ceding so much authority to lawyers and judges," sometimes even going so far as to compare "the chicanery of lawyers with the practices of 'Romish priests in matters of religion.'"[21] For these "popular" interpreters, who were often themselves erudite elites, practical experience and common sense were paramount.

Because of these methodological disagreements, Americans who shared an understanding of speech and press freedoms as natural rights often profoundly disagreed about the *legal implications* of the First Amendment. Federalists in the late 1790s, for instance, typically invoked the English common law to defend the constitutionality of sedition prosecutions, while many Republicans appealed to practical experience and common sense to reach the opposite conclusion. Yet this virulent disagreement among contending elites began with a shared recognition of expressive freedom as a natural right. This Article's reframing thus illustrates that identifying methodological differences among the Founders can help clarify, and not merely complicate,[22] the historical meanings of constitutional concepts.

Debates about expressive freedom also were wide ranging because the Founders often vehemently disagreed about which regulations of speech promoted the public good. Many viewed narrowly drawn sedition laws as *enhancing* public debate by combating efforts to mislead the public.[23] Others thought that

20. *See* Cornell, *The People's Constitution vs. The Lawyer's Constitution*, *supra* note 9, at 296-97, 306. As Cornell notes, "the conflict over legal interpretation . . . exist[ed] along a spectrum in which elite culture shaded gradually into a more popular plebian culture." *Id.* at 309.

21. *Id.* at 306 (quoting [BENJAMIN AUSTIN], HONESTUS, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW 20 (Boston, Adams & Nourse 1786)).

22. Scholars have widely noted how methodological disagreements among the Founders can *complicate* efforts to recover original meanings. *See, e.g.*, *id.* at 296-98; Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 912-13 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555-56, 561, 571-73 (2003).

23. *See, e.g.*, ALEXANDER ADDISON, A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 13 (Vergennes, Samuel Chipman 1799) (arguing that sedition leads to the "greatest of all plagues, the corruption of public opinion").

sedition laws created more harm than good by chilling too much useful speech.[24] But properly understood, this conflict did not reflect profound divisions about the *concept* of expressive freedom. Rather, the Founders disagreed about how to *apply* that concept to sedition laws.[25]

To set the stage for this historical argument, Part I discusses the Article's historical contribution and previews its potential modern implications. It begins by offering a brief overview of related scholarship. This overview sets in relief the Article's focus on the interplay between natural rights and the common law. The Part then explores the ways that this revisionist account could influence modern understandings of the First Amendment. In particular, it emphasizes that the Speech and Press Clauses were originally rooted in a broader Founding Era discourse about natural rights – not, as modern scholarship generally posits, a particular theory about why expression warrants constitutional protection.

Part II then turns to the history, drawing out three different meanings of speech and press freedoms at the Founding. *First*, speech and press freedoms were natural rights that were regulable in promotion of the public good, meaning the good of the society as a whole.[26] *Second*, the Founders widely thought that the freedom to make well-intentioned statements of one's views belonged to a subset of natural rights, known as "unalienable" natural rights, that could not be restricted in promotion of the public good and thus fell outside legislative

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24. *See, e.g.*, JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCOUNTROULABLE NATURE OF THE HUMAN MIND 83 (New York, Johnson & Stryker 1801) (describing the "laws of society" – akin to the proverbial marketplace of ideas – as "fully sufficient to the purpose" of handling malicious falsehoods); TUNIS WORTMAN, A TREATISE, CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS 170 (New York, George Forman 1800) ("Public prosecutions for libels are . . . more dangerous to Society than the misrepresentation which they are intended to punish."). This view developed among English radicals, whose writings circulated in America. *See, e.g.*, RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION, AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD 25 (London, Barlow & Babcock 1784) (arguing that the "evils" of granting civil authority to regulate speech outweigh the benefits); James Burgh, *Of the Liberty of Speech and Writing on Political Subjects*, *in* 3 POLITICAL DISQUISITIONS 246, 254 (London, Edward and Charles Dilly 1775) ("For if you punish the *slanderer*, you deter the *fair inquirer*.").

25. Readers need not accept a general distinction between *meanings* and *expected applications* in order to recognize my point, which is simply that individuals could simultaneously *agree* that speaking, writing, and printing were natural rights regulable in the public interest and *disagree* about whether particular governmental restrictions of speaking and printing promoted the public good. For arguments in favor of a general distinction between meanings and expected applications, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559 (2006); and Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 383 (2013).

26. *See infra* Section II.A.

authority to curtail.[27] *Third*, Americans recognized a variety of common-law rules that offered more determinate legal protection for expressive freedom.[28] A concluding Section then explores the contested interrelationship between these concepts.[29]

Part II, it bears emphasis, aims to recover the principles that Founding Era elites had in mind when designing and applying the Speech and Press Clauses, but it is not *directly* concerned with the original meanings of those provisions. Postponing that discussion until Part III is deliberate. Indeed, this Article defends the view that we cannot understand the meaning of the First Amendment until we first understand the forgotten language in which it was written.

With this conceptual framework in mind, Part III offers a novel interpretation of the original meanings of the Speech and Press Clauses. The argument proceeds by connecting the text and early interpretations of the First Amendment to the framework developed in Part II. Throughout the ratification debates and into the First Congress, supporters of a bill of rights pushed for constitutional recognition of *existing* concepts. Therefore, to the extent that Founding Era elites originally understood the First Amendment as imposing determinate limits on congressional power, these limits were delineated by accepted common-law rules and by the inalienable natural right to make well-intentioned statements of one's thoughts. Beyond these principles, however, the First Amendment left unresolved whether certain restrictions of expression promoted the public good. In laying out this argument, this Part also rebuts competing scholarly accounts of the original meanings of the Speech and Press Clauses and emphasizes the ways in which these Clauses had distinct meanings.

The Article then concludes by returning to the modern implications of First Amendment history. A point of emphasis is the historical distance that separates us from our constitutional past. If the Supreme Court wanted to apply only those legal rules that the Founders recognized (or likely would have recognized), a huge swath of modern case law would have to go. There is no evidence, for instance, that the Founders denied legislative authority to regulate expressive conduct in promotion of the public good – a principle that runs contrary to countless modern decisions.

But beyond case-specific implications is a more fundamental point: the early history of speech and press freedoms undercuts the mythological view that foundational principles of modern doctrine inhere in the original Speech Clause. The Justices, for instance, have repeatedly asserted that the First Amendment itself

27. *See infra* Section II.B.

28. *See infra* Section II.C.

29. *See infra* Section II.D.

strictly disfavors content-based regulations of speech.[30] And when the Court recently derided the government's suggestion that some speech might be deemed "low value" and thus subject to less rigorous scrutiny, it acted as if the Speech Clause contains a full set of doctrinal rules.[31] Lowering judicial scrutiny for less valuable forms of speech, the Court explained, would "revise th[e] judgment" that "[t]he First Amendment itself reflects."[32] Doubling down on this idea, the Court later insisted that "[t]he whole point of the First Amendment" was to prevent speech restrictions based on "a generalized conception of the public good."[33]

Simply put, however, the First Amendment did not enshrine a judgment that the costs of restricting expression outweigh the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote the public good. Whether modern doctrine serves those original principles is then a judgment that *we* must make. The original meanings of the Speech and Press Clauses do not provide the answer.

I. STAKES AND IMPLICATIONS

Before turning to the eighteenth century, it is worth making some preliminary remarks about this Article's contribution to historical scholarship and its implications for modern doctrine.

A. Scholarly Contribution

This Article charts a new historical path by concentrating on the *conceptual meanings*, and not merely the legal dimensions, of speech and press freedoms. For much of the twentieth century, scholarship about expressive freedom at the Founding overwhelmingly focused on the compatibility of sedition prosecutions with the First Amendment.[34] While historically enlightening, much of this

30. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 128 (1993) (Kennedy, J., concurring).

31. United States v. Stevens, 559 U.S. 460, 468-71 (2010).

32. *Id.* at 470; *see also* United States v. Alvarez, 132 S. Ct. 2537, 2544, 2547 (2012) (plurality opinion) (summarizing the same idea, with application to false statements).

33. McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014).

34. *Compare* ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH 17-24 (1920) (insisting that the First Amendment was designed to bar seditious libel prosecutions), *with* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 2-3 (1960) (arguing that historical evidence "points strongly in support" of the conclusion that the First

scholarship offered little clarity about the First Amendment's original meaning beyond the topic of sedition. Some historians and legal academics have pursued that effort more directly, but the literature falls far short of consensus. Scholars typically treat speech and press freedoms as common-law rules, leading many to emphasize the ban on prior restraints.[35] Others, relying both on Federalist claims during the ratification debates and on Republican arguments against the Sedition Act, insist that the Speech and Press Clauses categorically withdrew all federal authority over expression.[36] Still more assert that the Speech Clause was linguistically and substantively derived from the legislative privilege of speech and debate.[37] Finally, many have simply thrown up their hands and declared the enterprise to be hopeless or misguided.[38]

A few scholars have identified a connection between the First Amendment and natural rights, but none has accounted for the multifaceted way that the Founders referred to speech and press freedoms. Philip Hamburger, for instance, classifies both freedoms as natural rights, emphasizing governmental authority to prevent encroachment on the rights of others.[39] Yet Hamburger never grapples with the complex relationship between natural rights and customary legal rules – an issue that profoundly shaped Founding Era disputes about expressive

Amendment "left the law of seditious libel in force"), *and* Rabban, *supra* note 8, at 796 (arguing that Levy's focus on seditious libel led him to overlook genuine and growing support among the Founders for a greater degree of expressive freedom).

35. *See, e.g.*, Vikram Amar, *Introduction* to THE FIRST AMENDMENT FREEDOM OF SPEECH: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 13, 13 (Vikram David Amar ed., 2009); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2180-81 (2015); Marc Lendler, *"Equally Proper at All Times and at All Times Necessary": Civility, Bad Tendency, and the Sedition Act*, 24 J. EARLY REPUBLIC 419, 426 n.28 (2004).

36. *See* BIRD, *supra* note 3, at 77; LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 47-48 (1991); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1556, 1567-71 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1111-14 (1994); Mayton, *supra* note 8, at 97, 119.

37. *See supra* note 4 (collecting sources).

38. *See supra* notes 2 and 9 and accompanying text.

39. *See* Hamburger, *supra* note 3, at 908-11.

freedom.[40] Meanwhile, others who describe speech and press freedoms as natural rights typically view the First Amendment as a categorical ban on any federal restrictions of expression.[41]

This Article, by contrast, presents an understanding of Founding Era expressive freedom grounded on the interrelationship between common-law traditions and natural-rights principles. As a general matter, natural rights did not impose fixed limitations on governmental authority. Rather, Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good—generally defined as the good of the society as a whole.[42] Recognition of natural rights, in other words, simply set the terms of political debate, not the outcomes. In this sense, speech and press freedoms were expansive in scope—applying to all forms of expression—but weak in their legal effect. And no evidence indicates that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare.[43] (Although perhaps strange to modern readers, this interpretation of the First Amendment—generally permitting the government to restrict speech in the public interest—survived into the early twentieth century.[44])

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40. Hamburger's only engagement with this issue is an unilluminating footnote:

> [N]atural law was not necessarily the only indication of what was an abridgement of the *constitutional* right, because a constitution might enumerate a natural right but qualify or supplement its protection of the right. The First Amendment right of free speech and press, for example, was understood to preclude publication censorship . . . . [T]his preference for postpublication restraints was highly compatible with the notion of a physical natural right, but it was not claimed to be derived from natural rights analysis.

Id. at 954 n.130. In a similar vein, David Bogen shows that many Founders viewed the freedom of speech as a natural right, but he offers little account of what that meant. *See* Bogen, *supra* note 8, at 453 ("[N]atural rights theory . . . failed to mark the line between protected liberty and punishable license."). Like Hamburger, Bogen does not explore the place of customary positive rights within a natural-rights framework. *See id.* at 450-53.

41. *See, e.g.*, Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267, 278-79 (1992); *see also* LEVY, *supra* note 3, at 225 ("The Framers believed that . . . no provision of the Constitution authorized the government to act on any natural rights."); *cf.* Heyman, *supra* note 3, at 1282 (classifying freedom of thought as a right "not subject to legislative regulation for the public good . . . [but] nevertheless limited by the rights of others"). For others who interpret the First Amendment as a categorical ban on federal regulations of expression, see *supra* note 36 (collecting sources).

42. *See infra* notes 114-118 and accompanying text.

43. *See infra* notes 290-294 and accompanying text.

44. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907) (providing that the First Amendment prohibits prior restraints on speech but permits "the subsequent punishment of such [speech] as may be deemed contrary to the public welfare"). *See generally* Crowley v. Christensen, 137

Nonetheless, the Founders also accepted that speech and press freedoms denied the government narrower slices of regulatory power. Everyone agreed, for instance, that the liberty of the press encompassed at least the common-law rule against press licensing. Americans also prized the right to a general verdict in sedition trials – enabling juries to decide questions of law and fact – and the right to present truth as a defense. Based largely on natural-rights principles, the Founders further rejected governmental authority to punish well-intentioned statements of one's thoughts absent direct injury to others.[45] But this principle did not extend to speech designed to mislead or harm others, nor is there evidence that it offered protection for what we now call "expressive conduct."[46] In these limited ways, speech and press freedoms were narrow in scope but strong in their legal implications. And the legal dimensions of expressive freedom reveal how the Founders sometimes treated speech and press freedoms as distinct, with press freedom encompassing only the legal rights of printing-press operators.

The claims made in the previous two paragraphs – developed further in Part II – simply describe a historical system of thought that Founding Era elites widely embraced. This Article does not attempt the impossible task of uncovering how every American actually thought about expressive freedom. Consequently, the discussion of "original meaning" in Part III aims to recover how Founding Era elites understood (where we have direct evidence), or would likely have understood (where we lack direct evidence), the Speech and Press Clauses of the First Amendment.[47] But this Article has little to say about the views of

U.S. 86, 89 (1890) ("[T]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."); Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752 (2009) ("Today, fundamental rights trump the general welfare, whereas in 1905, under the police power of the state, the general welfare trumped rights.").

45. *See, e.g.*, N.Y. Legislative Debates (Jan. 26, 1790), *in* N.Y. DAILY GAZETTE, Jan. 27, 1790, at 2 (statement of Rep. Rufus King) ("The liberty of uttering our sentiments and giving publicity of our thoughts, might be supposed an evil were it not well guarded against by wholesome laws, which prevents any one man from injuring another.").

46. *See infra* notes 188-189 and accompanying text.

47. Because of the evidence available, this Article relies on the views of Founding Era elites. References to the Founders, Americans, and so forth, should be read accordingly. Of course, this binary distinction between "elites" and "non-elites" is stylized. *See* Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENT. 383, 388 (2014).

Americans who were unfamiliar with the underlying principles of social-contract theory.[48]

The interpretive relevance of my historical claims is therefore contingent. Scholars using some other methodology might propose an alternative understanding of the First Amendment as the *correct* meaning at the time of the Founding.[49] This Article cannot contest that claim because, as historical scholarship, it does not take any position on what made a constitutional interpretation "correct."[50] Rather, it argues that Founding Era elites widely embraced a particular system of thought and that this system of thought undergirded how those elites wrote and originally understood the First Amendment.

B. Implications for Modern Doctrine

Shifting from the perspective of a historian to that of a modern constitutional interpreter, however, it might be reasonable to assume that elite views suffice to show what *now* counts as an "original meaning." After all, the historical evidence that scholars and judges routinely use in modern constitutional interpretation consistently reflects the perspectives of elites.[51]

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48. Although "large numbers of Americans spoke about government, liberty and constitutional law on the basis of some shared assumptions about natural rights and the state of nature," Hamburger, *supra* note 3, at 915, these speakers may not be representative of the entire Founding generation, *see id.* at 916.

49. Perhaps those unfamiliar with natural-rights reasoning would have understood the term as the *practical* freedom that speakers and publishers exercised at the time of the First Amendment's ratification – a meaning that would prevent the government from instituting any *new* restrictions of speech or the press. Without evidence, one scholar posited this idea. *See* Leonard W. Levy, *The* Legacy *Reexamined*, 37 STAN. L. REV. 767, 769 (1985); *cf. James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania*, CLAYPOOLE'S AM. DAILY ADVERTISER (Philadelphia), Apr. 11, 1799, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 332, 347 (Maeva Marcus et al. eds., 1990) [hereinafter Iredell] ("What might be deemed the Freedom of the Press, if it had been a new subject, and never before in discussion, might indeed admit of some controversy."). Or perhaps Americans unfamiliar with social-contract theory would have interpreted the First Amendment in light of the Speech and Debate Clause. Yet again, however, historical evidence does not support that view. *See infra* notes 275-281 and accompanying text.

50. *See infra* Part IV. For this reason, this Article cannot refute interpretive arguments based on other methodologies.

51. Readers may refer to any Supreme Court opinion that mentions history. To be sure, Justice Scalia once asserted that the Constitution's original meaning "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." District of Columbia v. Heller, 554 U.S. 570, 577 (2008). But the Court *never* demonstrates that elite sources reflect how "ordinary citizens" would have understood the Constitution's words and phrases, and it regularly relies on highly technical legal sources that were surely

So what relevance does this history have today? Most judges and constitutional scholars think that Founding Era evidence does and should matter when interpreting the Constitution.[52] On this assumption, accounting for the original meanings of speech and press freedoms would have profound consequences for First Amendment theory and doctrine.

In terms of its consequences for theory, history undermines the notion that the First Amendment itself embraces a particular rationale for protecting expression. Such theories dominate modern debates.[53] The meaning and scope of the First Amendment, scholars usually posit, depend on *why* the Constitution singles out speech and press freedoms.[54] Some theories emphasize republican government,[55] others the marketplace of ideas,[56] and still more the autonomy of individuals.[57]

Viewed historically, however, the First Amendment did not enshrine a particular rationale for expressive freedom. To be sure, the men who drafted and ratified the First Amendment had various reasons for why they valued expression.[58] And when it came time to *apply* the Speech and Press Clauses, various

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unfamiliar to most ordinary citizens. *Cf.* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 970 (2009) (offering an originalist perspective on the "public meaning" of terms of art). Of course, limiting the relevant public to voters might narrow the linguistic gap between the public and elites, *see* Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 611-12 (2008), but that limitation is unwarranted if the relevant public includes non-voting members of the body politic.

52. *See, e.g.*, Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 676 (1999); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990).

53. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 nn. 6-8, 1768 (2004) (listing several theories).

54. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 199 (1996) ("The First Amendment . . . cannot be applied to concrete cases except by assigning some overall *point* or *purpose* to the amendment's abstract guarantee of 'freedom of speech or of the press.'").

55. *See* MEIKLEJOHN, *supra* note 5; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016).

56. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

57. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (describing the "one true value" of free speech as "individual self-realization").

58. In particular, many scholars have noted that preserving republican government was the primary objective for many proponents of speech and press freedoms. *See* Bhagwat, *supra* note

theories of expressive freedom could inform an assessment of the public good. But these theories were not themselves baked into the First Amendment.

Recovering the history of expressive freedom also has potentially dramatic consequences for legal doctrine. Worth highlighting, yet again, is the "utter differentness and discontinuity of the past."[59] Indeed, modern speech doctrine, which emerged in the twentieth century, bears almost no resemblance to eighteenth-century judicial decisions.[60] And the Founders certainly did not envision courts crafting legal rules to prohibit speech-suppressing legislation that judges viewed as contrary to the public good.[61] In that sense, modern doctrine is fundamentally inconsistent with Founding Era law.

For originalists with a narrow conception of the judicial role,[62] this variance either calls for a radical dismantling of speech doctrine, or it requires a concession that precedent has displaced original meaning.[63] A huge swath of modern case law, after all, falls outside of the First Amendment's original legal ambit, including its ban on prior restraints and its protection for well-intentioned statements of one's thoughts. If an originalist wanted First Amendment doctrine to track Founding Era judicial reasoning, the Supreme Court's decisions in *Texas v.*

55, at 1102 ("[A] broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance."). That account of the Founders' *motives* is certainly true. But one goal of this Article is to show that the *meanings* of speech and press freedoms, as concepts, were not defined by or limited to concerns about preserving republican government.

59. Gordon S. Wood, *The Creative Imagination of Bernard Bailyn*, *in* THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY 16, 46 (James A. Henretta et al. eds., 1991).

