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The Invention of First Amendment Federalism

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When insisting that the Sedition Act of 1798 violated the First Amendment, Jeffersonian Republicans cast their argument in historical terms, claiming that the Speech and Press Clauses eliminated any federal power to restrict expression. Scholars, in turn, have generally accepted that Republicans had a consistent understanding of the First Amendment throughout the 1790s. But Founding Era constitutionalism was dynamic in practice, even while often conservative in rhetoric, and scholars have missed the striking novelty of the principal argument against the Sedition Act. Republicans had taken a rights provision and transformed it into a federalism rule.

Mostly ignored in the literature, and never analyzed as a central feature of the opposition to the Sedition Act, the problem of partisan jury selection drove the shift in Republican thought. As originally understood, speech and press freedoms put juries primarily in charge of administering governmental limitations of expression. Following the development of political parties, however, Republicans perceived that the guarantee of a jury trial was nearly meaningless when federal jurors were hand selected by partisan federal marshals. In response, Republicans promoted a new reading of the First Amendment. Deeply suspicious of abuse by federal judges and juries, Republicans insisted that the First Amendment deprived the federal government of any authority to regulate speech or the press, even though analogous speech and press clauses at the state level left considerable room for states to regulate harmful expression.

This episode reveals a latent tension in eighteenth-century constitutionalism. Some threads of Founding Era thought embraced the notion of a document with fixed meaning, but other features encouraged constitutional evolution as conditions changed. Rather than seeking a principled resolution of this tension, however, Republicans developed entirely new arguments and then cast them in historical terms. The invention of First Amendment federalism also

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raises the possibility of a different path for modern speech doctrine, guided less by a particular theory of why speech is special and more by practical concerns about political entrenchment and politically biased enforcement.

Introduction

In May 1797, with partisan tempers flaring, a Federalist-dominated federal grand jury in Richmond presented "as a real evil the circular Letters of several members of the late Congress, and particularly Letters with the Signature of [Virginia Republican] Samuel J. Cabell."[1] Coming a year before the infamous Sedition Act of 1798, the presentment unleashed a torrent of criticism and catalyzed Republican thought on speech and press freedoms. Crucially, it taught Republicans that they could no longer rely on juries as the great "palladium of liberty."[2] As the Virginia House of Delegates explained that winter, juries had become a tool for the "subjection of the natural right of speaking and writing freely, to the censure and controul of Executive power."[3] Republicans, in response, developed a new conception of the

1. Presentment of the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1797) [hereinafter Presentment of the Grand Jury], *in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 181, 181 (Maeva Marcus et al. eds., 1990).

2. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *350 ("[T]he liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate . . . ."); A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (1788) (asserting that in prosecutions of "a bold writer, or any other person, who had become obnoxious to [the government,] . . . the trial by jury may well be called the palladium of liberty"), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 686 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

3. *Resolution of the Virginia House of Delegates*, VA. GAZETTE, & GEN. ADVERTISER (Richmond), Jan. 3, 1798, at 2.

Speech and Press Clauses, arguing that the First Amendment removed *all* federal authority over expression, even though state speech and press guarantees left ample room for state-level regulations of harmful speech.

The basic problem, as Republican congressional leader Albert Gallatin explained during the Sedition Act debates, was jury selection. The Judiciary Act, it turns out, put federal marshals in charge of hand selecting federal jurors in many mid-Atlantic and Southern states. Back in 1789, executive control over juror selection *enhanced* rights, helping to ensure that creditors received fairer treatment in federal courts than in state courts dominated by parochial juries. But following the emergence of political parties in the 1790s, the selection of jurors by a federal marshal—a "creature of the Executive," as Gallatin put it—raised grave problems in politically charged cases.[4] "[W]hen the supposed crimes to be punished were a libel against the Administration," Gallatin asked rhetorically, "what security of a fair trial remained to a citizen, when the jury was liable to be packed by the Administration, when the same men were to be judges and parties?"[5]

Mostly ignored by scholars, and never analyzed as a central feature of Republican thought,[6] the problem of partisan jury selection lay at the heart of opposition to the Sedition Act and powerfully shaped Republican strategy and rhetoric about speech and press freedoms. Republicans widely acknowledged that libelous speech ought to be proscribed, and many agreed that seditious speech should be criminally punished. But critics of the government, Congressman Edward Livingston explained, would much

4. 8 ANNALS OF CONG. 2164 (1798) (statement of Rep. Albert Gallatin).

5. *Id.*

6. Many scholars have pointed out Republican *complaints* about jury selection, usually once sedition prosecutions were underway, but these scholars have not explored how fears of partisan juries shaped Republican thought about speech and press freedoms in the first place. *E.g.*, 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 42–43 (1919); ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 78 (1920); MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 67–68 (2000); PETER CHARLES HOFFER, THE FREE PRESS CRISIS OF 1800: THOMAS COOPER'S TRIAL FOR SEDITIOUS LIBEL 47–48 (2011); Frank Maloy Anderson, *The Enforcement of the Alien and Sedition Laws*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 115, 125–26 (1914); *Juror Reform Bills of 1800*, *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 270, 270 (Maeva Marcus ed., 1992); 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, 182–83 (Maeva Marcus ed., 1992); Geoffrey R. Stone, *The Story of the Sedition Act of 1798: "The Reign of Witches"*, *in* FIRST AMENDMENT STORIES 13, 20 (Richard W. Garnett & Andrew Koppelman eds., 2012). Richard Buel Jr. observes that lessened confidence in juries reinforced longstanding Republican opposition to proscribing political opinions, RICHARD BUEL JR., SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789-1815, at 251–52 (1972), and Adrienne Koch and Harry Ammon note that Jefferson's effort to reform jury selection was an aspect "of one campaign to defend civil liberties," Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 153 (1948), but these works do not account for the Republicans' innovative theory of the First Amendment.

likelier "receive an impartial trial" in a state tribunal, without "a jury selected by an officer holding his office at the will of the President."[7] With Federalists running all three branches of the national government, Republicans skeptical about the administration of speech-suppressing laws channeled their thinking toward an innovative reading of the First Amendment.

The Republican account of the First Amendment departed substantially from prevailing ideas about speech and press freedoms.[8] In the late eighteenth century, American elites generally understood the freedom of speech as a natural right, qualified in its scope and without concrete legal effect. This principle essentially meant that the government could regulate expression only pursuant to law and only in promotion of the public good, as determined in good faith by the people and their representatives. For many, the freedom of speech also imposed a more categorical limit on governmental power, barring punishment of well-intentioned statements of one's thoughts but leaving the government free to punish efforts to deceive others. The freedom of the press was multifaceted, too, providing both a broad requirement that the government restrict publishing only in the public interest and a narrower categorical ban on licensing rules that imposed "prior restraints" on printers. The latter of these effectively ensured that juries stood between the government and any restrictions on the press.

By the late 1790s, after national political parties had developed, these conventional speech and press freedoms offered little solace to Republicans. The guarantee of a jury trial was nearly meaningless if jurors were hand selected by federal marshals, whose search for jurors of sound judgment would naturally lead them to people with similar political views. And once the jury was stacked, substantive protections would be worthless, too. Partisan juries, they perceived, would tend to view invectives against the Adams Administration as breaching the Sedition Act's prohibition of "false,

7. 8 ANNALS OF CONG. 2153 (1798) (statement of Rep. Edward Livingston).

8. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 312 (2017) ("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."). For more on speech and press freedoms from the Founding Era to the Sedition Act, see generally PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW (2010); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); David. S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); and David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985). For a closer look at non-elite attitudes, see 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).

scandalous and malicious" writings—a narrowly drawn legal rule that comported with prevailing law. Strongly suspicious of abuse by federal judges and juries, Republicans insisted that the First Amendment categorically deprived the federal government of *any* authority to regulate speech or the press.

Scholars tend to treat Republican views about the federal Speech and Press Clauses as mostly static, making the fight over the Sedition Act an opportunity for the Founding generation to hash out a constitutional disagreement that had been lurking throughout the 1790s.[9] On this view, the election of 1800 was pivotal in fixing the role of speech and press freedoms in American democracy. "In their first opportunity to weigh in on the matter," Akhil Amar writes, "American voters sided with [James] Madison, vaulting his mentor and fellow free-speech champion Thomas Jefferson into the executive mansion and sweeping the Jefferson-Madison party into congressional power."[10] Importantly, this conventional account lends an air of originalist support for our more libertarian approach to modern First Amendment law.

There are some grains of truth to this story of historical continuity. Republicans and Federalists frequently clashed in the 1790s over the role of popular participation in politics,[11] and this conflict occasionally led to

9. *See, e.g.*, Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 837 ("The abstract language of the First Amendment left unresolved differing views about the meaning of freedom of speech and press; these disputes would break out into the open later on in the 1790s . . . ."); 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, 121 (1999) ("[T]he Sedition Act was really a 'last hurrah' and pyrrhic victory in a conflict between a fading 'republican' and still emerging 'liberal' understanding of representation and the political and social order."). For portrayals of Republican views as consistent over the 1790s, see, for example, Anderson, *supra* note 8, at 529–33; Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1567–71 (1995); and Mayton, *supra* note 8, at 117–21. When scholars have drawn on the dynamism of the period, it is often to emphasize a putative shift in views among Federalists. *E.g.*, Anderson, *supra* note 8, at 519–20. Leonard Levy, it is worth noting, famously argued that Republican views substantially evolved in the 1790s. But where Levy perceived *continuity* in an understanding of the First Amendment as a categorical bar on federal regulations of expression, LEVY, *supra* note 8, at 323, and *novelty* in Madison's more liberal understanding of speech and press freedoms, *id.* at 320–25, my view is the opposite. Nobody at the Founding argued that the First Amendment would have a different effect than state speech and press freedoms, but *other* arguments against the Sedition Act were not—as David Rabban rightly points out—"a sudden breakthrough in libertarian thought." Rabban, *supra* note 8, at 852.

10. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 169 (2012). For those keeping score, Americans' first electoral opportunity to weigh in on the Sedition Act was the election of 1798—a tidal wave Federalist victory. In another work, Amar wrote that "a popular majority adjudicated the First Amendment question in the election of 1800, by throwing out the haughty and aristocratic rascals who had tried to shield themselves from popular criticism." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 23 (1998) [hereinafter AMAR, BILL OF RIGHTS]. The Sedition Act, he emphasized, was a "betrayal of the original Bill of Rights." *Id.* at 305.

11. *See* COLLEEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-

disputes over speech and press freedoms.[12] Not every rejoinder to the Sedition Act was novel. But the *dominant* Republican argument was a substantial departure from earlier views. When it came to interpreting the First Amendment, the *only* consensus position among Republicans in the late 1790s was that federal protections, *unlike state-level guarantees*, categorically barred any regulation of expression.[13] At the heart of their campaign against the Sedition Act, Republicans were recasting the First Amendment as a rule about the allocation of power between the federal and state governments, not as a guarantee of rights.[14]

The Republican invention of First Amendment federalism highlights latent tensions in American constitutionalism at the Founding. On the one hand, dynamism and creativity thrived. Partisan political objectives were certainly one catalyst for constitutional change, but there were other contributors too. From an experiential standpoint, Americans were born and bred in the evolutionary culture of English customary constitutionalism, where time and again new constitutional principles had emerged from prominent public controversies. This experience made it second nature for the Founders to argue for new constitutional rules.[15] And from a more philosophical bent, elites still embraced flexible interpretive principles derived from social-contract theory, like the idea that constitutions should be construed to promote the public good.

At the same time, however, Americans were beginning to think about and describe their constitution in conservative—even static—terms. To be sure, this phenomenon was not entirely new. English constitutional rhetoric

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GOVERNMENT 54 (2009) (describing the conflict between James Madison and Alexander Hamilton as being "propelled by a fundamental philosophic disagreement over the nature and role of public opinion in a republic"). *See generally* JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS (1993) (providing an overview of political conflict in the 1790s).

12. *See* BUEL, *supra* note 6, at 91–136 (highlighting disagreements over the role of public opinion in various conflicts throughout the 1790s).

13. *See* Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 129–35 (discussing the Republican opposition to the Sedition Act and simultaneous acceptance of analogous state laws). For a brief summary of Jefferson's views, see Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 694–99 (1998).

14. Although limiting powers was sometimes a means for protecting liberty, the Founding generation did not equate "retaining rights" and "reserving powers" in the way that much of the modern scholarship suggests.

15. *See, e.g.*, Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1171–74 (2013) (describing the emergence of the anticommandeering principle post-ratification); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1017–18 (2010) (observing that Federalists and Republicans had "a tendency to reargue" constitutional issues of foreign policy that had appeared settled at the time of ratification); Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018) (presenting Madison's enumerated-powers argument against the national bank, and the ensuing debate, as novel).

had long been backward-looking, replete with claims about the fundamental law that had existed since "[t]ime immemorial."[16] But as historian Jonathan Gienapp has revealed, the idea of constitutional fixity took a new form in the early 1790s as Americans came to associate the writtenness of the constitutional text with a permanence in constitutional meaning.[17] In other words, the Founders increasingly viewed their own constitutionalism as a new type of enterprise, rooted in the interpretation of a historical document with fixed meaning.

With the Republican invention of First Amendment federalism, these strands of Founding Era constitutionalism powerfully collided. Republicans explicitly made arguments about the emergence of a new and unanticipated constitutional problem: the partisan selection of federal jurors. That point bears repeating. Republicans openly discussed the existence of new problems that, in their view, required a particular construction of the First Amendment. Yet when making these observations, they were constrained by the incipient notion of a fixed constitution, limiting their ability to articulate a case for interpretive change. The result was a sharp disjunction in their practice and rhetoric. Republicans adopted a novel constitutional position, based on a forceful argument about how long-held principles ought to apply to new circumstances, all the while casting their argument in originalist terms.

Demonstrating the novelty of the Republican position against the Sedition Act begins in Part I with a survey of debates about expressive freedom a decade earlier. Discussions of speech and press freedoms at that point featured an assortment of ideas, but no one articulated a theory of the First Amendment's Speech and Press Clauses premised on federalism. To be sure, some Founders had more robust theories of expressive freedom than others, and some had a limited view of congressional power to restrict expression under Article I. But nobody thought that the First Amendment had a categorical effect while state constitutional guarantees did not. The whole point of enumerating federal speech and press rights, in fact, was to ensure *parity* in the protection of those rights at the federal and state levels. At the same time, this Part illuminates the more flexible thinking about rights in the 1780s that helped shape Republican thinking about the Sedition Act a decade later.

Part II turns to the Cabell affair, explaining how Republicans came to realize that the advent of political parties, combined with the hand selection of jurors, opened the door to substantial partisan abuses. Partisanship, in other words, undermined the effectiveness of conventional speech and press

16. JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 29–30 (2005).

17. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018).

freedoms.[18] And with these concerns in mind, Jefferson and his political allies began to shift toward a new view of the First Amendment—all of this occurring months before the Sedition Act was even conceived.

The Sedition Act is addressed in Part III, with a focus on the Republican opposition. As is true with any innovative thinking, Republican ideas about the First Amendment reflected continuity with certain strands of their earlier views. When opposing state authority to levy taxes to support religious instruction in Virginia in the mid-1780s, for instance, Jefferson and Madison had described the inalienable natural right to conscience in a way that categorically disclaimed state power to legislate on religious matters. (Notably, their argument lacked any federalism dimension.) And a few years later, during the ratification debates, some Founders had denied the existence of any affirmative federal power to regulate printers under Article I. Moreover, when emphasizing that hand selecting jurors effectively allowed the administration to decide its own cases, Republicans tapped into a longstanding natural-law principle that "a man is not to be a judge in his own cause."[19] These constitutional traditions provided crucial ingredients for later developments in Republican thought.

What was strikingly novel about the opposition to the Sedition Act, however, was their conclusion: The First Amendment imposed a *categorical* ban on federal power to regulate expression *even though analogous state constitutional guarantees did not*. Faced with dire concerns about the administration of a federal sedition law, Republicans sought to transform the Speech and Press Clauses into a rule about the allocation of federal and state power. Rather than argue that new circumstances required a change in constitutional interpretation, however, Republicans cast their argument in terms of original meaning. The First Amendment, Madison asserted in his famous Virginia Report of 1800, "was meant as a positive denial to Congress, of any power whatever on the subject."[20]

Part IV evaluates the Republican effort to revise history. It hardly needs mention that the Sedition Act deserves its place as a national embarrassment. But that is no reason to afford a mythical status to its opposition. Republican constitutional arguments against the Sedition Act—though still defended by

18. For an assessment of the broader constitutional impact of the development of parties, see generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

19. Anarchy, *To the* Anti-Federal Electors *of the County of Dutchess*, POUGHKEEPSIE COUNTRY J., Mar. 18, 1788, *reprinted in* 21 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1449, 1450 (John P. Kaminski et al. eds., 2005); *see also, e.g.*, THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., Wesleyan University Press 1961) ("No man is allowed to be a judge in his own cause . . . ."); THE FEDERALIST NO. 80, *supra*, at 538 (Alexander Hamilton) ("No man ought certainly to be a judge in his own cause . . . .").

