

**FIRST AMENDMENT ORIGINALISM:
THE ORIGINAL LAW AND A THEORY OF LEGAL
CHANGE AS APPLIED TO THE FREEDOM OF SPEECH
AND OF THE PRESS**

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ABSTRACT

Modern First Amendment law on the freedom of speech and press is, in an important way, originalist. This claim runs contrary to the perception of many. This Article explains the originalist pedigree of the First Amendment. The original meaning of the First Amendment in 1791, standing alone, does not protect as much expression as the modern Supreme Court's jurisprudence says it does. The Constitution's structure, however, protects liberty. The original legal meaning of the First Amendment, taken in conjunction with the original understanding of the enumerated powers scheme of Article I, Section 8, the rights protecting rule of construction in the Ninth Amendment, and the reservation of powers to the States in the Tenth Amendment, protects a greater sphere of speech and press than does the First Amendment alone. It may protect all of it, from the federal government at least. This was the Jeffersonian argument in opposition to the Sedition Act of 1798, that the First Amendment barred all federal government regulation of speech and press. That argument became the law of the First Amendment through the theory of liquidation. Liquidation is a theory for how ambiguous constitutional meaning can be fixed or settled to a more refined meaning. Through liquidation, the original meanings of the Constitution's multi-faceted structural protections for speech and press liberties was condensed entirely into the confines of the First Amendment. The Jeffersonian construction of the First Amendment that emerged from this contest over the Amendment's meaning, was importantly connected to the original meaning of the Constitution and its First Amendment. It is also the foundation for the Supreme Court's modern First

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Amendment jurisprudence. This pedigree of the First Amendment makes it originalist in an important way.

This Article walks readers through this historical process of legal change in the original meaning of the First Amendment. Originalism does not prevent legal change. It requires that law be changed in accordance with the law. This Article does not arrive at the final word on the meaning of the First Amendment. It does not claim to argue what the correct interpretation of the First Amendment is or what its meaning should be. Yet, it does argue that in an important way our First Amendment law is originalist. That fact is of importance for our understanding of the First Amendment's meaning and its correct application to concrete legal problems.

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INTRODUCTION

James Madison wrote that the First Amendment “is a denial to Congress of all power over the press[.]”¹ But was the “Father of the Constitution” right? Weighed against Ratification-era sources, Madison’s interpretation of the First Amendment was a novel invention² and not part of the First Amendment’s original meaning.³ Yet, Madison’s succinct articulation of the Jeffersonian interpretation of the First Amendment became the law of the United States⁴ and is still considered the foundation of modern First Amendment jurisprudence by the Supreme Court.⁵ If the Jeffersonian interpretation is incorrect, it should follow that a great deal of First Amendment case law is consequently incorrect.⁶ I argue that the original legal meaning of the First Amendment, properly situated in the constitutional superstructure, may not require the overturning of many seminal First Amendment cases, even if those cases could have been decided with a firmer grounding in originalism. Further, I argue that through a theory known as liquidation, the fixing of ambiguous constitutional meaning, the Jeffersonian interpretation of the First Amendment may be the original law of the First Amendment.

This Article attempts to define and explain a theory of “Original Law Originalism” as applied to the First Amendment. It begins by first restating the original meaning of the First

¹ JAMES MADISON, *Report of 1800* (Jan. 7, 1800), in 17 THE PAPERS OF JAMES MADISON 336 (David B. Mattern et al. eds., 1991).

² Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. (forthcoming 2019) [hereinafter Campbell, *First Amendment Federalism*].

³ *Id.* at 21.

⁴ *Id.* at 5.

⁵ See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (explaining Madison’s interpretation of the First Amendment in the context of his opposition to the Sedition Act, a view that “has carried the day in the court of history”).

⁶ Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 263–64 (2017) [hereinafter Campbell, *Natural Rights*] (“A huge swath of modern case law, after all, falls outside of the First Amendment’s original legal ambit, including its ban on prior restraints and its protection for well-intentioned statements of one’s thoughts. If an originalist wanted First Amendment doctrine to track Founding Era judicial reasoning, the Supreme Court’s decisions in *Texas v. Johnson*, *Boy Scouts of America v. Dale*, *Citizens United v. FEC*, and *Snyder v. Phelps*, among many, many others, would likely have to go.”); see also Cass R. Sunstein, *What If the Founders Had Free Speech Wrong? A Scholar’s Jarring Claim: America’s Framers Meant to Protect a Lot Less Speech than Most of Us Think*, BLOOMBERG (Dec. 14, 2017, 8:00 AM), <https://www.bloomberg.com/view/articles/2017-12-14/what-if-the-u-s-has-free-speech-all-wrong> (“Campbell’s research raises serious questions for ‘originalists’ . . .”). But see Campbell, *Natural Rights*, *supra* note 6, at 264 (“[O]ther originalists argue that judges are empowered, or even duty-bound, to give concrete meaning to underdeterminate constitutional provisions. If one accepts this view, then modern law might still comport with original meaning.”).

Amendment (Campbell's view) then explaining how that original meaning was "changed" or "liquidated" by the Jeffersonians. It connects the legal history of the First Amendment to its modern legal meaning to demonstrate that, by its pedigree, our modern First Amendment law *is* originalist.⁷ Original Law Originalism is a theory of originalism and of legal change. It is "a particular way to understand where our law comes from, what it requires, and how it can be changed."⁸ The theory rests on the principle that law has a meaning at the time it is adopted and that that meaning can change. It can only change, however, if it is legally changed by the proper method authorized by the law for making that legal change. The proposition is that "our law"—that is, American law—"happens to consist of their law, the Founders' law, including lawful changes made along the way."⁹ Consequently, to understand what our law is today, we must understand the content of the Founder's law and then, if it was changed, how it was changed. This Article applies that Original Law Originalism definition of our law's legal content to the First Amendment to explain the current foundation of First Amendment jurisprudence and to provide a means for discovering the Amendment's true legal meaning.

The natural place to begin our inquiry is the text of the First Amendment and its legal content at the time of enactment in 1791. The "freedom of speech, or of the press"¹⁰ in the law of the First Amendment has two distinct meanings; and the meaning of those legal words proceeds from two sources. One springs from the Framers' conception of the natural rights of *speaking, writing, and publishing*.¹¹ The other is a fundamental positive right, *the liberty of the press*, derived from the common law, which carries with it certain established customary legal rules about what government can and cannot do in regards to regulating the press.¹² What the legal content of the First Amendment consists of is its original meaning. Professor Campbell defines that original meaning as "the First Amendment recognized (either implicitly or outright) the ordinary natural right of expressive freedom along with (either

⁷ This Article heavily relies upon Professor Campbell's recently published article *Natural Rights and the First Amendment* for understanding the First Amendment's original meaning. See Campbell, *Natural Rights*, *supra* note 6.

⁸ Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 818 (2015).

⁹ *Id.* (emphasis omitted).

¹⁰ U.S. CONST. amend. I.

¹¹ See *infra* Section I.D.

¹² See *id.*

absolute or presumptive) protection for a set of customary rules with more determinate legal meanings.”¹³

This Article agrees with Campbell’s original understanding of the First Amendment; however, I argue that there is more to it. The meaning of the First Amendment is decidedly shaped by its relationship to governmental power and historical practices. Both the Federalist and later Republican view (that developed out of the Anti-Federalist view)¹⁴ share that the First Amendment’s interactions with the exercise of governmental power help define its protective content.¹⁵ Each camp’s distinct views of how the First Amendment applies to resolve concrete cases hinges as much on different conceptions of federalism and governmental power, at the state and federal level, as they do on the meaning of the text of the Amendment itself. Therefore, the ultimate question of how the Constitution protects freedom of speech and press is resolved by practices and events in Founding-Era history.

Finally, this Article will conclude with a discussion of how the law of the First Amendment can be changed, or more accurately, how a more settled meaning can crystalize out of a range of plausible original meanings. Though there may be other original methods of authorized legal change available, this Article purports to apply a theory of liquidation that explains how ambiguous constitutional meanings can be resolved through historical practices.¹⁶ Liquidation theory is the idea that the meaning of an ambiguous provision in the Constitution can be settled by a course of historical practice that consistently employs a certain meaning of the provision.¹⁷ The historical course of practice settles or liquidates the meaning of that provision as the meaning that is used in practice.¹⁸ Liquidation theory is often employed in constitutional interpretation and construction to determine a provision’s meaning, sometimes under the modality of historical practices, but the Founding-Era version is known as liquidation and has some definitive and distinguishing components.¹⁹

¹³ Campbell, *Natural Rights*, *supra* note 6, at 308.

¹⁴ See generally LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 92–125 (1978).

¹⁵ Federalists argued that a bill of rights was unnecessary because of the Constitution’s limited grant of enumerated powers and Republicans argued that rights provisions, i.e. the First Amendment, categorically bar the exercise of certain governmental powers.

¹⁶ See generally William Baude, *Constitutional Liquidation*, 71 *STAN. L. REV.* 1 (forthcoming 2019) [hereinafter Baude, *Constitutional Liquidation*].

¹⁷ *Id.*

¹⁸ *Id.* at 3–4.

¹⁹ *Id.* at 1–4.

In the context of First Amendment Originalism, this Article will look to the arguments made by Federalists and Republicans over the meaning of the First Amendment during debates over the Sedition Act of 1798.²⁰ This investigation into legal history will analyze if the Federalist or Republican position has the better understanding of the original meaning of the First Amendment. Then this Article will look to the Republican victory vindicating the principles of '98 in the Election of 1800 and ask if that election and subsequent historical practices settled or liquidated the Republican interpretation of the First Amendment. In the alternative, the settlement of the First Amendment's legal meaning that occurred after the election of Thomas Jefferson to the Presidency might have been an unauthorized legal change in the First Amendment's original meaning.²¹ As part of that legal change analysis, this Article will ask if the change in meaning of the First Amendment brought about by the Jeffersonian Republicans was an authorized or unauthorized change in legal meaning and how that determination is affected by the interpretation of governmental power granted in Article I, Section 8.

In sum, this Article will analyze what the state of the law relating to speech and press was at the time of the First Amendment's enactment; how the First Amendment's enactment as written law changed the state of the law at that point, i.e. what the original law of the First Amendment is; and if the Jeffersonian-Republican interpretation of the meaning and effect of the First Amendment's textual enactment was consistent with the Original Law Original Meaning of the First Amendment.²² Regardless of whether one is persuaded that the liquidation of the First Amendment's meaning on the Jeffersonian construction in the aftermath of the Sedition Act controversy of 1798 was a valid or invalid use of that legal concept, a more concrete meaning of the Amendment emerged from that historical contest and it established an originalist pedigree in our current First Amendment law.

²⁰ See WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT* 256–58 (2016).

²¹ See BANNING, *supra* note 14, at 246–70 (defining the “Principles of Ninety-Eight” as the principles that the Republicans espoused in their opposition to the Federalist passage, support for, and execution of the Sedition Act that led to the Jeffersonian electoral victory in 1800).

²² The Fourteenth Amendment also legally changes the meaning of the First Amendment and/or its relationship vis-a-vis state and federal power but that is beyond the scope of this paper, which seeks to define only the original meaning of the First Amendment to its Framers.

