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Response

The Foreign Founding: Rights, Fixity, and the Original Constitution

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Anyone today who wishes to understand the American Founding must first come to terms with a central fact: By our lights, it is a foreign world.[1] To properly understand how and what people thought back then requires considerable abstraction and conceptual translation. It demands a willingness to look beneath surface-level familiarity by attending to, rather than ignoring, strange and paradoxical evidence in order to recreate a largely hidden world of unfamiliar assumptions, ideas, distinctions, and logics. Only by recovering the foreign conceptual world of Founding-era Americans can we grasp the meaning of their constitutional expressions.[2]

All of this is of special significance to the theory of constitutional originalism. For in insisting that the United States Constitution should be interpreted today in accordance with its original meaning, originalists place special burden on recovery of the historical past, especially the distant eighteenth-century past. Yet, despite the fact that most leading historians of the period have long emphasized how different and removed the Founding was from our own time[3], originalists have rarely engaged with the force of

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1. Thus, fully capturing L. P. Hartley's enduring lesson: "The past is a foreign country: they do things differently there." L. P. HARTLEY, THE GO-BETWEEN 10 (1953).

2. *See generally* Jonathan Gienapp, *Knowing How vs. Knowing That: Navigating the Past*, PROCESS: A BLOG FOR AM. HIST. (Apr. 4, 2017), http://www.processhistory.org/gienapp-knowing-how/ [https://perma.cc/RK2G-H9PB].

3. *See generally* JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1st ed. 1992); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 5 (1995); JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE EARLY REPUBLIC

this insight, typically overlooking, misunderstanding, or dismissing it outright. These various reactions to historians' arguments are driven by a common instinct. Whether claiming to heed historical guidance or proceeding happily unaware, originalists often interpret Founding-era thinking with a sense of familiarity—confident that the Founding generation more or less spoke and thought like we do today. This familiarity, however, is decidedly unwarranted. Even if the Founding generation's constitutional expressions and arguments feature familiar words, which in many cases carried an identical semantic meaning as they do today, those words were set against a conceptual background distinct from our own. And familiar words, if strung together via unfamiliar conceptual relationships, can convey radically different constitutional ideas. By failing to grasp the Founding generation's distinct conceptual vocabularies, many (though certainly not all) originalists have been prone to read the words of the Constitution as though they were set against a largely legible conceptual background. By unwittingly imposing modern assumptions on eighteenth-century words, originalists too often wrench eighteenth-century expressions into the present, silently transforming their meaning in the process. All of this is to say: There is no way to decipher the Constitution's original meaning without first reconstructing the conceptual world of the eighteenth-century Founding; which, in turn, means there is no way to do originalism properly without first recognizing the foreignness of that conceptual world and engaging in the kind of historical immersion necessary to penetrate it.[4]

Beyond originalism and the ever-heated debates that surround it, grasping the foreign character of the Founding and what is needed to comprehend it is crucial to our historical understanding of the original Constitution and its early development. Only by recreating the foreign constitutional world from which the Constitution sprang can we understand both its distinct original features *and* how, why, and when that unfamiliar world haltingly turned into our own.

Few legal scholars working today exhibit a clearer recognition of the foreignness of the Founding or more proficient talent at navigating its complicated conceptual terrain and making the strange and unfamiliar legible

(2001); RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 5 (1999); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at xvi (1998); Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 971 (2015). On the foreignness of the past and historical study, see for example BERNARD BAILYN, SOMETIMES AN ART: NINE ESSAYS ON HISTORY 22 (2015); DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY (1985); J. G. A. POCOCK, POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 3–41 (1989); Gordon S. Wood, *The Creative Imagination of Bernard Bailyn*, *in* THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY 16, 46 (James A. Henretta et al. eds., 1991); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

4. For a fuller account of this criticism, see Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 935–36 (2015).

than Jud Campbell. Through a series of pathbreaking articles[5], he has established himself as one of the leading historians of Founding-era rights, especially as they pertained to the various speech and press freedoms that comprise the original First Amendment. Because Campbell has correctly recognized that deciphering the meaning and enforcement of any particular right at the Founding requires first excavating "the largely forgotten language of Founding Era rights discourse," his work on the First Amendment has far transcended this narrower (though no doubt essential) subject.[6] Based on a deep immersion in eighteenth-century sources and supported by a massive volume of primary research, Campbell's work offers as sophisticated and nuanced an assessment of Founding-era rights as is available.