60. *See* G. Edward White, *Intellectual History and Constitutional Decision Making*, 101 VA. L. REV. 1165, 1176-77 (2015). American judges, for instance, unanimously upheld sedition prosecutions. *See* BLUMBERG, *supra* note 8, at 145. For twentieth-century developments, see, for example, Lakier, *supra* note 35; and G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

61. *See infra* notes 290-294 and accompanying text.

62. *See* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1777 (2015); John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 843 (2016).

63. Plenty of originalists value precedent. *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358-59 (2015); *see also infra* note 307 (collecting sources).

Johnson,[64] *Boy Scouts of America v. Dale*,[65] *Citizens United v. FEC*,[66] and *Snyder v. Phelps*,[67] among many, many others, would likely have to go.[68]

But other originalists argue that judges are empowered, or even duty-bound, to give concrete meaning to underdeterminate constitutional provisions.[69] If one accepts this view, then modern law might still comport with original meaning. For instance, a natural-rights reading of the First Amendment would require the government to act for reasons that promote the public good, and modern doctrine can perhaps be understood, or justified, as prophylactic rules that help ferret out illicit motives.[70] To be sure, these judicial efforts bear little resemblance to anything that the Founders themselves would have endorsed. But they can still be seen as a way of *implementing* the original concepts of speech and press freedoms using modern doctrinal tools.[71] And it is to those historical concepts that we now turn.

II. NATURAL RIGHTS AT THE FOUNDING

When James Madison proposed constitutional amendments in 1789, he noted that his draft included "*natural rights*, retained—as Speech, Con[science]."[72] Indeed, eighteenth-century writers often identified speech as

64. 491 U.S. 397 (1989).

65. 530 U.S. 640 (2000).

66. 558 U.S. 310 (2010).

67. 562 U.S. 443 (2011).

68. *See infra* notes 188-189 and accompanying text.

69. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 132-49, 255-71 (rev. ed. 2014). This view is ahistorical, *see* Campbell, *supra* note 13, at 105-08, but that does not make it "wrong." Modern constitutional practice ultimately has to be based on normative grounds (or some other assessment of what counts as our law), which may call for only a limited form of historical inquiry. *See* Whittington, *supra* note 25, at 400-04 (discussing the relationship between originalism and judicial review).

70. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 196-202 (1988).

71. For different formulations of this two-step process of constitutional adjudication, see, for example, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); and Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

72. James Madison, Notes for Speech in Congress (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979).

"a natural Right, which must have been reserved, when Men gave up their natural Rights for the Benefit of Society."[73] But what were natural rights?

Section II.A explores the general eighteenth-century meaning of natural rights. In short, natural rights shaped how the Founders thought about the structure and purposes of government – ensuring that the government could restrain natural liberty only to promote the public good and only with the consent

73. THOMAS HAYTER, AN ESSAY ON THE LIBERTY OF THE PRESS CHIEFLY AS IT RESPECTS PERSONAL SLANDER 18 (London, J. Raymond 1755); *see also* FREEMAN'S J.: OR, THE NORTH-AM. INTELLIGENCER (Philadelphia), Nov. 16, 1785, at 3 (reprinting this passage); PA. PACKET (Philadelphia), Nov. 12, 1785, at 2 (same); VA. GAZETTE (Williamsburg), May 18, 1776, at 1 (same). For other sources that identify speaking, writing, and publishing as retained natural rights, see, for example, 8 ANNALS OF CONG. 2,148 (1798) (statement of Rep. Harrison Gray Otis) (mentioning the "liberty of writing, publishing, and speaking, one's thoughts, under the condition of being answerable to the injured party"); 4 ANNALS OF CONG. 918 (1794) (statement of Rep. William Giles) (referring to the "the inalienable privilege of thinking, of speaking, of writing, and of printing"); Congressional Debates (Jan. 21, 1791) (statement of Rep. Fisher Ames), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 342 (William Charles DiGiacomantonio et al. eds., 1995) (describing the freedom of speech as an "unalienable right"); *id.* at 340 (statement of Rep. John Vining) ("[N]o law can divest" individuals of the right "of speaking and writing their minds . . . ."); Proposal by [Roger] Sherman to House Committee of Eleven (July 21-28, 1789), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 83 (Neil H. Cogan ed., 1997) [hereinafter COMPLETE BILL OF RIGHTS] ("Speaking, writing and publishing" are among "certain natural rights which are retained"); Resolution of the Virginia House of Delegates, VA. GAZETTE, & GEN. ADVERTISER (Richmond), Jan. 3, 1798, at 2 (referring to the "natural right of speaking and writing freely"); 2 JOSEPH PRIESTLEY, LECTURES ON HISTORY, AND GENERAL POLICY 47 (Philadelphia, P. Byrne 1803) ("[I]n a state of society, every man retain[s] his natural powers of speaking, writing, and publishing his sentiments on all subjects . . . ."); *Freeborn American*, BOS. GAZETTE & COUNTRY J., Mar. 9, 1767, *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 95, 95 (Leonard W. Levy ed., 1996) [hereinafter FREEDOM OF THE PRESS] ("Man, in a state of nature, has undoubtedly a right to speak and act without controul."); Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 676, 678 (1958) ("[R]ights which it is useless to surrender to the government" include "the rights of thinking, and publishing our thoughts by speaking or writing . . . ."); and Letter from Thomas Paine to Thomas Jefferson (Mar. 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 4, 5 (1956) ("[N]atural rights" include "the rights of thinking, speaking, forming and giving opinions . . . ."). The understanding of speaking, writing, and publishing as natural rights was articulated in seminal discussions about speech and press freedoms during the Zenger controversy. *See* Argument of Andrew Hamilton, *in* FREEDOM OF THE PRESS, *supra*, at 43, 54 ("I beg Leave to insist, That the Right of complaining or remonstrating is natural; And the Restraint upon this natural Right is the Law only, and that those Restraints can only extend to what is *false* . . . ."); N.Y. WEEKLY J. (Nov. 1733), *reprinted in* FREEDOM OF THE PRESS, *supra*, at 30 ("No Nation Antient or Modern ever lost the Liberty of freely Speaking, Writing, or Publishing their Sentiments, but forthwith lost their Liberty in general and became Slaves.").

of the people. But these "rights" (including the natural right of speaking, writing, and publishing) generally were not determinate legal privileges or immunities.

Since natural rights were subject to governmental regulation, we might wonder why the Founders bothered amending the Constitution to include any of them.[74] Indeed, some Federalists made exactly this argument when opposing an enumeration of rights. The purpose of declaring rights, John Jay explained, was to establish that "certain enumerated rights belonged to the people, and were not comprehended in the royal prerogative."[75] Under a republican government, however, all legislative power was exercised by elected representatives, thus obviating any need to enumerate natural rights.[76] Though puzzling today, Jay's argument had considerable merit. Moreover, even among those who advocated for enumerating rights, many thought that declarations were hortatory, serving as a

74. For instance, one scholar insists that confining regulations of expression to *lawful* restraints would have been "nothing but a tautology." BIRD, *supra* note 3, at 11. But this reflects an anachronistic view of freedom. Confining any restraints of natural liberty to known laws passed with the consent of the people and in pursuit of the public good was, according to many eighteenth-century thinkers, the very essence of freedom. *See* JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 38-39 (2005); *see, e.g.*, The Democratic Society of the City of New-York, to Their Brethren the Citizens of the United States (Jan. 14, 1795), *in* THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS 192, 195 (Philip S. Foner ed., 1976) [hereinafter DEMOCRATIC-REPUBLICAN SOCIETIES] ("CIVIL LIBERTY is the right of the citizen freely to dispose of his actions subject only to the restraint of the laws . . . . Restraint commences . . . where the liberty of one individual is incompatible with the safety, or happiness of another – it is dictated by justice, and constitutes law.").

75. *See, e.g.*, A Citizen of New-York [John Jay], *An Address to the People of the State of New York* (Apr. 15, 1788), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 922, 933 (John P. Kaminski et al. eds., 2004).

76. *See, e.g.*, Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 24, 1788) (statement of James Iredell), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 10-11 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS]; THE FEDERALIST NO. 84 (Alexander Hamilton); Remarker, INDEP. CHRON., Dec. 27, 1787, *reprinted in* 5 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 527, 529-30 (John P. Kaminski et al. eds., 1998); *see also* Gordon S. Wood, *The History of Rights in Early America*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 233, 236-42 (Barry Alan Shain ed., 2007) [hereinafter THE NATURE OF RIGHTS] (describing the development of this view in England and America).

reminder, both to the people and to their government, of the reasons for instituting government and of the terms of the social contract and constitution.[77]

Nonetheless, as Sections II.B and II.C demonstrate, the Founders often referred to certain rights, including speech and press freedoms, in a more legalistic way. Enumerated constitutional rights were "exceptions" to legislative authority, James Madison explained to Caleb Wallace in 1785.[78] This would have been quite a strange comment if Madison were alluding to liberty that could be regulated to promote the public good. Others called for a bill of rights so that a "Check will be placed on the Exercise of . . . the powers granted."[79] Indeed, Thomas Jefferson claimed that enumerating rights would put a "legal check . . . into the hands of the judiciary,"[80] even though American elites broadly agreed that judges had no business resolving cases based on judicial assessments of the general welfare.[81]

In fact, speech and press freedoms had assumed greater determinacy in two respects. First, as explained in Section II.B, the Founders recognized an inalienable natural right to express one's thoughts, sometimes described as the "freedom of opinion." Second, as shown in Section II.C, American elites widely embraced an assortment of common-law rules, including a ban on press licensing, that offered more determinate legal protections for expressive freedom.[82] In this

77. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 69-70 (Murray Dry ed., 1981); Jack N. Rakove, *The Dilemma of Declaring Rights*, *in* THE NATURE OF RIGHTS, *supra* note 76, at 181, 193-94.

78. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON, *supra* note 72, at 350, 351 (Robert A. Rutland et al. eds., 1973).

79. Letter from Samuel Chase to Richard Henry Lee (May 16, 1789), *in* 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 565, 565 (Charles Bangs Bickford et al. eds., 2004); *see also* The Massachusetts Convention (Jan. 23, 1788) (statement of Samuel Thompson), *in* 6 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1312, 1317 (John P. Kaminski et al. eds., 2000) ("[W]here is the bill of rights which shall check the power of this Congress, which shall say, *thus far shall ye come and no farther.*").

80. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 659, 659 (1958).

81. *See* Campbell, *supra* note 13, at 107-08; *see also infra* notes 290-294 and accompanying text.

82. Although not explored in this Article, other parts of the First Amendment also protected fundamental positive rights that furthered the natural right of expressive freedom. The ancient right to petition, for instance, was a procedural device through which individuals and groups could seek redress of grievances with accompanying "protect[ion] from formal political retaliation by governmental authorities." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right To Petition*, 66 FORDHAM L. REV. 2153, 2202 (1998). The right of peaceable assembly similarly barred prosecutions for peaceable public meetings, although its broader implications were contested. *See* Saul Cornell, *"To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84

way, speech and press freedoms were legally distinct, with the latter referring only to the customary legal rules that protected printing-press operators. Finally, Section II.D concludes with a discussion of the contested relationship between natural rights, inalienable natural rights, and the common law.

A. Natural Rights and Expressive Freedom

The intellectual foundation of Founding Era constitutionalism was social-contract theory.[83] Essentially, the theory was a thought experiment designed to reveal the proper scope and distribution of political authority. It began by positing a world without government, commonly known as a "state of nature," in which individuals had only "natural rights." The theory then explored why people in this condition would choose to organize politically.[84]

Natural rights were any capacities that humans could rightly exercise on their own, without a government. (Positive rights, by contrast, were defined in terms of governmental action or inaction.) Consequently, natural rights encompassed nearly all human activities, sometimes summarized as a right to liberty or a "right to act."[85] More typically, however, natural-rights rhetoric developed around particular controversies. The natural rights to conscience and self-defense were part of the eighteenth-century lexicon, for instance, while other aspects of natural liberty, like eating and sleeping, were largely unmentioned.[86]

Without recognizing this broader natural-rights discourse, scholars often view the freedom of speech as a term of art that originated with the legislative privilege of speech and debate,[87] or they conclude that "freedom of

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FORDHAM L. REV. 915, 928-30 (2015); *see also* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 21-29 (2012) (discussing the history of the freedom of assembly in the Founding Era).

83. *See* Campbell, *supra* note 13, at 87.

84. *Id.* at 87-88.

85. *See, e.g.*, RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 74-75 (1974); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 88-90 (1986); James Wilson, *Of the Natural Rights of Individuals*, *in* 2 COLLECTED WORKS OF JAMES WILSON 1053, 1055-56 (Kermit L. Hall & Mark David Hall eds., 2007).

86. When Federalists came under fire for not enumerating rights, however, they mercilessly mocked their Anti-Federalist opponents by pointing out the limitless breadth of natural liberty. *See* Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 20-30 (1994).

87. *See infra* notes 275-281 and accompanying text.

speech . . . had little history as an independent concept when the first amendment was framed."[88] For the Founders, however, mentioning a "freedom to do something" naturally alluded to natural rights, without any need for further clarification or consistent terminology.[89]

Not surprisingly, then, the Founders invoked the natural right of expressive freedom in all sorts of ways. References to the freedom of *speaking, writing, and publishing* seem to have been the most common,[90] probably because that phrasing appeared in the Pennsylvania Constitution of 1776 and the Vermont Constitution of 1777.[91] In the committee that revised Madison's proposed Bill of Rights, for instance, one draft mentioned "certain natural rights which [we] retained," including the right "of [s]peaking, writing and publishing . . . with decency and freedom."[92] But in the course of discussing natural rights, contemporaries also mentioned the "right to speak,"[93] "[t]he right of publication,"[94] "the natural right of free utterance,"[95] the "liberty of discussion,"[96] "the liberty of the tongue,"[97] the "exercise of . . . communication,"[98] and so forth.

Eighteenth-century commentators sometimes referred to "the liberty of the press" as a natural right, too.[99] "Printing," after all, was "a more extensive and

88. Anderson, *supra* note 6, at 487 (citing LEVY, *supra* note 34, at 5-6); *accord* Jay, *supra* note 6, at 793; Rosenthal, *supra* note 6, at 17.

89. *See supra* notes 14-15, 83-86 and accompanying text.

90. *See supra* note 73 and *infra* notes 93-98 (collecting sources).

91. PA. CONST. of 1776, art. 12; VT. CONST. of 1777, ch. 1, art. 14.

92. Proposal by Sherman to House Committee of Eleven, July 21-28, 1789, *in* COMPLETE BILL OF RIGHTS, *supra* note 73, at 83.

93. *Freeborn American*, *supra* note 73, at 95.

94. ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY, ON THE PROCEEDINGS OF SUNDRY OF THE OTHER STATES IN ANSWER TO THEIR RESOLUTIONS 44 (Philadelphia, Zachariah Poulson Jr. 1800).

95. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 473 (Fredericksburg, Green & Cady 1814).

96. RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION, AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD 21-22 (London, T. Cadell 1784).

97. Eteocles, *An Essay on the Freedom of Speech*, MD. GAZETTE (Annapolis), Nov. 24, 1780, at 180.

98. ADDISON, *supra* note 23, at 4.

99. *See, e.g.*, James Alexander, Letter to the Editor, PA. GAZETTE (Philadelphia), Nov. 24, 1737, *reprinted in* FREEDOM OF THE PRESS, *supra* note 73, at 62, 66 (referencing "freedom of speech and liberty of the press" as "natural rights").

improved Kind of Speech."[100] Some Founders distinguished the freedom of *publishing*, as a natural right, from the freedom of *the press*, as a common-law rule against press licensing.[101] (In eighteenth-century English, "the press" was a reference to printing; the term did not refer to journalists until the nineteenth century.[102]) But the use of this terminology was fluid, and Founding Era discussions of press freedom often alluded to natural-rights concepts.[103] Some writers even equated "the Liberty of the Press" with "the Liberty of publishing our Thoughts in any Manner, whether by Speaking, Writing or Printing," thus treating speech and press freedoms as synonymous.[104]

Recognizing that expressive freedom was a natural right, however, is just the beginning. We also need to consider what that classification meant in terms of limits on governmental power. And that issue turned on two inquires: *first*, the scope of pre-political natural liberty, and, *second*, the extent to which individuals surrendered control of that liberty upon entering into a political society. As we will see, the Founders defined pre-political natural rights in two distinct ways,

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100. HAYTER, *supra* note 73, at 18; *see also* ADDISON, *supra* note 23, at 4 ("We communicate our sentiments by words spoken, written, or printed, or by pictures or other signs."); WILLIAM BOLLAN, THE FREEDOM OF SPEECH AND WRITING UPON PUBLIC AFFAIRS, CONSIDERED 3-4 (London, S. Baker 1766) (discussing "speech and writing, or printing, a species of writing invented for the more expeditious multiplication of copies, both being modes of presenting to the eye what speech conveys to the ear").

101. *See, e.g.*, 8 ANNALS OF CONG. 2147-48 (1798) (statement of Rep. Otis) (distinguishing "the liberty of writing, publishing, and speaking" from "the freedom of the press").

102. *See* 12 THE OXFORD ENGLISH DICTIONARY 411 (J.A. Simpson & E.S.C. Weiner eds., 2d. ed. 1989); *see also* JAMES SULLIVAN, DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES 10 (Boston, Joseph Nancrede 1801) ("The conventions of the states, and the Congress of the United States, use the word *press* as descriptive of the free communication of ideas and sentiments, by the art of printing."). *See generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

103. *See, e.g.*, 8 ANNALS OF CONG. 2167-68 (1798) (statement of Rep. Harper) (decrying the "licentious abuse" of the liberty of the press, thus alluding to the natural-rights distinction between *liberty* and *license*—i.e., the abuse of liberty); NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 152 (Rutland, Vt., J. Lyon 1793) ("Let there be no restraint upon the liberty of the Press, no check upon public or private discussion, but what is imposed by the manners, morals, taste, and good sense of the age.").

104. *The Craftsman No. 121*, *in* 3 THE CRAFTSMAN 274, 274 (Caleb D'Anvers ed., London, R. Francklin 1731) (emphasis omitted); *see American Intelligence*, INDEP. GAZETTEER (Philadelphia), Jan. 5, 1789, at 3 ("Freedom of speech, which is nothing more than the freedom of press, is the great bulwark of liberty . . . ."). Other authors treated the freedom of speech as synonymous with "the liberty of individuals to communicate their thoughts to the public." *Of the Liberty of the Press and Elections*, LONDON EVENING POST, Oct. 29, Nov. 9, Nov. 14, 1754, *reprinted in* 16 SCOTS MAGAZINE 518-19 (1754). As this passage illustrates, "liberty" and "freedom" were typically used interchangeably.

but this difference ended up being of little practical significance because of a comparable divergence over how much natural liberty individuals surrendered when leaving the state of nature.

In terms of the scope of natural rights, the Founders universally accepted that pre-political natural liberty was circumscribed by natural law.[105] At a minimum, natural law required that individuals not interfere with the natural rights of others.[106] There was no natural right to assault others, for instance, because assault interfered with the natural right of personal security. Viewed in this way, natural rights could be roughly understood as human liberty to act unless those acts directly harmed others.

But some Americans, informed by David Hume's view that humans are inherently sociable,[107] defined natural law in terms of social obligations, too. "Man, as a being, sociable by the laws of his nature," Vermont jurist Nathaniel Chipman observed, "has no right to pursue his own interest, or happiness, to the exclusion of that of his fellow men."[108] James Wilson echoed this theme in his law lectures, explaining that natural law requires individuals to avoid injury, selfishness, and injustice.[109] Thus, Wilson explained, every person can act "for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; *provided he does no injury to others; and provided some publick interests do not demand his labours.* This right is natural liberty."[110]

At the next stage of social-contract theory, the Founders imagined that individuals—recognizing the deficiencies of a state of nature—would unanimously agree to form a political society (or *body politic*) under a *social contract* (or *social compact*).[111] "The body-politic is formed by a voluntary association of

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105. *See* Hamburger, *supra* note 3, at 922-30.

106. *See id.* at 930.

107. *See* DAVID HUME, *Of the Original Contract*, *in* 2 ESSAYS AND TREATISES ON SEVERAL SUBJECTS 287, 289-91 (London, A. Millar 1760); *see also* RUTHERFORD, *supra* note 15, at 10 ("It is therefore the law of [man's] nature, that he should live in society with others of his own species" and "should join with them in a common interest . . . as to labour with them for a general good.").