This Article explains the originalist pedigree of First Amendment law. This Article applies a theory of originalism (Original Law Originalism) to the First Amendment and explains how the meaning of the First Amendment was fixed or liquidated in the Jeffersonian “Revolution of 1800” and from this liquidation explains how through these moments of creation and liquidation our First Amendment law is originalist. Part I begins with an exploration of the intellectual and legal world in which the Framers created the First Amendment to give the reader an original understanding of the water that the First Amendment is swimming in and to provide a language for original law rights discussion. Part II explores an ambiguity in the original meaning of the First Amendment in the context of its place within the legal structure of the Constitution. The question presented here is: regardless of the First Amendment, did the federal government have constitutional authority to regulate speech and press at all in 1789 (before the First Amendment was ratified). This part of the Article pays particular attention to the interaction between notions of power and of liberty in the Constitution, from the Federalist and Anti-Federalist perspectives, pre-ratification of the Bill of Rights and post-ratification, accounting for significant historical practices that shaped the meaning of constitutional provisions in the 1790’s. Part III then explains the originalist roots of modern First Amendment law. It explains how the meaning of the First Amendment was liquidated by the historical practices of the Jeffersonian opposition to the Sedition Act. It further explains how liquidation could validly occur in this situation because the Jeffersonian legal view is connected to the Anti-Federalist conception of power, liberty, and constitutional purpose—views that were present during Ratification. This Article concludes that in an important way, our First Amendment law is originalist.

I. THE FRAMEWORK FOR DISCUSSING THE FIRST AMENDMENT’S ORIGINAL MEANING: SOCIAL CONTRACT THEORY AND NATURAL RIGHTS PHILOSOPHY

The Framers of the United States Constitution, the founding generation, and ratifying public, understood their constitutional rights in the context of the interplay between social contract theory and natural rights philosophy. It is important for understanding the meaning of the First Amendment to understand the legal and intellectual world into which it was

drafted and enacted.²³ Social contract theory was the founding generation’s way of understanding how society and governments were formed by intellectually analyzing hypothetical stages of political development.²⁴ This theory—derived from a kind of thought experiment—was the foundation of Founding-Era constitutionalism and rights discourse.²⁵ This Section of the Article will first lay out the Framers’ concept of the “state of nature.” Then follows an explanation of the social contract theory, of which the state of nature is a part, and its connection to the Constitution. The next step is to explain how Founding-Era rights discourse emerged from this state of nature/social contract theory framework. The section concludes by inserting the First Amendment into that intellectual and legal framework to arrive at the original meaning of the First Amendment. It is this meaning of the First Amendment that Original Law Originalism and liquidation theory acted on during the decade following ratification.

A. *The State of Nature*

The first stage in the development of a political society under social contract theory was the state of nature.²⁶ In the context of Original Law Originalism, this is the framework that holds the roots of the First Amendment’s legal content.²⁷ The state of nature—like social contract theory itself—is something of a legal fiction, an abstract hypothetical.²⁸ In the state of nature,

²³ See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (50th Anniversary ed. 2017) (explaining the intellectual world of the Founders); see also GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1998).

²⁴ See Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87 (2017) [hereinafter Campbell, *Republicanism*] (“Social-contract theory . . . underpinned most of Founding-Era constitutionalism . . .”).

²⁵ See, e.g., Campbell, *Natural Rights*, *supra* note 6, at 252 n.13; JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 276–77 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“For ‘tis not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing together mutually to enter into one Community, and make one Body Politick . . .”); JAMES MADISON, *Essay on Sovereignty*, in 9 *THE WRITINGS OF JAMES MADISON* 568, 570 (Gaillard Hunt ed., 1910) (1835).

²⁶ See, e.g., Campbell, *Republicanism*, *supra* note 24, at 87 (2017) (explaining that the state of nature was “imagining what things would be like without a government”); ALEXANDER HAMILTON, *The Farmer Refuted* (1775), reprinted in 1 *THE PAPERS OF ALEXANDER HAMILTON* 81, 86 (Harold C. Syrett ed., 1961).

²⁷ Sachs, *supra* note 8, at 818 (explaining that Original Law Originalism is a “particular way to understand *where our law comes from*, what it requires, and how it can be changed.”) (emphasis added).

²⁸ See Campbell, *Natural Rights*, *supra* note 6, at 87; John P. Reid, *Law and History*, 27 *LOY L.A. L. REV.* 193, 213 (1993) (“The social contract was a legal fiction explaining the stipulations under which individuals left the state of nature and created societies.”); 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 14 (John B. Windham ed., 1795) (“I doubt whether a state of nature ever did, or

there is no government, people possess their natural liberty in full, and thus they possess all of their natural rights.²⁹ Natural rights were considered easily identifiable because they were “self-evident”—encompassing all the liberties that people could exercise in the absence of government or governmental action.³⁰ In other words, natural rights were those things people could do in a state of nature.³¹ Such things as walking, talking, hunting, and praying were seen as natural rights.³²

Natural laws circumscribed natural rights. Natural laws were seen as governing human nature, like gravity governed nature itself, and it was believed that humans could naturally discern these laws.³³ Natural law and the interaction of one person’s natural liberty with another’s were the only theoretical limitations on the exercise of humans’ natural rights in a state of nature.³⁴ Thus, natural law and natural rights, in some sense, defined the parameters of the state of nature.

The Declaration of Independence recognized the state of nature. That upon the separation of the American colonies from Great Britain, the people had “assume[d] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.”³⁵ This was an express recognition that the state of humans without government is the state of nature. The separation from Great Britain had brought

can exist; but I can imagine such a state, and thence infer the advantages derived from a union in society.”).

²⁹ Campbell, *Republicanism*, *supra* note 24, at 88; THOMAS HOBBS, *LEVIATHAN* 64 (Richard Tuck ed., 1996) (1651) (“The Right of Nature . . . is the Liberty each man hath, to use his own power as he will himself for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything which, in his own Judgement and Reason, he shall conceive to be the aptest means thereunto.”); Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819) in 14 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES*, Feb.–Aug. 1819, 201–02 (J. Jefferson Looney ed., 2017).

³⁰ SWIFT, *supra* note 28, at 176 (“Natural rights consist in our possessing and enjoying the power, and privilege of doing whatever we think proper, without any other restraint than what results from the laws of nature.”).

³¹ In the “intellectual world commonly known as ‘the Founding[.]’” natural rights meant something different than the modern understanding. Natural rights were not concrete trumps on governmental action nor determinate legal privileges and immunities. Campbell, *Republicanism*, *supra* note 24, at 86. “Rather, embracing natural rights meant embracing a *mode of reasoning*” with the purpose of creating and serving the best form of republican representative government. *Id.* (emphasis in the original).
³² *Id.* at 91.

³³ See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 3 (“Antecedent to [positive] laws are those of nature; so called because they derive their force entirely from our frame and existence.”).

³⁴ JAMES WILSON, *Of the Natural Rights of Individuals*, in 2 *COLLECTED WORKS OF JAMES WILSON* 1056 (Kermit L. Hall & Mark D. Hall eds., 2007) (“In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature.”).

³⁵ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

about a state of nature among the national polity by dissolving the colonies' social contract with England.³⁶

B. The Social Contract and the Constitution

Realizing that the state of nature was insufficient to safeguard their natural rights, people entered into a social contract.³⁷ A social contract predated the formation of a government and was “an agreement among isolated individuals in a state of nature to combine in a society.”³⁸ The social contract was something to which all the people had to consent, because the individual was viewed as the “original sovereign.”³⁹ By nothing but the universal consent of all individual sovereigns, so the theory went, could the people be bound by the social contract.⁴⁰ With the creation of a social contract, individuals formed the body politic,⁴¹ which was the new sovereign, united in the pursuit of their common good and individual happiness.⁴² The body politic as the sovereign governed through majority rule.⁴³

The next step was for the body politic to create and adopt a form of government, to organize and govern the society formed by the social contract. The preamble to the United States Constitution recognized that the American body politic, by whom and for whom the Constitution was formed, was already in existence before the Constitution was written. That pre-existent body politic is acknowledged as “We the People.”⁴⁴ This

³⁶ *Id.*

³⁷ See Campbell, *Republicanism*, *supra* note 24, at 88.

³⁸ WOOD, *supra* note 23, at 283.

³⁹ *Chisholm, Ex'r. v. Georgia*, 2 U.S. 419, 456 (1793) (Wilson, J., concurring) (explaining the concept of the individual as the original sovereign for purposes of social contract theory).

⁴⁰ See Campbell, *Republicanism*, *supra* note 24, at 89; see also RANDY BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 74–76 (2016) (describing the Founders' view of supposed or implicit consent).

⁴¹ See Campbell, *Republicanism*, *supra* note 24, at 88; MASS. CONST. OF 1780 pmb1. (“The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”).

⁴² LOCKE, *supra* note 25, at 330–31 (“The only way whereby any one divests himself of his Natural Liberty, and puts the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.”) (emphasis in the original).

⁴³ *Id.* at 331 (“When any number of men have so consented to make one community or Government, they are thereby presently incorporated, and make one *Body Politick*, wherein the *Majority* have a Right to act and conclude the rest.”) (emphasis in original).

⁴⁴ U.S. CONST. pmb1; see also Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (remarks of William Findley), *reprinted in* 2 THE DOCUMENTARY HISTORY OF

theory of societal and governmental formation forms the legal backbone for the constitutional structure into which the First Amendment was inserted. In that respect, these underlying philosophies of government are an intellectual and legal history of the original meaning for the First Amendment.

The Declaration of Independence goes on to explain that governments derive “their just powers from the consent of the governed,” (the body politic) and further that “Governments are instituted” to “secure . . . rights” including “Life, Liberty, and the pursuit of Happiness.”⁴⁵ So if the purpose of government formed out of these hypothetical stages of political development is centrally to protect natural rights, or, as the Declaration refers to them, “unalienable Rights,” then what are these rights? Under the broad umbrella of social contract theory there exists a taxonomy of rights that is rooted in and descends from natural rights philosophy. It was this taxonomy that the Founders understood, and that shaped their discourse about rights, including speech and press rights.

C. Founding-Era Rights Talk

Descending from natural rights philosophy and stemming from the common law tradition, the Founders understood rights in a particular way. They were well versed in this taxonomy of rights and their conception of it informed how they talked and wrote about rights, including those codified in the First Amendment. This taxonomy first broke down into two camps, rights that are retained portions of human beings’ natural liberty and positive rights that are granted by the government.⁴⁶ This taxonomy included several categories of rights: inalienable natural rights, natural rights generally, retained natural rights,

THE RATIFICATION OF THE CONSTITUTION 447–48 (Merrill Jensen ed., 1976) (“In the Preamble, it is said, ‘We the People,’ and not ‘We the States,’ which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power and delegating a portion of that power for their common benefit.”).

⁴⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁶ The distinction between natural rights and positive rights is important in the context of freedom of speech and freedom of the press because the Founders saw speech as one of the rights of which effective government “do[es] not require a surrender[.]” and that might be encroached upon if surrendered, whereas freedom of the press is protected because it is among those “certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shewn a disposition to weaken and remove.” See Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), in *Founders Online*, NATIONAL ARCHIVES (last modified June 13, 2018), <http://founders.archives.gov/documents/Jefferson/01-18-02-0091>; see also Campbell, *Republicanism*, *supra* note 24, at 90–91.

fundamental positive rights, and ordinary positive rights.⁴⁷ Founding-Era natural rights philosophy, consistent with social contract theory, understood the existence of rights to predate society, and viewed them as inherent in the nature of humans, existing in the state of nature, or developing out of experience.⁴⁸ As Randy Barnett succinctly put it, “first come rights and then comes government.”⁴⁹

Natural rights were liberties which people could readily exercise independent of the existence of government.⁵⁰ Thus speaking, writing, and publishing were clearly identified as natural rights.⁵¹ These natural rights, by and large, could be regulated by representative government pursuant to the common good—the object for which society and constitutions are formed.⁵² Under this conception, far more regulations of First Amendment “natural rights” would be permissible under the original meaning of the First Amendment (the Campbell-Federalist view⁵³) if the representatives decided such regulations promoted the public good.⁵⁴

A subset of natural rights is “inalienable natural rights.” The Founders used this terminology to describe two sets of

⁴⁷ *Federal Farmer No. 6* (Dec. 25, 1787), in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 979, 983–84 (John P. Kaminski et al. eds., 2004) (describing different types of rights, Madison said “[o]f rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; . . . and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.”); see also James Madison, Remarks (June 8, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 64, 81 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING].