20. James Madison, The Report of 1800 (Jan. 7, 1800), *in* 17 THE PAPERS OF JAMES MADISON 303, 339 (David B. Mattern et al. eds., 1991); *see id.* at 340 (declaring that the First Amendment "was intended as a positive and absolute reservation" of any "power whatever over the press").

many scholars and often used in modern constitutional argument[21]—were deeply problematic. Contorted understandings of history and federalism, not a liberal conception of expressive freedom, endured as the oft-invoked "principles of '98."

But rather than abandoning the Republican opposition to the Sedition Act as a centerpiece of our constitutional tradition, perhaps we might elevate it in a different way. The enduring insight of Republicans was not their wholly invented idea that the Speech and Press Clauses were designed as a federalism rule. Nor was it a theoretical account of why speech deserves special constitutional protection—a perspective that dominates modern judicial decisions and academic commentary on expressive freedom.[22] As argued elsewhere, "[H]istory undermines the notion that the First Amendment itself embraces a particular rationale for protecting expression."[23] The Republican invention of First Amendment federalism, which also lacked a theoretical account, bolsters that conclusion.[24] Rather, the enduring insight of Republicans was that speech-restrictive rules are dangerous when designed and implemented to entrench political power.

That idea could help reorient First Amendment doctrine today. As originally designed, the First Amendment recognized only a few determinate rules and otherwise left the government free to regulate speech and the press to promote the public good. The Republicans opposed to the Sedition Act tapped into this principle, worried that Federalists were not pursuing the interests of the whole political society but instead were simply trying to entrench their own power. As we will see, several foundational First Amendment decisions in the twentieth century stem from a similar concern about partiality in governmental decisions.[25] Since then, however, doctrine has gravitated toward an overriding (and ahistorical) emphasis on content and viewpoint neutrality. Perhaps it is time to bring the pursuit of the public good back to the fore.

I. The First Amendment

To understand how Republicans reinterpreted the First Amendment in the late 1790s, we first need to consider where matters stood a decade earlier.

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21. *E.g.*, LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 47–48 (1991); Bybee, *supra* note 9, at 1556, 1567–71. For further discussion, see *infra* notes 259–62 and accompanying text.

22. *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).

23. Campbell, *supra* note 8, at 262.

24. To be sure, a minority of Republicans made theory-based arguments that have become significant to our modern constitutional ethos. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 38, 119, 245 (1993) (drawing on James Madison's ideas).

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

Two points deserve emphasis up front. First, although the term "rights" had a variety of meanings, rights generally were not the inverse of powers, disabling the government from acting within an entire field. Second, the Speech and Press Clauses were designed to provide protections at the federal level that were *equivalent* to those created at the state level by state bills of rights. The constitutional arguments levied a decade later by Republicans against the Sedition Act were thus doubly innovative.

But rights discourse in the late 1780s provides more than just a contrast to arguments against the Sedition Act a decade later. The prevailing conception of rights at the Founding also helps reveal how and why Republicans were able to invent an entirely new understanding of the First Amendment in so little time. Again, two points deserve emphasis. First, speech and press freedoms empowered *juries* to decide cases involving governmental restrictions of expression. This feature put extraordinary pressure on Republicans to come up with a new understanding of the First Amendment once the protection of a jury in sedition cases was, in their view, undermined by the partisan selection of jurors. Second, and more fundamentally, the philosophical ideas underpinning American thinking about rights had inculcated flexible and dynamic interpretive ideas among the Founders. And these older habits of mind lingered late into the 1790s, even as Americans increasingly framed their constitutional arguments in fixed terms.

A. Eighteenth-Century Rights

Founding Era constitutionalism was grounded in social-contract theory.[26] This theory was premised on a thought experiment designed to reveal the purposes and limits of governmental authority. It did so by asking, hypothetically, what would lead individuals to form a political community in the first place—an agreement known as a "social compact" or "social contract." After creating a body politic, the theory went, the people would then agree to form a government through an instrument known as a "constitution."[27]

American understandings of rights in the late 1780s flowed from this theory. All individuals, social-contract theory posited, surrendered some of their "natural rights"—or their rights to life, liberty, and property in an imagined "state of nature"[28]—for the greater security of those rights as a

26. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–88 (2017).

27. Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267, 267, 271 (1992); *see also* sources cited *infra* note 29.

28. *See, e.g.*, MASS. CONST. pt. 1, art. I (ratified 1780) ("All men . . . have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; [and] that of acquiring, possessing, and protecting property . . . ."), *amended by* MASS. CONST. amend. CVI; *see also* MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC:

whole. The point of retaining natural rights, however, was *not* to make certain aspects of natural liberty immune from governmental regulation. Rather, retained natural rights were aspects of natural liberty that could be restricted only with *just cause* and only with *consent of the body politic*.[29] Natural rights retained by the people were subject to regulation by the people.

It was impractical, of course, for the entire body of the people to exercise power directly, so Americans looked to representative institutions for that purpose. Not surprisingly, the most important representative institutions were legislatures, and retained natural liberty could therefore be restricted pursuant to *law*. William Blackstone summed it up nicely in his *Commentaries*, remarking that the natural right "of acting as one thinks fit" is exchanged for civil liberty, which "is no other than natural liberty so far restrained by human laws . . . as is necessary and expedient for the general advantage of the public."[30]

But legislatures were not the only representative bodies. Juries, too, served in a representative capacity. In modern constitutional law, we tend to think of juries as factfinding bodies and jury rights as procedural safeguards.[31] Juries in the eighteenth century, however, were not simply, or even primarily, empaneled to protect criminal defendants and civil litigants. Rather, jurors acted as representatives of the entire political society.[32] As John Adams privately noted, "the People are by the Constitution appointed to take [part], in the passing *and Execution* of Laws."[33] In an overstated but revealing comment, Thomas Jefferson went even further: "Were I called upon to decide whether the people had best be omitted in the Legislative or

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STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION 77–82 (1996) (exploring the treatment of these concepts in the writings of Thomas Jefferson).

29. *See* Campbell, *supra* note 26, at 92–98 (exploring this concept); Hamburger, *supra* note 8, at 909 (same); Barry A. Shain, *Rights Natural and Civil in the Declaration of Independence* (same), *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 116, 132, 139–41 (Barry Alan Shain ed., 2007); *see also* Campbell, *supra* note 8, at 272 n.114 (collecting additional sources).

30. 1 WILLIAM BLACKSTONE, COMMENTARIES *121.

31. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 70 (2004) (noting this view).

32. *See, e.g.*, JAMES WILSON, *Of Juries* (explaining this view in connection to social-contract theory), *in* 2 COLLECTED WORKS OF JAMES WILSON 954, 960 (Kermit L. Hall & Mark David Hall, eds., 2007); *see also* KRAMER, *supra* note 31, at 70 ("[T]he eighteenth-century view was more complex."); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996) ("[R]epresentation and jury trial were dual securities for . . . personal rights."); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 50–52 (1986) (surveying eighteenth-century views of juries); 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, 536 (2007) (discussing the representative view of juries).

33. John Adams, Diary Notes on the Right of Juries (Feb. 12, 1771) (emphasis added), *in* 1 LEGAL PAPERS OF JOHN ADAMS 228, 228 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

Judiciary department, I would say it is better to leave them out of the Legislative."[34]

Because the natural rights of life, liberty, and property could be restricted only with the consent of the body politic, juries were integral to the American legal system.[35] "Juries are taken by Lot or by Suffrage from the Mass of the People," Adams declared, "and no Man can be condemned of Life, or Limb, or Property or Reputation, without the Concurrence of the Voice of the People."[36] This view was conventional. "Juries are constantly and frequently drawn from the body of the people, and freemen of the country," Federal Farmer later explained, "and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department."[37]

According to social-contract theory, the creation of a body politic set the stage for a "constitution" in which the people created a government by majority consent.[38] In the English tradition, the constitution was customary, stemming from longstanding traditions and an assortment of seminal documents.[39] And these customary protections included a variety of "constitutional" or "fundamental" positive rights that were defined in terms of governmental authority. Notably, some of these rules, like the right to a jury trial and the rule against ex post facto laws, limited how the government could restrict natural liberty.

Social-contract theory thus shaped American thinking about rights, and the following subpart will discuss speech and press freedoms in particular.

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34. Letter from Thomas Jefferson to Abbé Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed., 1958).

35. *See, e.g.*, Virginia Assembly Debates (Dec. 14, 1798) (statement of Del. George K. Taylor) ("[*N*]*atural rights* . . . could not be deprived . . . without a trial by Jury."), *in* DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA, UPON CERTAIN RESOLUTIONS BEFORE THE HOUSE, UPON THE IMPORTANT SUBJECT OF THE ACTS OF CONGRESS PASSED AT THEIR LAST SESSION, COMMONLY CALLED, THE ALIEN AND SEDITION LAWS 18 (Richmond, Thomas Nicolson 1818) [hereinafter DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA].

36. Adams, *supra* note 33, at 229.

37. FEDERAL FARMER, LETTER XV TO THE REPUBLIC (1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1043, 1048–49 (John P. Kaminski et al. eds., 2004).

38. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *52 ("[A] state is a collective body . . . [that] can therefore be no otherwise produced than by a *political union*; by the consent of all persons . . . according to [the state's] constitution[] . . . ."); John Adams, *Preliminary Observations* ("The first 'collection' of authority must be an unanimous agreement to form themselves into a *nation*, *people*, *community*, or *body politic* . . . ."), *in* 4 THE WORKS OF JOHN ADAMS 299, 301 (Charles Francis Adams ed., Bos., Little, Brown & Co. 1851); James Madison, *Sovereignty* ("[L]et us consult the Theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights the safety & the interest of each may be under the safeguard of the whole."), *in* 9 THE WRITINGS OF JAMES MADISON 568, 570 (Gaillard Hunt ed., 1910).

39. *See generally* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 4 vols. (1986–1993) (comparing British and American constitutional thought). For a shorter discussion, see KRAMER, *supra* note 31, at 9–34.

But another point is worth emphasis. Social-contract theory trained Americans to think and speak about foundational principles in potentially conflicting terms.

On the one hand, social-contract theory prized arguments about the happiness of the political society as a whole—a highly underdeterminate standard that created substantial room for debate. 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."[40] The social contract, we must remember, was not a real agreement; its content was determined by abstract reasoning. This gave the social contract a dynamic, evolutionary character.

At the same time, however, the Founders often talked about the social contract as if it were a historical agreement.[41] They often debated its content, for instance, by invoking what the common law had been since "time immemorial," even without any historical basis for those claims.[42] Moreover, many Founders thought that one of the most reliable ways of ascertaining the dictates of reason was by looking to the lessons of experience, and particularly the customary traditions of the common law.[43] Founding Era constitutionalism thus trained Americans to think and speak about foundational principles in potentially conflicting ways. Republicans would take that training to heart a decade later.

B. Speech and Press Freedoms

The Founders often described the freedom of speaking, writing, and publishing as a retained natural right.[44] Ordinarily, as we have seen, such "rights" were subject to legislative restrictions that promoted the public good. Unsurprisingly, then, English and American law recognized plenty of limitations on speech through rules against defamation, blasphemy, perjury, profane swearing, and so forth.[45] A series of restrictive English efforts to

40. JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 59 (London, J. Dodsley et al. 1768).

41. *See, e.g.*, JAMES WILSON, *Of Citizens and Aliens* (describing the formation of the social contract historically but then discerning the terms of the social contract through reasoning, not historical inquiry), *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 32, at 1038, 1045; *Brutus II*, N.Y.J., Nov. 1, 1787 (same), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 154, 154–55 (John P. Kaminski et al. eds., 2003).

42. *See* REID, *supra* note 32, at 28–40 (reviewing the concept of "immemoriality").

43. Campbell, *supra* note 8, at 290–92.

44. *See id.* at 265 n.73 (collecting sources).

45. *See, e.g.*, JAMES WILSON, *Of the Natural Rights of Individuals* (discussing limits of the freedom of speech), *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 32, at 1053, 1066; William Livingston, *Of the Use, Abuse, and Liberty of the Press*, INDEP. REFLECTOR (N.Y.C.), Aug. 30, 1753 ("Civil Liberty is built upon a Surrender of so much of our natural Liberty, as is necessary for the good Ends of Government; and the Liberty of the Press, is always to be restricted from becoming a Prejudice to the public Weal."), *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 75, 79 (Leonard W. Levy ed., Carolina Acad. Press 1996); Jacob Rush, The Nature

insulate the government from public criticism, however, led political theorists in the seventeenth and eighteenth centuries to view the freedom of speaking, writing, and publishing as vital to representative government.

Particularly important in this effort were the widely read essays that John Trenchard and Thomas Gordon published under the pseudonym *Cato* in the early 1720s. In his essay, "Of Freedom of Speech," Gordon highlighted the connection between public discussion and republican government:

> 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.
>
> The administration of government is nothing else, but the attendance of the trustees of the people upon the interest and affairs of the people. And as it is the part and business of the people, for whose sake alone all publick matters are, or ought to be, transacted, to see whether they be well or ill transacted; so it is the interest, and ought to be the ambition, of all honest magistrates, to have their deeds openly examined, and publickly scanned . . . .[46]

Gordon essentially argued that overregulation of speech was *against* the public interest because it deprived the public of useful, perhaps even essential, information about their government.

This understanding of the freedom of speech, viewed through the lens of popular sovereignty, dominated American discourse about the right. "The citizen under a free government," James Wilson explained in his law lectures, "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."[47] Others widely agreed that open public discussion was essential to republican government.[48]

To be sure, not all criticism of government was okay. Carefully delineated governmental power to punish sedition, for instance, was usually accepted even among otherwise "liberal" writers like *Cato*.[49] For most

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of an Oath Stated and Explained (Aug. 8, 1796) (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"), *in* CHARGES AND EXTRACTS OF CHARGES, ON MORAL AND RELIGIOUS SUBJECTS 25, 31 (Phila., D. Hogan 1803).

46. [THOMAS GORDON], OF FREEDOM OF SPEECH: THAT THE SAME IS INSEPARABLE FROM PUBLICK LIBERTY (1720), *reprinted 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).

47. WILSON, *supra* note 41, at 1046.

48. *See* BUEL, *supra* note 6, at 93–112 (esp. 93), 128–35, 244–61 (esp. 250, 255–57) (offering a balanced assessment of Federalist views).

49. For recognitions of the general approval of sedition laws in the eighteenth century, see BLUMBERG, *supra* note 8, at 2; HOFFER, *supra* note 6, at 139; LEONARD W. LEVY, LEGACY OF

people, the right to make well-intentioned statements hardly included a corollary right to deceive others. Nonetheless, Americans recognized the importance of remaining vigilant against governmental efforts to suppress dissent under the pretext of fighting sedition. In an essay written after he successfully defended John Peter Zenger against charges of sedition, James Alexander explained that

> abuses of the Freedom of Speech are the excrescences of Liberty. They ought to be suppressed; but to whom dare we commit the care of doing it? An evil Magistrate entrusted with a power to *punish Words* is armed with a Weapon the most *destructive* and *terrible*. Under pretense of pruning off the exuberant branches, he frequently destroys the tree.[50]

The English and American response was a constitutional right commonly known as the liberty of the press.

The liberty of the press put juries in control of governmental efforts to regulate expression. First, the principle barred the government from instituting a licensing regime—the famous rule against "previous restraints upon publications"[51]—meaning that jurors rather than governmental censors would have the final word on efforts to control publishing. "The liberty of the press, as established in England," Jean Louis de Lolme explained, ensured that libel prosecutions would "proceed by the Trial by Jury."[52] Controversially, William Blackstone argued that the right afforded no "freedom from censure for criminal matter when published."[53] But American views were more complex. Juries had the power to give general verdicts, and many Americans thought that the truth of putatively seditious statements was a proper ground for acquittal.[54]

SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 10 (1960) [hereinafter LEVY, LEGACY OF SUPPRESSION]; Berns, *supra* note 13, at 134; Bogen, *supra* note 8, at 462; Hamburger, *supra* note 8, at 910–11; Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225, 252 (1985); and Rabban, *supra* note 8, at 810, 823. The acceptance of sedition laws, however, was by no means unanimous. In a revised and retitled version of his pathbreaking and controversial book, *Legacy of Suppression*, Leonard Levy offered contradictory remarks about the original meaning of the First Amendment. LEVY, *supra* note 8, at 272–74.

50. James Alexander, Letter to the Editor, *Free Speech Is a Pillar of Free Government*, PA. GAZETTE (Phila.), Nov. 17, 1737, *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, *supra* note 45, at 62, 62–63.

51. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52.