108. CHIPMAN, *supra* note 103, at 75.

109. Wilson, *supra* note 85, at 1056.

110. *Id.* at 1055-56 (emphasis added).

111. *See* Campbell, *supra* note 13, at 88; *see, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 96-97 (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 142 (Ian Shapiro ed., 2003); THEOPHILUS PARSONS, *Essex Result*, *in* MEMOIR OF THEOPHILUS PARSONS 359, 366 (Boston, Ticknor & Fields 1861). Although typically cast in

individuals," the Massachusetts Constitution of 1780 characteristically declared, and "is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[112] Creation of a body politic, the Founders imagined, then set the stage for another pact, the *constitution*, in which the people vested power in a government by majority consent.[113]

Elites widely agreed about the essence of the social contract—namely, that the political society should protect natural liberty and should limit freedom only to promote the public good.[114] And the Founders generally understood this concept of the public good in an aggregate, collective sense, embracing the "safety

historical terms, the social contract was a *theoretical* idea used to frame the relationship between individuals and their government. *See* Campbell, *supra* note 13, at 87 n.10, 89 n.19.

112. MASS. CONST. of 1780, pmbl.

113. *See, e.g.*, ADAMS, *supra* note 13, at 6; 1 WILLIAM BLACKSTONE, COMMENTARIES *52; Madison, *supra* note 13, at 570. In English and colonial thought, this agreement was often described as an "original contract" between the people and the monarch. *See* REID, *supra* note 85, at 132-34. Founding Era writers sometimes merged the *social contract* and *constitution*. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 98-99, 294 (2008); *see, e.g.*, SULLIVAN, *supra* note 102, at 11 ("In the social compacts, which we denominate constitutions . . . ."). This conflation was common in the United States after independence, *see* Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375, 376 (1965), likely because the notion of an "original contract" between the people and a monarch became obsolete. But American constitutional theorists maintained the distinction between a social contract and a constitution. *See, e.g.*, ADAMS, *supra* note 13, at 6; Madison, *supra* note 13, at 570; *see also* 3 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 114 (1991) ("American Whigs, in contrast to later historians, seldom compound[ed] or confuse[d] the two contracts."); REID, *supra* note 85, at 133-34 (noting eighteenth-century political writers' distinctions between the social contract and the original contract).

114. *See* Campbell, *supra* note 13, at 92-94; *see, e.g.*, JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 12-13 (2d ed., London, J. Johnson 1771) ("It must necessarily be understood, therefore, whether it be expressed or not, that all people live in society for their mutual advantage; so that the good and happiness of the members, that is the majority of the members of any state, is the great standard by which every thing relating to that state must finally be determined."); JOHN WITHERSPOON, *Lectures on Moral Philosophy*, *in* THE SELECTED WRITINGS OF JOHN WITHERSPOON 191 (Thomas P. Miller ed., 1990) ("[I]t is certain that the public good has always been the real aim of the people in general in forming and entering into any society."). When Jefferson recommended five works on "the organization of society into civil government . . . according to the rights of nature," Letter from Thomas Jefferson to John Norvell (June 11, 1807), *in* 5 THE WRITINGS OF THOMAS JEFFERSON 90, 90-91 (H. A. Washington ed., 1853), all of his recommendations prioritized the public good. *See* CHIPMAN, *supra* note 103, at 174-75 (noting that retained natural rights "must be in a just compromise with the convenience and happiness of others, agreeably to the laws of social nature, and such combinations and regulations, as are clearly derived from those laws"); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 130 (1690), *reprinted in* JOHN LOCKE, *supra* note 111, at 156 (noting that individuals

and happiness of society," as Madison put it.[115] (A slew of interchangeable terms referred to the same idea, including "collective interest," "common good," "general utility," "general welfare," "public interest," and so forth.[116]) In the end, this framework prioritized the interests of the whole society over narrower private interests. The common good, the Founders repeatedly implored, often required individual sacrifices.[117] At the same time, however, "respect for the public interest meant that lawmakers had to consider everyone's interests, and not merely those of particular individuals or factions."[118]

But while largely in agreement on substance, the Founders spoke in a confusing assortment of ways about the retention of natural rights. The most common phrasing was, as William Blackstone put it, that "every man, when he enters into society, gives up a *part* of his natural liberty."[119] Meanwhile, others talked

surrender "as much . . . natural Liberty . . . as the Good, Prosperity, and Safety of the Society shall require"); THE FEDERALIST NO. 43, at 297 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he safety and happiness of society are the objects at which all political institutions aim."); PRIESTLEY, *supra*, at 57 ("[A]ll claims of individuals inconsistent with the public good are absolutely null and void."); ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 255 (2d ed., London, J. Darby 1704) (stating that "the publick Good . . . is the end of *all* . . . Government") (emphasis added).

115. THE FEDERALIST NO. 43, *supra* note 114, at 297 (James Madison); *see also supra* note 114 and accompanying text (discussing the public good).

116. *See, e.g.*, Alexander Hamilton, *Opinion on the Constitutionality of the Bank*, *in* 8 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 13, at 91 (1965).

117. *See, e.g.*, THE FEDERALIST NO. 37, *supra* note 114, at 239 (James Madison) (noting "the necessity of sacrificing private opinions and partial interests to the public good"); James Wilson, Of Citizens and Aliens, *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 1038, 1043 ("By the will and by the interest of the community, every private will and every private interest must be bound and overruled."); *see also* Campbell, *supra* note 13, at 93 n.41 (collecting other sources).

118. Campbell, *supra* note 13, at 94 (emphasis removed).

119. 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (emphasis added); *see also* Hamburger, *supra* note 3, at 931 n.70 (collecting sources).

about it being "necessary to give up [natural] liberty" *entirely*,[120] or at least necessary to "surrender[] the power of *controuling* . . . natural alienable rights."[121] Still more insisted that in forming a republic, "the people surrender *nothing*."[122]

This dizzying array of statements—that individuals retained some, all, or none of their natural liberty—has created an extraordinary amount of confusion among scholars.[123] And it would seem to indicate substantial differences of opinion among the Founders about the scope of their natural rights. In truth, however, the disagreement was semantic, not substantive, because competing views about the terms of the social contract mirrored the competing views about the scope of pre-political natural rights.

For those who viewed natural rights as inherently circumscribed by a concern for the general welfare, individuals could retain *all* of their natural liberty without creating any conflict with "the due exercise of the powers of government, for the common good."[124] In 1816, for instance, Thomas Jefferson wrote that "the idea is quite unfounded, that on entering into society we give up any natural right."[125] But Jefferson clarified that these natural rights were limited not only by a prohibition on "commit[ing] aggression on the equal rights of another" but also by "the natural duty of contributing to the necessities of the society."[126] Consequently, by incorporating social duties into natural law, no conflict arose between the preservation of natural rights and the exercise of

120. 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 15 (New Haven, S. Converse 1822); *see also* New York Ratification Convention Debates (June 25, 1788) (statement of Melancton Smith), *in* 22 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1877, 1879 (John P. Kaminski et al. eds., 2008) ("What is government itself, but a restraint upon the natural rights of the people?").

121. PARSONS, *supra* note 111, at 366 (emphasis added).

122. THE FEDERALIST NO. 84, *supra* note 114, at 578 (Alexander Hamilton) (emphasis added); *see also, e.g.*, Massachusetts Ratification Convention Debates (Jan. 23, 1788) (statement of Theophilus Parsons), *in* 6 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1324 (John P. Kaminski et al. eds., 2000) ("[T]he people divest themselves of nothing.").

123. This confusion is most apparent in the view that natural rights were categorical exclusions of regulatory authority. *See* sources cited *supra* note 41. For an illuminating effort to trace and unravel much of the confusion, see Dan Edelstein, *Early-Modern Rights Regimes: A Genealogy of Revolutionary Rights*, 3 CRITICAL ANALYSIS L. 221 (2016).

124. CHIPMAN, *supra* note 103, at 117.

125. Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), *in* 15 WRITINGS OF THOMAS JEFFERSON 23, 24 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

126. *Id.*

governmental powers to promote the public good.[127] "To give up the performance of any action, which is forbidden by the laws of moral and social nature," Nathaniel Chipman insisted, "cannot be deemed a sacrifice."[128]

This is not to say that natural rights were identically defined after the formation of a political society. Some natural rights, Chipman explained, "to render them universally reciprocal in society, may be subjected to certain *modifications*."[129] Yet, these rights, he insisted, "can never justly be *abridged*," meaning they could not "suffer any dim[i]nution."[130] This refrain was especially familiar with respect to property rights. Many people "consider property as a natural right," James Wilson noted, but one that "may be extended or modified by positive institutions."[131] Accordingly, as Wilson explained:

> [B]y the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but . . . every citizen will gain more liberty than he can lose by these prohibitions . . . . Upon the whole, therefore, man's natural liberty, instead of being *abridged*, may be increased and secured in a government, which is good and wise.[132]

A natural right that could not be *modified*, by contrast, was an aspect of natural liberty over which the government simply had no authority.[133]

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127. For a discussion of how individuals could "retain" their natural rights in a social contract but consent to certain restrictions of those liberties under law, see Campbell, *supra* note 13, at 96-98.

128. CHIPMAN, *supra* note 103, at 74.

129. *Id.* at 175 (emphasis added); *see also* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (James H. Hutson ed., 1987) ("[W]e are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society . . . ." (quoting Nathaniel Chipman)).

130. CHIPMAN, *supra* note 103, at 175 (emphasis added).

131. James Wilson, *On the History of Property*, *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 387.

132. Wilson, *supra* note 85, at 1056 (emphasis added).

133. *See* ADDISON, *supra* note 94, at 46 ("[T]he liberty of conscience cannot be modified, and the liberty of the press cannot be abridged, by authority of the United States."); Thomas Jefferson, Jefferson's Opinion on the Constitutionality of the Residence Bill (July 15, 1790), *in* 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 194, 195-97 (1965) (using the phrase "abridged or modified," and treating "modified" as synonymous with "regulated in [its] exercise by law"). In the late 1790s, some Republicans elided the inherent limits on expressive freedom imposed by natural law and social obligation, thus leading to the view that any regulation of expression was an abridgment of the freedom of speech. *See* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES (1803), *reprinted in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 386 (1999).

For those who thought that individuals gave up *some* of their natural liberty in a social contract, however, retained natural liberty was still regulable so long as those regulations were in pursuit of the public good and made by a representative legislature.[134] As William Blackstone observed, natural liberty could be "so far restrained by human laws . . . as is necessary and expedient for the general advantage of the public."[135] Importantly, this framework did not endorse governmental power to *abridge* retained natural rights. Rather, it simply recognized that individuals in a political society assumed certain reciprocal obligations that did not exist in a state of nature.[136] Regard for the public good, in other words, was always implicit in the retention of natural rights.

In sum, whether inherently limited by natural law or qualified by an imagined social contract, retained natural rights were circumscribed by political authority to pursue the general welfare. Decisions about the public good, however, were left to the people and their representatives – not to judges – thus making natural rights more of a constitutional lodestar than a source of judicially enforceable law.[137] Natural rights, in other words, dictated *who* could regulate natural liberty and *why* that liberty could be restricted, but they typically were not "rights" in the modern sense of being absolute or presumptive barriers to governmental regulation.

Speaking, writing, and publishing were thus ordinarily subject to restrictions under laws that promoted the public good. The principle that "Speech is a natural Right . . . reserved," Thomas Hayter explained, was consistent with "the Power of Legislators, to restrain every impious, or immoral Abuse of speech" because "The principal End of every Legislature is the public Good."[138] Or, as another writer put it, the "right to speak and act without controul . . . is limited by the law – Political liberty consists in a freedom of speech and action, so far as the laws of a community will permit, and no farther."[139]

Consequently, even though the Founders broadly acknowledged that speaking, writing, and publishing were among their natural rights, governmental limitations of expressive freedom were commonplace. Blasphemy and profane

134. *See* Campbell, *supra* note 13, at 92-98.

135. 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

136. *See* Campbell, *supra* note 13, at 92-98.

137. *See infra* notes 290-294 and accompanying text.

138. HAYTER, *supra* note 73, at 8, 18.

139. *Freeborn American*, *supra* note 73, at 95; *see* Tenax, *To the People of Pennsylvania*, THE FREEMAN'S JOURNAL: OR, THE NORTH-AMERICAN INTELLIGENCER, Oct. 30, 1782, at 1; William Livingston, *Of the Use, Abuse, and Liberty of the Press*, THE INDEP. REFLECTOR OR WKLY. ESSAYS ON SUNDRY IMPORTANT SUBJECTS, Aug. 30, 1753, *reprinted in* FREEDOM OF THE PRESS, *supra* note 73, at 75, 79.

swearing, for instance, were thought to be harmful to society and were thus subject to governmental regulation even though they did not directly interfere with the rights of others.[140] Some states even banned theater performances because of their morally corrupting influence.[141] Although stated without qualification, and often viewed by modern interpreters as being unconditional,[142] natural rights were always implicitly qualified, with the scope of their qualifications often turning on assessments of public policy.

Yet while the Founders broadly agreed that governmental power should be defined and exercised only to promote the general welfare, they often disagreed passionately about the details. As Joseph Priestley noted, there was "a real difficulty in determining what general rules, respecting the extent of the power of government, or of governors, are most conducive to the public good."[143] And nowhere was this difficulty more pronounced than the long-running controversy over sedition laws.

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140. *See, e.g.*, Jacob Rush, *The Nature of an Oath Stated and Explained*, *in* CHARGES, AND EXTRACTS OF CHARGES, ON MORAL AND RELIGIOUS SUBJECTS 33, 44 (Philadelphia, 1804) (defending bans on profane swearing because it "lessen[s] that awe and reverence of the Supreme Being, which is one of the strongest guards against perjury; and consequently be in a high degree, injurious to society"). Others recognized that disrupting the "peace and order of society" was grounds for restricting publications, even without directly violating the rights of others. *See* Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788); *cf.* Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 364, 367 (1958) (endorsing restrictions of speech "affecting the peace of the confederacy with foreign nations"). Occasionally, writers worried that a general declaration of press freedom might be *construed* to "extend to the justification of every *possible publication*." America [Noah Webster], *To the Dissenting Members of the Late Convention of Pennsylvania*, N.Y. DAILY ADVERTISER, Dec. 31, 1787, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 484, 487 (John P. Kaminski et al. eds., 2003); *see also* Hamburger, *supra* note 3, at 936 n.83; *cf.* N.Y. Legislative Debates (Jan. 26, 1790), *in* N.Y. DAILY GAZETTE, Jan. 27, 1790, at 2 (statement of Rep. Samuel Jones) ("[H]e hoped that something might be done, if it were possible, to discriminate between the liberty and the licentiousness of the press. The amendment now proposed would be nugatory, as something similar thereto was already included in the constitution. Unless it went a little farther, it appeared to him as if this amendment would not leave it in the power of the legislature to make any law even to punish the injuries that might be done to individuals by the indiscriminate publication of libels."). But these sources do not indicate that existing legal privileges actually extended that far or that the Founders wanted to extend them that far.

141. *See* HEATHER S. NATHANS, EARLY AMERICAN THEATRE FROM THE REVOLUTION TO THOMAS JEFFERSON: INTO THE HANDS OF THE PEOPLE 37-70 (2003).

142. *See, e.g.*, Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring); BIRD, *supra* note 3, at 27, 112, 461.

143. PRIESTLEY, *supra* note 114, at 57. Priestley emphasized that this inquiry depended on empirical assessments, not purely abstract reasoning. *Id.* at 58.

Arguments for punishing sedition were straightforward. It was "necessary for the preservation of peace and good order," Alexander Addison of Pennsylvania explained, "to punish any dangerous or offensive writing, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency."[144] Proponents of this view rejected the argument that narrowly tailored sedition laws would stifle useful criticisms of government and that counterspeech was sufficient to prevent lasting harm.[145] "It may be said, that an unrestrained license to publish on the conduct of public men, would operate as a restraint upon [the government], and thus promote the public good," Massachusetts Governor James Sullivan wrote, "but this is not true; an unrestrained license to publish slander against public officers, would . . . answer no possible valuable purpose to the community."[146] In fact, some argued that it was even *more* necessary to punish sedition in a republic. "In a Republican Government, where public opinion rules everything," John Rutledge Jr. insisted during the Federalist effort to reauthorize the Sedition Act in 1801, "it is all-important that truth should be the basis of public information."[147]

Other eighteenth-century writers, however, argued that punishing sedition would, in the long run, harm the general welfare, even though sedition itself was deleterious. "The great object of society—that object for which alone government itself has been instituted, is the *general good*," Elizabeth Ryland Priestley wrote in 1800.[148] Thus, she continued, "It may perhaps be urged, and plausibly urged, that the welfare of the community may sometimes, and in some cases, require certain restrictions on [an] unlimited right of enquiry: that publications exciting to insurrection or immorality for instance, ought to be checked or suppressed."[149] Yet "ascertaining the proper boundary of such restrictions" would be vexing, she observed, and governmental power to regulate harmful speech, "once conceded, may be extended to every [opinion] which insidious despotism

144. ADDISON, *supra* note 23, at 10.

145. *See, e.g.*, 10 ANNALS OF CONG. 925 (1801) (statement of Rep. Samuel Dana) ("[T]hough upon general principles, truth may be said to be an antidote to falsehood, truth does not always make its appearance in time to prevent the evil intended by the evil-disposed.").

146. SULLIVAN, *supra* note 102, at 21-22. Sullivan, despite being a Republican, defended the constitutionality of the Sedition Act. *See id.*

147. 10 ANNALS OF CONG. 931 (1801) (statement of Rep. John Rutledge Jr.); *see, e.g.*, ADDISON, *supra* note 94, at 42-43.

148. E[lizabeth] P[riestley], *On the Propriety and Expediency of Unlimited Enquiry*, *in* THOMAS COOPER, POLITICAL ESSAYS 62, 62 (Thomas Cooper ed., Philadelphia, 2d ed. 1800). For a brief introduction to this essay, see Eugene Volokh, *Elizabeth Ryland Priestley, Early American Author on Free Speech*, 4 N.Y.U. J.L. & LIBERTY 382 (2009).

149. P[riestley], *supra* note 148, at 63.

may think fit to hold out as dangerous."[150] Moreover, as Republicans frequently argued, fear of being prosecuted might have a chilling effect on useful criticisms of government.[151]

Notably, these arguments all relied on contingent judgments about public policy—not an understanding of natural rights that categorically permitted or barred governmental efforts to suppress expression, irrespective of the public good.[152] Americans thus offered vastly different visions of how far expressive freedom should extend (due to differing calculations of what best furthered the public good) even while sharing the same conceptual understanding of speech and press freedoms.

Further evidence of the Founders' conceptual understanding of expressive freedom comes from their recognition of an *equality* between speech and press freedoms and, at the same time, their acceptance of *distinct* legal rules regarding oral and written statements. "The freedom of speech of writing and of printing are on equal grounds by the words of the constitution," one commentator observed in 1782, referring to the Pennsylvania constitution.[153] As concepts, therefore, the freedoms of speaking, writing, and publishing were identical, allowing the government to punish only "the disseminating or making public of falsehoods, or bad sentiments, destructive of the ends of society."[154] Yet these equivalent principles were perfectly consistent with broader liability and harsher punishment for *written* libels. "The reason," the commentator explained, was that

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150. *Id.* at 63-64; *see also, e.g.*, 10 ANNALS OF CONG. 928 (1801) (statement of Rep. Benjamin Huger) ("[S]o nice and delicate were the shades of distinction between the licentiousness of the press, and a necessary freedom of discussion, that it was upon the whole better perhaps . . . to leave the measures of Government and its Administration entirely open to investigation and animadversion, without attempting to repress the eccentricities and exuberances of public discussion by even an ideal restraint.").

151. *See, e.g.*, 10 ANNALS OF CONG. 923 (1801) (statement of Rep. Joseph Nicholson).

152. To be sure, the *doctrinal conclusions* that Republicans reached were often categorical, but their pre-doctrinal understandings of expressive freedom usually were not. *See, e.g.*, GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS 27-28 (Richmond, Samuel Pleasants, Jr. 1803) (concluding that publications on "matters of public concern" were immune from punishment because "the point at which freedom of enquiry ends and licentiousness begins, must remain forever unknown"). For a narrower interpretive argument that *did* take a categorical form, see *infra* Section II.B. Republicans in the late 1790s also wholly denied federal power over expression based on a novel interpretation of the First Amendment. *See infra* Section III.B; *see also* Jud Campbell, The Invention of First Amendment Federalism (Sept. 10, 2017) (unpublished draft) (on file with author).