⁴⁸ Campbell, *Republicanism*, *supra* note 24, at 90–91.

⁴⁹ BARNETT, *supra* note 40, at 44.

⁵⁰ Campbell, *Natural Rights*, *supra* note 6, at 252 (listing Founding-Era sources defining natural rights).

⁵¹ *Id.* (listing Founding-Era sources that defined the natural rights of speaking, writing and publishing).

⁵² Barnett and others make a counter or parallel claim that the object of society and of constitutions is to protect natural rights, though it very well may be that the common good and protection of natural rights were one in the same in the Founders’ conception. See BARNETT, *supra* note 40, at 44.

⁵³ This view of the First Amendment has a great deal of parity with the Blackstone-Mansfield view of freedom of speech and of the press. See generally LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 191 (1985) (providing the Blackstonian definition of freedom of the press); see also Campbell, *Natural Rights*, *supra* note 6, at 263–64 (explaining the “original legal ambit” of the First Amendment, the “Campbell-Federalist view”).

⁵⁴ Statutes in the Founding Era contained preambles that stated the purpose of the statute and many believed the Constitution would be interpreted in common law fashion as a kind of “super-statute” and thus the purpose laid down in the preamble, including promotion of the public good, was relevant to interpretation and construction of the document. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 908 (1985).

natural rights. Sometimes they referred to rights that were considered so fundamentally endowed in human nature that a person could not give them up, even willingly; and this was because individuals lacked control over them. This included the right of conscience or having thoughts, something seen as non-volitional.⁵⁵ The other way the Founders used the phrase “inalienable natural rights” was to refer to rights retained by the people that could be given up only by consent. However, under their theory of republican government—a body politic that governed through majority rule—legislative representation could give consent.⁵⁶

Retained natural rights, a further subset of inalienable natural rights, on the other hand, consisted of that portion of natural liberty that the people reserved for themselves in the terms of the social contract or constitution⁵⁷—some argued that all of natural liberty was retained⁵⁸ and others argued only a limited sphere of natural liberty was retained within the bounds of established legal rules.⁵⁹ Regardless, natural rights generally could only be restricted in the interest of the public good. Consequently, representative government determined the scope of retained natural liberty by legislating (in theory) in accordance with the common good.⁶⁰ In this way the people’s liberties were tied to the public good through representative government—designed to encourage good government and promote the public happiness.⁶¹

⁵⁵ Interestingly, Madison and Jefferson considered Freedom of Religion as a Freedom of Conscience in the realm of inalienable rights. See James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in JAMES MADISON: WRITINGS 29–36 (Jack N. Rakove ed., Library of America 1999); see also Thomas Jefferson, A Bill for Establishing Religious Freedom (June 18, 1779), in THOMAS JEFFERSON: WRITINGS 346–48 (Merrill D. Peterson ed., Library of America 1984).

⁵⁶ Campbell, *Republicanism*, *supra* note 24, at 97.

⁵⁷ *Federal Farmer No. 2* (Oct. 9, 1787), reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 214, 216, (John P. Kaminski et al. eds., 2003) (“There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed . . .”).

⁵⁸ Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), in 15 WRITINGS OF THOMAS JEFFERSON 23, 24 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905) (“[T]he idea is quite unfounded, that on entering into society we give up any natural right.”).

⁵⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *121–22 (“Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.”).

⁶⁰ Campbell, *Republicanism*, *supra* note 24, at 93–96.

⁶¹ Madison makes a similar move in *The Federalist*, arguing that individual rights should be tied to representative republican government thereby the individual’s natural liberty would be tied to the common good so that in defending their natural liberty they will in turn be defending the common good. See THE FEDERALIST NO. 51 (James Madison) (“The provision for defense must in this, as in all other cases, be

Positive rights, by contrast,⁶² were legally defined privileges and immunities that were cast in terms of government action or inaction and included rights such as habeas corpus and trial by jury.⁶³ These positive rights developed over time from experience and adjudications primarily contained in the principles, precepts, and precedents of the common law. Some were deemed fundamental or essential and often overlapped with the people's natural rights, while others were simply statutory rights.⁶⁴ A positive right became fundamental by widespread consensus and acceptance of the inviolability of the right, or, in America, by enumeration.⁶⁵ Given the way in which many positive rights protected natural rights, there was a perceived harmony between natural rights and the common law; the former was the source of liberty, and the latter defined its legally protected contours and ensured that the liberty was safeguarded.⁶⁶

D. The First Amendment's Place in this Framework

Social contract theory and natural rights philosophy served as a framework for early discussions about the rights—natural and positive—contained in the First Amendment. The Amendment's original meaning cannot be understood without first understanding its philosophical, intellectual, and legal context. Founding-Era constitutional interpretation often began with principles derived from social contract theory framework of how political society developed. As stated in the introduction, Professor Campbell, through an extensive dive into this framework⁶⁷ and the place of the First Amendment within it, developed an understanding of the original meaning of the First Amendment: “[T]he First Amendment recognized (either

made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”).

⁶² THOMAS PAINE, *Candid and Critical Remarks on a Letter Signed Ludlow* (June 4, 1777), reprinted in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 274 (Philip S. Foner ed., Citadel Press 1945) (explaining the difference between natural and positive rights by stating that “[a] natural right is an animal right; and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals. Civil rights are derived from the assistance or agency of other persons; they form a sort of common stock, which, by the consent of all, may be occasionally used for the benefit of any.”).

⁶³ Campbell, *Natural Rights*, *supra* note 6, at 253 (listing Founding-Era sources defining positive rights).

⁶⁴ Campbell, *Republicanism*, *supra* note 24, at 99.

⁶⁵ See *id.* (discussing how confrontation became a fundamental positive right in the late sixteenth century and the prohibition on press licensing in the seventeenth).

⁶⁶ Campbell, *Natural Rights*, *supra* note 6, at 291; see also R. H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 97–98 (2015).

⁶⁷ See *supra* Sections I.A–C.

implicitly or outright) the ordinary natural right of expressive freedom along with (either absolute or presumptive) protection for a set of customary rules with more determinate legal meanings.”⁶⁸ The former recognized an inalienable natural right to the “freedom to make well-intentioned statements of one’s thoughts” that was not subject to government control⁶⁹ and then also recognized the natural rights of speaking, writing, and publishing that could be regulated by government in the interest of the public good.⁷⁰ The latter recognized the common law positive right “liberty of the press,” which required a ban on prior restraints.⁷¹ In America, an additional defense of truth developed, the Zenger defense, and was recognized in many jurisdictions.⁷² However, all of the content of this common law positive right was additionally protected by the jury trial, which was the only means of obtaining a conviction for laws prosecuting alleged abuses of the press freedom.⁷³ This dual meaning—the one grounded in natural rights and the other in common law legal rights (positive rights)—is key to understanding the First Amendment’s relation to governmental power and the debates over its meaning between Federalists and Republicans.

Campbell’s definition of the First Amendment’s original meaning represents a unified original understanding of the Amendment itself, one that most of the public at the time of its ratification understood the Amendment to mean. But I argue that the original understanding of speech and press freedoms at the federal level may have more bite if fully situated within the superstructure of the Constitution.⁷⁴ Campbell himself acknowledges that there is more to the First Amendment’s

⁶⁸ Campbell, *Natural Rights*, *supra* note 6, at 308.

⁶⁹ *Id.* at 283.

⁷⁰ *Id.* at 276.

⁷¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (“The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”).

⁷² See *Andrew Hamilton Defends Zenger*, in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 43, 54 (Leonard W. Levy ed., 1966) (“I beg Leave to insist, That the Right of complaining or remonstrating is natural; And the Restraint upon this natural Right is the Law only, and that those Restraints can only extend to what is *false* . . .”).

⁷³ Campbell, *First Amendment Federalism*, *supra* note 2, at 16 (“Commentators during the ratification debates explicitly linked jury rights to concerns about governmental suppression of dissent.”).

⁷⁴ By superstructure of the Constitution I mean taking the Constitution as a whole—situating the First Amendment in the whole constitutional text that includes limits on power in Article I, Section 8, unenumerated rights in the Ninth Amendment, and reserved powers in the Tenth Amendment.

original meaning than his consensus definition,⁷⁵ but that its scope is to be determined by representative republican government.⁷⁶ The debates over liberty and power that pervade the early national period in American history initiated a process of constitutional theory known as liquidation⁷⁷ that serves to further clarify and determine the First Amendment's meaning and connect our modern doctrine to the original understanding.

II. POWER, LIBERTY, AND AMBIGUITY

Before the First Amendment was adopted, the debates over the ratification of the Constitution reveal an ambiguity in the understanding of governmental power over the freedom of the press.⁷⁸ A single argument was made repeatedly by the Federalists against the Anti-Federalists' fierce insistence that a Bill of Rights be added to the new federal Constitution in the context of speech and press freedoms. That argument was that protection for the freedom of the press was not necessary because, as Charles Cotesworth Pinckney declared in the South Carolina Ratifying Convention, "[t]he general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press."⁷⁹ Pinckney was expressing a common Federalist position.⁸⁰ Hamilton, in Federalist No. 84, further explained the position. He wrote that a provision for protecting the liberty of the press was not only unnecessary but dangerous. He asked: "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power."⁸¹ Perhaps, Hamilton recognized the limited legal content of a speech and press provision like the First

⁷⁵ Campbell, *Natural Rights*, *supra* note 6, at 246 ("Founding-Era elites shared certain understandings of speech and press freedoms, as concepts, even when they divided over how to apply those concepts.").

⁷⁶ *Id.* at 259, 321.

⁷⁷ See Baude, *Constitutional Liquidation*, *supra* note 16, at 1.

⁷⁸ This ambiguity will be important for the application of liquidation theory to the First Amendment.

⁷⁹ DEBATES IN THE LEGISLATURE AND IN CONVENTION OF THE STATE OF SOUTH CAROLINA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jan. 18, 1788) (statement of Charles Cotesworth Pickney), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 253, 315 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES].

⁸⁰ *Id.*

⁸¹ THE FEDERALIST NO. 84 (Alexander Hamilton).

Amendment. The danger in codifying, in writing, the legal content inherent in an amendment protecting speech and press was that it would be less protective of those general rights than enumerating powers and leaving rights unenumerated. Given that enumerating the rights of speech and press might imply that the government had power over speech and press generally, other than the limited protective legal content of the Amendment's text. The Federalists argued that the enumerated powers of the new government did not contain a power over the press, and this would operate as a greater protection for the rights by denying power over them. In a sense, silence would speak louder than words.