52. JEAN-LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 283 (London, T. Spilsbury 1775).

53. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52. Notably, however, Blackstone assumed that "the object of legal punishment" was "the disseminating or making public of bad sentiments, destructive of the ends of society" and that "to censure the licentiousness is to maintain the liberty of the press." *Id.* at *152–53.

54. This issue remained contested for a long time. *See, e.g.*, Letter from John Adams to William Cushing (Mar. 7, 1789) ("The difficult and important question is whether the Truth of words can be admitted by the court to be given in evidence to the jury, upon a plea of not guilty?"), *in* FREEDOM

Juries thus linked the common law right of press freedom to the retained natural right of speaking, publishing, and writing—together guaranteeing popular control over any efforts to abridge expression. Only one early state constitution explicitly recognized both principles. The Pennsylvania Constitution of 1776 declared that "the 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."[55] Meanwhile, constitutions in other states mentioned only the liberty of the press.[56] But by maintaining a republican form of government and ensuring the right to a jury trial, other states implicitly protected unmentioned natural rights, including the freedom of speaking, writing, and publishing.

Founding Era discussions of the liberty of the press thus reflect a foreign way of thinking. From our modern perspective, speech and press freedoms operate primarily as *substantive* limits on legislative power. The government cannot regulate speech based on the viewpoint being expressed; restrictions of speech based on its communicative content are presumptively unconstitutional; and so forth.[57] Moreover, because expressive freedom operates as a set of substantive legal rules, judges are specially charged with ensuring that the government stays within its proper legal limits.[58]

From this perspective, scholars have voiced exasperation with the idea that the freedom of the press was confined to a rule against prior restraints. Limiting regulations of expression to *lawful* restraints, Wendell Bird writes, would have made press freedom "nothing but a tautology."[59] Indeed, defining expressive freedom in a way that lacked substantive content would be directly contrary to the modern definition of constitutional rights.

In the eighteenth century, however, it was anything but a tautology to

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OF THE PRESS FROM ZENGER TO JEFFERSON, *supra* note 45, at 152, 153; Kate Elizabeth Brown, *Rethinking* People v. Croswell*: Alexander Hamilton and the Nature and Scope of "Common Law" in the Early Republic*, 32 LAW & HIST. REV. 611, 612–13, 639–41 (2014) (recounting a famous 1803–1804 New York controversy over the truth defense). American judges sometimes ruled 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).

55. PA. CONST. of 1776, ch. I, art. XII. Vermont, which was not yet recognized as an American state, also mentioned the freedom of speech in its constitution. *See* VT. CONST. of 1786, ch. I, art. XV ("That the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government—and therefore the freedom of the press ought not to be restrained.").

56. Anderson, *supra* note 8, at 464–65, app. at 538–41.

57. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992); Texas v. Johnson, 491 U.S. 397, 406, 420 (1989).

58. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984) ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any [defamation] judgment that is not supported by clear and convincing proof of 'actual malice.'").

59. WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT 11 (2016).

affirm that the government could restrict natural liberty only pursuant to laws passed by a representative legislature and enforced by a jury. Founding Era constitutional thought, after all, was obsessed with the dangers of unbounded governmental discretion, particularly when public officials had their own interests at stake. Consequently, acting pursuant to known laws passed and executed with popular consent was, as Alexander Hamilton put it, "the very essence of civil liberty" and the antithesis of arbitrary rule.[60]

The need for representative control over the creation and execution of law was especially profound in the context of sedition because of a famed axiom in eighteenth-century constitutional thought: "No man is allowed to be a judge in his own cause."[61] When someone criticized the government, the Founders widely thought, it would be downright dangerous to give agents of the government, including prosecutors and judges, the power to punish governmental critics. In this context, giving power to juries was crucial.

Commentators during the ratification debates explicitly linked jury rights to concerns about governmental suppression of dissent. The "interposition of a jury," one writer explained, was an essential shield against self-interested prosecutions:

> The Chief Magistrate, or the Legislature itself, of a republic, is as liable to personal prejudice, and to passion, as any King in Europe; and might prosecute a bold writer, or any other person, who had become obnoxious to their resentment, with as much violence and rigour. What so admirable a barrier to defend the innocent, and protect the weak from the attacks of power, as the interposition of a jury? In this respect, the trial by jury may well be called the palladium of liberty.[62]

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60. ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 100 (Harold C. Syrett ed., 1961); *see* REID, *supra* note 16, at 38–39 (explaining the eighteenth-century conception of arbitrary rule); *see also* HAMILTON, *supra*, at 100 ("When any people are ruled by laws, in framing which, they have no part, that are to bind them, to all intents and purposes, without, in the same manner, binding the legislators themselves, they are in the strictest sense slaves, and the government with respect to them, is despotic.").

61. THE FEDERALIST NO. 10, *supra* note 19, at 59 (James Madison); *accord, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) ("[A] law that makes a man a *Judge in his own cause* . . . is against all reason and justice . . . ."); THE FEDERALIST NO. 80, *supra* note 19, at 538 (Alexander Hamilton) ("No man ought certainly to be a judge in his own cause . . . ."). Indeed, the rule that no man should judge his own cause was the foundation of one of Edward Coke's most famous decisions. *See* Dr. Bonham's Case (1610) 77 Eng. Rep. 638, 652; 8 Co. Rep. 107 a, 118 a ("[O]ne cannot be Judge and attorney for any of the parties . . . ."); *see also* R.H. Helmholz, Bonham's Case, *Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 335 (2009) ("There is no doubt . . . that acting as a judge in one's own cause had long been regarded as a violation of the law of nature.").

62. A NATIVE OF VIRGINIA, *supra* note 2, at 686. As Theophilus Parsons proclaimed during the Massachusetts Ratifying Convention:

> Let him be considered as a criminal by the general government, yet only his own fellow citizens can convict him—they are his jury, and if they pronounce him innocent, not

Jury protections were essential, another Anti-Federalist exclaimed, because the government "will easily find pretexts" to restrain "what it may please them to call—the licentiousness of the press."[63] As Virginia lawyer Alexander White summarized, "should I be unjustly accused of [sedition], the trial by a jury of my countrymen is my security."[64]

These writers could hardly anticipate what lay ahead. The emergence of political parties, combined with the power of the federal administration to hand select jurors in key states, would soon undermine the sanctified status of juries as neutral arbiters in sedition cases.

C. The First Amendment

Late in the Philadelphia Convention of 1787, a few delegates pushed for a guarantee of the liberty of the press, but these proposals were narrowly defeated.[65] The Constitution thus emerged without any express protections for the freedom of speaking, writing, and publishing, or for the liberty of the press. As it turned out, the omission of a bill of rights became one of the most contentious issues during the ratification contest.

A complete review of the ratification debates is unnecessary, but a few points are worth highlighting. First, although the Anti-Federalists made all sorts of creative arguments against ratification, nobody seems to have mentioned that the Constitution would threaten the retained natural right to the freedom of speaking, writing, and publishing.[66] This silence did not stop

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> all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.

Massachusetts Ratification Convention Debates (Jan. 23, 1788) (statement of Theophilus Parsons), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1313, 1328 (John P. Kaminski & Gaspare J. Saladino eds., 2000); *see also, e.g.*, [Samuel Bryan], *Centinel I*, INDEP. GAZETTEER (Phila.), Oct. 5, 1787 ("[I]f I use my pen with the boldness of a freeman, it is because I know that *the liberty of the press yet remains unviolated*, and *juries yet are judges*."), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 158, 159 (Merrill Jensen ed., 1976); Letter from John Adams to William Cushing, *supra* note 54, at 153 ("[I]f the jury found [the putatively libelous statements] true and that they were published for the Public good, they would readily acquit.").

63. *Cincinnatus I: To James Wilson, Esquire*, N.Y.J., Nov. 1, 1787 [hereinafter *Cincinnatus I*], *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 160, 163.

64. Alexander White, *To the Citizens of Virginia*, WINCHESTER VA. GAZETTE, Feb. 22, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 402, 405 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

65. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341, 587–88, 617 (Max Farrand ed., 1911).

66. Using the Pennsylvania Constitution as a template, several state ratification conventions mentioned the freedom of speaking, writing, and publishing in a preamble to their recognition of the liberty of the press. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 93 (Neil H. Cogan ed., 1997) (proposals of North Carolina, Rhode Island, Virginia, and the Pennsylvania minority); *see also The Society of Western Gentlemen Revise the Constitution*, VA. INDEP. CHRON. (Richmond), Apr. 30, 1788 ("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

Alexander Hamilton and his friends from lambasting Anti-Federalists for misunderstanding the protection for rights in republican governments. Where the people retain sovereignty, Hamilton explained in *Federalist No. 84*, "in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations."[67] But if Hamilton was referring to speech freedom, he was responding to a straw man; the freedom of speech was ignored during the ratification controversy.[68]

The omission of a clause protecting the liberty of the press, by contrast, was one of the leading Anti-Federalist objections. Significantly, however, nobody seems to have advocated for the liberty of the press as a way of *uniquely* constraining federal authority relative to state authority. That is, there is no evidence of anyone suggesting that a federal ban on abridging the liberty of the press would take a *different* meaning than its state counterparts. To be sure, Federalists occasionally asserted that the new government would have no authority over the press under Article I.[69] (More commonly, however, Federalists simply denied that any government could abrogate fundamental positive rights.[70]) And Anti-Federalist "references to press freedom were usually cursory, with no elaboration about what the term meant or what a declaration in its favor would accomplish."[71] Nonetheless, Federalists and Anti-Federalists alike never suggested that federal protection

restraint, other than liableness to legal prosecution, for false facts printed and published."), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 2, at 769, 773.

67. THE FEDERALIST NO. 84, *supra* note 19, at 578 (Alexander Hamilton).

68. *See, e.g.*, Virginia Ratification Convention Debates (June 16, 1788) (statement of Patrick Henry) (mentioning only press freedom), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1332 (John P. Kaminski & Gaspare J. Saladino eds., 1993); FEDERAL FARMER, LETTER VI TO THE REPUBLIC (1788) (same), *in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 37, at 979, 985; *see also* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 15 (2011) ("As for freedom of speech, anti-Federalists said virtually nothing about it."). To be fair to Hamilton, Anti-Federalists had voiced concerns about all sorts of infractions on other forms of retained natural liberty. *See* Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 12–17 (1994) (describing Anti-Federalists' appeals for a "remarkably long list of rights," even including a right to hunt).

69. *See* Campbell, *supra* note 8, at 300 n.242 (collecting sources).

70. *E.g.*, A CITIZEN OF NEW YORK [JOHN JAY], AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 37, at 922, 933; *Foederal Constitution*, PA. GAZETTE (Phila.), Oct. 10, 1787, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 362, 363–64 (John P. Kaminski & Gaspare J. Saladino eds., 1981); *Uncus*, MD. J. (Balt.), Nov. 9, 1787, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 76, 78 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

71. Campbell, *supra* note 8, at 296.

for the liberty of the press would somehow be more capacious than its state-level counterparts.[72]

Indeed, the principal Anti-Federalist argument was that the federal constitution—*just like state constitutions*—ought to mention fundamental rights like press freedom. "The powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government," Brutus explained.[73] To Anti-Federalists, parity in the means of federal and state power warranted the enumeration of *the same* rights at both levels.

Over time, some Federalists recognized merit in that argument.[74] Among them, most significantly, was James Madison, who emphasized this point in his speech on June 8, 1789, introducing a set of amendments to the House of Representatives. Although congressional powers were limited, Madison explained, Congress had "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."[75] Thus, the people would benefit from having their rights guarded against federal power, too.

For the most part, Madison's push for amendments met with Federalist indifference, and congressional debates on the topic are largely unilluminating.[76] Strikingly, however, nobody so much as hinted that proposed *federal* protections for expression might differ in meaning from their *state* counterparts. Indeed, Madison's draft followed nearly word-for-word the language and structure of Pennsylvania's speech and press clauses: "The people," Madison proposed, "shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the

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72. Support for this statement comes from the author's review of every mention of the word "press" in the first twenty-four volumes of *The Documentary History of the Ratification of the Constitution*.

73. *Brutus II*, *supra* note 41, at 156; *see also, e.g.*, *Cincinnatus I*, *supra* note 63, at 162 ("The conventions that made the state and the general constitutions, sprang from the same source, were delegated for the same purpose . . . .").

74. Thomas Jefferson may deserve some credit for stimulating shifts in Madison's views. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Mar. 15, 1789) ("[I]n a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement."), *in* 14 THE PAPERS OF THOMAS JEFFERSON 659, 660 (Julian P. Boyd ed., 1958); *see also* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 443–46 (2010) (summarizing Jefferson's correspondence with Madison over adding a declaration of rights).

75. 1 ANNALS OF CONG. 438 (1789) (statement of Rep. James Madison). The editors of the Annals of Congress published two versions of the first two volumes. These versions have different pagination but identical title pages, making it necessary to distinguish them by the page headings ("History of Congress" or "Gales & Seaton's History of Debates in Congress") rather than publication details. *See* Campbell, *supra* note 26, at 91 n.27. Citations in this Article are to the "History of Congress" volumes.

76. *See* Rabban, *supra* note 8, at 814 ("[T]he few congressional comments on the proposed first amendment were brief, ambiguous, and apathetic." (citing LEVY, *supra* note 8)).

press, as one of the great bulwarks of liberty, shall be inviolable."[77] The final House version was shorter—simply declaring that "[t]he freedom of speech, and of the press . . . shall not be infringed"—but again without any suggestion of a novel meaning.[78] Again, the whole impetus for enumerating rights at the federal level was to recognize "simple, acknowledged principles" that states had already widely embraced.[79]

Indeed, decisive evidence points in the opposite direction. When it first endorsed the Speech and Press Clauses, the House also passed an amendment providing, "No *State* shall infringe . . . the freedom of speech, or of the press."[80] This provision reinforces that the First Amendment did not withdraw all federal authority to regulate expression. Put simply, "If infringements of speech and press freedoms arose from *any* controls over expression, then this proposal would have barred state laws against defamation, conspiracy, threats, profanity, blasphemy, perjury, sedition, and so forth."[81] No evidence suggests that any congressman, much less a majority of the House, had such a radical agenda in mind.[82] The First Amendment and its state-restricting counterpart thus did not, at least in the view of the House, categorically bar governmental control over expression.[83]

Nor does the language of the First Amendment suggest a lack of federal power over expression. Scholars who defend that position often point to the First Amendment's opening phrase, "Congress shall make no law . . . ."[84]

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77. 1 ANNALS OF CONG. 434 (1789) (statement of Rep. James Madison). Pennsylvania's constitution specified that "the 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." PA. CONST. of 1776, ch. I, art. XII.

78. House Committee Report (July 28, 1789), *in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 27, 28 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

79. 1 ANNALS OF CONG. 738 (1789) (statement of Rep. James Madison).

80. House Resolution and Articles of Amendment (Aug. 24, 1789) (emphasis added), *in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 78, at 35, 39.

81. Campbell, *supra* note 8, at 313.

82. *See* Anderson, *supra* note 8, at 502, 508 (refuting the notion that any of the Framers considered the Speech and Press Clauses to be absolute prohibitions); Bogen, *supra* note 8, at 458 n.143 ("Because no one spoke against the adoption of a guarantee of freedom of speech and of the press as placing too strong a limit on government . . . any notion that the framers intended all statements to be immune from federal prosecution is hard to credit.").

83. Some modern textualists would endorse this use of "drafting history" arguments. *See* 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 . . . to shed light on how members of the enacting legislature understood the resulting statute . . . ."). Notably, Congress has constitutional authority to draft and propose amendments, whereas the Philadelphia Convention of 1787, whose then-secretive proceedings are afforded less weight in modern originalist theory, was not authorized to draft the Constitution.

84. *See, e.g.*, Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From*

Simply put, however, a ban on passing laws that abridge a certain right in no way suggests a lack of power to pass laws that do *not* abridge that right. If anything, the appropriate inference at the Founding was precisely the opposite, thus *supporting* an inference that federal authority included at least some room for regulating expression.[85]

Before turning to the 1790s, it is worth pausing a moment to consider the First Congress's treatment of another form of natural liberty: religious freedom. In the 1780s, Thomas Jefferson and James Madison had creatively argued that the retained natural right of freedom of conscience meant "that Religion is wholly exempt from [governmental] cognizance."[86] Relying on this position, scholars have read the First Amendment as following this categorical (some say "jurisdictional") approach to natural rights, thus completely depriving the government of all authority with respect to religion.[87] Republicans, too, frequently invoked religious freedom during the Sedition Act debates in support of their innovative reading of the First Amendment.[88]

Although Jefferson and Madison's "jurisdictional" arguments about religious freedom surely informed their responses to the Sedition Act, there are compelling reasons to doubt that it reflected their thinking about expressive freedom in 1789, much less the thinking of their contemporaries. First, the "jurisdictional" argument was highly creative.[89] "Retaining" natural

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the Eighteenth Century to the Mid-Twentieth Century, 34 WM. MITCHELL L. REV. 773, 791 (2008) ("The introductory clause, 'Congress shall make no law,' which originated in the Senate, exactly paralleled the Federalist position on the press clause; that there was no affirmative power in the Constitution that granted Congress the ability to regulate the press."); Leonard W. Levy, *Introduction* (citing the introductory clause for the view that Congress was "totally without power to enact legislation respecting the press"), *in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, *supra* note 45, at xix, lvi–lvii.