153. Tenax, *supra* note 139, at 1, 2.

154. *Id.* Though unattributed, this language was drawn directly from Blackstone. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *152 ("[T]he disseminating, or making public, of bad sentiments, destructive of the ends of society is the crime which society corrects.").

written statements were "more extended" and "more strongly fixed," thus posing a greater threat to public order.[155] In short, speech and press freedoms were equivalent, as natural rights, but the legal implications of these rights differed.

B. Inalienable Natural Rights and the Freedom of Opinion

Unlike ordinary natural rights, which were regulable to promote the public good, certain *inalienable* natural rights imposed more determinate constraints on legislative power.[156] These rights, Nathaniel Chipman explained, were aspects of natural liberty that "can never justly be subject to civil regulations, or to the control of external power."[157] Some writers limited this category to the freedoms of conscience and thought[158] without necessarily including a correlative liberty to exercise religion or to express thoughts.[159] "Opinions are not the objects of legislation," James Madison succinctly explained to his congressional colleagues in 1794.[160] Few would have disagreed. But by the late eighteenth century, Americans widely embraced the idea that the government could not prohibit well-intentioned statements of one's thoughts, either.

Opinions were sacrosanct because they were understood to be non-volitional.[161] Unlike "*Volition*, or *Willing*," John Locke explained, "in bare

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155. Tenax, *supra* note 139, at 2; *see also, e.g.*, SULLIVAN, *supra* note 102, at 12 (drawing the same distinction between oral and written communication).

156. Confusingly, the Founders sometimes referred to inalienable rights in an entirely different sense – namely, rights that could not be surrendered to the control of a monarch. *See* Campbell, *supra* note 13, at 96-98.

157. CHIPMAN, *supra* note 103, at 174.

158. *See* N.H. CONST. of 1784, pt. 1, art. IV; PARSONS, *supra* note 111, at 366, 371; WITHERSPOON, *supra* note 114, at 405, 408; *see also* Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 260 (1990); Barry A. Shain, *Rights Natural and Civil in the Declaration of Independence*, *in* THE NATURE OF RIGHTS, *supra* note 76, at 116, 119.

159. *See An Eastern Layman, To The Publick*, VA. GAZETTE (Williamsburg), Aug. 14, 1779, at 1.

160. 4 ANNALS OF CONG. 934 (1794) (statement of Rep. James Madison); *see also, e.g.*, Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 545, 546 (1950) (noting that "the opinions of men are not the object of civil government, nor under its jurisdiction"); Oliver Ellsworth, *A Landholder No. 7* (Dec. 17, 1787), *reprinted in* 14 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 448, 451 (John P. Kaminski et al. eds., 1983) ("Civil government has no business to meddle with the private opinions of the people."); Resolutions Adopted Upholding Freedom of Speech, Writing, and Publishing, Dec. 17, 1794, *reprinted in* DEMOCRATIC-REPUBLICAN SOCIETIES, *supra* note 74, at 148, 148-49 ("[T]he freedom of opinion is a right inherent in nature, and never was intended to be surrendered to government.").

161. *See, e.g.*, THOMAS COOPER, A TREATISE ON THE LAW OF LIBEL, at ix-x, xxii-xxiii (1830); THOMSON, *supra* note 24, at 11, 13-14, 18-19.

naked *Perception* the Mind is, for the most part, only passive; and what it perceives, it cannot avoid perceiving."[162] Consequently, in Francis Hutcheson's words, "the Right of private Judgment, or of our inward Sentiments, is unalienable; since we cannot command ourselves to think what either we our selves, or any other Person pleases."[163] Or, as Madison put it in his famous *Memorial and Remonstrance*, "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men."[164] The freedom of *opinion* was thus, at its core, a freedom against governmental efforts to punish people for their thoughts. (The Founding Era term "freedom of *opinion*" is thus somewhat misleading; the essence of the principle was protection for non-volitional *thoughts*.[165])

Americans often invoked the freedom to *have* opinions to defend a correlative freedom to *express* opinions.[166] Among the natural rights that individuals had not surrendered to government, Thomas Jefferson wrote in 1789, were "the rights of thinking, and publishing our thoughts by speaking or writing."[167] The

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162. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 119 (A.D. Woozley ed., Meridian Books 1969) (1690).

163. FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE: IN TWO TREATISES 185 (Knud Haakonssen ed., Liberty Fund 2004) (1726).

164. James Madison, *Memorial and Remonstrance against Religious Assessments*, *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 72, at 295, 299 (Robert A. Rutland et al. eds., 1973).

165. The Founders thus referred interchangeably to the freedom to express "sentiments," see, for example, PA. CONST. of 1776, ch. 1, § 12, and "thoughts and opinions," PA. CONST. of 1790, art. IX, § 7. To the extent that statements of *opinion* received broader protection than statements of *fact*, it was because of a duty to tell the truth. *See* RUTHERFORD, *supra* note 15, at 295 ("[U]nlawful lyes [include] . . . not only such falshoods, as will directly injure a man, or hinder his innocent benefit; but all such falshoods likewise, as are inconsistent with that tacit consent to tell him the truth.").

166. *See, e.g.*, THOMSON, *supra* note 24, at 11-12 ("[M]en should be allowed to express those thoughts, with the same freedom that they arise. In other words – speak, or publish, whatever you believe to be *truth*."); Albert Gallatin, *The Speech of Albert Gallatin, a Representative from the County of Fayette, in the House of Representatives of the General Assembly of Pennsylvania*, *reprinted in* 3 THE WRITINGS OF ALBERT GALLATIN 1, 6 (Henry Adams ed., 1879) ("Whether the opinion be right or wrong, as long as it is only an opinion, everybody has a right to express it."). Alexander Addison drew a distinction between *thought* and *speech*, but he also, following Blackstone, limited his endorsement of speech restrictions to "bad sentiments." *See* ADDISON, *supra* note 23, at 10 ("[L]iberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects.").

167. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 676, 678 (1958); *see also* Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), *in* 18 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 131, 132 (noting "an universal and almost uncontroverted position in the several states, [is]

inalienability of this liberty was broadly recognized. All men had a right "of speaking and writing their minds – a right, of which no law can divest them," Congressman John Vining observed in January 1791, before the First Amendment was ratified.[168] This right, Fisher Ames echoed in agreement, was "an unalienable right, which you cannot take from them, nor can they divest themselves of."[169] Any abridgment of that right, he insisted, would be "nugatory."[170]

The freedom to express thoughts, however, was limited to *honest* statements – not efforts to deceive others. "The true liberty of the press is amply secured by permitting every man to publish his opinions," Pennsylvania jurist Thomas McKean explained in 1788, "but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame."[171]

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that the purposes of society do not require a surrender of all our [natural] rights"). Notably, Jefferson did not categorically reject governmental authority to punish malevolent expression. *See* Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 440, 442 (1956) ("A declaration that the federal government will never restrain the presses from printing any thing they please, will not take away the liability of the printers for false facts printed.").

168. Congressional Debates (Jan. 21, 1791) (statement of Rep. John Vining), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 340 (William Charles DiGiacomantonio et al. eds., 1995). This debate occurred before the First Amendment was formally ratified, but this fact evidently made little difference to the members of the First Congress. *See also* Congressional Debates (Feb. 11, 1790) (statement of Rep. Elias Boudinot), *in* 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 288 (Helen E. Veit et al. eds., 1994) ("[I]t has been so lately contended, and settled, that the people have a right to assemble and petition for redress of grievances.").

169. Congressional Debates (Jan. 21, 1791) (statement of Rep. Fisher Ames), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 342 (William Charles DiGiacomantonio et al. eds., 1995).

170. *Id.* Vining and Ames were opposing a proposal to prevent tax collectors "from interfering, either directly, or indirectly, in elections, further than giving their own votes, on penalty of forfeiting their offices." *Id.* at 339 (statement of Rep. James Jackson). Some representatives enthusiastically supported the proposal, suggesting that it ought to be applied to other governmental officials, *see id.* at 340-41 (statement of Rep. Elbridge Gerry); *id.* at 341 (statement of Rep. John Laurance); *id.* at 342 (statement of Rep. Roger Sherman), thus protecting "the freedom of elections" from official interference, *id.* at 341 (statement of Rep. Michael Stone). The law did not *prohibit* speech, some proponents of the bill noted, because it merely placed a condition on office holding, *see, e.g.*, *id.* at 340 (statement of Rep. Egbert Benson), although Roger Sherman advocated a broader ban on "the arts of electioneering," *id.* at 339-40 (statement of Rep. Roger Sherman). The House ended up rejecting the measure.

171. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788); *see also* ADDISON, *supra* note 94, at 50 ("If a man willfully, maliciously, and with intent to defame, publish an opinion not supported by fact, it is an offense."); James Wilson, *Of the Nature of Crimes; and the Necessity and*

For that reason, this Article often refers to a "freedom to make well-intentioned statements of one's thoughts." The Founders, immersed in their own constitutional language, hardly needed such a periphrastic term; they could simply invoke the "freedom of opinion" or "freedom of speech."

Sedition laws were thus facially consistent with the freedom of opinion when confined to false and malicious speech. "Because the Constitution guaranties the right of expressing our opinions, and the freedom of the press," Federalist John Allen asked rhetorically during the congressional debates over the Sedition Act, "am I at liberty to falsely call you a thief, a murderer, an atheist?"[172] Answering his own question, and again treating the First Amendment as guaranteeing "the liberty of opinion and freedom of the press,"[173] Allen implored that "[t]he freedom of the press and opinions was never understood to give the right of publishing falsehoods and slanders, nor of exciting sedition, insurrection, and slaughter, with impunity. A man was always answerable for the malicious publication of falsehood; and what more does this bill require?"[174] Over and over, Federalists emphasized the requirement of "a false and malicious intention."[175]

Opponents of the Adams Administration saw through the Federalist charade, viewing the Sedition Act as part of "a legislative program designed to cripple, if not destroy, the Republican Party."[176] Frequent complaints that Federalists had "countenance[d] a punishment, for mere freedom of opinion," thus appear

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Proportion of Punishments, *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 1087, 1090 ("The law of nature, it is admitted on all hands, measures crimes by the intention, and not by the event."); *Extract from a Charge . . . by the Honorable Thomas M'Kean, Chief Justice of the Supreme Court, with the unanimous approbation of the other Judges*, *in* PA. PACKET (Philadelphia), Apr. 19, 1785, at 3 ("Men therefore have only to take care in their publications, that they are decent, candid and true, that they are for the purpose of reformation and not of defamation, and that they have an eye solely to the public good.").

172. 8 ANNALS OF CONG. 2097 (1798) (statement of Rep. John Allen).

173. *Id.* at 2098; *see also id.* (mentioning "liberty of the press and of opinion").

174. *Id.*

175. 10 ANNALS OF CONG. 917 (1801) (statement of Rep. Jonas Platt); *see, e.g.*, H.R. REP. NO. 5-110, at 183 (1799); ADDISON, *supra* note 94, at 50; Iredell, *supra* note 49, at 348.

176. Stone, *supra* note 9, at 16. This point is widely recognized, though any effort to appreciate Federalist motives must at least grapple with the ongoing tumult in France. *See* Kathryn Preyer, United States v. Callender*: Judge and Jury in a Republican Society*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 173, 187 (Maeva Marcus ed., 1992) ("Only present-mindedness or lack of imagination leads us to dismiss casually [Federalist] fears as paranoia."). The Federalist effort to reauthorize the Sedition Act in 1801 further complicates this standard historical account. For a penetrating review of Federalist thought, see Lendler, *supra* note 35, at 419-25.

justified.[177] Yet in their more contemplative moments, some Republicans recognized that the Sedition Act itself fell short of abridging the freedom of opinion. If the law were perfectly administered, one Virginia editorial noted, "No person . . . would be the subjects of ruin under this statute, unless they annexed to those opinions a *design* that was not pure."[178] Or, as libertarian writer John Thomson acknowledged, if prosecutions "were not for the *publication of opinions*, then the Constitution has not been violated by them."[179]

Also notable about the Sedition Act controversy, however, was the nearly universal acknowledgment by Federalists that well-intentioned statements of opinion, including criticisms of government, were constitutionally shielded.[180] "[I]t is well known," Alexander Addison remarked, "that, as by the common law of England, so by the common law of America, and by the Sedition act, every individual is at liberty to expose, in the strongest terms, consistent with decency and truth all the errors of any department of the government."[181] Federalists, in other words, firmly rejected the long-discredited rule that "no private man can take upon him[self] to write concerning the government at all."[182] By limiting

177. THE DISSENT OF THE MINORITY OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA, FROM THE ADDRESS TO THE PRESIDENT OF THE UNITED STATES, ADOPTED BY SAID HOUSE, DECEMBER, 1798, at 4 (Philadelphia, 1799).

178. *The Independant* (Dec. 11, 1798), TIMES & ALEXANDRIA ADVERTISER, Dec. 15, 1798; *see also* 10 ANNALS OF CONG. 922 (1801) (statement of Rep. Joseph Nicholson) ("It was and might be further urged, that the act was only aimed at false and malicious libels, tending to defame the Government. He granted it; but who were to be the judges?").

179. THOMSON, *supra* note 24, at 25. Later, Thomson made a broader argument against regulations of expression. *See id.* at 81-84; *see also, e.g.*, JOHN PAGE, AN ADDRESS TO THE FREEHOLDERS OF GLOUCESTER COUNTY 15 (Richmond, John Dixon 1799) (describing the Sedition Act as "*unjust* as well as *unconstitutional*" because it applied to those who criticized the government "patriotically, and conscientiously, and constitutionally").

180. To be sure, Federalists generally preferred deferential rather than populist politics, and they abhorred the Democratic-Republican societies in the mid-1790s that claimed to speak on behalf of the people. But contrary to some portrayals, *see* James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 134-35 (1999), these ideas did not come close to a view that individuals could or should be barred from discussing public affairs or criticizing the government in good faith, *see* RICHARD BUEL JR., SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789-1815, at 93-112, 128-35, 244-61 (1972); Richard Buel Jr., *Freedom of the Press in Revolutionary America: The Evolution of Libertarianism, 1760-1820*, *in* THE PRESS AND THE AMERICAN REVOLUTION 59, 89 (Bernard Bailyn & John B. Hench eds., 1981).

181. ADDISON, *supra* note 94, at 42; *see also* 10 ANNALS OF CONG. 933 (1801) (statement of Rep. John Rutledge, Jr.) ("[E]very man has the privilege of expressing unreservedly whatever he thinks on political subjects.").

182. *The Trial of the Seven Bishops* (1688) (opinion of Richard Allibond), *in* 12 A COMPLETE COLLECTION OF STATE TRIALS 183, 428 (London, T.B. Howell ed., 1816). For English statements

the Sedition Act to false and malicious statements, and by providing a truth defense,[183] Federalists could reasonably claim fidelity to this longstanding respect for the freedom of opinion. Indeed, Federalists sought to renew the Sedition Act in January 1801—with a new administration poised to take the helm—because

against this view, see, for example, JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 280 (London, T. Spilsbury 1775) ("[T]he English constitution . . . has allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority; and . . . has thus delivered into the hands of the People at large, the exercise of the Censorial power."); and [Thomas Gordon], Letter No. 15 (Feb. 4, 1720), *in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110, 111 (Ronald Hamowy ed., 1995) ("That men ought to speak well of their governors, is true, while their governors deserve to be well spoken of; but to do publick mischief, without hearing of it, is only the prerogative and felicity of tyranny: A free people will be shewing that they are so, by their freedom of speech."). For similar statements by Supreme Court justices, see *John Blair's Charge to the Grand Jury of the Circuit Court for the District of Delaware* (Oct. 27, 1794), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 49, at 485, 489 (Maeva Marcus ed., 1988) ("[W]hile men pay an external obedience to the laws, they have a right to think of them as they please, and even beyond this, to express their opinion decently, yet strongly, as a mean of obtaining an alteration . . . ."); *Draft of John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia* (before Apr. 22, 1793), *in* 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 49, at 359, 364 (Maeva Marcus et al. eds., 1990) ("As free Citizens we have a Right to think and speake our Sentiments . . . in Terms . . . explicit plain and decorous."); and Wilson, *supra* note 85, at 1046 (stating that every "citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures"). An enormous literature addresses the political controversies in the seventeenth and eighteenth centuries from which this freedom emerged. *See, e.g.*, Bogen, *supra* note 8, at 442-44, 446; Mayton, *supra* note 8, at 102-08; Michael E. Stevens, *Legislative Privilege in Post-Revolutionary South Carolina*, 46 WM. & MARY Q. 71, 71-73 (1989). *See generally* FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS (1952).

183. For earlier discussions of the truth defense, see, for example, Letter from John Adams to William Cushing (Mar. 7, 1789), *in* FREEDOM OF THE PRESS, *supra* note 73, at 152, 153; Letter from John Marshall to Archibald Stuart (May 28, 1794), *in* 2 THE PAPERS OF JOHN MARSHALL 267, 268 (Charles T. Cullen & Herbert A. Johnson eds., 1977). For a discussion of a famous controversy in New York over the truth defense, see Kate Elizabeth Brown, *Rethinking* People v. Croswell*: Alexander Hamilton and the Nature and Scope of "Common Law" in the Early Republic*, 32 L. & HIST. REV. 611 (2014). Some judges thought that "a defendant could establish the truth of the publication only to show that he lacked the requisite malicious intent." David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 192 (2001); *see, e.g.*, *id.* at 198-99 (describing the views of James Kent and Joseph Story).

the Act, in their view, had "enlarged instead of abridg[ed] the 'liberty of the press.'"[184]

Scholars, however, routinely overlook Federalist support for expressive freedom. Defenders of the Sedition Act, one author writes, equated "the freedom of speech and press" with an understanding that "government could restrain speech post-publication or post-utterance in whatever way it pleased."[185] In fact, not a single Federalist in Congress took that view. To be sure, many Federalists interpreted the *freedom of the press* as simply a rule against prior restraints – an idea that we will turn to next.[186] But the First Amendment, as Federalist Harrison Gray Otis explained, also guaranteed "the liberty of writing, publishing, and speaking, one's thoughts, under the condition of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions, whether spoken or written."[187] This was a qualified liberty, of course, and perhaps inadequate when executed by a partisan administration and partisan judiciary. But Federalists widely accepted the freedom of opinion, even in the late 1790s.

Readers may be curious about the scope of the freedom to make well-intentioned statements of one's thoughts – whether, for instance, it applied to certain forms of expressive conduct like flag burning or political donations. Historical evidence offers no clarion answers, but the principles of social-contract theory frame the inquiry in a way that disfavors categorical protection for expressive conduct. To be sure, engaging in expressive behavior was an innate human capacity, so it was properly understood as falling within the natural right of expressive freedom.[188] But there was little basis for recognizing an *inalienable* natural right of expressive conduct. The scope of inalienable rights, after all,

184. H.R. REP. NO. 5-110, at 183 (1799); *see* 10 ANNALS OF CONG. 920-21 (1801) (statement of Rep. Roger Griswold). Notably, some Federalists in January 1801 still held out hope that the presidential election would eventually swing their way after an impending deadlock between Jefferson and Burr. *See* JAMES ROGER SHARP, THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE 139-41 (2010).

185. Lakier, *supra* note 35, at 2180; *see* sources cited *supra* note 35. The few scholars who have noted possible differences between speech and press rights either have yet to illuminate their relationship, *see, e.g.*, Anderson, *supra* note 6, at 490 & n.211, or have insisted that the freedom of speech was derived from the legislative privilege of speech and debate, *see* sources cited *supra* note 4.

186. *See, e.g.*, 8 ANNALS OF CONG. 2148 (1798) (statement of Rep. Harrison Gray Otis) ("[T]he liberty of the press is merely an exemption from all previous restraints.").

187. *Id.*

188. *See, e.g.*, ADDISON, *supra* note 23, at 4 ("We communicate our sentiments by words spoken, written or printed, or by pictures or other signs."); *see also* Volokh, *supra* note 3, at 1059 ("The

depended on whether individuals were physically capable of parting with certain aspects of natural liberty and, if so, whether collective control of that liberty would serve the public good.[189] Some expressive conduct, like instinctive smiles, surely fell on the side of inalienability. But when expressive conduct caused harm and governmental power to restrict that conduct served the public good, there is no reason to think that the freedom of opinion nonetheless immunized that conduct.