The Federalists argued that the liberty of the press was protected by the original Constitution, even before a Bill of Rights expressly protecting that liberty was added.⁸² They argued that the right was protected by the limitations on power inherent in the Article I, Section 8 enumeration.⁸³ Some even referred to that enumeration as a “Bill of Powers” and that which was not granted was reserved.⁸⁴ But what was meant by the “liberty of the press” in these arguments? Did they intend “no power over the press” to mean no power over a distinct set of common law positive rights protections, such as no prior restraints on publications in the press, but legislative power over all other natural rights pursuant to the public good?⁸⁵ Or when the Federalists argued that there is no power over the press enumerated in the Constitution, did they mean that the federal government is deprived of all power over the press, ordinary or extraordinary?⁸⁶ There is some ambiguity here.⁸⁷

⁸² James Madison, Debates in the House of Representatives (June 10, 1789), in *CREATING*, *supra* note 47, at 66–67.

⁸³ *Id.*

⁸⁴ *Id.* at 82 (“It has been said that in the federal government they [a bill of rights] are unnecessary, because the powers are enumerated, and it follows that all that are not granted by the constitution are retained: that *the constitution is a bill of powers*, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government. I admit that these arguments are not entirely without foundation”) (emphasis added).

⁸⁵ BLACKSTONE, *supra* note 71, at *151.

⁸⁶ MADISON, *supra* note 1, at 340 (“[I]t 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.”).

⁸⁷ James Iredell best captures this ambiguity by straddling both sides of the debate at different times in his career. During the Ratification debates, Iredell went as far as to argue that Congress could not create any new crimes not listed in the enumerated powers of Congress. See James Iredell, *Answers to Mr. Mason's Objections to the New Constitution Recommended by the Late Convention at Philadelphia*. By Marcus., (Jan. 8, 1788), reprinted in 3 *THE PAPERS OF JAMES IREDELL* 359–60 (Donna Kelly & Lang Baradell eds. 2003). Then, in 1798, while a Supreme Court Justice charged with interpreting and applying the Sedition Act, he was one of the strongest advocates for

Between these competing ideas, James Wilson clearly articulated his view in the Pennsylvania ratification debate. Beginning with the well-rehearsed line that a Bill of Rights was unnecessary because “this Constitution says nothing with regard to [the subject of the press], nor was it necessary because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.”⁸⁸ Wilson goes on, however, to define the liberty of the press: “that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.”⁸⁹ This seems to support an original intent that the deprivation of power over the press, in the unamended original Constitution, is only preventing power to institute prior licensing. But then Wilson’s arguments reveal an ambiguity as to *when* the author can be held responsible for his press attacks, whether the power to punish common law crimes, such as sedition and libel, can only be proscribed by a state where they are published or if the federal government may possess such a power.⁹⁰

It is possible that there is an original intent and original public meaning disagreement in this instance. This would mean that the Federalists were arguing that the document limits only extraordinary power over the press, such as instituting prior restraints, but allows traditional governmental power over it, such as passing sedition and libel laws. Meanwhile, the public was hearing the Federalists’ promise that their new government shall have no power to infringe the freedom of the press, speaking, writing, and ultimately publishing whatsoever.⁹¹ Perhaps this view would leave such unenumerated traditional state powers over speech and press to the states or as rights retained by the people, given the inherent nature of American federalism, later codified in the Ninth and Tenth Amendments.⁹²

the constitutionality of that piece of legislation. See BIRD, *supra* note 20, at 198–99 (2016) (Statement of James Iredell).

⁸⁸ PENNSYLVANIA RATIFICATION CONVENTION DEBATES (Dec. 1, 1787) (statement of James Wilson), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 444, 454–55 (John P. Kaminski & Gaspare J. Saladino eds., 1976).

⁸⁹ *Id.* at 455.

⁹⁰ *Id.* (recognizing a federalism inherent in libel prosecutions; that if a libel is prosecuted it must be tried in the state where it is committed).

⁹¹ See DEBATES, *supra* note 79, at 315.

⁹² THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (June 16, 1788) (Statement of George Mason), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 441–42 (Jonathan Elliot ed., 2d ed. 1836) (arguing that

Either way, practice under the new Constitution would come to liquidate the scope of the Necessary and Proper Clause.

The Necessary and Proper Clause in Article I, Section 8 was seen as giving the government wide latitude in exercising unenumerated powers by implication, at least in the context of the National Bank, if not more broadly.⁹³ This liquidation of the scope of the federal government's power has a latter effect on the First Amendment's meaning as applied to the Sedition Acts and speech and press freedoms.⁹⁴

All of this is to reiterate the main point of this Section: that the power of the federal government to impinge on speech and press freedoms before the adoption of the First Amendment was ambiguous. The adoption of the First Amendment was influenced by these two possible understandings of governmental power over the liberty of the press. Particularly so if it was designed to codify rights and protections already inherently protected in the document,⁹⁵ and even if it was designed to supplementally protect specific legal concepts of speech and press.⁹⁶ Understanding this ambiguity illuminates the contested meaning over how much federal power was granted in the Constitution over the liberty of the press. Did Article I, Section 8 completely deprive Congress of power to pass any law governing the press because no such power was enumerated and was therefore reserved to the states? Or were the enumerated powers merely limited from being construed to infringe the concrete common law legal content of the "liberty of the press"?

A. The Sweeping Clause and the First Amendment

This view of federal power's interaction with the freedom of speech and press, prior to the adoption of the First Amendment, depends significantly on the original meaning of the Necessary and Proper Clause. Also called the Sweeping Clause by many in the Founding-Era, it reads "[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the

a reserved powers clause (like the future Tenth Amendment) would prevent a restrictive power over the press by implication from being exercised).

⁹³ Baude, *Constitutional Liquidation*, *supra* note 16, at 19–22.

⁹⁴ Campbell, *First Amendment Federalism*, *supra* note 2, at 4 ("The Republican account of the First Amendment departed substantially from prevailing ideas about speech and press freedoms.").

⁹⁵ Campbell, *Natural Rights*, *supra* note 6, at 300 ("Federalist denials of authority to abridge the liberty of the press relied on the lack of any enumerated power that would justify a licensing regime.").

⁹⁶ *Id.* at 299 ("[M]any [Federalists] explained that bills of rights were merely declaratory of pre-existing rights and were therefore legally unnecessary.").

Government of the United States, or in any Department or Officer thereof.”⁹⁷ All of the Framers acknowledged that this and Article I, Section 8, Clause 1⁹⁸ were not unlimited grants of power—indeed, there were powers that were clearly not within the grant of power to the federal government.⁹⁹ Several legal scholars have written about the original meaning of the Sweeping Clause, and many have found that the power over the press was outside the bounds of the powers therein granted to Congress and the federal government.¹⁰⁰

Thus, this Article’s argument builds upon Campbell’s work on the original meaning of the First Amendment, which might allow for more restrictions on speech and press in the interest of the public good than current law does.¹⁰¹ It also suggests that the federalism-based Jeffersonian interpretation of the First Amendment is not a mere “invention” of the 1790s, which would make it incompatible with the original meaning of the Amendment.¹⁰² This Article suggests that the Jeffersonian viewpoint might have an intellectual link to the viewpoints of many Anti-Federalists who participated in the Constitution’s ratification, and a link to a literalist interpretation of Federalist

⁹⁷ U.S. CONST. art. I, § 8, cl. 18.

⁹⁸ *Id.* § 8, cl. 1. (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 464 (1833) (“In this sense, congress has not an unlimited power of taxation; but it is limited to specific objects,—the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority.”).

⁹⁹ ALEXANDER HAMILTON, *Opinion on the Constitutionality of a Bank*, reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 103, 103 (Harold C. Syrett & James E. Cooke eds., 1965) (“It may be truly said of every government, as well as of that of the United States, that it has only a right, to pass such laws as are necessary [and] proper to accomplish the objects intrusted to it. For no government has a right to do *merely what it pleases.*”) (emphasis in original).

¹⁰⁰ See generally Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 319 (1993); see also Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183–221 (2003); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1822 (2013) (“Perhaps the First Amendment is merely a confirmation of the broader, structural principle that Congress lacks any implied authority to regulate the press, because regulation of the press is a great power. Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers.”).

¹⁰¹ See Campbell, *Natural Rights*, *supra* note 6, at 263–64; see also Sunstein, *supra* note 6.

¹⁰² See generally Campbell, *First Amendment Federalism*, *supra* note 2 (arguing that the Jeffersonian opposition to the Sedition Act was based on a novel interpretation of the First Amendment, not principally as a rights provision, but as a federalism rule).

ratification arguments, giving it a foothold in the original meaning and opening the door to liquidation post-ratification.¹⁰³

The “core axiom” of Thomas Jefferson’s constitutionalism was that the purpose of a constitution, in fact its very reason for existence, was “to limit government and the power that might endanger liberty.”¹⁰⁴ This “core principle” put Jefferson philosophically in the Anti-Federalist camp that sought to protect liberty and strengthen states with the addition of a Bill of Rights.¹⁰⁵ The Jeffersonian conception of the First Amendment springs from that interpretation of the Constitution’s meaning.¹⁰⁶ The original law, therefore, may still provide for more robust speech and press protections as originally understood, not through the First Amendment standing alone, but through an original understanding of governmental power in Article I, Section 8 and in the nature of American government in the Ninth and Tenth Amendments. Alternatively, but interconnectedly, greater protection for speech and press is afforded in the original law through the theory of liquidation operating on the Sweeping Clause and on the federalism-based Jeffersonian interpretation of the First Amendment.

B. The Original Meaning of the Sweeping Clause

The question becomes: what power does the federal government have over the freedom of speech and press? There is no enumerated power given to the federal government over either. If a federal power exists at all to enact something like the Sedition Act, it is contained in the Sweeping Clause. Two principal perspectives then arise: first, the Sweeping Clause gives the federal government implied incidental powers over speech and press only limited by limitations on power inherent in the Constitution and by the definitive legal content of the First Amendment. Second, such power is altogether outside the bounds of federal power by virtue of the limited grant of power and the structure of the Constitution rather than by the specific textual meaning of the First Amendment alone. The answer to this ambiguity hinges on the original meaning of the Sweeping Clause.

¹⁰³ See *id.* (arguing that the Jeffersonian opposition to the Sedition Act was based on a novel interpretation of the First Amendment, not principally as a rights provision, but as a federalism rule).

¹⁰⁴ David T. Konig, *Thomas Jefferson’s Armed Citizenry and the Republican Militia*, 1 ALB. GOV’T L. REV. 250, 268 (2008).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

1. Necessary

The Sweeping Clause reads: “The Congress shall have Power . . . To make all Laws which shall be necessary and proper to carry into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁰⁷ The famous exposition of this clause’s meaning is given by Chief Justice John Marshall in *McCulloch v. Maryland*,¹⁰⁸ however, this case has generally been misunderstood by the courts as proving too much.¹⁰⁹ Marshall himself explained his position as standing for a less high-toned view than many have since made it out to be.¹¹⁰ He makes this point in a pseudonymously published essay explaining and defending his opinion in *McCulloch*.¹¹¹ Marshall defended his opinion by arguing that his definition of “necessary,” meaning “convenient, or useful, or essential to another,”¹¹² did not extend the powers of Congress by implication beyond the Constitution, but, to the contrary, “[t]he whole opinion of the court proceeds upon this basis, as on a truth not to be controverted. The principle it labors to establish is not that congress may select means beyond the limits of the constitution, but means within those limits.”¹¹³ Marshall recognized limits to the Sweeping Clause’s allowances and recognized that the Court would police the discretion exercised by Congress in the use of its power.¹¹⁴

There was another, stricter meaning of the Sweeping Clause, advanced by Jefferson, Madison, and Randolph,¹¹⁵ that powers implied through it must “be limited to means necessary to the end, and incident to the nature of the specified powers.”¹¹⁶ If there was no limit on what powers could be implied through

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 18.