85. *See infra* note 266 (collecting sources).

86. James Madison, *Memorial and Remonstrance Against Religious Assessments* (ca. June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973). Jefferson articulated the idea in a draft bill that Virginia's legislature did not end up passing until 1786. Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 546 (Julian P. Boyd ed., 1950).

87. *E.g.*, Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1113 (1994); Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 23 (2003).

88. *See, e.g.*, 8 ANNALS OF CONG. 2105 (1798) (statement of Rep. Nathaniel Macon) ("[I]f a law like this was passed, to abridge the liberty of the press, Congress would have the same right to pass a law making an establishment of religion, or to prohibit its free exercise . . . ."); *id.* at 2153 (statement of Rep. Edward Livingston) ("Gentlemen may tomorrow establish a national religion agreeably to the opinion of a majority of this House . . . . The doing of this is not less forbidden than the act which the House are about to do.").

89. *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 353 (calling such arguments "unconventional"). Some earlier commentators took the same position as Jefferson, *e.g.*, RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 79–86 (1974), but this was decidedly a "minority point of view," *id.* at 86.

rights, after all, did not bar their regulation through law. Liberty and property, for example, were retained natural rights, but nobody viewed these freedoms as beyond governmental control. So, too, with religion. American states broadly recognized the inalienable natural right of conscience—a firm ban on direct punishment of religious belief—while simultaneously maintaining a diverse array of rules that dealt with religion, including religious taxes and religious qualifications for holding public office.

Moreover, Madison and his colleagues in the First Congress—many of whom were paranoid about protecting state establishments—never suggested that their proposed state-restraining amendment, which guaranteed a right of free exercise against state governments, might stealthily ban all remaining state support for religion.[90] Rather, that proposal strongly indicates that the natural-rights guarantees in the First Amendment—including the protections for speech and conscience[91]—did not categorically deprive the federal government of authority with respect to those topics.

In any event, whatever one thinks of the meaning of speech and press freedoms in the late 1780s, the simple fact remains that nobody so much as hinted that a guarantee of those rights in the *federal* constitution had a "jurisdictional" meaning, whereas analogous provisions in *state* constitutions left ample room for state governments to regulate harmful speech. In other words, no one in the 1780s articulated the interpretation of the federal Speech and Press Clauses that Republicans invented a decade later. Many aspects of Founding Era thought were contested or unclear,[92] but this was not one of them. The Founders were not imposing a categorical ban on federal power over expression, and they did not suggest that the federal Speech and Press Clauses would somehow have entirely different meanings than their state-level counterparts.

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90. Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 379–86. As Snee observes, "It is indeed stressing the obvious to conclude that, in [Madison's] mind at least, . . . the establishment of a religion by law is not per se an infringement of the equal rights of conscience." *Id.* at 384. I agree, although it seems possible that Madison proposed the clause with awareness that he or others might use it as a basis for disestablishmentarian arguments.

91. James Madison, Notes for Speech in Congress (June 8, 1789) ("[*N*]*atural rights*, retained—as Speech, Con[science.]"), *in* 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979); Proposal by Roger Sherman to House Committee of Eleven (July 21–28, 1789) ("[C]ertain natural rights which are retained . . . [include] the right of conscience . . . [and the right] of Speaking, writing and publishing . . . with decency and freedom . . . ."), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 66, at 83, 83.

92. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 567 (2006).

II. The Cabell Affair

Though originally unanticipated, partisan divisions emerged quickly in the 1790s. By the time John Adams became President in 1797, a genuine crisis had emerged. Federalists were convinced that their Republican opponents were staging an American sequel to France's disastrous revolution. Meanwhile, Republicans saw themselves as the heirs of '76 and the true voice of the people, with Federalists (in their view) busy reestablishing ties with Great Britain and planning to inaugurate an American monarchy.[93]

The ongoing European wars exacerbated these conflicts, and Federalists often jumped at the chance to label their opponents as disloyal French stooges. In his inaugural address on March 4, 1797, John Adams decried "the pestilence of foreign influence, which is the angel of destruction to elective governments."[94] Just two months later, Adams delivered another rousing speech urging Congress to prepare for war in response to French attacks on American shipping.[95] "It must not be permitted to be doubted," Adams stated, "whether the people of the United States will support the government established by their voluntary consent, and appointed by their free choice" or surrender to "foreign and domestic factions, in opposition to their own government."[96]

Republicans pleaded that Federalists had already succumbed to British interests in the Jay Treaty. Particularly outspoken was Virginia Congressman Samuel Jordan Cabell, who harangued Federalists in rambling yet colorful public letters to his constituents. American capitulation to Britain and belligerency toward France, he wrote in January 1797, was "sapping the foundation of that illumined pyramid of liberty" and "thereby hastening with a precipitancy and frantic rage only to be equalled by its depravity and madness, the attainment of the *darling wish* of the aristocracy in this country, the establishment of monarchy."[97] Americans, he ominously declared, "are furiously hurling ourselves into the vortex of tyranny."[98] Cabell's remarks

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93. For discussions of the emerging political parties of the 1790s, see generally NOBLE E. CUNNINGHAM, JR., THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789-1801 (1957); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993); and SHARP, *supra* note 11.

94. John Adams, Inaugural Speech to Both Houses of Congress (Mar. 4, 1797), *in* 9 THE WORKS OF JOHN ADAMS 105, 109 (Charles Francis Adams ed., Bos., Little, Brown & Co. 1854). For French political meddling, see ELKINS & MCKITRICK, *supra* note 93, at 341–65, 520–21.

95. *See* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801, at 8–11 (1966).

96. John Adams, Speech to Both Houses of Congress (May 16, 1797), *in* 9 THE WORKS OF JOHN ADAMS, *supra* note 94, at 111, 118.

97. Circular Letter from Samuel Jordan Cabell (Jan. 12, 1797), *in* 1 CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789–1829, at 67, 69 (Noble E. Cunningham, Jr. ed., 1978).

98. *Id.*

were typical of 1790s politics, but they soon garnered attention in an unusual forum: the federal circuit court in Richmond.

A. The Presentment

"The object" of a grand jury's duties, Justice James Iredell announced to the seventeen grand jurors assembled in Richmond on May 22, 1797, "is the preservation of a union."[99] Iredell, continuing a tradition of giving political lectures in the form of jury charges,[100] echoed Adams's complaints about partisan conflict. "This country has great energies for defence, and by supporting each other might defy the world," he announced. "But if we disunite, if we suffer differences of opinion to corrode into enmity, . . . we must expect nothing but a fate as ruinous as it would be disgraceful, that of inviting some foreign nation to foment and take advantage of our internal discords."[101] Iredell concluded with an ominous warning: "So critical and peculiar is our situation, that nothing can save us from this as well as every other external danger, but constant vigilance."[102]

The grand jury returned a presentment that took up Iredell's provocative invitation:

> We of the grand Jury of the United States for the District of Virginia, present as a real evil the circular Letters of several members of the late Congress, and particularly Letters with the Signature of Samuel J. Cabell, endeavouring at a time of real public danger, to disseminate unfounded calumnies against the happy Government of the United States, and thereby to separate the people therefrom, and to encrease or produce a foreign influence ruinous to the peace, happiness and independence of these United States.[103]

Newspapers soon published the presentment along with Iredell's charge.[104] The impact was electric. "The presentment going in the public papers just at the moment when Congress was together," Jefferson wrote to Madison, "produced a great effect both on its friends and foes in that body, very much to the disheartening and mortification of the latter."[105]

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99. James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Maryland (May 8, 1797) [hereinafter James Iredell's Charge], *in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 173, 177. Iredell's Richmond charge included minor revisions but none pertinent to this part of his charge. *See id.* at 173 nn.1–7 (noting the differences).

100. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 126–29 (1995) (providing examples).

101. James Iredell's Charge, *supra* note 99, at 177.

102. *Id.*

103. Presentment of the Grand Jury, *supra* note 1, at 181.

104. VA. GAZETTE, & GEN. ADVERTISER (Richmond), May 24, 1797, at 3.

105. Letter from Thomas Jefferson to James Madison (Aug. 3, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON 489, 490 (Barbara B. Oberg ed., 2002); *see also, e.g.*, A Virginian, *From the Virginia Argus*, AURORA GEN. ADVERTISER (Phila.), June 21, 1797, at 3 ("I do not remember that

Many scholars have mistakenly characterized the episode as "an abortive attempt to try Congressman Samuel J. Cabell of Virginia for seditious libel."[106] The grand jury, however, had issued a "grievance presentment"—a type of censure, common in the South, that did not initiate criminal proceedings.[107] The following year, for instance, a grand jury in Charleston "present[ed] as a grievance of the most dangerous nature to the community . . . that such a number of dogs are allowed to go about the streets, at present, when canine madness is so very prevalent in the city."[108] The Cabell presentment, too, pointed to "a real evil," not a crime.[109]

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my astonishment has been so greatly excited as it was the other day at reading a presentment, by the grand jury to the federal court."). Jefferson's use of "it's" as a possessive pronoun—common at that time—is edited here for clarity.

106. LEVY, LEGACY OF SUPPRESSION, *supra* note 49, at 241; *accord* BLUMBERG, *supra* note 8, at 74 ("The grand jury without dissent promptly returned a presentment charging Cabell with criminal libel . . . ." (footnote omitted)); JOSHUA A. CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 88 (2007) ("Samuel J. Cabell . . . was charged with seditious libel"); DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 199 (1994) ("[A] federal grand jury had returned a presentment, or formal accusation of crime, against Samuel J. Cabell . . . for seditious libel . . . ."); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 77 (1986) ("[G]rand jurors returned an indictment . . . against Congressman Samuel J. Cabell of Virginia for criminal libel."); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 95 (1956) ("[T]he federal grand jury at Richmond, Virginia, handed down a presentment which denounced the Republican representative from Albemarle district . . . ."). Several scholars have properly regarded the presentment as distinct from a formal charge. *E.g.*, Koch & Ammon, *supra* note 6, at 152–53. The most thorough summary of the Cabell affair appears in Brent Tarter & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809*, 49 AM. J. LEGAL HIST. 257, 266–74 (2007).

107. *See* Sally E. Hadden, *South Carolina's Grand Jury Presentments: The Eighteenth-Century Experience* (explaining the difference between indictments and presentments), *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 89, 89 (Sally E. Hadden & Patricia Hagler Minter eds., 2013); Renée B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1338 (1994) (same). Some grievance presentments protested the Sedition Act. *See* Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts*, 65 WM. & MARY Q. 565, 582 (2008) (discussing a Tennessee presentment).

108. CITY GAZETTE & DAILY ADVERTISER (Charleston, S.C.), Jan. 27, 1798, at 2. Grievance presentments were commonplace. *See, e.g.*, Presentment of the Grand Jury of the Circuit Court for the District of Virginia (May 23, 1794) (expressing a "national Grievanc[e]" over debts owed to Britain), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 472, 472 (Maeva Marcus ed., 1988).

109. Contemporaries widely understood the Cabell presentment as grievance presentment rather than as a formal indictment. *See, e.g.*, Samuel Jordan Cabell, Letter, AURORA GEN. ADVERTISER (Phila.), May 31, 1797 ("They do not complain of violations of any law . . . but they complain of opinions . . . ."), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 183, 183–84; Anonymous Correspondent, Letter, PHILA. GAZETTE, June 16, 1797 ("When judges and juries, whose province is rigid justice under the law, quit that solid ground for the wide field of opinion, they may thereby become political engines . . . ."), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 199, 200; Letter from Henry Tazewell to [John Page?] (June 3, 1797) ("If the writers had violated the Laws, the Court and Jury knew that the Culprits and not their opinions were the fit subjects for animadversion."), *in* 3 THE DOCUMENTARY HISTORY OF

Still, Republicans were livid. Federal judges, Cabell complained, had "become a band of political preachers, instead of a sage body to administer the law."[110] In a public letter addressed to Iredell, an anonymous author—perhaps a young Henry Clay—alleged that "by not directing the attorney for the United States to prosecute, you tacitly admitted that the presentment was improper."[111] He excoriated Iredell for "endeavour[ing] to regulate the degree of heat" of political discussions. "You offer yourself as a political thermometer for the use of the Virginians! But I fear, sir, that the mercury of your political composition, will never rise to the temperature of manliness."[112]

Republican responses to the Cabell presentment flowed from their earlier defense of Democratic-Republican societies in the wake of the so-called Whiskey Rebellion. Federalists, horrified by the blatant disregard for federal law in the West, had pinned the blame on "certain self-created societies," commonly known now as Democratic-Republican societies.[113] Federalists in Congress sought a resolution condemning the societies for calumnies that, in their view, had excited the insurrection.[114] In response, congressional Republicans "exploded in wrath."[115] "The law is the only rule

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THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 189, 189. The claim that "the grand jury quickly withdrew its presentment," Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1142 (1973), is mistaken.

110. Cabell, *supra* note 109, at 183.

111. Scaevola, *To James Iredell*, VA. GAZETTE, & GEN. ADVERTISER (Richmond), June 11, 1797, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 192, 194. Clay, who lived in Richmond until November 1797, used the pseudonym Scaevola the following year in Kentucky. 1 CALVIN COLTON, THE LIFE AND TIMES OF HENRY CLAY 29, 187 (N.Y.C., A.S. Barnes & Co. 1846). Clay was involved in opposition to the Sedition Act in Kentucky. Bradburn, *supra* note 107, at 567–68.

112. Scaevola, *supra* note 111, at 192. Iredell responded in a Richmond newspaper, explaining that "it has been a frequent practice in some of the southern states for grand juries to present what they considered as grievances though they could not be the foundation of a criminal prosecution." James Iredell Letter, VA. GAZETTE, & GEN. ADVERTISER (Richmond), June 21, 1797, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 201, 202.

113. *See, e.g.*, Letter from George Washington to the United States Senate and House of Representatives (Nov. 19, 1794) ("In the four western Counties of Pennsylvania a prejudice . . . produced symptoms of riot and violence. . . . [C]ertain self-created societies assumed the tone of condemnation."), *in* 17 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 181, 181 (David R. Hoth & Carol S. Ebel eds., 2013); Letter from the United States Senate to George Washington (Nov. 22, 1794) ("Our anxiety, arising from the licentious & open resistance to the laws, in the western counties of Pennsylvania, has been increased, by the proceedings of certain self-created societies . . . ."), *in* 17 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra*, at 198, 198.

114. Philip S. Foner, *The Democratic-Republican Societies: An Introduction*, *in* THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS 3, 31 (Philip S. Foner ed., 1976).

115. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD

of right," James Madison insisted, and "what is consistent with that, is not punishable; what is not contrary to that, is innocent, or at least not censurable by the Legislative body."[116] With rhetorical flair, Madison explained: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[117]

The Cabell affair brought back to the fore Republicans' concerns over the *lawless* nature of public censures. "If these letters contained calumnies that were illegal—If they produced, or increased a foreign influence in our country contrary to law," Cabell himself posited, "the authors were fit subjects for a presentment and for punishment."[118] But, he explained, only false statements of fact—not opinion—could support criminal charges.[119] Virginia Senator Henry Tazewell agreed. "Having presented the Letters and not the writers," he explained, "they shew that the writers were no further censureable than for their political opinions. Thus have a Court and Jury erected themselves into a tribunal of political Censors."[120] Although Republicans frequently invoked speech and press freedoms,[121] their arguments were directed at the *lawless* nature of the presentment rather than a lack of federal power over speech.[122] Recall that "the very essence of civil

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1789–1801, at 190 (1997). The vehemence of Republican opposition perhaps stemmed from a fear that Congress might later invoke legislative privileges to *punish* critics of the government.

116. 4 ANNALS OF CONG. 935 (1794) (statement of Rep. James Madison).

117. *Id.* at 934; *see also id.* at 917–18 (statement of Rep. William Giles) (making similar points).

118. Cabell, *supra* note 109, at 183.

119. *Id.* at 184 ("If I have written falsely with a view to deceive my countrymen, why did not this enlightened jury state the facts which I have misrepresented?").

120. Letter from Henry Tazewell to [John Page?], *supra* note 109, at 189; *see also* Marius, *To Jugurtha*, VA. GAZETTE, & GEN. ADVERTISER (Richmond), June 24, 1797 ("I doubt . . . whether a judicial body of men have a right to brand with infamy, the expression of . . . political sentiments . . . . If they do not punish them because they are without their jurisdiction, neither can they take cognizance of political opinions, which the law has not expressly placed within it."), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 203, 203–04; Scaevola, *supra* note 111, at 194 ("If the conduct for which mr. Cabell was presented was criminal, the court should have directed a prosecution . . . .").