Consequently, although the freedom of opinion was fixed in some respects – allowing individuals to criticize the government in good faith, for instance – determining its scope called for the same policy-driven analysis that characterized the Founders' general approach to natural rights. In short, outside of the core protection for well-intentioned statements of one's thoughts, the boundaries of the freedom of opinion depended on political rather than judicial judgments.

C. Common-Law Rights and the Freedom of the Press

In addition to *inalienable* natural rights, state declarations of rights in the 1770s and 1780s also included numerous fundamental positive rights, like the right to trial by jury and the rule against ex post facto laws. Unlike "natural liberty . . . retain[ed]," one Anti-Federalist noted, fundamental positive rights were

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equivalence of symbolic expression and verbal expression is consistent with the First Amendment's original meaning."). The fact that expressive and non-expressive aspects of natural liberty were both subject to regulation in the promotion of the public good negated the need for a distinction between "speech" and "conduct." *Cf.* Frederick Schauer, *Speech and "Speech" – Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 902-03 (1979) ("In order that the first amendment be applied effectively to carve out a category of activity for special protection, consideration must be given to the meaning of the word 'speech' . . . ."). Some Founders denounced theater bans, for instance, as obstructing "the natural right of every freeman to dispose of his time and money, according to his own taste and disposition, when not obnoxious to the real interests of society," without any mention of the expressiveness of theater performance. *To the Honorable the General Assembly of Pennsylvania, the Subscribers Being a Committee of the Dramatic Association* . . . , PA. PACKET (Philadelphia), Feb. 17, 1789, at 3. Moreover, theater supporters emphasized the permissibility of governmental regulation to promote the public good. *See, e.g.*, *Arguments in Favour of the Drama*, PA. PACKET (Philadelphia), Feb. 17, 1789, at 3 (removing a ban on theater would still permit theaters to "be regulated," because "every thing that has an immoral tendensy should be prohibited; – every exceptionable play, now extant, should be altered, or rejected, and none but those that have the good of mankind for their object, should be acted"). For an analysis of mid-1790s controversies about raising liberty poles, see Cornell, *supra* note 82, at 922-32.

189. *See, e.g.*, HUTCHESON, *supra* note 163, at 185 (asking "[i]f the Alienation be within our natural Power" and whether it "may serve some valuable Purpose").

"particular engagements of protection, on the part of government."[190] These were rights defined in relation to governmental authority. And what made them "fundamental" was an acceptance of their inviolability, usually based on their recognition in the social contract or constitution.[191] In short, these rights were, as Thomas Jefferson explained in 1790, "certain fences which experience has proved particularly efficacious against wrong, and rarely obstructive of right."[192] Interestingly, Jefferson classified the freedom of the press as a fundamental positive right.[193]

Scholars typically assert that the freedom of speech and the freedom of the press were equivalent,[194] and, as we have seen, those concepts were equivalent as natural rights.[195] Yet in the context of enumerated bills of rights, discerning the meanings of these freedoms is more complicated and reveals an important difference between speech and press freedoms.[196] The Pennsylvania Constitution of 1776, for instance, separated the "right to freedom of speech, and of

190. *An Old Whig IV*, INDEP. GAZETTEER (Philadelphia), Oct. 27, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 497, 501 (John P. Kaminski & Gaspare J. Saladino eds., 1981). Benjamin Rush lamented that combination, writing in 1777 that Pennsylvania's "Bill of Rights has confounded *natural* and *civil* rights in such a manner as to produce endless confusion in society." Benjamin Rush, Observations upon the Present Government of Pennsylvania, *in* FOUR LETTERS TO THE PEOPLE OF PENNSYLVANIA 3 (Philadelphia, Styner & Cist 1777).

191. *See* Campbell, *supra* note 13, at 99.

192. Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), *in* 18 PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 132.

193. *Id.* (listing "trial by jury, Habeas corpus laws, free presses" as positive rights); *see also Federal Farmer No. 6* (Dec. 25, 1787), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 979, 983-84 (2004) (distinguishing natural rights from "constitutional or fundamental" rights); *Federal Farmer No. 16* (Jan. 20, 1788), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1051, 1059 (2004) (describing press freedom as a "fundamental right"). *But see* Heyman, *supra* note 3, at 1289 (citing Federal Farmer for the idea that press freedom is a natural right); McAffee, *supra* note 41, at 278-79 (same).

194. *See* sources cited *supra* note 3.

195. *See supra* Part II.

196. The Founders *also* often mentioned the freedom of the press as an obligation of printers to publish all items "conducive of general Utility," without discrimination among writers. Livingston, *supra* note 139, at 81. *See generally* ROBERT W. T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF DEMOCRATIC PRESS LIBERTY, 1640-1800 (2001) (presenting a scholarly account of the development of the concept of the free press). This usage was prevalent, but it related to the public norms applicable to printers, not limitations on governmental power, and it seems to have had no direct relationship to original understandings of the First Amendment.

writing, and publishing" from "the freedom of the press."[197] That split strongly suggests a distinction in meaning. And Jefferson's letter suggests an intriguing explanation: the term "freedom of the press" could denote a particular fundamental positive right.

The content of this right was widely known. "The liberty of the press," William Blackstone had famously declared, "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."[198] And without a governmental censor, local juries rather than royal agents controlled how far publishing could be restricted. "The liberty of the press, as established in England," Jean Louis de Lolme wrote in 1775, effectively meant that courts considering libels against printers "must . . . proceed by the Trial by Jury."[199]

Americans, and particularly those with legal training, frequently echoed these ideas. "[W]hat is meant by the liberty of the press," James Wilson observed during the 1787 ratification debates, "is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual."[200] Others mentioned the importance of empowering juries to

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197. PA. CONST. of 1776, art. 12 ("[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); *see also* COMPLETE BILL OF RIGHTS, *supra* note 73, at 93 (presenting similar proposals of North Carolina, Rhode Island, Virginia, and the Pennsylvania minority). For a history of this provision, see Smith, *supra* note 8, at 58-63. Scholars have elided the distinct meanings of these clauses. *See, e.g.*, Levy, *supra* note 3, at 204; Volokh, *supra* note 3, at 1080-81. Other states opted for a simple declaration in favor of the liberty of the press. *See* Anderson, *supra* note 6, at 464-65, 538-41. Vermont, which had asserted its independence from New York, was the only other state to invoke the freedom of speech in its constitution. *See* VT. CONST. of 1786; VT. CONST. of 1777, ch. 1, § 14. For John Adams's earlier proposal of a nearly identical provision, see John Adams, The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts (Sept. 1, 1779), *reprinted in* 4 THE WORKS OF JOHN ADAMS 219, 227 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) ("The people have a right to the freedom of speaking, writing, and publishing their sentiments. The liberty of the press, therefore, ought not to be restrained."). For a brief history of this proposal, see CLYDE AUGUSTUS DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 133-36 (1906).

198. 4 WILLIAM BLACKSTONE, COMMENTARIES *151, *152. Notably, Blackstone assumed that "the object of legal punishment" was harmful speech, "destructive of the ends of society." *Id.* at *153.

199. DE LOLME, *supra* note 182, at 283. Sedition was originally tried in the Star Chamber, without common-law procedural rights. *See* Mayton, *supra* note 8, at 105.

200. Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of James Wilson), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 455 (Merrill Jensen ed., 1976); *see also, e.g.*, [Hugh Williamson], *Speech at Edenton, N.C.*, N.Y. DAILY ADVERTISER (Feb.

determine the proper bounds of expressive freedom. "[S]hould I be unjustly accused of [sedition]," Virginia lawyer Alexander White remarked, "the trial by a jury of my countrymen is my security – if what I have said or wrote corresponds with their general sense of the subject, I shall be acquitted."[201]

In sum, although many of the Founders discussed press freedom as a natural right, it also had a readily available meaning as a *fundamental positive right* against press licensing, thus empowering juries to determine the proper scope of expressive freedom.

D. Nature and Law

The notion that speech and press freedoms referred to natural rights, inalienable natural rights, and fundamental positive rights may appear confused or even contradictory. In the eighteenth century, however, these rights were closely intertwined.[202] The fundamental positive rights embodied in common law informed understandings of natural rights, and vice versa.

The common law did not directly recognize natural rights as a set of positive rights. Natural rights, after all, were simply the liberty that humans would enjoy in a state of nature, bounded by the dictates of natural law. In contrast to positive rights, they were not defined in terms of governmental action or inaction. When a constitution protected certain natural rights against abridgment, however, it became important to determine the scope of retained natural liberty. And to assist with this task, the Founders naturally turned to positive law, and particularly the common law.

25, 1788), *in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 201, 202 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (equating freedom of the press with freedom from "the restraint of any license"); N.Y. Legislative Debates (Jan. 26, 1790), *in* N.Y. DAILY GAZETTE, Jan. 27, 1790, at 2 (statement of Rep. Rufus King) (same).

201. *To the Citizens of Virginia*, WINCHESTER VA. GAZETTE, Feb. 22, 1788, *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 404-05 (1988); *cf.* Letter from John Adams to William Cushing (Mar. 7, 1789), *in* FREEDOM OF THE PRESS, *supra* note 73, at 152, 153 ("[I]f the jury found [the putatively libellous statements] true and that they were published for the Public good, they would readily acquit."); *Cincinnatus I: To James Wilson, Esquire*, N.Y. J., Nov. 1, 1787, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 160, 163 (John P. Kaminski et al. eds., 2003) (warning that without a jury the government "will easily find pretexts" to restrain "what it may please them to call – the licentiousness of the press").

202. *See, e.g.*, Meyler, *supra* note 18, at 581.

The common law was probative, in part, because it helped define the natural-law boundaries of natural rights.[203] Natural law, we must recall, was not a finely tuned set of legal rules. Rather, it embodied the dictates of reason and justice. "We discover it," James Wilson explained, "by our conscience, by our reason, and by the Holy Scriptures."[204] Not surprisingly, therefore, the Founders recognized considerable underdeterminacy about what natural law required.[205] "[W]hoever expects to find, in [reason, conscience, and the Holy Scriptures], particular directions for every moral doubt which arises," Wilson cautioned, "expects more than he will find."[206]

In day-to-day practice, then, natural law itself provided little guidance about how to resolve difficult legal questions. Instead, lawyers and judges used a system of customary legal rules known as the common law. Yet the legal system operated on the assumption—or at least the fiction—that the common law and natural law were in harmony.[207] "The *common law*," Alexander Addison characteristically observed, "is founded on the law of nature and the revelation of God."[208] Consequently, the common law could help determine the proper boundaries of natural liberty. Governmental powers recognized at common law were presumptively acceptable, while common-law limits on those powers (such as the rule against prior restraints) recognized presumptively unjustified abridgments of natural rights.

Moreover, for those who viewed social obligations as stemming from common consent rather than from natural law, the common law helped delineate the scope of those obligations. The common law, after all, had the presumptive consent of the people over an extended period. "[L]ong and uniform custom," English jurist Richard Wooddeson explained, "bestows a sanction, as evidence of

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203. *See* Hamburger, *supra* note 3, at 954. Inalienable natural rights, just like alienable natural rights, were circumscribed by natural law. *Id.* at 931-32, 954.

204. Wilson, *supra* note 131, at 509.

205. *Id.* at 514-18.

206. *Id.* at 522.

207. *See* R. H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 97-98 (2015).

208. ADDISON, *supra* note 94, at 29; *see* HELMHOLZ, *supra* note 207, at 96 (mentioning English invocations of this idea); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 854 (1978) (describing the custom of the common law as "the most reliable *evidence* of the content of natural law"); *see also* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 39-40 (2001) (noting that natural rights required political recognition before entering the customary constitution).

universal approbation and acquiescence."[209] Though certainly not immune to change,[210] the common law at least presumptively comported with the reciprocal obligations that individuals had assumed in the social contract. In short, customary positive law helped reveal the proper scope of natural liberty.

At the same time, Americans sometimes used natural-law reasoning to shape their understanding of positive law. This approach reflected the prevalent view that positive law should reflect and conform to natural law. "[M]unicipal laws are under the control of the law of nature," Wilson noted in his law lectures, meaning that natural law was superior to positive law.[211] Because of its underdeterminacy, natural-law reasoning was typically reserved within legal circles for resolving ambiguities in the common law or statutory law; judicial assessments of natural justice could not displace positive law.[212] Among the laity, however, the priority of natural law sometimes prompted calls for an abandonment of legal pedantry. "It is our business to do justice between the parties," John Dudley of New Hampshire opined about the jury's role, "not by any quirks of the law

209. WOODDESON, *supra* note 13, at 28; *see, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *74 (observing that the common law "probably was introduced by the voluntary consent of the people"); SULLIVAN, *supra* note 102, at 16 ("The common law, is a system of commonly received opinions, established by the common consent of the people, without acts of the legislature, and defined by practice in the courts of law."); James Wilson, *Of Municipal Law*, *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 549, 569 ("A customary law carries with it the most unquestionable proofs of freedom in the country, which is happy enough to be the place of its abode.").

210. *See* REID, *supra* note 74, at 22. Overlooking the Founders' appreciation for the substantial indeterminacy of natural law, James Whitman asserts that their writings about custom and reason lacked coherence and intelligibility and were, instead, "a confused mélange." James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1323, 1367 (1991). This position leads Whitman to the bold conclusion that "[t]here is little point in trying to identify the underlying logic of American legal thinking in the revolutionary era," and "[s]tudies that purport to explain the Founders' conception of the Constitution are thus doomed to mislead." *Id.* at 1366-67. In my view, Whitman gives inadequate attention both to the recognition of *underdeterminacy* in reason, which made it far easier to claim simultaneous fidelity to both reason and custom, and to the rational need for established legal rules, including customary rules. Locke and Blackstone, for instance, each insisted that human law must conform to natural law, that natural law is a highly underdeterminate source of law, and that reason dictates that governments must act pursuant to established rules. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *42-55, *67-71; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 135-137 (1690), *reprinted in* JOHN LOCKE, *supra* note 111, at 159-61.

211. *See* James Wilson, *Of the Law of Nations*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 526, 529; *see also, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *41 ("This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other . . . . [N]o human laws are of any validity, if contrary to this.").

212. HAMBURGER, *supra* note 113, at 38-39.

out of Coke or Blackstone, books I have never read, and never will, but by common sense and common honesty as between man and man."[213] Some Republican lawyers took a similar view. The meaning of Virginia's press clause, lawyer George Hay opined, "presents a great constitutional question, the solution of which depends, not on cases and precedents furnished by books, but on principles whose origin is to be traced in the law of nature, and whose validity depends on their tendency to promote the permanent interests of mankind."[214]

Not surprisingly, then, forceful disagreements emerged about the extent to which the common law defined the scope of natural rights.[215] During the ratification debates, for instance, lawyers like James Wilson, Rufus King, and Alexander White equated press freedom with the common-law rule against press licensing.[216] A decade later, when Republicans attacked the Sedition Act of 1798 as violating the freedom of the press, Federalist lawyers again turned to the familiar terrain of legal authority. "By the freedom of the press," jurist Alexander Addison insisted, the Press Clause "must be understood to mean the freedom of the press as it then existed at common law in all the states."[217]

For Americans with less elitist inclinations, however, determining the scope of natural rights was not exclusively within the ken of professionally trained lawyers. James Madison's famous Virginia Report of 1800, for instance, made arguments from "plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts" to wage an extended attack on Federalist reliance upon the common law.[218] It would be a "mockery" to confine

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213. JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 25 (2004) (quoting Dudley).

214. HAY, *supra* note 152, at 9.

215. Of course, the divide between lawyers and non-lawyers is stylized, just like my distinction between elites and non-elites. *See* Cornell, *The People's Constitution vs. The Lawyer's Constitution*, *supra* note 9, at 309.

216. *See supra* notes 200-201 and accompanying text.

217. ADDISON, *supra* note 94, at 48; *see also, e.g.*, William Paterson, Second Draft Opinion on the Sedition Law of 1798, *reprinted in* Williamjames Hull Hoffer, *William Paterson and the National Jurisprudence: Two Draft Opinions on the Sedition Law of 1798 and the Federal Common Law*, 22 J. SUP. CT. HIST. 36, 48 (1997) ("[T]he freedom of the press is a relative term; and refers to an existing rule. We must first know in what the freedom of the press consists . . . .The com. law gives the rule, which is well known to every part of the U. States."). Federalist arguments about judicial power had drifted in some respects by the late 1790s. *See* Larry D. Kramer, Marbury *and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 220-21 (2003). But struggles between lawyerly and non-lawyerly modes of constitutional interpretation were already prominent by the late 1780s. *See* Cornell, *The People's Constitution vs. The Lawyer's Constitution*, *supra* note 9, at 304-11.

218. James Madison, The Report of 1800 (Jan. 7, 1800), *in* 17 THE PAPERS OF JAMES MADISON 303, 309 (David B. Mattern et al. eds., 1991). The context of this passage was a defense of state

press freedom to a rule against prior restraint, Madison implored, because post-publication punishments would have the same effect of suppressing expression.[219] Moreover, practical experience showed that American printers enjoyed a "freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law."[220] It was thus "natural and necessary," Madison concluded, that press freedom in the United States went beyond the confines of English common law.[221]

Scholars, it is worth cautioning, have overstressed this part of the Virginia Report. Madison, whose views on expressive freedom were more liberal than those of his colleagues, plainly identified these observations as being "for consideration only," without, "by any means, intend[ing] to rest the [constitutional] question on them."[222] (The Virginia Report actually rested its constitutional argument on the First Amendment's supposed denial of federal power to impose *any* restrictions on printers.)[223] Nonetheless, Madison's mode of reasoning in this political dictum reflected an important strand of Republican thought grounded in a natural-rights view of expressive freedom.

interpretive authority, but Madison's language nicely captures the essence of his attack on using the common law to delineate the scope of speech and press freedoms.

219. *Id.* at 336.

220. *Id.* at 338. This analysis came in the midst of Madison's discussion of "the proper boundary between the liberty and licentiousness of the press," *id.* at 337, and the degree to which states, as a matter of "wis[e] . . . policy," *id.* at 338, had properly chosen to underenforce speech-restrictive rules. The Virginia Report of 1800 never took the broad, affirmative position that any restriction of political speech necessarily violates speech and press freedoms. Rather, it presented a narrower, negative argument that American protections for expressive freedom ought to be "greater" than in England, *id.* at 337, and were, in practice, "not . . . confined to the strict limits of the common law," *id.* at 338.

221. *Id.* at 337. Relatedly, Republicans denied that judges were the exclusive or supreme arbiters of constitutional meaning. *See* Kramer, *supra* note 217, at 222.

222. Madison, *supra* note 218, at 337, 339.

223. *See id.* at 339 ("[The First Amendment] was meant as a positive denial to Congress, of any power whatever on the subject.").

III. EXPLICATING THE FIRST AMENDMENT

Now that we have a grasp on how the Founders talked about rights in general, and about speech and press freedoms in particular, we can more closely evaluate the original meanings of the First Amendment.

This Part begins with an analysis of the ratification debates and drafting of the First Amendment. It draws two principal conclusions. *First*, the impetus for a bill of rights was a desire to enumerate well-recognized rights, not create new ones. Consequently, historical context strongly supports the view that the Speech and Press Clauses incorporated the meanings of expressive freedom discussed in Part II. *Second*, although originalist scholarship tends to treat speech and press freedoms as equivalent, the ratification debates reinforce that the Founders often referred to these ideas distinctly, particularly when mentioning press freedom as a fundamental common-law right.

Then, Section III.B synthesizes the evidence in Part II and Section III.A to assess the most likely original meanings of the Speech and Press Clauses. It argues that the Speech and Press Clauses recognized both abstract principles and concrete legal rules that were grounded in Founding Era rights discourse. The Section then responds to some competing accounts of the First Amendment's original meaning.

A. Enumerating Expressive Freedoms

The Constitution drafted by the Philadelphia Convention famously lacked a declaration of rights.[224] This omission quickly became a favorite point of attack for the opponents of ratification, commonly known as the Anti-Federalists.[225] Especially dangerous, Anti-Federalists insisted, was unchecked congressional

224. For the defeat of proposals to guarantee the freedom of the press, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341, 587-88, 617 (Max Farrand ed., 1911). For a more detailed account, see Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 9 SUP. CT. REV. 301, 304-08 (1990).