¹⁰⁸ 17 U.S. 316, 413–14 (1819) (“To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”); see also HAMILTON, *supra* note 99, at 102–03.

¹⁰⁹ 17 U.S. 316, 421 (1819) (“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.”). See also Barnett, *supra* note 100, at 199–200.

¹¹⁰ See John Marshall, *Essays from the “Alexandria Gazette”*: John Marshall, “A Friend of the Constitution”, 21 STAN. L. REV. 456–99 (1969).

¹¹¹ *Id.*

¹¹² *McCulloch*, 17 U.S. at 413–14.

¹¹³ Marshall, *supra* note 110, at 477.

¹¹⁴ Barnett, *supra* note 100, at 215.

¹¹⁵ *Id.* at 188–96.

¹¹⁶ 1 ANNALS OF CONG. 1947 (1791).

the Sweeping Clause's connection with an enumerated power, then "[t]he essential characteristics of the Government, as composed of limited and enumerated powers, would be destroyed[.]"¹¹⁷ and further, "[i]f implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."¹¹⁸ No matter what interpretive track one takes on the meaning of the clause, it is true that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress."¹¹⁹

It is likely that the Sweeping Clause's original meaning is somewhere in between the strong reading of the language in *McCulloch* and the position asserted by Jefferson, Madison, and Randolph.¹²⁰ Its meaning is principally contained within its two central words: "necessary" and "proper."¹²¹ Everyone at the time and to this day recognized that the word "necessary" requires a means-ends fit.¹²² The decision between "convenience" and "absolute necessity," however, was and is a false dichotomy.¹²³ Madison and Hamilton, on different sides of the debate, both espoused a similar interpretation of the Sweeping Clause's meaning that has been lost in a strong interpretation of *McCulloch*'s language.¹²⁴ Madison stated that the clause's words should be "understood so as to permit the adoption of measures the best calculated to attain the ends of government, and produce the greatest quantum of public utility."¹²⁵ Hamilton, in his opinion on the National Bank, argued that "[t]he relation between the measure and the end; between the nature of the mean employed towards the execution of a power, and the object of that power; must be the criterion of constitutionality; not the more or less of necessity or utility."¹²⁶ Under this view of "necessary," some powers can be implied and some cannot. The test is a middle ground between so strict a means-ends fit that no

¹¹⁷ *Id.* at 1947.

¹¹⁸ *Id.* at 1949.

¹¹⁹ *Id.* at 1947.

¹²⁰ Barnett, *supra* note 100, at 206–07 (“All parties to the first bank debate agreed that absolute necessity was not required, but at the same time all agreed that some degree of means-end fit was needed. . . . In modern terms, a showing of necessity should neither be so "strict" that no statute can pass muster . . .”).

¹²¹ *Id.* at 206.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 215.

¹²⁵ DEBATES, *supra* note 79, at 417–18.

¹²⁶ HAMILTON, *supra* note 99, at 104 (emphasis omitted).

statute can be upheld and so loose a fit that any statute can be affirmed.¹²⁷

2. Proper

The other key word in the clause, “proper,” has gotten less attention and may have received its first real treatment by the Supreme Court only recently in the opinion of Chief Justice Roberts in *National Federation of Independent Business v. Sebelius*.¹²⁸ As persuasively argued by Randy Barnett, Gary Lawson, and others, “proper” has an independent and important meaning distinct from “necessary.”¹²⁹ According to Lawson:

The Sweeping Clause requires valid executory laws to be “proper.” If the word “proper” in that clause has a jurisdictional meaning, then the authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular national institution whose powers are carried into execution.

The argument then hones in on three properties of the word “proper” in the original meaning of the Sweeping Clause:

In view of the limited character of the national government under the Constitution, Congress’s choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the “proper” allocation of authority within the federal government; second, such a law would have to be within the “proper” scope of the federal government’s limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be

¹²⁷ Barnett, *supra* note 100, at 206–07.

¹²⁸ 567 U.S. 519, 546–49 (2012).

¹²⁹ Lawson & Granger, *supra* note 100, at 275–76.

within the “proper” scope of the federal government’s limited jurisdiction with respect to the people’s retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.¹³⁰

This understanding of the Sweeping Clause is known as the jurisdictional interpretation.¹³¹ Barnett has formulated a three-part understanding of what is required by the word “proper” under this approach.¹³² He writes that “for a law to be ‘proper’ it must not only be necessary, it must also be within the jurisdiction of Congress.”¹³³ He goes on: “[t]his propriety of jurisdiction is determined in at least three ways: (1) according to principles of separation of powers, (2) according to principles of federalism, and (3) according to the background rights retained by the people.”¹³⁴ Further, he emphasizes the third requirement of “proper,” which is important in the First Amendment natural rights context, saying “[g]iven the importance of natural rights to constitutional legitimacy in the absence of unanimous consent, let me focus on the third element: laws are improper when they violate the background rights retained by the people.”¹³⁵ Chief Justice Roberts appears to track a form of this understanding of “proper” in his opinion in *Sebelius*, stating that “we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not ‘consist[ent] with the letter and spirit of the constitution,’ are not ‘proper [means] for carrying into Execution’ Congress’s enumerated powers.”¹³⁶ The Chief Justice recognized that the propriety requirement of the Sweeping Clause ensures that Congress stays within its jurisdiction when exercising power by implication and does not violate the “structure of government,” which is limited by

¹³⁰ *Id.* at 297.

¹³¹ *Id.*

¹³² Barnett, *supra* note 100, at 217.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Nat’l Fed. of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 559 (2012) (internal citations omitted).

principles of separation of powers, federalism, and also by individual rights.¹³⁷

Given this original understanding of the scope of the Sweeping Clause predating the First Amendment, the power of the federal government to regulate speech and press is at best uncertain, and many have argued such regulation is outside the bounds of implied federal power altogether.¹³⁸ William Baude has articulated this interpretation of federal powers and Article I, Section 8 as “a great powers theory.”¹³⁹ Even before the ratification of the First Amendment, it is wholly possible that regulations of speech and press—independent of a tight fitting connection between means employed to attain the ends of an enumerated power—was an unconstitutional exercise of federal legislative power.¹⁴⁰ This parallels the Federalist argument that a Bill of Rights was unnecessary because no power existed over any of those rights.¹⁴¹ It may also explain why Campbell’s argument for the meaning and definitive legal content of the First Amendment protects such a limited sphere of individual rights, by modern standards, and leaves so great a realm of discretion to Congress on how they will regulate speech and press, natural and positive rights, in the interest of the public good.¹⁴²

3. Federalism Considered

Federalism is also relevant to this analysis. The Tenth Amendment underscores the foundational principle of federalism in the American constitutional system and forms a component of the superstructure of the Constitution that protects speech and press more broadly under an originalist interpretation of all the Constitution’s parts than does the original meaning of the First Amendment standing alone. Constitutional structure protects liberty. State provisions identical to the First Amendment can operate within the structure of state

¹³⁷ *See id.*

¹³⁸ Baude, *supra* note 100, at 1822 (“So the First Amendment’s Press Clause would not have been unnecessary, but even without it, perhaps the idea was that Congress could not use its implied powers and the Necessary and Proper Clause to regulate the press.”).

¹³⁹ *Id.* (“Perhaps the First Amendment is merely a confirmation of the broader, structural principle that Congress lacks any implied authority to regulate the press, because regulation of the press is a great power. Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers.”).

¹⁴⁰ *Id.* (“Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers. Copyright laws restrict one’s ability to publish the thoughts of others without their consent. Hamilton acknowledged that the power to tax included the power to tax books.”).

¹⁴¹ Campbell, *First Amendment Federalism*, *supra* note 2, at 300–01.

¹⁴² *See* Campbell, *Natural Rights*, *supra* note 6, at 263–64.

constitutions differently than the First Amendment does within the federal Constitution's structure. This is not because there is a difference in the legal content of the rights provisions, but because a different conception of governmental power existed at the federal and state levels.¹⁴³ As Madison observed in Federalist No. 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.¹⁴⁴

Against the constitutional background of social contract theory, natural rights philosophy, separation of powers, federalism, and limited government powers, it could be improper for Congress to pass laws that infringed not only on the inalienable natural right of freedom of opinion but on all natural rights to speak, write, and publish, which are arguably retained by the people through the Ninth Amendment's rule of construction.¹⁴⁵ Perhaps these non-inalienable natural rights are protected not only implicitly in Article I, Section 8 but also explicitly under the Ninth Amendment's rule of construction applied to federal powers and the First Amendment.¹⁴⁶

This is not just an argument about federal power, however. It is also important that the nature of state governments is different from that of the federal government.¹⁴⁷ Campbell

¹⁴³ See Lawson & Granger, *supra* note 100, at 280.

¹⁴⁴ THE FEDERALIST NO. 45 (James Madison).

¹⁴⁵ U.S. CONST. amend. IX.

¹⁴⁶ *Id.*

¹⁴⁷ See Lawson & Granger, *supra* note 100, at 280.

argues that there is no evidence that the First Amendment operated on the powers of the federal government any differently than its state counterparts operated on state powers.¹⁴⁸ This statement does not properly situate speech and press protecting provisions against the inherent differences between the powers of the federal and state governments. As Lawson notes, a state government “is a general government, possessing all legislative powers not specifically restricted by its constitution, whereas the national government is limited to its constitutionally enumerated powers.”¹⁴⁹ This is a crucial difference. A state level speech and press clause is designed as a carve out of state general power,¹⁵⁰ whereas the First Amendment recognizes a limitation that Federalists already argued was inherent in the limited powers of Congress.¹⁵¹ The Federalists were expressly enumerating rights to placate the fears of Anti-Federalists, who still in many respects opposed the Constitution, especially so long as a Bill of Rights was absent from it.¹⁵²

Therefore, it is possible that identical rights protecting or rights recognizing provisions could operate differently at the federal and state level. This is supported by the inherent limitations on federal power in the enumeration of Article I, Section 8, and the later addition of the First, Ninth, and Tenth Amendments. The rule of construction in the Ninth Amendment is an additional recognition of this fact.¹⁵³ Even if the First Amendment protects only the limited and defined legal content, which Campbell ably demonstrates and the historical record shows that it does, the Ninth Amendment explains that the enumeration of powers in Article I, Section 8, culminating in the

¹⁴⁸ Campbell, *First Amendment Federalism*, *supra* note 2, at 5 n.8.

¹⁴⁹ Lawson & Granger, *supra* note 100, at 280; *see also* THE FEDERALIST NO. 45 (James Madison).

¹⁵⁰ *Id.*

¹⁵¹ This is the reason Federalists argued a Bill of Rights was superfluous to begin with. However, a different way of understanding the Federalists’ argument is that enumerating a protection for speech and press liberties would threaten those rights because it would be supplemental, not merely recognizing what was already protected. In this way, Congress could potentially imply a greater power over speech and press minus only the limited legal content of a protection for “the freedom of speech, and of the press.” Without enumerating a protection for “the freedom of the press” it would be the other way around. As it stood before 1791, Federalists argued that federal regulations on speech and press rights could only come as implied powers in furtherance of the Article I, Section 8 enumerated powers. If the rights were enumerated, it might imply a greater power over speech and press. I owe this point to Professor Jud Campbell.

¹⁵² CREATING, *supra* note 82, at 78 (“[Y]et still there is a great number of our constituents who are dissatisfied with it [the Constitution] . . . a great body of the people falling under this description . . . feel much inclined to join their support to the cause . . . if they were satisfied in this one point: We ought not to disregard their inclination . . .”).