121. *E.g.*, Circular Letter from Anthony New (June 17, 1797), *in* 1 CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789–1829, *supra* note 97, at 91, 91; Letter from Thomas Jefferson to Peregrine Fitzhugh (June 4, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 105, at 415, 417. Perhaps even more commonly, Republicans invoked freedom of opinion. *E.g.*, Marius, *supra* note 120, at 205; Circular Letter from John Clopton (June 19, 1797), *in* 1 CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789–1829, *supra* note 97, at 94, 94. Federalists sometimes rejected an absolute privilege to express opinions, making clear the natural-rights basis of the idea. *See* A Virginian, COLUMBIAN CENTINEL (Bos.), June 24, 1797 ("Freedom of opinion is certainly an inherent privilege.—So is freedom of action.—But murder is to be punished by death. And although Grand Jurors are not lawmakers, yet they are its guardians, and it is their peculiar province to stop sedition . . . ."), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 205, 205.

122. Federalists responded that the grand jurors were merely presenting *their* opinion of Cabell's letters, leaving Cabell and others free to express their views as well. *E.g.*, A Friend to

liberty" in the eighteenth century focused on the existence of prospective, generally applicable *laws*.[123]

Alongside these old concerns about lawless political censorship, a new fear arose among Republicans from the Cabell affair: jury composition. "Look at the names," Cabell wrote, pointing to the presence of several foreigners on the grand jury.[124] Republicans worried about the jurors' partisanship as well. According to the scurrilous Republican editor James Callender, who was later prosecuted under the Sedition Act, Cabell apparently claimed that "four fifths of the whole band consisted of pardoned tories, and of republicans imported from Scotland."[125] Tazewell also highlighted the jury's membership, remarking that several jurors he was "not astonished at," meaning they were known Federalist partisans.[126]

Indeed, the members of the grand jury were a powerful and well-connected group.[127] The foreman, John Blair, was a former Justice of the United States Supreme Court. Joining him were a Federalist member of the Virginia House of Delegates,[128] four former delegates,[129] six merchants,[130] and several county clerks.[131] Familial relationships abounded, too. One of the

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Juries, *Letter to Samuel Jordan Cabell*, VA. GAZETTE, & GEN. ADVERTISER (Richmond), June 30, 1797, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 207, 208–09; Timothy Tickle, *Letter to Samuel Jordan Cabell*, VA. GAZETTE, & GEN. ADVERTISER (Richmond), July 5, 1797, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 213, 215–16.

123. HAMILTON, *supra* note 60, at 100.

124. Cabell, *supra* note 109, at 184.

125. 1 JAMES T. CALLENDER, THE PROSPECT BEFORE US 20 (Richmond, M. Jones, S. Pleasants, Jr. & J. Lyon 1800).

126. Letter from Henry Tazewell to [John Page?], *supra* note 109, at 189.

127. *See* Letter from James Iredell to Hannah Iredell (May 25, 1797) (describing the Grand Jury as "composed of many of the most respectable Men in the State"), *in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 182, 182.

128. Robert Pollard was a Federalist member of the House of Delegates from King William County, where he also was clerk of court for many years.

129. Former delegates were Corbin Griffin, Edward Hack Moseley, Thomas Newton, and Thomas Tinsley.

130. Merchants included Robert Burton and Andrew Donald, who were members of expansive Scottish mercantile networks centered around Glasgow; Thomas Thompson, who was a native of Ireland and worked as a wine merchant in Madiera; Richard Randolph; William Vannerson; and Thomas Newton of Norfolk.

131. Former clerks included Otway Byrd, Edward Hack Moseley, and Thomas Griffin Peachy. Joseph Selden, one of the few Republicans on the grand jury, was a judge in Richmond and later represented Henrico County in the House of Delegates. In 1802, Selden heard a libel complaint against publisher James Thompson Callender. Unlike the other three Republican magistrates, Selden ruled in favor of Callender, deciding "it improper that such a restraint should be laid on the press." ALBANY GAZETTE, Jan. 17, 1803. This story apparently was reprinted from the *Virginia Gazette*.

grand jurors was the brother of the federal marshal,[132] while another was the brother of Cyrus Griffin—one of the presiding judges.[133]

The prominence of these men was no fluke. Virginia, although the country's most populous state, had a small and interconnected group of affluent men who held most positions of public trust.[134] And the federal marshal hand selected grand jurors from among this venerable group.[135]

In the late 1780s, political elites had viewed the hand selection of jurors as a way of safeguarding rights. As one of the architects of the Judiciary Act, Oliver Ellsworth, put it, "a very ignorant Jury might be drawn by Ballot," and parochial jurors might be inclined against defending property rights.[136] Hand selection ensured that jurors would be men of sound judgment. "Care may be taken in the manner of forming the delegated body," James Wilson explained in his law lectures.[137] Although Federalists uniformly endorsed the need for representative institutions, they did not think that representative bodies had to reflect a cross-section of the society.[138] Rather, a "very guarded selection" of jurors, Wilson observed, could be accomplished "by an officer,

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132. Richard Randolph was the brother of David Meade Randolph.

133. Corbin Griffin was the brother of Cyrus Griffin. Other jurors were related to each other. Andrew Donald was the brother-in-law of fellow juror Callohill Mennis. Richard Randolph was married to Maria Beverley—a first cousin of Otway Byrd's wife and a niece of Thomas Griffin Peachy's wife. Peachy was first cousin of Corbin Griffin, his son had married John Blair's niece, and he was related to Otway Byrd and Robert Pollard through his wife's family.

134. *See, e.g.*, ALBERT H. TILLSON, JR., GENTRY AND COMMON FOLK: POLITICAL CULTURE ON A VIRGINIA FRONTIER 1740–1789, at 18 (1991) ("A small circle of elite families dominated most Virginia counties in the eighteenth century . . . .").

135. The Judiciary Act instructed federal marshals to summon jurors "designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States." Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88. The Act further provided that federal jurors in each state had to have the same qualifications as required for jury service "in the highest courts of law of such State." *Id.* In six of the original eleven states—Delaware, Maryland, New Jersey, New York, Pennsylvania, and Virginia, plus Kentucky and Vermont—this meant that federal marshals hand selected jurors. Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1054 (2007); *Juror Reform Bills of 1800*, *supra* note 6, at 271.

136. Letter from William Loughton Smith to Edward Rutledge (Aug. 9–10, 1789) (reporting Ellsworth's remarks), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 6, at 496, 499; *see also id.* ("[State] Juries were too apt to be biassed ag[ain]st [foreigners], in favor of their own citizens & acquaintances . . . ."). Whigs had a longstanding complaint against the return of "Corrupt and Unqualifyed Persons" to serve on juries, including men who "were not Freeholders." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M. c. 2, § 9 (Eng.) [hereinafter English Bill of Rights].

137. WILSON, *supra* note 32, at 961. Robert Jones provocatively describes the federal selection of jurors as the primary impetus for federal diversity jurisdiction. *See* Jones, *supra* note 135, at 1005 ("[F]ederal officials could judiciously exercise their control over federal jury compositions to ensure that only the 'better sort' of Americans would decide cases in the federal courts.").

138. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 495–99 (1969).

confidential, impartial, and, by the people themselves, appointed for this very purpose" without undercutting the jury's representative role.[139]

Partisanship was not yet a concern in the late 1780s. To be sure, some people expected that federal *judges* would be loyal supporters of the Washington administration,[140] and countless Anti-Federalists worried about the ability of the federal government to change the *venue* of trials as a way of undercutting the jury right.[141] Alexander Hamilton even acknowledged in *Federalist No. 83* that the hand selection of jurors made judicial proceedings "more accessible to the touch of corruption."[142] But the Founders—in perhaps their greatest oversight—did not appreciate that the affinities of the people would soon fragment along partisan lines.

By the late 1790s, however, jury selection by a presidential appointee presented obvious partiality concerns. Virginia's federal marshal, David Meade Randolph, was an ardent Federalist who exhibited notable patterns in his juror picks. A recent study of federal grand juries in Richmond from 1789 to 1809 found that "[e]very grand jury included several men who were or recently had been members of Virginia's General Assembly or of Congress, and more than a few served prominently in one or the other legislative body or as governor after they were on the grand jury."[143] And their political views, unsurprisingly, tended to mirror those of the Administration.[144] On the Richmond jury in 1797, for instance, eight of the seventeen jurors are known to have been Federalists,[145] and five of the remaining nine were merchants,[146] a group that typically supported the Adams Administration. And Republicans knew it. No wonder they were so worried.

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139. WILSON, *supra* note 32, at 961.

140. *See* PHILA. INDEP. GAZETTEER, Dec. 14, 1787 (expressing fears of a "*partial* and *interested* FEDERAL COURT"), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 459, 459.

141. Some Anti-Federalists emphasized the importance of a local jury to fact-finding given the familiarity of local juries with the characters of the witnesses and parties. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 27–28 (1994). But, as Abramson trenchantly observes, "The jury served freedom not only by getting the facts right but also by getting the people right. Local citizens were empowered to control the actual administration of justice." *Id.* at 28.

142. THE FEDERALIST NO. 83, *supra* note 19, at 564 (Alexander Hamilton).

143. Tarter & Holt, *supra* note 106, at 263.

144. *Id.* at 283. Federalists in Virginia usually were not partisan firebrands, at least compared to their northern counterparts, but they responded to Federalist calls for order. RICHARD R. BEEMAN, THE OLD DOMINION AND THE NEW NATION, 1788-1801, at 156–58 (1972).

145. Those eight were John Blair, Otway Byrd, Corbin Griffin, Calohill Minnis, Thomas Griffin Peachy, Robert Pollard, Richard Randolph, and Thomas Tinsley.

146. Those five were Robert Burton, Andrew Donald, Thomas Newton, Thomas Thompson, and William Vannerson. Richard Randolph was a merchant but was also a known Federalist.

B. The Jeffersonian Response

Editorials about the Cabell presentment continued to appear in Virginia newspapers through late July,[147] but the most interesting response came from Thomas Jefferson, who was then serving as Vice President. By early August, Jefferson had completed a draft petition that he planned to submit anonymously to the Virginia General Assembly through one of his friends.[148] The draft reveals two significant developments in Jefferson's thinking.

First, the draft portrayed the federal grand jury as an arm of the government, not as a representative body of the people. "[T]he Grand jury is a part of the Judiciary," Jefferson wrote, and an effort by the judiciary to "interpose" on the "free correspondence" between representatives and their constituents was "to put the legislative department under the feet of the Judiciary."[149] This subordination was "more vitally dangerous," he explained, "when it is considered that Grand jurors are selected by officers appointed and holding their places at the will of the Executive, that they are exposed to influence from the judges who are appointed immediately by the Executive."[150]

Second, Jefferson's draft focused on the presentment's utter lawlessness—not simply its error—thus opening the door to drastic countermeasures. Grand juries, he argued, were constrained by "known limits . . . to make presentment of those acts of individuals which the laws have declared to be crimes or misdemeanors."[151] The grand jurors' "depart[ure] out of the legal limits of their said office," he concluded, meant that they had "avail[ed] themselves of the sanction of its cover."[152] For well over one hundred years, jurors in England and the colonies had been immune from civil or criminal penalties.[153] But by acting beyond their authority, Jefferson asserted, the federal grand jurors made themselves subject to punishment by the state assembly, even for offenses that "escape the definitions of the law."[154]

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147. See, for instance, several letters in the *Virginia Gazette, and General Advertiser* (Richmond), July 26, 1797.

148. Letter from Thomas Jefferson to James Madison, *supra* note 105, at 490.

149. Thomas Jefferson, Draft Petition to the Virginia House of Delegates (Aug. 3, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 105, at 493, 495.

150. *Id.* at 496.

151. *Id.* at 495.

152. *Id.* The apostrophe in the possessive pronoun "it's" has been removed for clarity.

153. *See* JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 426–27 (2009) (identifying *Bushell's Case*, a 1670 English decision, as establishing juror immunity).

154. Jefferson, *supra* note 149, at 496. Formally, Jefferson proposed that the General Assembly punish the grand jurors through impeachment. John Page also mentioned impeachment shortly after learning of Cabell's presentment. *See* Letter from John Page to St. George Tucker (June 14, 1797) ("What think you of the late Presentment? I confess I feel almost disposed to impeach the Judge &

Jefferson sent his proposal to James Madison and James Monroe, who each returned with tepid replies.[155] Monroe wondered "whether it would not be better to address it to the Congress?"[156] In response, Jefferson admitted that doubts "as to [Virginia's] jurisdiction" had occurred to him, too, but that sending a petition to the House of Representatives "would make bad worse, that a majority of that house would pass a vote of approbation."[157] Jefferson was in a bind. His argument focused on federal wrongs, but he knew that petitioning Congress would be counterproductive.

An intellectual breakthrough came in his second draft. Jefferson began with the same argument, explaining how the grand jury had exceeded its authority. This time, however, he added that "independently of these considerations of a constitutional nature, the right of free correspondence between citizen and citizen on their joint interests, public or private, and under whatsoever laws these interests arise, is a natural right of every individual citizen, not the gift of municipal law."[158] All Founders would have agreed that retained natural rights preexisted constitutional formation, but Jefferson used this idea in a novel way. The right to the freedom of communication, he contended, was simply not a federal concern, and *state* control over the retained liberty of speech called for *state* remedies when that freedom was abridged. "[T]he right of free correspondence is not claimed under that [federal] constitution nor the laws or treaties derived from it," he wrote, "but as a natural right, placed originally under the protection of our municipal laws, and retained under the cognizance of our own courts."[159]

Here we see the origins of a new understanding of the First Amendment. In his draft petition, Jefferson did not explain why the protection of natural rights was a uniquely state-based concern. But by contending that "the right of free correspondence is not claimed under that [federal] constitution," Jefferson cast the First Amendment as *not* guaranteeing speech and press rights *as federal rights*. Apparently the Speech Clause gave the federal government no role to play in defending the freedom of speech, even against federal encroachment. Jefferson was not yet explicitly denying federal

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his Gr[d] Jury!!!"), *in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 1, at 190, 190 n.2.

155. Letter from James Madison to Thomas Jefferson (Aug. 5, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 105, at 505, 505; Letter from James Monroe to Thomas Jefferson (Sept. 5, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 105, at 524, 524.

156. Letter from James Monroe to Thomas Jefferson, *supra* note 155, at 524.

157. Letter from Thomas Jefferson to James Monroe (Sept. 7, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 105, at 526, 526.

158. Thomas Jefferson, Revised Petition to the House of Delegates (Aug. 7–Sept. 7, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 105, at 499, 502.

159. *Id.*; *accord* Letter from Thomas Jefferson to James Monroe, *supra* note 157, at 526 ("[T]his right of free correspondence . . . has not been given to us under 1st. the federal constitution, 2dly. any law of Congress, or 3dly. any treaty, but as before observed, by nature. It is therefore not alienated, but remains under the protection of [states'] courts.").

authority to control speech, but his argument pointed clearly in that direction.

The evolution of Jefferson's drafts indicates that he developed new ideas in response to the particular challenge posed by the Cabell affair. Jefferson faced a practical problem—an intractable Congress—and he shaped a fascinating and innovative theory to meet that challenge. His desired remedy drove the analysis.

As all creative thinkers do, Jefferson tapped into earlier strands of his constitutional thought. During the controversy over religious assessments in Virginia, for instance, he began with a widely accepted view that "the opinions of men are not the object of civil government, nor under its jurisdiction,"[160] signifying that the government could not punish people because of their thoughts. More controversially, Jefferson then argued that the freedom of religious conscience barred public interference with religious matters at all, even in the form of governmental support for religion through taxation.[161] As noted earlier, this idea was highly creative, and probably not widely accepted.[162] For present purposes, however, the key point is that Jefferson's claim was about *state-level* support for religion; it had nothing to do with a unique definition of federal rights.

During the ratification debates, Jefferson again made statements that could be read as denials of governmental power over certain natural rights. "There are rights which it is useless to surrender to the government, and which yet, governments have always been fond to invade," he wrote to a correspondent in 1789.[163] "These are," he continued, "the rights of thinking, and publishing our thoughts by speaking or writing: the right of free commerce: the right of personal freedom."[164] Understood contextually, however, Jefferson was not insisting that all governments lacked authority to limit expression, commerce, or freedom. Natural rights, in Jefferson's view, were limited not only by a principle against harming others but also by certain social duties.[165] The freedom of expression, for instance, easily comported

160. Jefferson, *supra* note 86, at 546. Critics of Jefferson's position accepted this premise. *See* An Eastern Layman, *To The Publick*, VA. GAZETTE (Williamsburg), Aug. 14, 1779, at 1 ("That the *opinions* of men are not the objects of civil government, is a dogma, to which every rational mind must necessarily accede . . . ."); *see also, e.g.*, 4 ANNALS OF CONG. 934 (1794) (statement of Rep. James Madison) ("Opinions are not the objects of legislation."); A Landholder [Oliver Ellsworth], *Letter VII to the Landholders and Farmers*, CONN. COURANT (Hartford), Dec. 17, 1787 ("Civil government has no business to meddle with the private opinions of the people."), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 448, 451.