225. *See, e.g.*, George Mason, *Objections to the Constitution of Government Formed by the Convention*, *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 43, 43 (John P. Kaminski & Gaspare J. Saladino eds., 1988). Anti-Federalists "were by no means a homogenous or cohesive group," but "common themes run through many of their writings." Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1127-28 (2013). For the leading treatment of Anti-Federalism, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999). For a concise history of the Bill of Rights, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 435-68 (2010).

power under the Necessary and Proper Clause.[226] "The powers, rights, and authority, granted to the general government by this constitution," Brutus explained, "are as complete, with respect to every object to which they extend, as that of any state government."[227] Consequently, a federal declaration of rights was every bit as necessary as state declarations in order to restrict the *means* of federal power.

Anti-Federalists often focused their criticisms on the lack of protection for the freedom of the press. But their references to press freedom were usually cursory, with no elaboration about what the term meant or what a declaration in its favor would accomplish. Often Anti-Federalists simply pointed out numerous ways that the federal government could regulate printers – whether through "the

226. *See, e.g.*, Pennsylvania Ratification Convention Debates (Nov. 28, 1787) (statement of Robert Whitehill), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 399, 402 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (stating that "from the nature of their power they must necessarily be the judges, what laws are necessary and proper"); Pennsylvania Ratification Convention Debates (Dec. 4, 1787) (statement of James Wilson), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 467, 468 (Merrill Jensen ed., 1976) ("The powers of Congress are unlimited and undefined. They will be the judges of what is *necessary* and *proper*."); Virginia Ratification Convention Debates (June 10, 1788) (statement of James Monroe), *in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1092, 1112 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (stating that Congress would be "not restrained or controuled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect").

227. *Brutus II*, N.Y. J., Nov. 1, 1787, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 154, 156 (John P. Kaminski et al. eds., 2003); *see also, e.g.*, *Cincinnatus I: To James Wilson, Esquire*, N.Y. J., Nov. 1, 1787, *reprinted in id.* at 160, 162 ("The conventions that made the state and the general constitutions, sprang from the same source, were delegated for the same purpose . . . .").

trial of *libels*, or *pretended libels* against the United States,"[228] taxes on newspapers,[229] the copyright authority,[230] or federal power over the capital district.[231] Importantly, these worries often went beyond mere concern about prior

228. *An Officer of the Late Continental Army*, INDEP. GAZETTEER (Philadelphia), Nov. 6, 1787, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 210, 211 (Merrill Jensen ed., 1976). The following year, Findley tied the "right of every man to publish his sentiments on public proceedings" to the requirement of a jury trial, but he did not suggest that publishers were constitutionally immune from prosecution *even with a jury*. Pennsylvania Assembly Debates (Sept. 1788) (statement of Rep. William Findley), *in* Respublica v. Teischer, 1 U.S. (1 Dall.) 335, 335-36 n.* (Pa. 1788). For other concerns about the manipulations of libel laws, see Virginia Ratification Convention Debates (June 16, 1788) (statement of George Mason), *in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1325, 1326 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (noting that Congress might construe its powers to punish "any writer [who] should dare to stand forth and expose to the community at large, the abuses of those powers"); and Pennsylvania Ratification Convention Debates (Dec. 4, 1787) (statement of James Wilson), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 467, 468 (Merrill Jensen ed., 1976) ("The liberty of the press is not secured. Congress may license the press, and declare what shall be a libel."). Others located a possible grounding for this power in the Speech and Debate Clause. *See* Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of Robert Whitehill), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 454, 454 (Merrill Jensen ed., 1976) ("The press is by this clause restrained; because the members shall not be questioned for speeches in any other place.").

229. A Plebeian, An Address to the People of the State of New York (Apr. 17, 1788), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 942, 961 (John P. Kaminski et al. eds., 2004); *Federal Farmer No. 16* (Jan. 20, 1788), *in id.* at 1059.

230. *See, e.g.*, Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of Robert Whitehill), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 454, 454 (Merrill Jensen ed., 1976) (stating that Congress, under the Copyright Clause, "may license the press, *no doubt*; and under licensing the press, they may suppress it").

231. *See, e.g.*, Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 30, 1788) (statement of William Lenoir), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 76, at 203 ("[Congress] have also an exclusive legislation in their ten miles square . . . . Should any one grumble at their acts, he would be deemed a traitor, and perhaps taken up and carried to the exclusive legislation, and there tried without a jury."); Virginia Ratification Convention Debates (June 16, 1788) (statement of George Mason), *in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1325, 1326 (John P. Kaminski & Gaspare J. Saladino eds., 1993) ("[C]ould they not . . . lay a dangerous restriction on the press? Might they not even bring the trial of this restriction within the ten miles square, when there is no prohibition against it?").

restraints,[232] but Anti-Federalists rarely suggested how an enumerated guarantee of press freedom would constrain federal authority.[233]

Notably, the freedom of speech played almost no role in the public jousting that occurred in newspapers, pamphlets, and state ratification conventions.[234] Anti-Federalist fears about unenumerated rights, it turns out, usually focused on positive rights that imposed more determinate limits on governmental authority.[235] (Scholars, by contrast, often describe the freedom of speech as an im-

232. *But see An Old Whig III*, INDEP. GAZETTEER (Philadelphia), Oct. 20, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 425, 426-27 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (identifying the Supremacy Clause as a potential threat to the freedom of the press).

233. *Cf. Address of the Minority of the Maryland Convention*, ANNAPOLIS MD. GAZETTE, May 1, 1788, *reprinted in* 17 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 242, 244 (John P. Kaminski & Gaspare J. Saladino eds., 1995) ("In prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right may prove invaluable."); *Cincinnatus I: To James Wilson, Esquire*, N.Y. J., Nov. 1, 1787, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 160, 163-64 (John P. Kaminski et al. eds., 2003) (describing press freedom as the "only" security "that will save any future printer from the fangs of power" because otherwise "the judges might put the verdict of a jury out of the question").

234. An exception was the frequent Anti-Federalist inclusion of a "right to freedom of speech, and of writing and publishing their sentiments," or similar phrases, in their lengthy lists of draft amendments. *See* Virginia Convention Amendments (June 27, 1788), *in* 18 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 199, 202 (John P. Kaminski & Gaspare J. Saladino eds., 1995); *see also* Proposals from the State Conventions, *in* COMPLETE BILL OF RIGHTS, *supra* note 73, at 93 (presenting similar proposals by North Carolina, Rhode Island, and the Pennsylvania minority); *The Society of Western Gentlemen Revise the Constitution*, VA. INDEP. CHRON. (Richmond), Apr. 30, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 769, 773 (John P. Kaminski & Gaspare J. Saladino eds., 1990) ("That the people have a right to the freedom of speech, of writing, and publishing their sentiments; therefore printing presses shall not be subject to restraint, other than liableness to legal prosecution, for false facts printed and published."). A decade earlier, some town returns in Massachusetts mentioned the omission of the freedom of speech (or speaking, writing, and publishing) in the state's proposed constitution. *See* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 682, 742, 749-50, 762, 789, 795, 856 (Oscar Handlin & Mary Handlin eds., 1966).

235. *Federal Farmer No. 16* (Jan. 20, 1788), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1051, 1057-58 (John P. Kaminski et al. eds., 2004); *see also, e.g.*, A Plebeian, An Address to the People of the State of New York (Apr. 17, 1788), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 942, 961-62 (John P. Kaminski et al. eds., 2004) (focusing on fundamental positive rights); *Brutus II*, N.Y. J., Nov. 1, 1787, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 154, 156-59 (John P. Kaminski et al. eds., 2003) (same); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 438, 440 (1955) (same). Many Anti-Federalists mentioned the freedom of conscience, which was an inalienable natural right that had

portant Anti-Federalist issue, but their evidence notably mentions only the liberty of the press, again highlighting the scholarly conflation of speech and press rights.)[236] Amidst the wide-ranging and creative arsenal of Anti-Federalist arguments, concern about the freedom of speech was conspicuously missing.

In response to Anti-Federalist admonitions about the liberty of the *press*, Federalists generally made two related arguments. First, many explained that bills of rights were merely declaratory of pre-existing rights and were therefore legally unnecessary.[237] It was "absurd to construe the silence . . . into a total extinction" of the press right, John Jay insisted, because "silence and blank paper

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assumed a place in the customary constitution (through the Toleration Act, for instance). McAffee asserts that Federal Farmer's "same analysis applied to the rights that were considered natural and inalienable," McAffee, *supra* note 41, at 278, but McAffee errs by concluding that Federal Farmer viewed press freedom as a retained natural right. *See supra* note 193.

236. *See, e.g.*, Heyman, *supra* note 3, at 1289 (noting that the "most important" rights to Anti-Federalists included "freedom of speech and press"); *cf.* Mayton, *supra* note 8, at 118 ("[A]n understanding was reached at the convention and during the ratification process that the national government had no power over speech."). *But see* Rosenthal, *supra* note 6, at 15 ("As for freedom of speech, anti-Federalists said virtually nothing about it."); *Federal Farmer No. 6* (Dec. 25, 1787), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 979, 985 (John P. Kaminski et al. eds., 2004) (mentioning only press freedom); Virginia Ratification Convention Debates (June 16, 1788) (statement of Patrick Henry), *in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1328, 1332 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (same); Philanthropos [Tench Coxe], *To the People of the United States*, PA. GAZETTE (Philadelphia), Jan. 16, 1788, *reprinted in* 15 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 391, 393 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (noting that, outside of Pennsylvania, "the freedom of speech" was unmentioned by leading Anti-Federalists). Anti-Federalist references to freedom of expression usually related to the effect of press restraints on public discussion. *See, e.g.*, *An Old Whig I*, INDEP. GAZETTEER (Philadelphia), Oct. 12, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 376, 378 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (mentioning, in a discussion of press freedom, "free communication . . . on political subjects"); [Samuel Bryan], *Centinel II*, PHILA. FREEMAN'S J., Oct. 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 457, 460, 466 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (mentioning "the right of expressing and publishing . . . sentiments upon every public measure" but otherwise focusing solely on press freedom). Mentions of the longstanding English right of petition were similarly rare. *See* Mark, *supra* note 82, at 2206.

237. *See* WOOD, *supra* note 18, at 295-96; Rakove, *supra* note 77, at 187; John Phillip Reid, *The Authority of Rights at the American Founding*, *in* THE NATURE OF RIGHTS, *supra* note 76, at 67, 97; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171-72 (1992); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1157-58 (1987); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 502 (2005). Whether customary positive rights implicitly limited governmental authority continued to be a topic of heated discussion. *Compare* Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-89 (1798) (opinion of Chase, J.) (concluding that certain fundamental positive rights were implicit limitations on governmental power), *with id.* at 398-99 (opinion of Iredell, J.) (confining judicial review to enumerated rights).

neither grant nor take away any thing."[238] The Virginia and New York ratification conventions later passed declaratory resolutions making the same point.[239] Indeed, many Federalists thought that fundamental positive rights were recognized in the social contract,[240] obviating any need for subsequent enumeration, just as modern legislation hardly needs to specify that it operates only within constitutional boundaries.

Second, Federalist denials of authority to abridge the liberty of the press relied on the lack of any enumerated power that would justify a licensing regime. In response to the Anti-Federalist argument that the federal government might abridge the freedom of the press under the taxing power, for instance, Alexander Hamilton asked in *Federalist No. 84*, "why declare that things shall not be done which there is no power to do?"[241] But Hamilton, unlike some of his Federalist colleagues,[242] was not rejecting all federal power over printers. Rather, he clarified, "declarations . . . in favour of the freedom of the press" were not understood

238. [Jay], *supra* note 75, at 933; *see also, e.g.*, *Uncus*, MD. J. (Baltimore), Nov. 9, 1787, *reprinted in* 14 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 76, 78 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (declaring that freedom of the press is "a privilege, with which every inhabitant is born;-a right . . . too sacred to require being mentioned"); *Foederal Constitution*, PA. GAZETTE (Philadelphia), Oct. 10, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 362, 363 (John P. Kaminski & Gaspare J. Saladino eds., 1981) ("[T]he *Liberty of the Press* would have been an inherent and political right, as long as nothing was said *against* it."); South Carolina Ratification Convention Debates (Jan. 18, 1788) (statement of Charles Cotesworth Pinckney), *in* COMPLETE BILL OF RIGHTS, *supra* note 73, at 98, 98 ("The general government . . . has no power to take away the liberty of the press.").

239. *See* Virginia Ratification Convention Debates (June 25, 1788), *in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 1537-38 (John P. Kaminski & Gaspare J. Saladino eds., 1993); New York Declaration of Rights, Form of Ratification, and Recommendatory Amendments to the Constitution (July 26, 1788), *in* 23 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 2326, 2326-28 (John P. Kaminski et al. eds., 2009).

240. *See* Campbell, *supra* note 13, at 100.

241. THE FEDERALIST NO. 84, *supra* note 114, at 579 (Alexander Hamilton); *see also, e.g.*, *A Native of Virginia: Observations upon the Proposed Plan of Federal Government* (Apr. 2, 1788), *in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 655, 691 (John P. Kaminski & Gaspare J. Saladino eds., 1990) ("[A]s the Congress can claim the exercise of no right which is not expressly given them by this Constitution; they will have no power to restrain the press in any of the States; and therefore it would have been improper to have taken any notice of it."); [Robert Sherman], *A Citizen of New Haven*, CONN. COURANT (Hartford), Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 524, 525 (Merrill Jensen ed., 1978) ("The liberty of the press can be in no danger, because that is not put under the direction of the new government.").

242. *See* James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 337, 340 (John P. Kaminski & Gaspare J. Saladino eds., 1981); Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of James Wilson), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at

to be "a constitutional impediment to the impositions of duties upon publications."[243]

When it came to natural rights, Federalists used a similar tack. Rather than denying any federal authority over speech, Federalists insisted that protections for natural liberty were superfluous under republican governments. As we have seen,[244] that argument had considerable merit. In some sense, the people in a republic retained *every* aspect of natural liberty because no natural rights were surrendered to an unaccountable monarch. Enumerating retained natural rights, Federalists therefore concluded, would be pointless. In republics, Alexander Hamilton explained in *Federalist No. 84*, "the people surrender nothing, and as they retain every thing, they have no need of particular reservations."[245]

As the ratification contest dragged on, however, some Federalists gradually perceived a need for amendments to quell Anti-Federalist opposition.[246] Declaring rights, they realized, would help undercut Anti-Federalist calls for

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454, 454-55 (Merrill Jensen ed., 1976); [James Iredell], *Marcus No. 4*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 379, 382 (John P. Kaminski & Gaspare J. Saladino eds., 1986) ("[T]he future Congress will have no other authority over [the press] than to secure to authors for a limited time the exclusive privilege of publishing their works."). But Federalists generally denied only federal power over the *freedom of the press*.

243. THE FEDERALIST NO. 84, *supra* note 114, at 580 n.* (Alexander Hamilton). Other Federalists equated press freedom with freedom from "the restraint of any license." Hugh Williamson, *Speech at Edenton, N.C.*, N.Y. DAILY ADVERTISER, Feb. 25, 1788, *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 201, 202 (John P. Kaminski & Gaspare J. Saladino eds., 1986); *see, e.g.*, Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of James Wilson), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 454, 455 (Merrill Jensen ed., 1976) ("[W]hat is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual.").

244. *See infra* notes 122-128 and accompanying text.

245. THE FEDERALIST NO. 84, *supra* note 114, at 578 (Alexander Hamilton); *see* Shain, *supra* note 158, at 127; *see, e.g.*, Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 29, 1788) (statement of [Archibald] Maclaine), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 76, at 160, 166-67; *John De Witt No. 2*, AM. HERALD (Boston), Oct. 29, 1787, *reprinted in* 4 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 156, 158-59 (John P. Kaminski & Gaspare J. Saladino eds., 1997); *see also* Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 988-97 (1992) (collecting dozens of examples).

246. *See, e.g.*, Letter from George Washington to James Madison (ca. May 31, 1789), *in* 12 The PAPERS OF JAMES MADISON, *supra* note 72, at 191, 191 (Charles F. Hobson et al. eds., 1979); Letter from David Ramsay to Benjamin Rush (Nov. 10, 1787), *in* 14 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 83, 83-84 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

broader reforms.[247] Some men, including Thomas Jefferson and James Madison, also came to recognize merit in the Anti-Federalist arguments.[248] Although Congress was confined to enumerated powers, Madison explained in his speech introducing a draft of amendments to the House of Representatives that it "has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent."[249]

Madison was not admitting that Congress could *properly* abridge customary rights. Nonetheless, Congress had power under the Necessary and Proper Clause "to fulfil every purpose for which the government was established," and it was "for them to judge of the necessity and propriety to accomplish those special purposes."[250] Madison had previously criticized declarations of rights as mere "paper barriers," but in his congressional speech he justified them as having "a tendency to impress some degree of respect for [rights], to establish the public opinion in their favor, and rouse the attention of the whole community."[251] Moreover, he noted, a written guarantee would help embolden judges to uphold their legal duty to enforce certain rights.[252] In short, an enumeration of rights might be useful after all.

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247. *See* Finkelman, *supra* note 224, at 336-37; *see also* CORNELL, *supra* note 225, at 158-63 (explaining the modesty of the Bill of Rights); *see also, e.g.*, Letter from Fisher Ames to Thomas Dwight (June 11, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 748, 749 (Charlene Bangs Bickford et al. eds., 2004) ("Upon the whole, it may do some good towards quieting men who attend to sounds only, and may get the mover [James Madison] some popularity – which he wishes."); Letter from Pierce Butler to James Iredell (Aug. 11, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra*, at 1288, 1289 (Charlene Bangs Bickford et al. eds., 2004) ("A few *milk-and-water* amendments have been proposed by Mr. M[*adison*], such as liberty of conscience, a free press, and one or two general things already well secured.").

248. *See* Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 659, 660 (1958) ("This instrument forms us into one state as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power within the feild [sic] submitted to them."). Scholars have long disagreed about Madison's private ambivalence about a bill of rights. *See* Stuart Leibiger, *James Madison and Amendments to the Constitution, 1787-1789: "Parchment Barriers,"* 59 J.S. HIST. 441, 441-42 (1993) (reviewing the scholarly debate).

249. Congressional Debates (June 8, 1789) (statement of Rep. James Madison), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 818, 823 (Charlene Bangs Bickford et al., eds., 1992).

250. *Id.* at 823-24.

251. *Id.* at 823.

252. *Id.* at 825 ("[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights"). Scholars often misattribute to Madison the idea that enumerating a right in the Constitution was *necessary* and *sufficient* for its judicial enforceability

Madison's initial proposal for constitutional recognition of expressive freedom was divided in two parts: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[253] His notes suggest that he also remarked to his colleagues that speech and conscience were among the "*natural rights*, retained."[254] By contrast, his separation of the right of speaking, writing, and publishing from the freedom of the press suggests a positive-law connotation of press freedom.[255]

This dual structure became clearer within the House Committee of Style when Roger Sherman proposed dividing these clauses into separate articles. In one article, he addressed "certain natural rights which are retained," including the right "of Speaking, writing and publishing . . . with decency and freedom."[256] Six articles later, he presented a two-part ban on licensing rules: "Congress shall not have power to grant any monopoly or exclusive advantages of Commerce to any person or Company; nor to restrain the liberty of the Press."[257] Notably, only Sherman's proposed press clause, surely meant as a rule against press licensing, was framed as a categorical denial of congressional power.

For unknown reasons, but probably just for sake of brevity, the Committee of Style shortened Madison's proposal to read: "The freedom of speech, and of

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against contrary legislation. *See, e.g.*, Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 19-20 (2010). Both the wording and the context of Madison's statement, however, indicate that "Madison was making a point about judicial psychology and judicial politics, not judicial duty." Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 571 (2017). Madison, in other words, was addressing the same types of concerns that Alexander Hamilton mentioned in *The Federalist* regarding the "natural feebleness" of the judiciary, which Hamilton described as "in continual jeopardy of being overpowered, awed or influenced by [the] coordinate branches . . . ." THE FEDERALIST NO. 78, *supra* note 114, at 523 (Alexander Hamilton).

253. Madison Resolution (June 8, 1789), *in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 9, 10 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

254. James Madison, Notes for Speech in Congress (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON, *supra* note 72, at 193, 194 (Charles F. Hobson et al. eds., 1979) ("*natural rights*, retained – as Speech, Con[science]").