¹⁵³ U.S. CONST. amend. IX.

Sweeping Clause is not to be construed to “deny or disparage others retained by the people.”¹⁵⁴ Against the constitutional background of natural rights philosophy and the Federalist insistence that the powers of the federal government could not be legally expanded to regulate the press, the Ninth Amendment *might* contain protections for the natural rights of speaking, writing, and publishing that were recognized by all as inherent natural rights and that many state constitutions expressly recognized as protected rights.¹⁵⁵ Thus, the limited protection afforded by Campbell’s recovered original meaning of the First Amendment is actually much broader when one situates it in the full structure of the Constitution—its limited grant of power, further separation of those powers, additional safeguard of federalism, and its rights favoring rule of construction expressed in the Ninth Amendment. The structure of the Framers’ Constitution protects liberty over and above the protections of its individual parts.

III. LIQUIDATION OF THE FIRST AMENDMENT’S MEANING

A. Liquidation Theory

The concept of liquidation, the fixing of ambiguous or open-textured constitutional meaning through historical practices,¹⁵⁶ was a commonplace theory in the Founding-Era.¹⁵⁷ It has been the subject of significant attention recently in legal academia and it has sparked some significant debates¹⁵⁸ while being the subject

¹⁵⁴ *Id.*

¹⁵⁵ Campbell, *Natural Rights*, *supra* note 6, at 309 n.281.

¹⁵⁶ See generally Baude, *Constitutional Liquidation*, *supra* note 16.

¹⁵⁷ During the Founding Era, especially the 1790s, numerous constitutional questions were purported to be decided through liquidation. See Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, UNIV. ILL. L. REV. 1797, 1806–07 (2013) (stating that “[p]erhaps the most famous case of a supposed liquidation is the ‘Decision of 1789,’” which discussed liquidating the removal power of the President); see also Baude, *Constitutional Liquidation*, *supra* note 16, at 19–26 (discussing the constitutionality of chartering a national bank); Baude, *Constitutional Liquidation*, *supra* note 16, at 26–29 (discussing constitutional scope of federal spending power).

¹⁵⁸ Legal scholars have recently published articles debating liquidation and its relationship to originalism. See Randy Barnett, *Liquid Constitutionalism*, WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/13/liquid-constitutionalism/?utm_term=.513b5c285da7; Will Baude, *Some Cold Water on the Liquidation Debate*, WASH. POST (Apr. 14, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/14/some-cold-water-on-the-liquidation-debate/?utm_term=.d34313a23962; Greg Weiner, *Madison and the Liquid Constitution*, LAW & LIBERTY (Apr. 18, 2017), <http://www.libertylawsite.org/2017/04/18/madison-and-the-liquid-constitution/>; Richard M. Reinsch II, *The Liquid Constitution*, LAW & LIBERTY (Apr. 12, 2017), <http://www.libertylawsite.org/2017/04/12/the-liquid-constitution/>.

of deeper exploration in legal scholarship.¹⁵⁹ Following the recent decision by the U.S. Supreme Court in *NLRB v. Noel Canning*,¹⁶⁰ which invoked the constitutional concept of liquidation for the first time in the Court's recent history,¹⁶¹ it remains to be seen how the modern court may invoke the theory to solve future cases and controversies in constitutional law.¹⁶²

This Article's contribution to the scholarly enterprise reveals how the theory of liquidation has been applied to the First Amendment. The theory of liquidation as applied to the difficult question of discovering the First Amendment's original meaning and understanding the Court's modern First Amendment jurisprudence may provide clarity to an otherwise ambiguous subject and partially describe what has actually happened in the Supreme Court's seminal free speech and press cases—connecting current doctrine to the First Amendment's original meanings to show that our First Amendment law is originalist. The work of Professor Campbell has provided an intellectual pathway into the Founding-Era conception of First Amendment rights.¹⁶³ His view of the Amendment's meaning, however, was quickly dispensed with in the aftermath of the debates over the Sedition Act of 1798, when the federalism-based Jeffersonian interpretation of the First Amendment's meaning became the dominant view.¹⁶⁴ These 1790's historical practices open a door to understanding how the Founding-Era views on the First Amendment's legal meaning were settled, clarified, or fixed—*liquidated*—and how disagreements about the scope or application of that meaning have been and can be resolved through a course of historical practices.¹⁶⁵ Thus, it is arguable

¹⁵⁹ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 10–21 (2001); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–29 (2003); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2452–53 (2016); Sachs, *supra* note 157, at 1806–08 (2013); Jefferson Powell, *The Original Understanding of Original Intent*, 9 HARV. L. REV. 85, 910, 941 (1985); Baude, *supra* note 100, at 1808–12; Baude, *Constitutional Liquidation*, *supra* note 16.

¹⁶⁰ 134 S. Ct. 2550 (2014).

¹⁶¹ *But see* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 550 n.33 (1944) (citing Madison's use of the word "liquidat[ion]" in *Federalist* No. 37).

¹⁶² In *Noel Canning*, the Court cites nine cases in which it has used Madison's theory of liquidation: *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 U.S. 655, 689–90 (1929); *Ex parte Grossman*, 267 U.S. 87, 118–19 (1925); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–74 (1915); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Stuart v. Laird*, 5 U.S. 299 (1803).

¹⁶³ See Campbell, *Natural Rights*, *supra* note 6, at 249–57.

¹⁶⁴ See Campbell, *First Amendment Federalism*, *supra* note 2, at 45–47.

¹⁶⁵ I argue that the Republican approach to the meaning of the First Amendment, while in some important respects was innovative or novel, was in fact connected to

that the Jeffersonian interpretation of the First Amendment, extrapolated from original meanings and Anti-Federalist original intent, became the law consistent with the original law or the Founders' law.¹⁶⁶

The part of the Founders' law that makes this arguably possible is the original method of liquidation. Liquidation is a theory for how historical practices can "settle" or "clarify" the meaning of an otherwise ambiguous constitutional provision.¹⁶⁷ The word is derived from the Latin word "liquidus," which can have the meaning "clear" or "evident."¹⁶⁸ To liquidate constitutional meaning in this context means clarifying or making clear, "to render unambiguous; to settle."¹⁶⁹

The primary proponent of the constitutional theory of liquidation was James Madison, who developed the theory¹⁷⁰ and employed it throughout his life.¹⁷¹ It was central to the way he thought about the Constitution.¹⁷² One of his earliest references to liquidation theory emerged in Federalist No. 37. Commenting on the difficulty of writing laws, he wrote that even laws "penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."¹⁷³ Madison's explanations of liquidation are scattered among his papers, mostly letters, and though he does not give us a scholarly exposition of exactly what he meant by the idea, three concepts emerge as essential to a Madisonian theory of liquidation.¹⁷⁴

ideas on liberty and power that were expressed in the Ratification Conventions by an ideological connection to the views expressed by Anti-Federalists. See BANNING, *supra* note 14, at 92–160 (explaining how the Republican Party of Thomas Jefferson developed out of the English Whig opposition thought which had been adopted by the Anti-Federalists whose intellectual heirs were the Jeffersonian Republicans by what Lance Banning calls an "Antifederal Connection"). *But see* Campbell, *First Amendment Federalism*, *supra* note 2, at 46–47 (arguing that, although the Republicans cast their opposition to the Sedition Act and their interpretation of the First Amendment in historical terms, they were in fact inventing a novel approach to the Amendment's meaning that lacked any basis in the original moment of ratification).

¹⁶⁶ *See id.*

¹⁶⁷ Baude, *Constitutional Liquidation*, *supra* note 16, at 12.

¹⁶⁸ *Id.* at 11.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 3–4.

¹⁷¹ *Id.*

¹⁷² *Id.*; *see also* Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV., 267, 285–91 (1997) (describing what this Article calls "liquidation," and discussing Madison's view of constitutional "precedent" as legislative rather than judicial).

¹⁷³ THE FEDERALIST NO. 37 (James Madison).

¹⁷⁴ Baude, *Constitutional Liquidation*, *supra* note 16, at 12.

The three features of liquidation are, as Will Baude explains, “an indeterminacy, a course of deliberate practice, and settlement.”¹⁷⁵ Indeterminacy occurs in cases of “doubtful or contested meanings” and comes in two primary flavors: vagueness and ambiguity.¹⁷⁶ Not everything in the Constitution is indeterminate. A constitutional provision *must* be indeterminate to be open for liquidation—indeterminacy is a barrier to entry for liquidation.¹⁷⁷ This requirement means that not every clause is up for grabs for liquidation purposes.¹⁷⁸

A course of practice takes on the form of a kind of precedent, not merely judicial but legislative, and it could potentially be a series of similar actions taken by the branches of the federal government, the states, and the public at large that settles a particular meaning of a constitutional provision from a range of plausible meanings.¹⁷⁹ The course of practice had to be deliberative—a deliberate exposition on meaning—the successive acts had to amount to a showing of acquiescence, and the course of practice had to “happen repeatedly and consistently.”¹⁸⁰ The course of practice could also *not* be sheer political will or expediency, it had to be a deliberate debate and a series of actions taken on the basis of a constitutional interpretation.¹⁸¹

Lastly, there must be settlement to render liquidation complete.¹⁸² As Baude phrased it, “the course of deliberate practice had to stick.”¹⁸³ The settlement required that the meaning established through a course of practice had to have some force independent and greater than individual actors.¹⁸⁴ It required acquiescence, or agreement, between opposing parties or institutions, and public sanction, approval by the people, that this course of practice was applying the appropriate meaning.¹⁸⁵ In other words:

[T]he people’s role as the ultimate source of binding constitutional norms made them the ultimate source of constructing its meaning

¹⁷⁵ *Id.* at 13.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 14–15.

¹⁷⁹ *Id.* at 15–16.

¹⁸⁰ *Id.* at 16.

¹⁸¹ *Id.*

¹⁸² *Id.* at 17.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 17.

¹⁸⁵ *Id.*

as well. (Though, to be sure, this expression of popular sovereignty was presumably lesser in stature than the formal enactment of constitutional text, which is why it could “expound” but not “alter.”)¹⁸⁶

By this process of liquidation that has existed since the Founding, historical practices can fill the gap in indeterminate meaning and provide a more specific meaning out of a previous constitutional indeterminacy.¹⁸⁷

Through the original method of liquidation, the meaning of governmental power and individual liberty were, in a sense, inverted. Reflecting on having lost the debate over the meaning of the Sweeping Clause in the debate over the constitutionality of a National Bank in the early 1790s,¹⁸⁸ Jefferson and Madison had to look beyond limits imposed by enumerated powers to oppose the constitutionality of the Sedition Acts in the late 1790s.¹⁸⁹ They turned to a tool that was not in the Constitution during the first debates: the Bill of Rights, specifically the First Amendment.¹⁹⁰ As the original meaning of the Sweeping Clause was liquidated with a vastly more expansive scope than originally intended, the First Amendment was liquidated as having a larger protective force, internally and of its own force, than originally intended.¹⁹¹ The result? The federal government was deprived of a power that it had not possessed under the original meaning of Article I, Section 8 but that it had acquired through a liquidated meaning of the Sweeping Clause, best expressed in a strong reading of *McCulloch v. Maryland*.¹⁹² The federal government was thereafter deprived of the ability to

¹⁸⁶ *Id.* at 19. This Madisonian theory of the people acting to expound the meaning of their Constitution fits neatly with Jefferson’s conception of a “republic.” See Letter from Thomas Jefferson to John Taylor (May 28, 1816), in THOMAS JEFFERSON WRITINGS 1392 (Merrill D. Peterson ed., 1984) (stating that the term republic “purely and simply, . . . means a government, by it’s [sic] citizens, in mass, acting directly and personally, according to rules established by the majority: and that every other government is more or less republican in proportion as it has in it’s [sic] composition more or less of this ingredient of the direct action of the citizens”).