161. *See* Jefferson, *supra* note 86, at 546 ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . .").

162. *See supra* notes 86–91 and accompanying text.

163. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 74, at 676, 678.

164. *Id.*

165. *See, e.g.*, Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), *in* 36 THE PAPERS OF THOMAS JEFFERSON 258, 258 (Barbara B. Oberg ed., 2009) ("I shall see with

with "liability of the printers for false facts printed."[166] In any event, Jefferson's discussions of federal rights in the late 1780s again offer no indication that those rights would have different meanings at the federal and state levels. His innovative move toward such a theory in 1797 was genuinely novel, responding to a problem that simply had not existed a decade earlier.

The House of Delegates debated Jefferson's petition in late December 1797.[167] In the end, the delegates approved resolutions that chastised the grand jury for its "political criminality," but they decided not to pursue impeachment. The resolutions concluded:

> That it ought therefore to be solemnly declared by the House of Delegates, that the said presentment is a violation of the fundamental principles of representation, incompatible with that independence between the co-ordinate branches of government, mediated both by the general and state constitutions: an usurpation of power not confided to one branch over another by any rule, legal or constitutional; and a subjection of the natural right of speaking and writing freely, to the censure and controul of Executive power.[168]

The Virginia House of Delegates thus embraced Jefferson's view of juries as arms of the government—a remarkable development attributable to Republican concerns about jury selection. No longer were juries, as Jefferson had heroically described in 1789, "the firmest bulwarks of English liberty."[169]

III. The Sedition Act

Acrimonious partisanship escalated even further in 1798. In April, Jefferson informed Madison that "one of the war-party, in a fit of unguarded passion declared some time ago they would pass a citizen bill, an alien bill, & a sedition bill."[170] The object of a sedition bill, he presciently explained, would be "the suppression of the whig presses."[171] Sure enough, in late June federal officers arrested Benjamin Franklin Bache—the irascible editor of the

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sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.").

166. Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed., 1956).

167. VA. GAZETTE, & GEN. ADVERTISER (Richmond), Jan. 3, 1798, at 1.

168. *Id.* at 2.

169. Letter from Thomas Jefferson to Abbé Arnoux, *supra* note 34, at 282, 283. Federalists protested Republican attacks on the jury, arguing that "legislative interferences with this sacred political institution tend to discredit the same, and by impairing its weight and influence, evidently promote the cause of despotism." VA. GAZETTE, & GEN. ADVERTISER (Richmond), Jan. 3, 1798, at 2. But to no avail; the delegates overwhelmingly voted down Federalist proposals. *Id.* In a rarely mentioned epilogue, the Virginia Senate excoriated the House for passing resolutions on behalf of the people "without the participation of the Senate." VA. GAZETTE, & GEN. ADVERTISER (Richmond), Jan. 10, 1798, at 2.

170. Letter from Thomas Jefferson to James Madison (Apr. 26, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON 299, 299 (Barbara B. Oberg ed., 2003).

171. *Id.* at 300.

most prominent Republican newspaper—on common law sedition charges, and less than a month later the Federalist majority in Congress passed a sedition law.

A. Congressional Debates

The Federalist argument for a Sedition Act was straightforward: Congress had an obligation to preserve the government. Seditious publications, Federalists insisted, were "approaches to revolution and Jacobinic domination."[172] Connecticut Representative John Allen put the point vividly: "[T]he liberty of vomiting . . . floods of falsehood and hatred" would produce effects already seen "across the water; it has there made slaves of thirty millions of men."[173] Indeed, the specter of revolutionary France loomed over the debates, not simply as a foreign threat but also as a forewarning of what might happen domestically if licentiousness reined free. As Kathryn Preyer cautions, "Only present-mindedness or lack of imagination leads us to dismiss casually such fears as paranoia."[174]

Relying on prevailing understandings of speech and press freedoms, Federalists had no trouble explaining the consistency of the Sedition Act with the First Amendment. "The terms 'freedom of speech and of the press,'" Harrison Gray Otis explained, "were a phraseology perfectly familiar in the jurisprudence of every State, and of a certain and technical meaning . . . borrowed from the only country in which it had been tolerated."[175] That freedom, he continued,

> is nothing more than 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; and the liberty of the press is merely an exemption from all previous restraints.[176]

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172. 8 ANNALS OF CONG. 2098 (1798) (statement of Rep. John Allen).

173. *Id.*; *see also, e.g.*, *id.* at 2146 (statement of Rep. Harrison Gray Otis) ("[E]very independent Government has a right to preserve and defend itself against injuries and outrages which endanger its existence . . . ."); *id.* at 2133 (statement of Rep. George Thatcher) (drawing an analogy to a federal law against threatening federal officials). Federalists described as "absurd" the view that the federal government might be "indebted to and dependent on an individual State for its protection." *Id.* at 2146 (statement of Rep. Harrison Gray Otis). Notably, Federalists had already sketched out the basis for a possible sedition law in the 1794 congressional debates over Democratic-Republican societies. *See* 4 ANNALS OF CONG. 937 (1794) (statement of Rep. Samuel Dexter) ("[W]hen [speech and press] were so abused as to become hostile to liberty, and threaten her destruction, the abuses ought to be corrected . . . . [H]e did not doubt the right to forbid such flagrant outrages on social order, and all arts tending to produce them.").

174. Preyer, *supra* note 6, at 187. For a nuanced and penetrating review of Federalist thought, see generally Marc Lendler, *"Equally Proper at All Times and at All Times Necessary": Civility, Bad Tendency, and the Sedition Act*, 24 J. EARLY REPUBLIC 419 (2004).

175. 8 ANNALS OF CONG. 2147 (1798) (statement of Rep. Harrison Gray Otis).

176. *Id.* at 2148.

Otis's comment reflects an important point that scholars often overlook: Many Federalists viewed the *liberty of the press* as simply a rule against prior restraints,[177] but they described the *freedom of speech* in a more capacious manner, embracing a liberty of well-intentioned, noninjurious speaking, writing, and publishing.[178]

Harmful speech, however, was an entirely different matter. "Because I have the liberty of locomotion, of going where I please," John Allen asked, "have I a right to ride over the footman in the path?" Extending this idea, Allen explained: "The 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."[179] Other Federalists echoed this theme.[180] The sedition bill did not restrain "a free animadversion upon the proceedings of Congress, or the conduct of its members; it merely prohibits calumny and deception," Harrison Gray Otis remarked.[181] And "an honest jury" could distinguish the two by "decid[ing] upon the falsehood and malice of the intention."[182] Indeed, the Sedition Act explicitly recognized the availability of a truth defense and gave juries the power to render a general verdict.[183] Thus, Otis insisted, the people "were

177. *See id.* at 2102 (statement of Rep. Robert Goodloe Harper) (defining the "true meaning" of "the liberty of the Press" as "no more than that a man shall be at liberty to print what he pleases, provided he does not offend against the laws").

178. The treatment of the Federalist understanding of the First Amendment as *merely* a rule against prior restraints is common in the literature. *See, e.g.*, Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2167, 2180 & n.51 (2015) (citing Otis for the principle that a "[no-prior-restraint] view of the freedom of speech and press had been propagated by some supporters of the Sedition Act of 1798"); Lendler, *supra* note 174, at 426 n.28 ("[I]t is clear that the Federalists thought the First Amendment meant 'no prior restraint.'"). But Otis and other Federalists referred to that rule when expounding the liberty of the *press*, not the freedom of speech (or, as Otis put it, the "liberty of writing, publishing, and speaking").

179. 8 ANNALS OF CONG. at 2098 (1798) (remarks of Rep. John Allen); *see also id.* at 2112 (remarks of Rep. Samuel Dana) ("Is [speech and press freedom] a license to injure others or the Government, by calumnies, with impunity? . . . Can it be anything more than the right of uttering and doing what is not injurious to others?").

180. *E.g.*, *id.* at 2167 (statement of Rep. Robert Goodloe Harper); *id.* at 2150 (statement of Rep. Harrison Gray Otis); *id.* at 2102 (statement of Rep. Robert Goodloe Harper).

181. *Id.* at 2150 (statement of Rep. Harrison Gray Otis); *see also, e.g.*, *id.* at 2156 (statement of Rep. Samuel Dana) ("[N]o honest man wanted the liberty of uttering malicious falsehood—and this law would operate against no other publications.").

182. *Id.* at 2149 (statement of Rep. Harrison Gray Otis); *see also id.* at 2168 (statement of Rep. Robert Goodloe Harper) (echoing these comments about the role of juries in determining falsity and malice).

183. The Senate bill did not mention a truth defense, but Federalists may have viewed the idea as implicit "from the construction of the bill itself." *Id.* at 2134 (statement of Rep. Robert Goodloe Harper). Congressional debates reflect wide agreement that juries should be permitted to serve as "judges of the law as well as the fact," *id.* at 2135; *id.* (statement of Rep. William Claiborne), meaning they would have "a power of returning a [general] verdict of guilty, or not guilty," *id.* (statement of Rep. Harrison Gray Otis); *see also id.* at 2136 (statement of Rep. Albert Gallatin) (describing the common law principle that "a jury in criminal cases were judges not only of the fact, but also of the criminality of that fact"); *id.* (statement of Rep. Nathaniel Smith) ("[T]here can be

still at liberty, and would ever be so, to use their tongues and their pens, like all other property, so as to do no wanton and unjustifiable injury to others."[184]

Republicans lobbed a slew of arguments in reply.[185] To justify "restraints on the liberty of speech and of the press," Albert Gallatin explained, "it was at least necessary to prove the existence of a seditious disposition amongst the people."[186] Yet Federalists had failed, he insisted, in showing the "absolute necessity" that Republicans typically demanded of laws passed pursuant to the Necessary and Proper Clause.[187] Republicans further denied that Congress had authority to "provide for the punishment of any offences against Government" other than those specifically enumerated,[188] unless a "specific power . . . could not be carried into effect" without the assistance of federal criminal law.[189]

The First Amendment—then still known as the "third amendment"—featured prominently in Republican arguments. According to John Nicholas, he had "looked in vain amongst the enumerated powers . . . for an authority to pass a law like the present; but he found what he considered as an express prohibition against passing it."[190] Nicholas did not deny that false statements had no value. "If there could be safety in adopting the principle, that no man should publish what is false," he explained, "there certainly could be no

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no doubt but juries have already that power . . . ."). Among those who spoke up, only James Bayard opposed giving power to juries to decide law, arguing that "a power of this kind is much more safely lodged in the hands of learned and upright Judges, than it could possibly be in those of an unlettered and perhaps prejudiced jury." *Id.* (statement of Rep. James Bayard). Bayard worried that "the effect of this amendment would be, to put it into the power of a jury to declare that this is an unconstitutional law, instead of leaving this to be determined, where it ought to be determined, by the Judiciary." *Id.*

184. *Id.* at 2151 (statement of Rep. Harrison Gray Otis); *see also id.* at 2168 (statement of Rep. Robert Goodloe Harper) ("[N]or could he be persuaded that the liberty of the press, as understood by the Constitution, could ever be abridged by a law to punish, on conviction before a jury, the publication of false, scandalous, and malicious libels."). In the so-called "Minority Report," Federalists in the Virginia Assembly, perhaps under the leadership of John Marshall, made similar arguments. Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 457–58 (2007).

185. Scholars often criticize the bill for not protecting Vice President Thomas Jefferson and for its expiration at the end of the presidential term, *e.g.*, Anderson, *supra* note 8, at 520; Mayton, *supra* note 8, at 124, but congressional debates do not reveal Republican opposition to either of these points, *see, e.g.*, 8 ANNALS OF CONG. 2134, 2138 (1798) (reporting the votes on several amendments to the bill); *see also* Lendler, *supra* note 174, at 420 (noting attempts to reauthorize the Act in 1801).

186. 8 ANNALS OF CONG. 2111 (1798) (statement of Rep. Albert Gallatin).

187. *Id.*; *see also, e.g.*, *id.* at 2159, 2161–62 (statement of Rep. Albert Gallatin) (emphasizing the lack of necessity); *id.* at 2106 (statement of Rep. Nathaniel Macon) (arguing that the availability of state libel prosecutions showed a lack of necessity for federal law).

188. *Id.* at 2158 (statement of Rep. Albert Gallatin); *see also, e.g.*, *id.* at 2151–52 (statement of Rep. Nathaniel Macon) ("They (Congress) have power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; but they have no power to define *any other crime whatever*." (quoting James Iredell)).

189. *Id.* at 2159 (statement of Rep. Albert Gallatin).

190. *Id.* at 2139 (statement of Rep. John Nicholas).

objection to it."[191] What worried Nicholas, though, was the *administration* of a sedition law. The "eye of a jealous Government," he explained, would "torture" critical statements "into an offence against this law."[192] And critics would then "have to be tried by judges appointed by the President, and by juries selected by the Marshal, who also receives his appointment from the President, all whose feelings would, of course, be inclined to commit the offender if possible."[193] The solution, for Nicholas, was a full denial of federal authority. "On this account," he insisted, "the General Government has been forbidden to touch the press."[194]

Edward Livingston made similar points. "Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment," Livingston explained.[195] But only *state* authorities had that power. It was "much more probable," he insisted, "that justice will be found in a court in which neither of the parties have influence, than in one which is wholly in the power of the President."[196] The problem, in Livingston's view, was straightforward. Federal judges were presidential appointees, and the jury was "selected by an officer holding his office at the will of the President."[197]

Albert Gallatin concurred. "[A]lthough there might be no change made by this bill in the law of libels," he acknowledged, "there was an all-important one made by the transfer of jurisdiction."[198] Again, the crux of the problem was jury selection. Federal marshals chose jurors in many states, Gallatin observed, and each marshal was a "creature of the Executive."[199] The sheriff charged with selecting jurors in Pennsylvania, by contrast, was elected to a three-year term, making him an "officer of the people."[200] This distinction between state and federal jury-selection practices might be "immaterial . . . in ordinary suits or prosecutions," Gallatin admitted, but suits "of a political nature" were entirely different.[201] In these cases, he explained, "the jury was liable to be packed by the Administration."[202]

Leading Republicans in the House thus presented a unified attack on the Sedition Act using a new theory of the First Amendment. The degree of

191. *Id.* at 2140.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 2153 (statement of Rep. Edward Livingston).
196. *Id.* at 2154.
197. *Id.* at 2153.
198. *Id.* at 2163 (statement of Rep. Albert Gallatin); *see also id.* at 2159–60 ("The sense, in which he and his friends understood this amendment, was that Congress could not pass any law to punish any real or supposed abuse of the press.").
199. *Id.* at 2164.
200. *Id.* at 2163–64.
201. *Id.* at 2164.
202. *Id.*

coordination between Nicholas, Livingston, and Gallatin is unclear, nor do we know how Jefferson may have influenced their strategy.[203] But the harmony of their opposition is striking. All three men pointed to jury selection when explaining why the federal government could not pass a sedition law. Perhaps not coincidentally, these three Republicans—from Virginia, New York, and Pennsylvania—each came from a state where federal marshals hand selected jurors and where most of the leading Republican newspapers operated. Indeed, as it turned out, the bulk of Sedition Act prosecutions were in states with hand selection of jurors.[204]

The Republican emphasis on federal power and jury selection reinforced several of their recurring constitutional motifs. One was an emphasis on constitutional limitations of federal power—a theme in Republican politics throughout the 1790s. Another was a claim about unchecked executive discretion. The principal Republican arguments against the 1798 Alien Friends Act, for instance, were that Congress lacked authority to pass the bill and that it gave the President too much control. With its emphasis on partisan jury selection, Republican opposition to the Sedition Act played to both of these themes.[205]

Provocatively, Republicans also invoked the longstanding principle that no man may judge his own case, turning the earlier anti-corruption justification for juries on its head. "If there could be safety in adopting the principle, that no man should publish what is false," John Nicholas explained early on in the debates, "there certainly could be no objection to it,"[206] accepting that expressive freedom did not require a categorical denial of governmental power over speech. But, he cautioned, "the persons who would have to preside in trials of this sort, would themselves be parties, or at least they would be so far interested in the issue, that the trial of the truth or falsehood of a matter would not be safe in their hands."[207] And it was "[o]n

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203. Jefferson was extraordinarily cautious in his correspondence at this time, DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 319–20 (1962), and his presence in Philadelphia until the eve of the Sedition Act debates in the House leaves unclear how he may have personally shaped the Republican opposition at this time. Without success, I have reviewed the papers of Albert Gallatin at the Library of Congress, the papers of Edward Livingston at Princeton, and the papers of the Nicholas family at the University of Virginia.