255. Madison also singled out the freedom of the press in a set of three rights that would apply against state governments, again suggesting an intent to treat speech and press freedoms differently. *See* Congressional Debates (June 8, 1789) (statement of Rep. James Madison), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 818, 826 (Charlene Bangs Bickford et al. eds., 1992).

256. Proposal by [Roger] Sherman to House Committee of Eleven (July 21-28, 1789), *in* COMPLETE BILL OF RIGHTS, *supra* note 73, at 83, 83.

257. *Id.* at 84.

the press, . . . shall not be infringed."[258] And, with various revisions accepted in the Senate, the third proposed amendment eventually read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[259] The drafters of the final version of the amendment thus, perhaps unwittingly, stripped away the earlier textual indication that speech and press freedoms had distinct meanings.

B. Original Meanings

So, what did the Speech and Press Clauses originally mean? A detailed answer to that question would require an account of what it means for a clause to have a "meaning,"[260] both conceptually and in terms of evidentiary thresholds. And the Founders often disagreed about methods of constitutional interpretation, so assigning a definitive "original meaning" to any constitutional clause may require contestable methodological choices.[261] Rather than venturing down that path, this Section simply points out a range of possibilities that – while different in some respects – display a substantial degree of agreement among Founding Era elites. In doing so, it focuses on *conceptual* meanings of the Speech and Press Clauses, not their precise doctrinal details. This synthesis suggests that the best account of the First Amendment's meaning is likely one rooted in a multifaceted view of expressive freedom, recognizing the interplay of natural rights, inalienable natural rights, and fundamental common-law rights. Importantly,

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258. House Committee of Eleven Report (July 28, 1789), *in* COMPLETE BILL OF RIGHTS, *supra* note 73, at 84, 84. For a slightly longer discussion of the Amendment's drafting history, see Rosenthal, *supra* note 6, at 15-17.

259. U.S. CONST. amend. I.

260. *See generally* A. P. Martinich, *Four Senses of 'Meaning' in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225 (2009) (classifying the four types of "meaning" in the history of ideas); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015) (examining the role of intellectual history in constitutional theory). Prompted by critics, *see, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 215-16 (1980), contemporary originalism scholarship focuses largely on the original "meanings" of constitutional provisions rather than the Framers' intentions. The distinction between intentions and meanings is somewhat porous, however, considering that Madison – a native speaker of the language of eighteenth-century American constitutionalism – tried to draft a provision with the meaning that he intended. *See* Gienapp, *supra* note 10, at 938 & n.15; Solum, *supra*, at 1134-36.

261. *See supra* note 22 (collecting sources that discuss Founding Era disagreements about methods of constitutional interpretation).

this account reveals, at least in some respects, distinct meanings of the Speech and Press Clauses.

Because expression was a natural right, one possibility is that the Speech and Press Clauses originally referred *exclusively* to ordinary natural rights that were fully regulable to promote the public good.[262] Under this view, customary protections for speech and press freedoms would likely *suggest* the proper bounds of natural liberty – perhaps even directing judges to interpret statutes "equitably" to avoid conflicts with these longstanding rules – but without imposing any fixed, judicially enforceable restraints on legislative power.[263] The Speech and Press Clauses, in other words, might have had legal *implications* without constitutionally ossifying any particular set of legal rules.

This is a plausible view. Speaking, writing, and publishing were liberties that people could exercise without governmental intervention, and the Founders thus viewed these freedoms as being among their natural rights. This liberty, moreover, was circumscribed by social obligations – either imposed by natural law or voluntarily assumed in a social contract – and therefore only restrictions of expression *beyond those that promoted the public good* were "abridgments" of natural rights.[264] Consequently, as Republican lawyer George Hay summarized in 1799, a natural-rights understanding of the First Amendment would "amount precisely to the privilege of publishing," as well as speaking and writing, "as far as the legislative power shall say, the public good requires."[265]

Other Founding Era commentary supports the possibility that the Speech and Press Clauses referred exclusively to natural rights. Not all aspects of Founding Era bills of rights, we must recall, had determinate meanings. Indeed, some declarations of rights announced principles that were, as Alexander Hamilton disparagingly put it in *Federalist No. 84*, "aphorisms" that "would sound much better in a treatise of ethics than in a constitution of government."[266] Provocatively, and perhaps disingenuously, Hamilton insisted that the freedom of the press was so indeterminate that "whatever fine declarations may be inserted in

262. *See supra* Section II.A.

263. For an introduction to "equitable" interpretation, see HAMBURGER, *supra* note 113, at 344-57; McConnell, *supra* note 252, at 20-21; and Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009 CATO SUP. CT. REV. 13.

264. *See supra* notes 124-136 and accompanying text.

265. HORTENSIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 38 (Philadelphia, Aurora Office 1799).

266. THE FEDERALIST NO. 84, *supra* note 114, at 579 (Alexander Hamilton).

any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."[267]

Nonetheless, the Founders often described declarations of rights as supplying stricter limits on legislative authority. A bill of rights, Theophilus Parsons remarked, should specify both "unalienable natural rights," over which "the supreme power hath no control," and a set of fundamental positive rights, "also unassailable by the supreme power."[268] Indeed, one of James Madison's principal rationales for a bill of rights in 1789 was to limit the "discretionary powers with respect to the *means*" of federal authority.[269] If state bills of rights were useful "for restraining the state governments," Madison explained, "there is like reason for restraining the federal government."[270]

Viewed in this light, it makes sense to construe the First Amendment as imposing at least some fixed limits on federal power. There is a compelling case, for instance, that the Press Clause codified at least a positive right against press licensing, thus putting juries in charge of restricting speech.[271] Meanwhile, the freedom of speaking, writing, and publishing—likely invoked in the Speech Clause—shielded from regulation any well-intentioned statements of one's thoughts (subject, of course, to the natural-law proscription against abridging

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267. *Id.* at 580; *see also* Cooper v. Telfair, 4 U.S. (4. Dall.) 14, 18 (1800) (opinion of Chase, J.) ("The general principles contained in the constitution are not to be regarded as rules to fetter and controul; but as matter merely declaratory and directory . . . ."); *A Countryman II*, NEW HAVEN GAZETTE, Nov. 22 1787, *reprinted in* 3 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 471, 472-73 (Merrill Jensen ed., 1978) (making a similar point); [Webster], *supra* note 140, at 484, 490 ("[A]ny restriction of [Congressional] power by a general indefinite expression, is a nullity—mere *formal nonsense*."). In *The Federalist*, Hamilton expressed contradictory views, stating both that without judicial protection "the reservations of particular rights or privileges would amount to nothing," THE FEDERALIST NO. 78, *supra* note 114, at 524 (Alexander Hamilton), and that placing "the whole power of the proposed government . . . in the hands of the representatives of the people . . . is the essential, and after all the only efficacious security for the rights and privileges of the people which is attainable in civil society," THE FEDERALIST NO. 28, *supra* note 114, at 178 (Alexander Hamilton).

268. PARSONS, *supra* note 111, at 367; *see also, e.g.*, Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON, *supra* note 78, at 350, 351 (Robert A. Rutland et al. eds., 1973) (describing bills of rights as providing "exceptions" to legislative authority); THE FEDERALIST NO. 78, *supra* note 114, at 524 (Alexander Hamilton) (describing constitutional rights like the rule against "ex-post-facto laws" as "certain specified exceptions to the legislative authority" that are enforceable in court).

269. Congressional Debates (June 8, 1789) (statement of Rep. James Madison), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 818, 823 (Charlene Bangs Bickford et al. eds., 1992) (emphasis added).

270. *Id.* at 824.

271. *See supra* Section II.C.

the rights of others).[272] As with most other enumerated rights, these principles constrained the *means* that the federal government could employ when exercising its other powers. And this positive-rights dimension of the Speech and Press Clauses reveals an important distinction in their meanings.

Following this train of thought, perhaps the Speech and Press Clauses referred *exclusively* to these more determinate customary rules, without directly recognizing a retention of the broader (but shallower) natural right of expressive freedom. Federalists in the late 1790s, it turns out, often interpreted the First Amendment in precisely this way. "By the freedom of the press," Addison implored, the Press Clause "must be understood to mean the freedom of the press as it then existed at common law in all the states."[273]

Finally, perhaps the Speech and Press Clauses in the First Amendment recognized *both* the natural right of expressive freedom (in which the Speech and Press Clauses had a common meaning) *and* the more determinate customary protections for expression (in which the Speech and Press Clauses had distinct meanings). Like the other historical accounts of the First Amendment's original meaning, this interpretation recognizes the interplay between natural rights, inalienable natural rights, and positive law, and it differs only by suggesting that this full spectrum of rights was incorporated into the Constitution itself. The First Amendment, on this account, recognized any customary legal principles that protected speech and the press while also recognizing that, apart from these rules, Congress was otherwise free to limit expression in pursuit of the public good (subject, of course, to any other constitutional constraints). In my view, this account best fits the available historical evidence, which shows the Founders constantly and fluidly moving between different notions of speech and press freedoms. Moreover, isolating First Amendment rights to a particular aspect of Founding Era expressive freedom seems dubious in light of the Ninth Amendment's implied reservation of rights.

In sum, it remains debatable whether the Speech and Press Clauses directly recognized ordinary natural rights, a set of more determinate legal rights, or both. But because of the fluid relationship between natural rights and positive

272. *See supra* Section II.B.

273. ADDISON, *supra* note 94, at 48. That stance, however, may be less revealing of original meaning than of the emergent Federalist quest for judicial supremacy, which sought to separate constitutional interpretation from matters of policy. *Cf.* Cornell, *The People's Constitution vs. The Lawyer's Constitution*, *supra* note 9, at 307 ("Elite legal culture in the Founding Era, particularly among Federalists, was designed to shore up a basic distinction between law and politics . . . . Proponents of popular constitutionalism generally sought to eliminate this distinction . . . ."); Iredell, *supra* note 49, at 344 (distinguishing "considerations of policy" from "questions of law").

rights, all of these possibilities point in basically the same direction: the First Amendment recognized (either implicitly or outright) the ordinary natural right of expressive freedom along with (either absolute or presumptive) protection for a set of customary rules with more determinate legal meanings.[274]

Other accounts of original meaning, however, are much less plausible. A common view is that the "freedom of speech" in the First Amendment was analogous to the "freedom of speech and debate" mentioned in Article I (and in various state constitutions).[275] That freedom was a separation-of-powers rule, barring legislators from being punished by the executive or judiciary for their speeches and activities within the legislative chamber.[276] But legislatures could, and occasionally did, punish their own members at will.[277] Based on this supposed genealogy of the freedom of speech, scholars often conclude that the First Amendment's protections are confined to *political* expression – the type of speech that typically occurs in legislative assemblies.[278]

This interpretation of the Speech Clause has a variety of problems. First and foremost, legislative privilege played basically no role in Founding Era debates about the First Amendment.[279] This lack of historical evidence may not bother "intratextualists," who are known to "draw[] inferences from the patterns of words that appear in the Constitution even in the absence of other evidence that these patterns were consciously intended."[280] This Article's analysis, however, focuses on historical understandings of speech and press freedoms, not modern

274. This account of the "original meaning" of the First Amendment is subject to the caveats mentioned in Part I regarding elite sources.

275. *See* sources cited *supra* note 4.

276. *See* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 87-90 (2007); Bogen, *supra* note 8, at 431-35; Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120-40 (1973).

277. Bogen, *supra* note 8, at 436.

278. Amar, *supra* note 5, at 815; *see* sources cited *supra* note 5.

279. As one scholar observes, "The tie between legislative privilege and the first amendment was asserted as early as 1799 by George Hay." Bogen, *supra* note 8, at 435 (citing [HAY], *supra* note 265). True, but Hay was defining the meaning of the word "freedom," not the provenance of the term "freedom of speech." [HAY], *supra* note 265, at 42 ("[T]he meaning of the word freedom, is precisely and unequivocally established by the constitution itself."). Hay argued that this "freedom" was secured through "a total exemption from the control of any law, or the jurisdiction of any court." *Id.* John Thomson also analogized to legislative privilege without suggesting that it was the originating concept for the freedom of speech. *See* THOMSON, *supra* note 24, at 19-20, 76-77.

280. Amar, *supra* note 5, at 790; *cf.* William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's* Bill of Rights, 106 MICH. L. REV. 487, 494

textualist theories. And there simply is no evidence that anybody in the late 1780s thought that the freedom of speech was directly analogous to, or drew its meaning from, the legislative privilege of speech and debate. Another difficulty is that the Founding Era right of speaking, writing, and publishing clearly extended to any subject, not just to political matters.[281]

Other scholars assert that the Speech Clause made speech "not subject to legislative regulation for the public good" but "nevertheless limited by the rights of others."[282] Reading the text of the First Amendment in isolation might support this so-called "libertarian" view. For those Founders who defined natural rights without regard to social obligations, after all, restrictions of natural liberty to promote the common good could easily be understood as "abridgments" of the liberty that had existed in a state of nature.

Viewed in historical context, however, this "libertarian" interpretation of the First Amendment is incomplete. To be sure, the Founders thought that the freedom to make well-intentioned statements of one's views was an inalienable natural right, rendering improper any restrictions that did not flow from natural law. And since the government itself did not possess natural rights that could be abridged, it was beyond the power of the government to punish speech that criticized the government in good faith.[283] These were important departures from the view that speech was always regulable in the public interest.

(2007) (criticizing Amar's "assumption that careful reading of the text consistently reveals original meaning").

281. *See, e.g.*, PA. CONST. of 1790, art. IX, § 7 (declaring the right to speak on "any subject"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874 (1833) (recognizing "a right to speak, write, and print his opinions upon any subject whatsoever"); TUCKER, *supra* note 133, at 376 ("Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political . . . ."); Wilson, *supra* note 85, at 1055-56 (stating that natural liberty existed for man to accomplish "those purposes . . . as his inclination and judgment shall direct"); Letter from William Cushing to John Adams (Feb. 18, 1789), *in* FREEDOM OF THE PRESS, *supra* note 73, at 147, 150 ("[D]oes [press freedom] not comprehend a liberty to treat all subjects and characters freely, within the bounds of truth?"). A polity could, of course, choose to reaffirm only a portion of this natural liberty in its declaration of rights. *See, e.g.*, VT. CONST. of 1786, ch. I, § V ("That the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government . . . ."). Again, my focus is the *meanings* of the Speech and Press Clauses, not the motives for enacting them. *See supra* note 58 (explaining my approach).

282. Heyman, *supra* note 3, at 1282; *see supra* note 48 (discussing Philip Hamburger's views).

283. Individuals, by contrast, had natural rights – and particularly the right of reputation – that could be abridged even through well-intentioned statements, thus placing a natural-law qualification on the inalienable right to make well-intentioned statements.

But the freedom of opinion did not encompass all expression. Individuals who joined together in a social contract, after all, had no reason to immunize efforts to lie or mislead. Nor did they need to prevent the government from preserving norms of civility and morality, like rules against blasphemy and profane swearing. Indeed, the Founders constantly mentioned that the inalienable right to speak was limited to those who spoke with decency and truth,[284] and state governments routinely and uncontroversially restricted plenty of speech that did not directly violate the rights of others.[285] Evidence from the late 1780s and early 1790s provides no indication that the First Amendment adopted a different understanding of expressive freedom.

Just the opposite, in fact. The Founders widely viewed enumeration as a *conservative* project meant to *preserve* existing rights, not to change their meaning or scope.[286] The proposed amendments, James Madison informed his congressional colleagues, provided for "simple and acknowledged principles" and not ones of "a doubtful nature."[287] The purpose of enumeration, in other words, was to guarantee at the federal level the rights already recognized by state constitutions and social contracts. Consequently, to the extent that states could regulate expression without "abridging" reserved natural liberty, the federal government

284. *See* sources cited *supra* note 182.

285. Examples include profane swearing bans, blasphemy laws, restrictions on advertising, restrictions on theater performances, and rules against making certain agreements on Sundays. *See* 8 ANNALS OF CONG. 2148-49 (1798) (statement of Rep. Harrison Gray Otis) (recounting many extant legal restrictions on speech); CONSTITUTION AND LAWS OF THE STATE OF NEW HAMPSHIRE; TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES 339 (1805) (prohibiting lotteries and any advertising thereof); 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700-1810, at 177-78 (1810) (forbidding "any worldly employment or business whatsoever" on Sunday, as well as profanity and swearing at all times).

286. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 196; Rakove, *supra* note 77, at 193. Indeed, the Ninth Amendment may reject "the necessity or superiority of enumeration." KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 82 (2009). Some people suggested that enumeration would facilitate the judicial enforcement of rights, *see, e.g.*, *An Old Whig II*, INDEP. GAZETTEER (Philadelphia), Oct. 17, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 14, at 399, 402 (John P. Kaminski & Gaspare J. Saladino eds., 1981) ("[W]ho can overrule [Congress's] pretensions?-No one, unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgements."), but these claims surely referred to *legal* rights and did not intimate that judges would assume the position of deciding which restrictions of natural liberty promoted the public good, *see supra* notes 232-236 and accompanying text.

287. Congressional Debates (Aug. 15, 1789) (statement of Rep. James Madison), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 1259, 1259 (Charlene Bangs Bickford et al. eds., 1992); *see* RAKOVE, *supra* note 4, at 324.

could properly do so as well.[288] The freedom of expression that could not be "abridged," in other words, was a liberty qualified by social obligations that stemmed either from natural law or from the imagined social contract.[289]

Nor did the First Amendment, as some scholars suggest, elevate speech to a constitutionally privileged liberty interest to be defended by free-ranging judicial supervision.[290] Founding Era judges, after all, were confined to defending "marked and settled boundaries" of governmental authority, disregarding legislation only where constitutional violations were clear.[291] Judges could not apply jurisprudential concepts "regulated by no fixed standard" on which "the ablest and the purest men have differed,"[292] even when those principles were enumerated in a written Constitution.[293] Judicial applications of the First Amendment were therefore limited to enforcing customary legal principles,[294] even though

288. Federalists made this point over and over in the Sedition Act debates. *See, e.g.*, H.R. REP. NO. 5-110, at 183 (1799) (contending that press freedom had never extended, "according to the laws of any State . . . to the publication of false, scandalous, and malicious writings against the Government"); Iredell, *supra* note 49, at 348 (arguing that state constitutions and bills of rights were the "strongest proof . . . that the freedom of the press does not require that libellers shall be protected from punishment").

289. *See supra* notes 124-136 and accompanying text.

290. *But see* Bogen, *supra* note 8, at 458 ("At a minimum, the freedom of speech meant that restrictions on speech are impermissible unless necessary to accomplish a legitimate function of government, and that the courts rather than the legislature should ultimately determine that necessity.").

291. Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.). The limited nature of Founding Era judicial review is well known. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140-42 (1893); *see also* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 172-83 (2015) (documenting the strong presumption of constitutionality evident in early state court decisions); McGinnis, *supra* note 62, at 880-904 (explaining that early judges would find unconstitutionality only when constitutional meaning was "clear"). Notably, the clarity of constitutional law did not depend solely on text but "drew on well-established principles of the customary constitution as well." LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 99 (2004).

292. *Calder*, 3 U.S. (3 Dall.) at 399 (opinion of Iredell, J.).

293. *See, e.g.*, Campbell, *supra* note 13, at 99-104.

294. Consequently, Founding Era judges repeatedly upheld narrowly drawn sedition laws. *See* BLUMBERG, *supra* note 8, at 1-6. Wendell Bird argues that some Federalist judges rejected the constitutionality of sedition laws. *See* BIRD, *supra* note 3, at 474. Bird's research is prodigious, but his evidence merely shows that Federalist judges accepted the freedom of opinion, not that they rejected the constitutionality of narrowly drawn sedition laws. *See supra* notes 166-187 and accompanying text. Bird, like Leonard Levy before him, "fails to recognize that it was possible for the framers of the first amendment [among other Founders], influenced by republican political theory, to expand the protection for freedom of expression well beyond the

the *concept* of expressive freedom, as a natural right, had a far broader range of potential implications.