¹⁸⁷ Baude, *Constitutional Liquidation*, *supra* note 16, at 19.

¹⁸⁸ See THOMAS FLEMING, THE GREAT DIVIDE: THE CONFLICT BETWEEN WASHINGTON AND JEFFERSON THAT DEFINED A NATION 101–04 (2015) (describing the debate over the constitutionality of the Bank of the United States between Jefferson, Madison, and Hamilton, with Washington ultimately siding with Hamilton over Jefferson and Madison’s objections).

¹⁸⁹ *Id.* at 264–65.

¹⁹⁰ The Bill of Rights was ratified by the requisite three-fourths of the states on December 15, 1791.

¹⁹¹ Campbell, *First Amendment Federalism*, *supra* note 2, 3–6.

¹⁹² *Supra* Section II, at 20; see also Barnett, *supra* note 100, at 215.

exercise power over speech and press rights not by implied limits on power generally but by the made-powerful enumeration of federalism rights in the liquidated Jeffersonian construction of the First Amendment.

B. Indeterminacy: The Sedition Act of 1798, The First Amendment and Government Power

The first major challenge to speech and press freedoms and the meaning of the First Amendment arose in the Federalist passage of the Sedition Act in 1798 and the Republican opposition to it.¹⁹³ The following section will recount this history through the lens of liquidation and explain how the original meaning of the First Amendment was liquidated as the federalism-based Jeffersonian interpretation that Professor Campbell describes as an “invention.”¹⁹⁴

The indeterminacy of how much protection was afforded speech and press freedoms in the original constitution is already established in the discussion above.¹⁹⁵ There were at least two distinct views of the meaning of the First Amendment at its adoption. The “majority view,” that the available evidence shows to be the most legally sound claim to the First Amendment’s original meaning at the time of its adoption. This is the view expressed by Professor Campbell.¹⁹⁶ The second is the “dissenting view”: this is the view developed or “invented” by Madison and the Jeffersonian Republicans but it has its roots in Federalist and Anti-Federalist ratification arguments¹⁹⁷ over the need for a Bill of Rights¹⁹⁸ and if the First Amendment was a mere codification of those arguments or not.¹⁹⁹ That view is that

¹⁹³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964) (“[T]he great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment.”).

¹⁹⁴ Campbell, *First Amendment Federalism*, *supra* note 2, at 1.

¹⁹⁵ *Supra* Section II (specifically, at 26–28, 30–3 discussing Federalists and Anti-federalists differing conceptions of governmental power and the scope of Article I Section 8’s Sweeping Clause as well as the substantive limitations on power in the original Constitution prior to the First Amendment’s ratification).

¹⁹⁶ Campbell, *Natural Rights*, *supra* note 6, at 307 (“[P]erhaps the Speech and Press Clauses in the First Amendment recognized *both* the natural right of expressive freedom (in which the Speech and Press Clauses had a common meaning) *and* the more determinate customary protections for expression (in which the Speech and Press Clauses had distinct meanings).”) (emphasis added).

¹⁹⁷ BANNING, *supra* note 14, at 92–160 (explaining the “Antifederal connection” between Jeffersonian constitutionalism and the views of the Anti-Federalists at Ratification).

¹⁹⁸ *Supra* Section II at 15–16.

¹⁹⁹ See Campbell, *Natural Rights*, *supra* note 6, at 310 (“The Founders widely viewed enumeration as a *conservative* project meant to *preserve* existing rights, not to change their meaning or scope . . . The purpose of enumeration, in other words, was to guarantee at the federal level the rights already recognized by state constitutions and social contracts.”); see also Campbell, *First Amendment Federalism*, *supra* note 2, at 44

the new government established by the Constitution had no power over speech and press whatsoever because it was unenumerated and out of the scope of the original meaning of the Necessary and Proper clause.²⁰⁰ Further indeterminacy arises when putting all of these moving parts—the First Amendment liberties, the Sweeping Clause and limited governmental powers, and the Ninth and Tenth Amendment rules of construction favoring retained rights and reserved powers—together in an as applied challenge mounted by the Jeffersonian Republicans against the Sedition Act of 1798.

C. Course of Practice

The Sedition Act was passed into law on July 14th, 1798, and provided a constitutional challenge and an opportunity for liquidation to occur.²⁰¹ The immediate controversy and opposition that surrounded its consideration and passage,²⁰² based primarily on constitutional grounds, was a testament to the indeterminacy of the power of the federal government over prosecutions of speech and press as well as the meaning of the First Amendment in relation to the exercise of that power.²⁰³ The debate that surrounded the Sedition Act sharpened and polarized the opposing viewpoints.²⁰⁴ The Federalists took a Blackstone-Mansfield view on governmental power over speech, press, and common law crimes.²⁰⁵ The Republicans took a federalism approach to speech and press freedoms—that the federal government had no power over these liberties, and that there were no federal common law crimes aside from those listed in the Constitution. They argued further that any such laws and

(“The First Amendment did not change the *meaning* of these rights [freedom of speech and press] that confined legislative power; rather, the American innovation was to *enumerate* them.”) (emphases in original).

²⁰⁰ *Supra* Section II.

²⁰¹ Sedition Act of 1798, ch. 74, 1 Stat. 596–97 (expired Mar. 1801 per Sedition Act § 4).

²⁰² A large part of that challenge is the argument that this law is not in the interest of the public good. This is an argument that holds water in the original meaning of the First Amendment because the natural rights it recognizes can only be regulated in the interest of the public good. See Campbell, *Natural Rights*, *supra* note 6, at 272. This is a different argument from the Jeffersonian interpretation of the First Amendment that is grounded in principles of federalism. See Campbell, *First Amendment Federalism*, *supra* note 2, at 8. Federalism was an obvious place in which liquidation would occur because it is “difficult to define” and its boundaries are hard to “ring-fence.” See Reinsch, *supra* note 158.

²⁰³ *But see* Campbell, *First Amendment Federalism*, *supra* note 2, at 46–47 (expressing skepticism of using post-ratification history as evidence of original meanings).

²⁰⁴ See generally BIRD, *supra* note 20, at 251 (discussing how previously speech and press protective Federalist judges after the passage of the Sedition Act and the ensuing controversy took a less protective hardline Blackstonian view of the liberty of the press).

²⁰⁵ *Id.* at 84.

prosecutions had to take place at the state level.²⁰⁶ As has been shown above, both of these views had intellectual lineage to the Constitution's ratification and the resultant dueling meanings of liberty and power were primed for a liquidation in the event of a challenge or crisis, which the Sedition Act provided.

Baude's piece on constitutional liquidation provides a framework for thinking about how a meaning of a constitutional provision is liquidated. He presents the debate over the constitutionality of the national bank as a paradigm case of constitutional liquidation. That debate primarily involved an interpretation of the Sweeping Clause.²⁰⁷ The events surrounding that episode in American constitutional history include striking parallels to those surrounding the Sedition Act crisis and provide an analogical roadmap to show how the meaning of the First Amendment was liquidated.²⁰⁸ It is also interesting to note that the liquidated meaning of governmental power in relation to the constitutionality of chartering a national bank may account for why much of the Republican constitutional opposition to the Sedition Act hinged on the First Amendment, despite the majority original public understanding explained by Campbell, rather than on an interpretation of Article I, Section 8.²⁰⁹

The course of practice that liquidated the Jeffersonian position on the First Amendment begins, not in the Sedition Act controversy itself, but with the Election of 1800.²¹⁰ This first practice is analogous to the passage of the bill to charter a national bank over fierce opposition that was a first practice in what would become an established course for liquidating the meaning of the Sweeping Clause to justify the exercise of that power.²¹¹ The Sedition Act controversy, however, was important in giving Jeffersonians an event to express their view of the meaning of the First Amendment, which would begin to be liquidated by Jefferson's election. The Election of 1800 that

²⁰⁶ *Id.* at 320–21.

²⁰⁷ Baude, *Constitutional Liquidation*, *supra* note 16, at 19–27.

²⁰⁸ *See generally* TERRI DIANE HALPERIN, *THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION* (2016) (a general history of the constitutional crisis surrounding the Sedition Act); *see also* Baude, *Constitutional Liquidation*, *supra* note 16, at 20 (“Madison discussed and applied the idea of liquidation most thoroughly in debates over the national bank.”).

²⁰⁹ As has already been demonstrated by Professor William Baude in his article on liquidation, Madison and most others (President Jackson and the Jacksonian-Democrats excluded), agreed that the Marshall view of the Sweeping Clause and constitutionality of the national bank had been liquidated and the remainder of American history after Jackson would bear out Madison's view further—not just that the view of *McCulloch* had been liquidated, but that the strong reading of *McCulloch* had been liquidated. *See* Baude, *Constitutional Liquidation*, *supra* note 16, at 22, 25–26.

²¹⁰ BANNING, *supra* note 14, at 266–70.

²¹¹ Baude, *Constitutional Liquidation*, *supra* note 16, at 19–22.

swept Republicans into two-thirds of the federal government, the Congress and the Presidency, was an initial vindication by the people of their view of the First Amendment as depriving the federal government of any power to regulate speech and press.²¹²

The next event in the course of practice that leads to liquidation is President Jefferson's actions after taking office. He ended all prosecutions under the Sedition Act and pardoned all persons convicted under it.²¹³ This was analogous to President Washington signing into law the bill chartering a national bank over the opposition opinions of Secretary of State, Thomas Jefferson, and Attorney General, Edmund Randolph.²¹⁴ Both actions amounted to Presidential approval of a particular view of constitutional meaning following a thoughtful deliberation on the matter. It is at this point that the Republican view of the First Amendment may have been liquidated, especially given the fact that it was not challenged in subsequent years.²¹⁵ Indeed, Madison, as President in 1815, several years before the Supreme Court decided *McCulloch v. Maryland*, had already found the constitutional question of the national bank's constitutionality to be a settled question. This was primarily due to the public acceptance following its signing into law by President Washington.²¹⁶

The continued elections of Republicans, especially the back to back Jeffersonian protégés,²¹⁷ coupled with the lack of significant challenges to speech and press freedoms until at least the Civil War, displays additional acquiescence by the majority to the Jeffersonian interpretation of the First Amendment.²¹⁸ The Madison Presidency is of particular interest to this analysis of historical practices, not just because he was the leading intellectual proponent of constitutional liquidation, but because it is generally agreed that one of his greatest achievements as president was that his administration did not infringe civil

²¹² FLEMING, *supra* note 188, at 288–92.

²¹³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (“Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: ‘I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.’”) (citing Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 4 JEFFERSON'S WORKS 555, 556 (Washington ed., 1904)).

²¹⁴ Baude, *Constitutional Liquidation*, *supra* note 16, at 21.

²¹⁵ See generally *Sullivan*, 376 U.S. 255; See also *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852 (2014) (the most recent case examining and relying on *New York Times Co. v. Sullivan* as persistently valid Supreme Court precedent).

²¹⁶ Baude, *Constitutional Liquidation*, *supra* note 16, at 21.

²¹⁷ See JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 188–204 (2012).