204. Federalists prosecuted the editors of seven newspapers in hand-selection states—two in Vermont, two in New York, two in Pennsylvania, and one in Virginia—and one each in the selection-by-lot states of Massachusetts and Connecticut. BLUMBERG, *supra* note 8, at 102–34. Other confirmed prosecutions took place in Massachusetts, New York, and Vermont, again tilting toward the hand-selection states. *Id.* at 134–39.

205. For Republican opposition to the Alien Friends Act, see generally, JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951). For continuity in Republican thought about federalism, see generally, K.R. Constantine Gutzman, *The Virginia and Kentucky Resolutions Reconsidered: "An Appeal to the* Real Laws *of Our Country"*, 66 J.S. HIST. 473 (2000).

206. 8 ANNALS OF CONG. 2140 (1798) (statement of Rep. John Nicholas).

207. *Id.*

this account," Nicholas concluded, that "the General Government has been forbidden to touch the press."[208]

Congressional Republicans occasionally hinted at a broader understanding of speech and press freedoms without relying on federalism.[209] But these arguments were subject to a devastating Federalist response: states had recognized the limited scope of speech and press freedoms by routinely restricting expression. One state law barred "aiding in a lottery by printing or publishing a scheme on account of it."[210] Another imposed "heavy penalt[ies]" on persons who "by public or private discourse or conversation . . . should dissuade or endeavor to prevent an officer from doing his duty in quelling riots."[211] Virginia had passed a law "against cursing and swearing, which," as Harrison Gray Otis pointed out, "is merely using the liberty of speech."[212] Indeed, any number of crimes like forgery or bribery could be "effected through the medium of the press or of the pen" or be "done by words only."[213] In the face of these laws, the new theory offered Republicans a way to deny federal authority to pass the Sedition Act without condemning these sorts of uncontroversial state laws.

B. Republican Opposition

After the Sedition Act went into effect, Republicans maintained steady attention on the issue of jury selection. "This power in a marshal, is a more complete and severe check on the press, and the right of the people to remark on public affairs," Charles Pinckney declared, "than ten thousand sedition laws, because here the power to select and by that means govern the opinion of juries, is continual, always increasing, and in a great degree subject on every trial to the wishes and directions of a President."[214] In states where "the federal marshals have a right to summon jurors as they please," he implored, "the people *are not free*."[215] Rather, justice in those states

208. *Id.*

209. *See, e.g.*, *id.* at 2160 (statement of Rep. Albert Gallatin) (describing reliance on the distinction between liberty and license as an "insulting evasion" of the Constitution). Gallatin further argued that speech was not subject to "previous restraints" unless "the Constitution had given Congress a power to seal the mouths or to cut the tongues of the citizens of the Union," *id.*, and therefore "a Constitutional clause forbidding any abridgement of the freedom of speech must necessarily mean, not that no laws should be passed laying previous restraints upon it, but that no punishment should by law be inflicted upon it," *id.* at 2160–61.

210. *Id.* at 2148 (statement of Rep. Harrison Gray Otis).

211. *Id.*

212. *Id.* at 2149.

213. *Id.* Federalists tried to reauthorize the Sedition Act in January 1801, leading to a reprisal of the same arguments. 10 ANNALS OF CONG. 916–40, 946–58, 960–76 (1801). Republicans again highlighted jury selection as a principal concern. *E.g.*, *id.* at 965 (statement of Rep. Nathaniel Macon); *id.* at 951 (statement of Rep. Albert Gallatin).

214. 10 ANNALS OF CONG. 40 (1800) (statement of Sen. Charles Pinckney).

215. *Id.* at 37.

> must depend not on the laws but the integrity and honest independence of a marshal; to him is left the monstrous and dangerous power of summoning proper or improper, fit or unfit, dishonest or upright men—men who may be the friends or enemies to the parties who are on their trial, or who on political questions may be known to be opposed to them, and to hold opinions diametrically contrary to those which are perhaps in the course of the trial to be submitted to them for their decision.[216]

Fears of partisan jury selection and calls for reform were common themes in other Republican writings.[217]

Thomas Jefferson, too, began to consider ways of reforming jury-selection practices. "[T]he people themselves are the safest deposit of power . . . [and] are competent to the appointment or election of their agents," Jefferson wrote in a petition drafted in October 1798.[218] Appointment of jurors, however, "has not been left in their hands, but has been placed by law in officers, dependant on the Executive or Judiciary bodies."[219] In place of this system, Jefferson proposed that Virginians elect a list of federal jurors, with panels of grand and petit jurors chosen randomly from that list.[220] This method would strip control from federal marshals without, in turn, empowering federal judges by creating juries "pliable to the will and designs of power."[221]

While Jefferson was contemplating jury selection, he was also preparing a draft resolution that he called "the Kentuckey resolves,"[222] now commonly known as the Kentucky Resolutions of 1798.[223] The draft took an

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216. *Id.*

217. *See, e.g.*, Virginia Assembly Debates (Dec. 19, 1798) (statement of Del. William Daniel) (warning of "a jury summoned with a *special regard* to their political opinions"), *in* DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA, *supra* note 35, at 99; AURORA GEN. ADVERTISER (Phila.), Nov. 7, 1799, at 3 ("How could such a President secure the conviction of those men? By *influencing marshals* to *pack* juries, *to select men* who should be devoted to his interest."); AURORA GEN. ADVERTISER (Phila.), May 20, 1799, at 2 ("The Grand Jury [are] *well selected* and as well calculated to echo the sentiments of any Judge . . . ."); *see also Juror Reform Bills of 1800*, *supra* note 6, at 270 ("Concern about juror selection increased during the Sedition Act trials that were held between 1798 and 1800. Throughout those well-publicized proceedings, Republicans insisted that federal marshals were packing juries to secure the conviction of men who had criticized the Adams administration." (footnote omitted)).

218. Thomas Jefferson, Petition to the General Assembly of Virginia (Nov. 2 or 3, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 170, at 571, 572.

219. *Id.*

220. *Id.* at 573.

221. *Id.* Jefferson was tapping into a Republican fear that judges would overbear unwitting jurors. *See* JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 115–30 (2004) (recounting an episode of heavy-handed judges in early nineteenth-century New Hampshire).

222. Letter from Thomas Jefferson to James Madison (Nov. 17, 1798), *in* 17 THE PAPERS OF JAMES MADISON, *supra* note 20, at 175, 175.

223. Thomas Jefferson, The Kentucky Resolutions of 1798, *in* 30 THE PAPERS OF THOMAS

extraordinarily bold position against federal power. The Constitution, he explained, was a mere compact ("under the style & title of a Constitution") creating a government "for special purposes" with "certain definite powers."[224] Those powers included authority to recognize only a few crimes—treason, counterfeiting, piracy, offenses against the law of nations—and "no other crimes whatsoever."[225] Statutes creating any other crimes, he admonished, were "altogether void and of no force."[226]

Jefferson then turned to speech and press freedoms. Under its enumerated powers, and based on the Tenth Amendment, he explained, Congress had "no power over the freedom of religion, freedom of speech, or freedom of the press."[227] Instead, states retained "all lawful powers" respecting those subjects, and each state retained "the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated rather than the use be destroyed."[228] In other words, the implicit reservation of speech and press freedoms under the Constitution meant not simply that the federal government could not *abridge* rights to speaking, writing, and publishing, but that it could not touch those subjects *at all* because doing so would require defining the scope of those rights. Recall that Jefferson had already begun to articulate this idea in response to the Cabell presentment.

After offering this account, Jefferson noted that "another & more special provision"—the First Amendment—reinforced the same conclusion: that "libels, falsehood and defamation equally with heresy & false religion are witheld from the cognisance of federal tribunals."[229] The Kentucky Resolutions thus defended an understanding of the First Amendment that limited federal power without explaining how state protections for speech and press freedoms might constrain state governments.[230] And, as with his

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JEFFERSON, *supra* note 170, at 529. The main text quotes from Jefferson's draft, but his "fair copy" is virtually identical. *See* Thomas Jefferson, Jefferson's Fair Copy (before Oct. 4, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 170, at 543, 543–45. On the origins of the Virginia and Kentucky Resolutions, see generally Koch & Ammon, *supra* note 6.

224. Thomas Jefferson, Jefferson's Draft (before Oct. 4, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 170, at 536, 536.

225. *Id.*

226. *Id.*

227. *Id.* at 536–37.

228. *Id.* at 537.

229. *Id.*

230. Jefferson, however, clearly indicated that states could "abridge[ ]" the "licentiousness of speech and of the press." *Id.* Indeed, although Kentucky's 1799 Constitution provided that "every citizen may freely speak, write, and print on any subject," it recognized legal responsibility "for the abuse of that liberty." KY. CONST. of 1799, art. X, § 7. It further provided for a truth defense in "prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information." *Id.*, art. X, § 8. These provisions were modeled on PA. CONST. of 1790, art. IX, § 7.

response to the Cabell presentment, Jefferson's argument for exclusive state authority over speech and the press also helped justify his radical state-based remedy: a declaration by the Kentucky legislature that the Sedition Act "is not law but is altogether void and of no force."[231]

In the Virginia Resolutions of 1798, by contrast, James Madison provided a more nuanced account of the First Amendment. The Sedition Act, Madison explained, exercised

> a power not delegated by the constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.[232]

The Sedition Act, he concluded, was a "palpable violation" of the rights that the people had "declared and secured."[233] Although not entirely clear, Madison seems to have been suggesting that an equivalent state sedition law would also abridge the right of "free communication among the people."[234]

Just a few weeks later, however, the Virginia legislature issued an "Address" that squarely returned to the Jeffersonian position.[235] "Every libellous writing or expression," the Assembly explained, "might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens."[236] Yet again, Republicans explicitly adopted a theory of speech and press freedoms grounded on a fear of corruptly chosen federal juries.

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231. Jefferson, *supra* note 224, at 537. In the Virginia legislature, John Taylor of Caroline similarly tied the state-based remedy to the usurpation of state power. *See* Virginia Assembly Debates (Dec. 20, 1798) (statement of Del. John Taylor of Caroline) ("[T]he States . . . as parties [to the Constitution], were justifiable in preserving their rights under the compact against violation."), *in* DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA, *supra* note 35, at 132–33.

232. James Madison, Virginia Resolutions (Dec. 21, 1798), *in* 17 THE PAPERS OF JAMES MADISON, *supra* note 20, at 185, 189–90.

233. *Id.* at 190.

234. *Id.*

235. The Address is often errantly attributed to James Madison. *See* David B. Mattern et al., *Note on the Virginia Resolutions, 10 January 1799, and the Address of the General Assembly to the People of the Commonwealth of Virginia, 23 January 1799* (addressing this misconception), *in* 17 THE PAPERS OF JAMES MADISON, *supra* note 20, at 199, 199–206. The Address criticizes Federalist reliance on the First Amendment as a *source* of federal power, but it does not articulate a theory of speech and press freedoms that would inhibit sedition prosecutions.

236. Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), *in* 6 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 332, 334 (Gaillard Hunt ed., 1906).

IV. The Invention of First Amendment Federalism

A. Recasting History

Skepticism about the *administration* of laws abridging speech, rather than opposition to the laws themselves, drove Republican thought. "If the triers were formed of angelic materials . . . and blessed with a considerate impartiality, that never was known to dwell in the hot flame of party spirit," a Virginia editorial opined, "this law might not then in its effects be a destruction of any thing but the abuse and licentiousness of the press."[237] But a federal marshal "would, no doubt, select those whom he should think *good* jurors, and warm friends to *his good order*, when a question of *good order* was upon the carpet."[238] And juries therefore were "not so much a body of inquest as instruments of conviction."[239] Republicans echoed these ideas over and over throughout debates over the Sedition Act, portraying the Act as giving the President dangerous authority to control the outcomes of cases in which he and his party had an interest.

As they recast the First Amendment, Republicans may have realized that the text of the First Amendment was largely unhelpful to their cause. Its language, Federalists pointed out, had an established common law meaning that was generally understood to permit sedition prosecutions.[240] To counter this persuasive textual argument, Republicans shifted their focus to a broader historical narrative. Particularly noteworthy is the account in the Virginia Report of 1800, authored by James Madison.

Madison's historical reimagination began overseas. To understand the "American idea" of the freedom of the press, he explained, it was useful to start with "[t]he essential difference between the British government, and the American constitutions."[241] Under the British constitution, he wrote, "the danger of encroachments on the rights of the people, is understood to be confined to the executive magistrate," and therefore "an exemption of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it."[242] (Madison was referring, at least in part, to the English Bill of Rights, which imposed disabilities on the King but not Parliament.[243]) But in the United States, Madison insisted, "the case is altogether different. The people, not the government, possess the absolute sovereignty."[244] Thus, he concluded:

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237. *The Independent* (Dec. 11, 1798), TIMES & ALEXANDRIA ADVERTISER, Dec. 15, 1798.
238. *Id.*
239. *Id.*
240. *See supra* notes 175–84 and accompanying text.
241. MADISON, *supra* note 20, at 336.
242. *Id.*
243. English Bill of Rights, *supra* note 136.
244. MADISON, *supra* note 20, at 336–37.

> This security of the freedom of the press, requires that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.[245]

In the English constitutional tradition, however, it was simply untrue that customary constitutional rights restricted only executive power. Rather, these rights routinely imposed limits on the *rightful* exercise of legislative authority. The rule against ex post facto laws is an obvious example. Parliamentary acts were generally unreviewable in court because of Parliament's legal supremacy, but most elites had long since come to the view that sovereignty resided in the people themselves, and that Parliament was constrained by the customary constitution even though its acts were beyond judicial review.[246] Following this tradition, the American colonists had fought a revolution to *defend* their rights as Englishmen—not to transform the meaning of those rights.[247]

Consequently, there was nothing peculiar about using English traditions to define American liberties.[248] Americans "hav[e] derived all [their] rights, from one common source, the British systems," Federal Farmer characteristically explained.[249] To be sure, not all of these rights were enumerated in England's foundational constitutional texts. As Madison had explained in 1789,

> whenever the great rights, the trial by jury, freedom of the press, or

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245. *Id.* at 337.

246. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 250–54 (2008); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE 84–86 (1991). On the development of popular sovereignty, see generally EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

247. For discussions of English rights and the American Revolution, see generally JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011) and REID, *supra* note 32.

248. Indeed, when arguing for the protection of customary rights, Anti-Federalists often relied on English authorities like Blackstone. *E.g.*, Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 64, at 61, 62–63.

249. FEDERAL FARMER, LETTER II TO THE REPUBLIC (1787), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 214, 216; *see also, e.g.*, A PLEBEIAN, AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (1788) (asserting that "it was useless to stipulate for the liberty of the press" in New York's constitution, "for the common and statute law of England, and the laws of the colony are established, in which this privilege is fully defined and secured"), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 37, at 942, 961. Interestingly, some Federalists in the First Congress adopted the narrative of American exceptionalism when protesting a proposed law that would have disabled federal officers from electioneering, with other representatives relying on English precedents. Debates in the House of Representatives, Third Session (Jan. 21, 1791), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, at 339, 339–42 (William Charles diGiacomantonio et al. eds., 1995).

> liberty of conscience, come in question in [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed.[250]

The First Amendment did not change the *meaning* of these rights by transforming them into restraints on legislative power; speech and press freedoms *already* imposed limits on legislative power. Rather, the American innovation was to *enumerate* these rights. The history of the ratification controversy offered no support to Madison's declaration in the Virginia Report that "[t]he state of the press, therefore, under the common law, can not in this point of view, be the standard of its freedom, in the United States."[251] English press freedom *did* limit Parliamentary authority.

Even if Americans were to depart from Blackstone's definition of press freedom, however, Madison recognized that they would still need to determine "the proper boundary between the liberty and licentiousness of the press."[252] But this difficulty was beside the point regarding *federal* regulations of speech, Madison argued, because the First Amendment "was meant as a positive denial to Congress, of any power whatever on the subject."[253] Venturing beyond his Virginia Resolutions of 1798, Madison now clearly adopted the standard Republican position. "To demonstrate that this was the true object of the article," he wrote, "it will be sufficient to recall the circumstances which led to it, and to refer to the explanation accompanying the article."[254] Again, Madison was turning to history.

The absence of enumerated rights in the original Constitution, combined with congressional power under the Necessary and Proper Clause, Madison recalled, led to "great apprehensions" that "certain rights, and . . . the freedom of the press particularly," might be "drawn by construction within some of the powers vested in Congress."[255] Federalists, he explained, had urged that "the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of

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250. 1 ANNALS OF CONG. 436 (1789) (statement of Rep. James Madison). Madison went on to say: "The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." *Id.* Assuming that the debate records are accurate, Madison seems to have viewed "the British Constitution" as limited to constitutional documents like Magna Carta and the English Bill of Rights. But the key point to recognize is that Madison clearly appreciated in 1789 that English constitutionalism recognized certain "great rights"—like "freedom of the press"—that operated against legislative as well as executive action. Thus, even if those English rights were not explicitly solemnized in constitutional texts, their *definition* needed no transformation when taken from England and applied in the United States.