Finally, the First Amendment did not comprehensively ban federal regulations of expression.[295] This view became prominent only later in the 1790s, when Republicans realized that Federalist control of all three branches of the federal government, combined with the administration's ability to choose jurors, threatened their political survival.[296] The First Amendment, many Republicans argued, imposed a "total exemption of the press from any kind of legislative control," leaving state common-law suits for abridgments of private rights as the *only* permissible limits on expression.[297]

Modern proponents of this view find support in the First Amendment's opening phrase, "Congress shall make no law."[298] However, a provision that "Congress shall make no law past some threshold" – such as the *abridgment* of the freedom of speech or of the press – simply does not suggest a lack of regulatory power leading up to that threshold. If anything, it implies just the opposite, as Federalist defenders of the Sedition Act repeatedly pointed out with glee.[299]

Another amendment passed by the House of Representatives in 1789 reinforces that the First Amendment did not withdraw all authority regarding speech and the press. In addition to declaring that "[t]he Freedom of Speech, and of the Press . . . shall not be infringed" – a rule applicable only to the *federal* government – the House passed a proposal that "[n]o *State* shall infringe . . . the

narrow boundaries of the English common law while retaining some conception of seditious libel." Rabban, *supra* note 8, at 796.

295. *But see supra* notes 36 & 41 and accompanying text. To be sure, if viewed in isolation from its context, the First Amendment's text could be stretched to eliminate federal power to regulate speech. All that a reader would have to do, after all, is disregard the limits on expressive freedom imposed by natural law and social obligation, leading to a view that the First Amendment categorically prohibited any interference with expression. *See* Tucker, *supra* note 133, at 386.

296. *See* Campbell, *supra* note 152. Although Republicans prevailed in their inventive interpretation of the First Amendment, an understanding of speech freedom as a natural right remained prominent in the nineteenth century. *See, e.g.*, COOPER, *supra* note 161, at 41; 1 BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 222 (1832).

297. [HAY], *supra* note 265, at 39.

298. *See, e.g.*, Leonard W. Levy, *Introduction* to FREEDOM OF THE PRESS, *supra* note 73, at xix, lvi-lvii; Jay, *supra* note 6, at 791.

299. *See, e.g.*, THE ADDRESS OF THE MINORITY IN THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE; CONTAINING A VINDICATION OF THE CONSTITUTIONALITY OF THE ALIEN AND SEDITION LAWS 12 (1799); ADDISON, *supra* note 94, at 44; Paterson, *supra* note 217, at 48; *cf.* THE FEDERALIST NO. 84, *supra* note 114, at 575, 579 (Alexander Hamilton) (expressing concern that bills of rights could be "dangerous" because they could "afford a colourable pretext to claim more [governmental powers] than were granted").

freedom of speech, or of the press."[300] If infringements of speech and press freedoms arose from *any* controls over expression, then this proposal would have barred state laws against libel, defamation, conspiracy, threats, profanity, blasphemy, perjury, sedition, and so forth. All of these laws, after all, suppress various forms of communication. But no evidence suggests that the House of Representatives was radically proposing to bar any federal or state limits on expression.[301] Rather, the First Amendment—just like its state-restraining counterparts—left ample room for the government to regulate speech in promotion of the public good, so long as it respected customary legal protections as well.

IV. USING HISTORY

How might this history inform modern constitutional interpretation? Most judges and scholars incorporate history into their interpretative method in some way.[302] But uses of history vary substantially. Originalism in particular now comes in many forms, and the Founding Era history of speech and press freedoms might inform originalist analysis in a range of ways.

One option is simply to return wholesale to a Founding Era perspective, recognizing that judges are not well positioned to evaluate whether a legislature has acted in good faith or whether restrictions of speech promote the public good.[303] In short, this approach would call for dismantling a huge swath of modern free-speech law. For instance, the Supreme Court's foundational decision in *New York Times v. Sullivan*,[304] which makes it harder for public officials to sue for defamation, conflicts even with the libertarian strand of Founding Era thought.[305] And

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300. House Resolution and Articles of Amendment (Aug. 24, 1789), *in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 35, 36, 39 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) (emphasis added).

301. *See* Anderson, *supra* note 6, at 493, 502, 508; Bogen, *supra* note 8, at 458 n.143. Even strict textualists might accept this argument. *Cf.* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 737 n.272 (1997) ("[T]extualist judges . . . do not categorically exclude a statute's drafting evolution from their consideration of statutory context."); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 361 (2005) ("[M]any textualists use records of a bill's drafting history . . . .").

302. *See supra* note 52 and accompanying text.

303. *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1796 (2008).

304. 376 U.S. 254 (1964).

305. *See, e.g.*, WORTMAN, *supra* note 24, at 259 (stating that public officials can sue for libel "upon the same footing with a private individual," given that "[t]he character of every man should be deemed equally sacred, and of consequence entitled to equal remedy"); Tucker, *supra* note 133, at 237-38 (same); *cf.* THOMSON, *supra* note 24, at 81-84 (calling for unimpeded public debate about public figures).

while the Founders viewed well-intentioned statements of one's thoughts as shielded from regulation, there is no indication that this principle would have extended to, say, donations to a political candidate.[306] Even assuming that giving money to a campaign is expressive, or is an exercise of the natural right to freedom of association, this activity was among the countless aspects of natural liberty subject to regulations that promote the general welfare.

Of course, many who use history in constitutional interpretation also accept the authority of precedent and may thus perceive modern speech law as too entrenched to be properly overruled.[307] Even under this view, Founding Era history may still have "gravitational force" in resolving ambiguities in modern doctrine.[308] Judges, for instance, often use conflicting definitions of what it means for a speech regulation to be "content based," and a historically grounded approach may help resolve contested issues of this sort.[309]

If we set aside Founding Era conceptions about the judicial role,[310] however, then modern doctrine is far easier—though perhaps still difficult—to justify on historical terms. In particular, a natural-rights reading of the Speech Clause would require the government to act for *reasons that serve the public good*, and scholars have noted that speech doctrine is largely structured as a way of smoking out illicit motives.[311] The heightened scrutiny that applies to content-based regulations, for instance, may correspond to an increased risk of parochial, rather than public-spirited, objectives.

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306. *See supra* notes 188-189 and accompanying text.

307. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 181-85 (2013); Baude, *supra* note 63, at 2358-61; McConnell, *supra* note 62, at 1765; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 861-64 (2015).

308. *See generally* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 420-31 (2013) (arguing that originalism can exert a "gravitational force" on doctrine, even when original meaning does not explicitly form the basis of judicial decisions).

309. *See infra* note 328.

310. For instance, robust judicial management of the Speech Clause might stem from a broader project of judicial engagement, *see, e.g.*, BARNETT, *supra* note 69, at 132-49, 255-71, or process-based concerns about regulations of expression, *see, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-16 (1980).

311. *See, e.g.*, Kagan, *supra* note 70, at 414; Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 736-44 (1998); Strauss, *supra* note 70, at 196-202. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 89-95 (2001) (discussing motive tests).

Indeed, rather than serving as categorical legal "immunities" or "trumps," modern free-speech rights often simply force the government to show a sufficient *justification* for abridgments of speech.[312] "Rights are not general trumps against appeals to the common good or anything else," Richard Pildes explains about modern American law.[313] "[I]nstead," he writes, "they are better understood as channeling the *kinds of reasons* government can invoke when it acts in certain arenas."[314] A ban on all fires in public, for instance, would trigger a lower degree of judicial scrutiny than a ban on flag burning, even though both would effectively ban flag burning.[315] And in either scenario, the government would have a chance to show that the law is sufficiently tailored to serve sufficiently important governmental interests. Modern doctrine, in other words, still accommodates certain claims to the public good.[316]

But certain claims only. The Court has staunchly resisted the notion, for instance, that claims to the public good might factor into the threshold decision of how closely courts should scrutinize speech restrictions. "The whole point of the First Amendment," the Court recently declared, "is to afford individuals protection against [speech] infringements" justified by "a generalized conception of the public good."[317] Rather, the Court has generally relegated the public-good analysis to the second stage of its analysis, thus putting the burden on the government to show the necessity of speech regulations and giving judges responsibility for ensuring, in the case of content-based regulations, that the proffered

312. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977) (defining rights as "political trumps held by individuals"); Pildes, *supra* note 311, at 728 (identifying "the view of rights as immunities" as "the prevailing view among rights philosophers"). Modern doctrine permits regulation of speech for good reasons. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 19-26 (1998); Pildes, *supra*, at 736-44.

313. Pildes, *supra* note 311, at 729.

314. *Id.*

315. *See generally* United States v. Eichman, 496 U.S. 310 (1990) (invalidating a federal law that criminalized flag burning); Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning is protected expression under the First Amendment); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (analyzing flag-desecration cases). Similarly, the government can impose criminal penalties on "fighting words"—i.e., speech likely to provoke violence—but it cannot target a more limited set of fighting words that the government finds especially objectionable. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

316. An important qualification is that the government generally cannot justify speech-suppressing laws based on *communicative harms*. This principle finds no historical support unless one supposes that its adoption, in the aggregate, promotes the public good.

317. McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014).

governmental interests are "compelling." The public good can still override the speech right, but only rarely.[318]

This approach departs from history in two ways: First, it waters down what was originally absolute protection for well-intentioned statements of one's views – a category of speech over which the Founders often said that the government simply had no power (except to regulate statements that violated natural law). Second, beyond this category, modern doctrine inverts the Founding Era understanding of freedom of speech as a natural right by putting the onus on the government to demonstrate a "compelling" justification for speech restrictions and by making judges the arbiters of what interests are compelling. Historically, it was up to legislators to assess which restrictions of speech would best serve the common good, with very little room for judicial oversight. Speech doctrine has thus followed a familiar pattern across an array of constitutional rights in the twentieth century: a vast expansion in the scope of rights coupled with a notable decrease in the afforded level of protection.[319]

Still, history offers at least *some* support for our non-absolutist approach to expressive freedom. Given the absence of any explicit textualist basis for a tiers-of-scrutiny approach, speech law is open to criticism by those who view rights as absolutes. The First Amendment's opening declaration that "Congress shall make no law," Justice Black famously insisted, does not invite judges to balance its protections against countervailing social interests.[320] Yet if Black had read the text of the First Amendment in a historically informed way, he might have been more sympathetic to the tiers-of-scrutiny approach that his colleagues on the Supreme Court were beginning to adopt. After all, beyond their protection for a narrow set of customary legal rights, the Speech and Press Clauses simply recognized the natural right of expressive freedom, and natural rights were always implicitly qualified by legislative authority to promote the public good.

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318. *See, e.g.*, Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015) (upholding a content-based regulation of speech in the context of judicial elections).

319. The same pattern has been true of press freedoms. In the early twentieth century, the scope of the rule against prior restraints expanded beyond just bans on licensing regimes. *See* Near v. Minnesota, 283 U.S. 697 (1931). At the same time, the Court recognized that countervailing governmental interests can sometimes justify prior restraints. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (collecting cases). Similarly, procedural due process rights have vastly expanded in scope (covering "new property," for instance), while now providing only a "flexible" degree of "procedural protections as the particular situation demands," Matthews v. Eldridge, 424 U.S. 319, 321 (1976), rather than an inflexible set of common-law procedural rules. One could make a similar argument about many other rights.

320. *See, e.g.*, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960); *see also* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (arguing that the First Amendment is absolute within the domain of self-governance).

On this view, modern doctrine is valid so long as it tries to confine the *processes* of democracy to a good-faith pursuit of the public good – a goal that aligns with a democracy-reinforcing account of judicial review[321] – or, perhaps, so long as it confines policy *outcomes* to those that comport with the public good. (The proper level of generality to use in making these decisions is unclear.) As noted above,[322] for instance, one could defend the tiers-of-scrutiny approach as a way of teasing out whether the government was restricting speech for public-spirited reasons or was simply trying to insulate itself from criticism. Or one might take the view that content-neutral regulations of speech are, on the whole, conducive to the public good, whereas content-based restrictions erode the benefits of an open speech marketplace.[323] But on either view, modern interpreters must make our own assessments of which doctrines best fulfill these objectives.

In giving doctrinal precision to underdeterminate constitutional provisions, Jack Balkin explains, "we are permitted, even encouraged, to favor some [historical] opinions over others – even minority opinions in their day – and render judgments on the past."[324] In other words, although the history of speech and press freedoms might settle the *meanings* of the Speech and Press Clauses, we can learn from the mistakes of history in deciding how to *apply* those provisions today. Founding Era support for punishing sedition and blasphemy, for instance, would not prevent us from making our own determination about the consistency of these laws with the public good. Consequently, although the constitutional reach of governmental power over speech is certainly far different now than it was at the Founding, modern speech law could nonetheless have deeper historical roots, or more feasible historical justifications, than scholars often realize.

Rather than justifying modern rules in this way, however, the Supreme Court routinely claims to be shackled by history. Writing for the Court, Justice Scalia once insisted that the freedom of speech "is the very *product* of an interest balancing by the people," leaving no room for governmental officials, including judges, to assess whether restrictions of speech promote the public good.[325] In a

321. *See generally* ELY, *supra* note 310.

322. *See supra* note 311 and accompanying text.

323. Some proponents of more robust speech doctrine in the early twentieth century took this approach, emphasizing the aggregate social benefits of speech-protective doctrines. *See* White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, *supra* note 60, at 316-21. But a weakness in this approach was the indeterminacy of questions about the public good and doubts about why judges were better situated than legislators to make these types of assessments. *Id.* at 322.

324. Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 93 (2016).

325. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

similar vein, the Court recently rejected as "startling and dangerous" an approach to the First Amendment that would allow judges to identify "low-value" speech based on its utility.[326] Instead, it asserted, "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[327] And just two terms ago, the Court seemed to treat the distinction between content-based and content-neutral restrictions as baked into the First Amendment.[328]

This Article has nothing to say about whether the rule against content-based regulations advances the public good, or whether confining low-value speech to traditional categories is a good idea. Those are empirical and value-based inquiries that have little to do with the Founding Era. But the history of speech and press freedoms overwhelmingly disproves the Supreme Court's insistence that modern doctrines inhere in the Speech Clause itself, with judges merely discovering – not crafting – the First Amendment's contours and boundaries.

CONCLUSION

As a natural right, expression was originally subject to regulations that furthered the public good, leading to vibrant and long-running constitutional debates about expressive freedom. Nearly everyone who spoke on the issue agreed that well-intentioned statements of one's thoughts were constitutionally protected. A few people thought that *any* governmental efforts to suppress political speech caused more harm than good. But for most, deliberate efforts to mislead the public were a different matter entirely and were deserving of punishment. In

326. United States v. Stevens, 559 U.S. 460, 470 (2010).

327. *Id.*; *see also, e.g.*, United States v. Alvarez, 567 U.S. 709, 717-18, 722-23 (2012) (plurality opinion) (summarizing the same idea and applying it to false statements).

328. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015). The issue in *Reed* was how to identify "content-based" speech restrictions – a concept aptly described as "the keystone of First Amendment law." Kagan, *supra* note 70, at 443; *see also* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1263 n.2 (2014) (collecting sources). Opting for a broader, more speech-protective definition, the Court declared that the First Amendment "expressly targets the operation of the laws – *i.e.*, the 'abridg[ement] of speech' – rather than merely the motives of those who enacted them." *Reed*, 135 S. Ct. at 2229 (alteration in original) (quoting U.S. CONST. amend. I). Historically, however, the mere "operation" of a speech restriction did not present a judicially cognizable First Amendment problem unless it abridged either a common-law right or the inalienable liberty to express one's thoughts. *See supra* notes 260-274 and accompanying text.

sum, opinions were wide-ranging, with arguments cast at different levels of generality. It bears emphasis that, on the whole, natural rights provided only a framework for argument – not a set of determinate legal rights.

The pliability of natural rights thus fostered a dynamic constitutional culture at the Founding. Natural liberty could be restrained, as William Blackstone put it, only when "necessary and expedient for the general advantage of the public."[329] Whenever natural liberty "is, by the laws of the state, further restrained than is necessary and expedient for the general advantage," St. George Tucker declared in 1796, "a state of *civil slavery* commences immediately."[330] Steeped in this tradition, the Founders virulently contested the scope of all sorts of governmental powers – including the capacity to regulate expression – from the standpoint of policy, all the while casting their arguments in terms of an unchanging original bargain.

Recognizing the contested relationship between natural rights and legal rules at the Founding also has implications that resonate beyond the context of expressive freedom. Scholars often read constitutional phrases like "freedom of speech," "unreasonable searches and seizures," and "cruel and unusual punishments" as, in the words of Jack Balkin, "abstract and vague rights provisions."[331] Indeed, the presence of *several* open-textured provisions in the Bill of Rights seems to reinforce that the Founders often preferred general constitutional standards over specific constitutional rules.[332] This Article, however, joins other recent scholarship suggesting that many Founding Era legal elites saw *none* of these rules as being abstract or vague. Rather, in their minds, these provisions simply reaffirmed longstanding features of Anglo-American law.

In the Fourth Amendment context, for instance, Laura Donohue has shown that Founding Era jurists viewed the ban on "unreasonable" searches and seizures as a simple reference to customary legal rules. "[A]t the Founding," she explains, "there was no such thing as a 'standard of reasonableness,' such as has marked the Fourth Amendment discourse since the 1967 case of *Katz v. United*

329. 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

330. ST. GEORGE TUCKER, ON THE STATE OF SLAVERY IN VIRGINIA (1796), *reprinted in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS, *supra* note 133, at 402, 407.

331. JACK M. BALKIN, LIVING ORIGINALISM 32 (2011); *see also id.* at 42 (identifying "abstract or vague phrases of the Constitution," including "cruel and unreasonable punishments" and "freedom of speech"); *id.* at 350 n.12 (making the same point with respect to "the Fourth Amendment's standard of 'unreasonable' searches and seizures and the First Amendment's principle of 'freedom of speech'"); DWORKIN, *supra* note 54, at 199 ("The First Amendment, like the other great clauses of the Bill of Rights, is very abstract.").

332. *Cf.* DWORKIN, *supra* note 54, at 272 ("The framers meant to enact a moral principle of constitutional dimensions, and they used broad and abstract language appropriate to that aim.").

States."[333] Rather, Donohue uncovers, unreasonableness meant "'against reason,' which translated into 'against the reason of the common law.'"[334]

Along similar lines, John Stinneford persuasively argues that, far from stating a "vague moral command," the Eighth Amendment rule against "cruel and unusual" punishments actually called for a careful study of the common law.[335] "[T]he best way to discern whether a government practice comported with principles of justice," Stinneford writes, "was to determine whether it was continuously employed throughout the jurisdiction for a very long time, and thus enjoyed 'long usage.'"[336]

In part, this Article reinforces these arguments. For many Founding Era legal elites, the First Amendment—far from being vague or abstract—imposed discrete legal commands recognized at common law. The First Amendment, in other words, was not designed or originally understood to provide a font of judicially crafted doctrines protecting expressive freedom.

At the same time, the history of the First Amendment complicates the idea that seemingly abstract constitutional rights actually carried more determinate common-law meanings.[337] Many Founders, as this Article demonstrates, forcefully rejected lawyerly assumptions about constitutional interpretation. In this way, the Founders' virulent contest over the legal implications of expressive freedom muddies the historical accounts offered by Donohue and Stinneford. If Republicans like George Hay were right that answering "a great constitutional question . . . depends, not on cases and precedents furnished by books, but on

333. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192 (2016); *see also id.* at 1270-71 ("That which was consistent with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and illegal.").

334. *Id.* at 1192.

335. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1743, 1745 (2008).

336. *Id.* at 1745.

337. By overwhelmingly relying on Founding Era legal elites, Donohue and Stinneford implicitly accept their sources' belief that ostensibly abstract terms like "unreasonable" and "unusual" should be read as legal terms of art. Stinneford discounts a contrary statement by Samuel Livermore during the First Congress because "Livermore . . . does not appear to have been within the mainstream of eighteenth-century thought regarding the usefulness of common law precedent generally." Stinneford, *supra* note 335, at 1809. But while Stinneford is surely correct that Livermore was outside the mainstream of constitutional thought *among legal elites*, his view nonetheless reflected an important current in American constitutional thought.

principles whose origin is to be traced in the law of nature,"[338] that observation resonated far beyond the topic of expressive freedom.[339]

A scholarly focus on the indeterminacy of the original First Amendment may thus seem deserved. That emphasis, however, misses a crucial point. As concepts, speech and press freedoms were relatively well defined, even though written in a different language. And perhaps, with a hint of irony for those who seek constitutional stability in original meaning, this lost history reveals our modern dilemma: the proper scope of expressive freedom is left for us to determine.

338. HAY, *supra* note 152, at 9.

339. To be sure, originalists might accept the more lawyerly Federalist position, leaving the Donohue and Stinneford positions undisturbed. But that choice, it is worth noting, would require accepting Federalist views of the First Amendment, too, thus undermining any plausible originalist basis for modern speech law.