²¹⁸ *Id.*

liberties during war times.²¹⁹ Madison was faced with an even greater military crisis and existential threat to the republic than the Federalists had been in 1798. The War of 1812 was no quasi-war with Britain, it was a full-scale military engagement on American soil. Despite all the noted hardships of that war, Madison never suppressed speech or press rights, though there was a great deal of both speech and press that were critical of “Mr. Madison’s War.”²²⁰ In so doing, the Federalists did not succeed in making a triumphant return to the political scene to vindicate their view that legislation, like the Sedition Act, was needed during war times.²²¹ Instead, the party that had passed the Sedition Act as a war measure was extinguished in the wake of the War of 1812, never to return.²²²

It is this course of practice, the Republican opposition to the Sedition Act, that led to the Jeffersonian ascendance to the Presidency and to Republican control of Congress, as well as the ultimate decline and fall of the Federalist Party that liquidated the federalism-based Jeffersonian interpretation of the First Amendment. The events in this “Revolution of 1800”—relating to, federalism, civil liberties, and the freedom of speech, and of the press are the events that ultimately liquidated the Jeffersonian interpretation of the First Amendment. An interpretation that had its roots, not simply in the creation of the First Amendment, but in the ratification arguments over a lack of federal government power over the liberties of speech and press and in the Antifederalists’ understanding of the purpose of a Constitution and Bill of Rights.²²³

D. Settlement

For settlement to occur, the course of practice must stick.²²⁴ The practices have to reach a “uniformity” and acquire “some kind of cumulative force that transcended one’s own personal interpretation.”²²⁵ The two elements of settlement are acquiescence and public sanction. Acquiescence means that “the losers in some sense gave up.”²²⁶ The legislature and executive

²¹⁹ JACK RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 161–62, 168–69 (3d ed. 2007).

²²⁰ *Id.*

²²¹ GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY AMERICAN REPUBLIC, 1789–1815*, 696 (2009) (“The Federalists were scorned and ridiculed, and they never recovered politically.”).

²²² *Id.* at 708 (“By the second decade of the nineteenth century the Republicans had won such an overwhelming victory that the Federalist ‘aristocrats’ no longer seemed to matter either politically or socially.”).

²²³ See sources cited *supra* notes 25–26, 36.

²²⁴ Baude, *Constitutional Liquidation*, *supra* note 16, at 17.

²²⁵ *Id.*

²²⁶ *Id.* at 18.

both became Republican, the Federalist Party never achieved national power again and would die out in short order. All the branches of government, even the courts, acquiesced.²²⁷ The public sanction was not only displayed in the Election of 1800 and continued electoral dominance by the Republicans, but in the overarching trend toward public acceptance of a view of freedom of speech and press that is decidedly broader than Blackstone's traditional common law view.²²⁸ The Jeffersonian interpretation of speech and press had both acquiescence and public sanction. Perhaps the strongest indication that the Jeffersonian view of the First Amendment was liquidated actually comes in one of the most famous First Amendment cases of all time, in which, paradoxically, the Jeffersonian view is simultaneously recognized and changed.²²⁹ That case is *New York Times v. Sullivan*.

In *New York Times v. Sullivan*, the Court spends a great deal of time discussing the public controversy over the Sedition Act of 1798, recognizing that it “first crystallized a national awareness of the central meaning of the First Amendment.”²³⁰ This language of crystallization is synonymous with Madison's description of the meaning of liquidation.²³¹ The Court goes on to say that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”²³² Again, this reference to “the court of history” seems to indicate an understanding that historical practices had crystallized the central meaning of the First Amendment.²³³ In other words, a course of practices had liquidated the meaning of the First Amendment. The Court also recognized the broad consensus of public opinion and the acquiescence of the institutions of government to the Republican position on the

²²⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 255, 273–76 (1964).

²²⁸ Sunstein, *supra* note 6 (“[N]oting that in the founding period, there was vigorous debate about the Sedition Act of 1798, under which people could be fined or imprisoned for writing, printing, uttering or publishing [,] . . . [f]rom the standpoint of law in the 21st century, that’s plainly unconstitutional. But in the founding-era, most people seemed to think that it was fine.”).

²²⁹ Campbell, *First Amendment Federalism*, *supra* note 2, at 6 (recognizing the Court’s decision in *NY Times v. Sullivan* as having numerous parallels to the meaning of the Amendment espoused by the Jeffersonian opposition to the Sedition Act and connecting modern free speech doctrine to originalism).

²³⁰ *Sullivan*, 376 U.S. at 273.

²³¹ Baude, *Constitutional Liquidation*, *supra* note 16, at 11.

²³² *Sullivan*, 376 U.S. at 276.

²³³ *Id.* at 272–76.

Sedition Act—an essential component of liquidation or crystallization.²³⁴

IV. CONCLUSION

Ultimately, to fully understand the Constitution's relationship to the "freedom of speech, or of the press,"²³⁵ one must understand the original meaning of several different provisions of the Constitution. First, the Sweeping Clause and governmental power over speech and press in Article I, Section 8. Second, the First Amendment itself and its definitive legal content as originally understood. In the background of all of this is the federal common law or general law over speech and press as originally understood, the Ninth and Tenth Amendments, as well as Founding-Era original methods, such as liquidation.

These sources of law are distinct and independent of one another while still interacting. The original meaning of the Sweeping Clause is between the strong reading of *McCulloch* and the Jeffersonian position, something along the lines of Marshall's own view of what *McCulloch* stood for.²³⁶ It was, and has come to be, liquidated as a much stronger version of *McCulloch* than Marshall himself seems to have intended.²³⁷ The original meaning of the First Amendment is best expressed in the work of Professor Campbell and has definitive legal content. Under that approach, the First Amendment enumerates the natural rights of speaking, writing, and publishing, all capable of being restricted in the interest of the public good. Except the inalienable freedom to express one's honest opinion and the common law positive right to the liberty of the press as best expressed by Blackstone, including the Zenger defense of truth, which cannot be restricted at all.²³⁸

Liberty and power interact in this context. The natural rights enumerated in the First Amendment could only be regulated according to the enumerated powers in Article I, Section 8, including authorized implied powers, and as such there is an ambiguity as to whether speech and press can be regulated at all at the federal level and if so, how much? This ambiguity comes into play in what is meant when one says there is no danger posed to the press by the Constitution because there

²³⁴ *Id.* at 276 ("These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.")

²³⁵ U.S. CONST. amend. I.

²³⁶ *See supra* Section II.

²³⁷ Barnett, *supra* note 100, at 215.

²³⁸ *See supra* Section I.

is no enumerated power over the press. Does this mean that the federal government has no power over the press at all or no power to infringe the common law liberty of the press?

At the very least, this ambiguity of governmental power over speech and press creates an indeterminacy that sets the stage for a liquidation of the meaning of that power and those liberties.²³⁹ The liquidation of the Sweeping Clause at its most broad reading and the loss of the Jeffersonian position as relates to that power in the debates over the constitutionality of the national bank led the Jeffersonians to oppose the Sedition Act's constitutionality not from the perspective of power but from the perspective of federalism and liberty.²⁴⁰ In so doing, the Jeffersonian view of the First Amendment, that the federal government is categorically deprived of all power over speech and press, is liquidated as the First Amendment's meaning. That meaning is not disturbed until at least the Civil War and Reconstruction adoption of the Fourteenth Amendment. At any rate, the liquidated federalism-based Jeffersonian interpretation continues to be foundational to the modern courts understanding of the First Amendment, beginning with *New York Times v. Sullivan* and animating its jurisprudence right up to the present day.²⁴¹

Although *New York Times v. Sullivan* recognized the liquidation that occurred during the Sedition Act controversy, it simultaneously changed the requirements of the First Amendment from the Jeffersonian federalism rule to the actual malice standard of modern First Amendment law.²⁴² Some Originalists, most notably Justice Thomas and the late Justice Scalia, have questioned whether this actual malice standard can possibly be the correct original understanding of the First Amendment.²⁴³

Justice Thomas's recent concurrence in *McKee v. Cosby* questions the rightness of *New York Times v. Sullivan*. Throughout the concurrence—in similar tones to the Campbell-Federalist

²³⁹ Baude, *Constitutional Liquidation*, *supra* note 16, at 13.

²⁴⁰ A similar move was made in the debate over religious assessments in Virginia during the 1780s.

²⁴¹ *See, e.g.*, *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852, 856 (2014) (affirming the law of the First Amendment as articulated in *New York Times v. Sullivan*).

²⁴² *New York Times v. Sullivan*, 376 U.S. at 279–80 (deciding that the First Amendment requires “a federal rule that 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’ -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

²⁴³ *McKee v. Cosby*, 586 U.S. ____ (2019) (Thomas, J., concurring in denial of certiorari) (“*New York Times* and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law.”) (slip op., at 2).

view—Justice Thomas touches on the founding-era common law of defamation and libel.²⁴⁴ At other times, he takes a federalism approach that resembles the Jeffersonian view stating that the States may be the proper venues for “striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”²⁴⁵ Thomas’s concurrence could provide a method of restoring a more originalist rule to First Amendment law—relying heavily on the positive law rules of the common law and leaving the regulation of these issues to the states. In both his common law history and reliance on federalism, Justice Thomas’s concurrence is tapping into the currents of the original understanding of the First Amendment.

This Article does not take a firm stand on the correct originalist interpretation of the First Amendment’s speech and press protections.²⁴⁶ It only states that the “official story” of our First Amendment law is originalist in important respects and embraces, rather than rejects, a form of originalism.²⁴⁷ Leaving the door open to getting the original meaning of the First Amendment right if the current understanding is incorrect as a matter of original law.

This Article does not purport to be the final word on the meaning of the First Amendment, many arguments can be made about what speech and press freedoms consist of and how the law protects them. This Article does, however, demonstrate that our modern doctrine has an originalist pedigree. Whether the moves made are all legally valid originalist moves is for a different article to examine. The fact is that these moves were made and, in some important ways, they are originalist moves. This means that in some sense our First Amendment law is originalist even if “the freedom of speech, and of the press”²⁴⁸

²⁴⁴ *McKee*, 586 U.S. at ____ (slip op., at 6-9).

²⁴⁵ *Id.* at ____ (slip. op., at 14).

²⁴⁶ It is possible that an Originalist answer to the question of the First Amendment’s meaning could hold that both Congress and State legislatures (under incorporation) are barred from legislating on matters of speech and press (the Jeffersonian view) leaving the regulation of libel, defamation, and the like to the common law. *See id.* at 10, fn. 3 (stating “[b]y its terms, the First Amendment addresses only ‘law[s]’ ‘ma[d]e’ by ‘Congress.’ For present purposes, I set aside the question whether the speech and press rights incorporated against the States restrict common-law rights of action that are not codified by state legislatures.”).

²⁴⁷ *See generally* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. UNIV. L. REV. 1 (forthcoming 2019) (“Our system’s official story is that we follow the law of the Founding, plus all lawful changes made since.”).

²⁴⁸ U.S. CONST. amend. I.

means not exactly the same thing in 1788,²⁴⁹ 1791,²⁵⁰ 1800,²⁵¹ and 1964.²⁵² Which of these points in time, if any or all, encapsulates an accurate original meaning of the First Amendment depends on one's theory of originalism, but the point is that originalism is, in an important way, our First Amendment law.²⁵³

²⁴⁹ The ratification of the Constitution.

²⁵⁰ The adoption of the First Amendment.

²⁵¹ The election of Thomas Jefferson to the Presidency.

²⁵² The year *New York Times Co. v. Sullivan* was decided.

²⁵³ This is the "official story" of our First Amendment law. See generally William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. UNIV. L. REV. 1 (forthcoming 2019).