251. MADISON, *supra* note 20, at 337.

252. *Id.*

253. *Id.* at 339.

254. *Id.*

255. *Id.*

them."[256] Thus, he concluded, "it would seem scarcely possible to doubt, that no power whatever over the press, was supposed to be delegated by the constitution, as it originally stood; and that the amendment was intended as a positive and absolute reservation of it."[257] In other words, the press was "wholly exempt from the power of Congress."[258]

Many scholars still defend the Republican view that the First Amendment disabled the federal government from passing laws that touch speech.[259] This argument, in turn, bolsters the idea that free speech challenges should be "facial," focusing on the constitutionality of *laws* rather than the facts of particular cases. Nicholas Rosenkranz, for instance, notes that Thomas Jefferson's analysis of the Sedition Act's constitutional deficiency "was 'facial' in the sense that he found the constitutional violation to be evident on the face of the statute."[260] Along similar lines, relying extensively on Jefferson's and Madison's arguments against the Sedition Act, Kurt Lash argues for a similar assessment of religious freedom because "the original Free Exercise Clause . . . appears to be limited to a prohibition of laws that abridge religion *qua* religion."[261] Meanwhile, Will Baude uses the Republican opposition to suggest that "regulation of the press is a great power" that cannot be reached under the Necessary and Proper Clause.[262]

Republicans, however, were making novel arguments against the Sedition Act, offering a distorted view of the First Amendment's origins. To be sure, a few Federalists had argued that the federal government would lack

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256. *Id.*

257. *Id.* at 340. Madison also used the rule against prior restraints to argue against legislative interference with the press. In order to be effectual, he insisted, the "exemption" of the press from "legislative restraint . . . must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws," *id.* at 337, because "a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them," *id.* at 336.

258. *Id.* at 340. A year earlier, prominent Virginia lawyer George Hay had offered a similar account of the First Amendment's origins. *See* HORTENSIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 37–38 (Phila., Aurora Office 1799) ("If the word freedom was used in [a natural-rights] sense, by the framers of the amendment, they meant to say, Congress shall make no law abridging the freedom of the press, which freedom, however, is to be regulated by law. Folly itself does not speak such language.").

259. *E.g.*, Lash, *supra* note 87, at 1111–14; Mayton, *supra* note 8, at 97, 119.

260. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1236, 1271 (2010).

261. Lash, *supra* note 87, at 1113; *see also* Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369, 369 (2016) ("The founders' jurisdictional understanding of religious liberty denies the idea of a constitutional right to religious exemptions."). Lash later adopted the Jeffersonian position full stop, arguing that prior to 1868 Congress had no authority to grant religious exemptions even to its own laws. Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1099–1116 (1998).

262. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1822 (2013).

any authority to regulate the press *under Article I*.[263] Most Federalist denials of federal power to restrain the liberty of the press, however, were based on the *implied* retention of rights, not a categorical lack of federal power.[264] And when Federalists had openly denied federal power over the liberty of the press, they often clarified that they were simply disclaiming federal power to initiate a licensing regime.[265]

Most importantly, though, whatever their views on the extent of congressional powers, nobody in the ratification debates suggested that adding a guarantee of speech and press freedoms would reinforce an absence of federal power over expression. If anything, they recognized that such an enumeration would imply just the opposite. As Alexander Hamilton noted in *Federalist No. 84*, for instance, a "provision against restraining the liberty of the press" would "afford[] a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government."[266]

Like so much of constitutional debate in the 1790s, Madison made new arguments in light of new circumstances. The Framers had not anticipated the emergence of political parties, and the alignment of partisan interests among the three branches—combined with the hand selection of federal jurors in many states—created a toxic environment for political dissenters. And, recognizing this development explicitly, Republicans justified their interpretation of the First Amendment by invoking the axiom of natural law that no man should decide his own case. "[W]hat security of a fair trial remained to a citizen," Albert Gallatin asked rhetorically, "when the jury was liable to be packed by the Administration, when the same men were to be judges and parties?"[267] To the extent that Founding Era constitutionalism allowed appeals to social-contract theory and natural law to interpret constitutional provisions, Republicans had a plausible case that the emergence of political parties had transformed constitutional meaning.[268]

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263. *See* Campbell, *supra* note 8, at 300 n.242 (collecting sources).

264. *Id.* at 301.

265. *Id.* at 300.

266. THE FEDERALIST NO. 84, *supra* note 19, at 579 (Alexander Hamilton); *see also, 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) ("It would have been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press, if the power itself does not exist."). Some have proposed that this line of reasoning violates the constructive rule in the Ninth Amendment. *E.g.*, Baude, *supra* note 262, at 1796–98. *But see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 659 n.3 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (inferring power from the Fifth Amendment). Madison's original draft of the Ninth Amendment included a rule specifically barring a powers-enlarging inference from the enumeration of rights, but this language did not survive in the House. Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 632 (1956).

267. 8 ANNALS OF CONG. 2164 (1798) (statement of Rep. Albert Gallatin).

268. On the importance of social-contract theory and natural law in shaping constitutional discourse at the Founding, see generally Campbell, *supra* note 26.

Republicans, however, resolutely avoided casting their argument in terms of constitutional change. Rather, "the best way of coming at the truth of the construction of any part of the Constitution," they insisted, was "examining the opinions that were held respecting it when it was under discussion in the different States."[269] The position of Madison and his colleagues, in other words, was constrained by a constitutional culture that prized historical argument over openly acknowledged shifts in constitutional meaning.[270] History was, as it continues to be, a core feature of American constitutionalism.

The fact that Republicans made new arguments in historical terms ought to give us significant pause about modern reliance on post-ratification statements as evidence of original meaning. Scholars of the Founding have widely appreciated the remarkable diversity and fluidity of constitutional argument,[271] making it tricky to assess whether and how debates in the 1790s reflected original meaning. What the history of the Republican opposition to the Sedition Act adds to this challenge is recognition of a constitutional culture where novel arguments were actually cast in historical terms by the Founders themselves. None of this is to deny our capacity to produce intellectual histories of Founding Era constitutional thought. But that task certainly becomes harder after realizing that the Founders were originalists and living constitutionalists at the very same time.

Drawing on their revised view of history, Republican opponents of the Sedition Act had a profound influence on American constitutionalism. Leading Virginia jurist Spencer Roane described Madison's Report as "the *Magna Charta* on which the republicans settled down, after the great struggle in the year 1799."[272] For the next century, however, that legacy was defined by a narrow understanding of federal power, with profound ramifications that

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269. 8 ANNALS OF CONG. 2151 (1798) (statement of Rep. Nathaniel Macon).

270. *See* GIENAPP, *supra* note 17 (exploring this concept); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 192–93, 197–213 (1997) (same); *see, e.g.*, Virginia Assembly Debates (Dec. 13, 1798) (statement of Del. John Taylor of Caroline) ("He then read the 3d article of the amendments to the constitution concerning freedom of speech &c. and asked in what sense this clause was understood at the time of adoption?"), *in* DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA, *supra* note 35, at 7. To be sure, it is *possible* that Madison fully believed what he was saying about history. But the 1798 Virginia Resolutions, which did not articulate a jurisdictional view of the First Amendment, *see supra* notes 232–34 and accompanying text, suggest that Madison was a latecomer to the dominant Republican position. For a discussion of "Madison and the Origins of Originalism," focusing on Madison's constitutional arguments earlier in the 1790s, see RAKOVE, *supra* note 32, at 339–65. Intriguingly, Madison's later invocations of the ratification debates may be inconsistent with his earlier views about using that type of evidence in constitutional interpretation. Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 165 (1996). For a probing discussion of the use of history in English and American constitutionalism, see REID, *supra* note 16, at 28–40.

271. *E.g.*, GIENAPP, *supra* note 17.

272. [Spencer Roane], *Hampden I*, RICHMOND ENQUIRER, June 11, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 113 (Gerald Gunther ed., 1969).

went well beyond debates about regulating expression.[273] Over time, some thinkers proposed a broader conception of speech and press rights, but these ideas gained very little traction among judges. As the Supreme Court summarized in 1907, the "freedom of speech and freedom of the press . . . do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[274]

B. Juries, Judges, and Expressive Freedom

By the middle of the twentieth century, the Supreme Court began to articulate far more robust free speech doctrines. And just as James Madison had reimagined the First Amendment's origins, the Justices reimagined the Madisonian mythology. In its seminal decision in *New York Times v. Sullivan*,[275] the Court claimed that "the great controversy over the Sedition Act . . . crystallized a national awareness of the central meaning of the First Amendment."[276] The Sedition Act was "never tested in this Court,"[277] Justice Brennan wrote—failing to mention that seven federal judges (including four of six Supreme Court Justices) had unanimously upheld its constitutionality.[278] But "the attack upon its validity ha[d] carried the day in the court of history," he triumphantly proclaimed.[279]

The only consensus Republican argument against the Sedition Act, however, was that the federal government lacked any authority to regulate expression. Incorporating *that* concept against state governments would have been radical indeed, depriving state and federal authorities from implementing all sorts of uncontroversial laws, like bans on defamation, perjury, and fraud. And even Republican opponents of the Sedition Act had widely acknowledged that public officials could bring libel suits "upon the same footing with a private individual."[280]

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273. *See* Kevin R. Gutzman, *A Troublesome Legacy: James Madison and "The Principles of '98"*, 15 J. EARLY REPUBLIC 569, 583–89 (1995) (examining this legacy); Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 182–86 (2006) (same); H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 690–96 (1994) (same).

274. Patterson v. Colorado *ex rel.* Att'y Gen. of Colo., 205 U.S. 454, 462 (1907). *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997) (examining free speech between 1870 and 1920).

275. 376 U.S. 254 (1964).

276. *Id.* at 273.

277. *Id.* at 276.

278. BLUMBERG, *supra* note 8, at 144–45.

279. *Sullivan*, 376 U.S. at 276.

280. TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS 259 (Da Capo Press 1970) (1800); *see also* ST. GEORGE TUCKER, *View of the Constitution of the United States* (writing in 1803 that "the farmer, and the man in authority, stand upon the same ground: both are equally entitled to redress for any false aspersion on their respective characters, nor is there any thing in our laws or constitution which abridges this right"), *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 237–38 (1999); *cf.*

But rather than grapple with historical complexity, Justice Brennan and his colleagues reinvented the First Amendment yet again. The freedom of speech, the Court held, "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'"[281] Perhaps the Justices were simply misinformed about history, but it seems more likely that their decision—historical homages notwithstanding—was never really about fidelity to original meaning.[282]

The many causes of developments in speech doctrine ever since are well beyond the scope of this Article, but one point is worth highlighting: the Supreme Court regularly announced speech-protective doctrines designed to shield speakers from the whims of biased or ignorant juries.[283] As Justice Harlan explained, "[I]n many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship."[284] With a brooding tone, he continued: "Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."[285]

Distrust of state judges and juries—particularly in cases coming out of the South—was commonplace in twentieth-century civil rights decisions.[286]

JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTROULABLE NATURE OF THE HUMAN MIND: CONTAINING AN INVESTIGATION OF THE RIGHT WHICH GOVERNMENT HAVE TO CONTROUL THE FREE EXPRESSION OF PUBLIC OPINION, ADDRESSED TO THE PEOPLE OF THE U. STATES 81–84 (N.Y.C., Johnson & Stryker 1801) (calling for unimpeded public debate about public figures, although seemingly not interpreting the First Amendment at this point of the argument).

281. *Sullivan*, 376 U.S. at 279–80.

282. *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 790 (1986) (suggesting that the Court was motivated to "save the Times" from a "deep miscarriage of the common law process"); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156 (1998) ("Fidelity to history wasn't the goal of the doctrinal innovations of the 1960's; adapting the law to immediate social needs was.").

283. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("A negligence test [for defamation] would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it . . . .").

284. *Id.* at 406 (Harlan, J., concurring in part and dissenting in part).

285. *Id.*; *see, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 360 (1974) (Douglas, J., dissenting) ("[A] jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 276–77 (1971) ("A standard of 'relevance,' . . . applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech . . . ."); *Hill*, 385 U.S. at 402 (Douglas, J., concurring) (highlighting the "capricious or whimsical circumstances" and "emotions and prejudices" that often guide a jury); *see also* AMAR, BILL OF RIGHTS, *supra* note 10, at 24 ("As the First Amendment's center of gravity has (appropriately, in light of the later Fourteenth Amendment) shifted to protection of unpopular, minority speech, its natural institutional guardian has become an insulated judiciary rather than the popular jury.").

286. *See, e.g.*, Kahan & Meares, *supra* note 282, at 1153 ("The need that gave birth to the

Speech cases were no exception. The Court recognized the "freedom to engage in association for the advancement of beliefs and ideas" in a famous 1958 decision overturning an Alabama court's onerous (and legally meritless) discovery order and contempt judgment against the nation's leading civil rights group.[287] Just six years later, *New York Times v. Sullivan* involved an Alabama jury's onerous (and legally meritless) damages award to a local official based on a civil rights advertisement.[288] As it expanded doctrinal categories in order to limit abridgments of speech, the Court also ensured that it (and other courts) could review the factual bases of earlier decisions.[289] Recent cases occasionally reflect similar concerns.[290] For better or worse, an amendment designed in part to empower juries now stands firmly as a bulwark against their prejudices.

More broadly, the Court's mid-century speech and press decisions were part of an effort to elevate judicial scrutiny in those instances where the justices had less reason to trust the good faith of governmental officials.[291] The Court's first significant doctrinal expansion under the First Amendment, for instance, came in *Near v. Minnesota*,[292] which curtailed the power of trial judges to insulate themselves from criticism using contempt sanctions.[293] Other cases cut back on the ability of political officials to limit speech through discretionary licensing schemes,[294] with the Justices occasionally signaling broader concerns of political entrenchment.[295] The Supreme

existing criminal procedure regime was institutionalized racism. . . . Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid."); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1388–89 (2004) (making a similar point); *see also* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 61–67, 79–82 (2000) (giving particular attention to the issue of black jury service).

287. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

288. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256–65 (1964).

289. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984).

290. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011) (concluding that a jury would be "unlikely to be neutral with respect to the content of [the] speech" (alteration in original) (quoting *Bose Corp.*, 466 U.S. at 510)).

291. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (laying out the framework for heightened scrutiny). For a provocative discussion of *Carolene Products* and its relationship to speech doctrine, see G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 327–42 (1996).

292. 283 U.S. 697 (1931).

293. *Id.* at 712–15.

294. *See, e.g.*, Saia v. New York, 334 U.S. 558, 559–62 (1948) (striking down discretionary licenses for loudspeakers); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) (striking down discretionary licenses for speech in streets and parks); Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938) (striking down discretionary licenses for leafleting).

295. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 416–18 (2015).

Court's earliest First Amendment decisions thus seem to align with a representation-reinforcing theory of judicial review.[296]

But while concerns about self-interested legislation and biased enforcement were often at play in these early cases, the Justices rarely relied on those concerns explicitly. And First Amendment law soon took a different turn. Judicial decisions and scholarly commentaries are now dominated by various substantive theories of expressive freedom, all of which seek to explain why speech and the press are deserving of special protection.[297] The First Amendment, many argue, exists to protect democratic self-government.[298] Others point to its role in promoting a marketplace of ideas, "further[ing] the societal interest in the fullest possible dissemination of information."[299] Still more insist that free speech is essential to "individual self-realization."[300]

None of these theories were baked into the First Amendment, which originally allowed the government to regulate harmful speech in promotion of the public good.[301] Nor does the Republican invention of First Amendment federalism offer a theoretical justification for treating speech as special. But for those inclined to reorient First Amendment doctrine in a more historically grounded direction, the response to the Sedition Act could still prove relevant. Republicans made strained arguments, to be sure, but their core insight endures: political entrenchment and politically biased enforcement are a clear danger to republican government. Perhaps it is time to bring that concern back to the doctrinal fore.[302]

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296. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 754–55 (1991).

297. *See, e.g.*, Schauer, *supra* note 22, at 1785–86 (reviewing some of these theories).

298. *E.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

299. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980).

300. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

301. Campbell, *supra* note 8, at 313.

302. For scholarly suggestions along these lines, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 631–48; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502 (1997); Klarman, *supra* note 296, at 753–57; Levinson & Sachs, *supra* note 295, at 402. Of course, translating general concerns about biased decisions into specific doctrinal rules would often be tricky. *See, e.g.*, Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 30–31 (2012) (discussing competing ways that a process-based theory of judicial review might apply in the context of campaign-finance cases).