His latest article, *The Invention of First Amendment Federalism*,[7] marks another major contribution to this effort. Carrying the story of speech and press freedoms—so expertly told in his prior work—forward from the 1780s (when the First Amendment was first conceived) into the late 1790s (when the explosively controversial Sedition Act of 1798 ripped the political community in half), Campbell upends much conventional wisdom surrounding the early meaning and development of the First Amendment. As in his earlier work, he expertly decodes late eighteenth-century Americans' "foreign way of thinking" about rights by elucidating the seemingly paradoxical ways in which they understood liberty's relationship to power.[8] That is among the many reasons why Campbell's piece is destined to become essential reading for anybody interested in deciphering early American constitutionalism and the place of speech and press freedom within it.

But, in addition, Campbell's latest article offers a further, invaluable contribution—one that breaks novel ground from his earlier work: it helps show how foreign constitutional assumptions and thinking mutated into new, more recognizable forms. How Americans conceived of core areas of constitutionalism changed—and, in some ways, quite dramatically—over the decade-plus that followed the drafting and ratification of the federal Constitution. As Campbell so vividly illustrates, by the end of the 1790s, though they certainly had not fully departed from prior constitutional habits, some Americans had begun talking about rights in novel ways that

5. *See generally* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569 (2017) [hereinafter *Judicial Review and the Enumeration of Rights*]; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) [hereinafter *Natural Rights and the First Amendment*]; Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)) [hereinafter *Republicanism and Natural Rights at the Founding*].

6. *Natural Rights and the First Amendment*, *supra* note 5, at 252.

7. *See generally* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEXAS L. REV. 517 (2019) [hereinafter *The Invention of First Amendment Federalism*].

8. *Id.* at 532.

anticipated modern conceptions of the subject. Jeffersonian Republicans' invention of First Amendment federalism marked not merely a new argument about the First Amendment but, in certain ways, a new argument about constitutional rights more generally. Meanwhile, beyond its penetrating examination of Founding-era rights discourse, Campbell's investigation sheds important light on the development of another pivotal feature of early American constitutionalism (and one that I have investigated at great length[9]): constitutional fixity. Founding-era rights talk was entwined with the idea of fixity, and the transformation of the latter wrought important changes for the former.

Bringing together what Campbell's article thus has to teach us about these two distinct but related constitutional concepts—rights and fixity—holds deeper lessons for understanding the foreignness of the Founding and with that the original Constitution. Whether one is engaged in an originalist enterprise or merely invested in understanding the nation's original constitutional settlement, it is simply not possible to recapture the original Constitution without first reconstructing the unfamiliar conceptual world from which it issued. But more than that, it is every bit as important to trace how debates in the 1790s began remaking that original conceptual scheme, such that we might begin to fathom how, why, and when the decidedly foreign language of early American constitutionalism gradually transformed into our modern idiom.[10]

I. Rights at the Founding

There are many ways to illuminate the foreignness of the American Founding, but few are quite as illustrative as the subject of rights. The first major contribution of Campbell's latest article proves this point. To spell out how he does this, I will synthesize his most recent essay with his earlier work to recapture the often unfamiliar ways Founding-era Americans thought about fundamental rights and their enforcement. I do this partly to draw out some of the larger significance of his broader project, but I also do so to set up the remainder of this reflection, which focuses on changes in constitutional thinking in the 1790s and cannot be fully understood without first establishing how the Founding generation initially thought about rights.

Confusion has long shrouded how Founding-era Americans conceived of rights. The primary reason why is because too many observers have been, as Campbell has instructively put it, "looking for original meaning in the wrong way, instinctively trying to fit the historical evidence to our own

9. *See generally* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018).

10. This topic, in a much different way, is the subject of my recent book. *See generally* GIENAPP, *supra* note 9.

conception of constitutional rights."[11] Historians, political theorists, and constitutional lawyers (especially originalists) have all too often filtered the subject through modern sensibilities, convinced that Founding-era Americans conceived of rights much as we long have.[12] These scholars have thus often begun their analyses with the wrong conception of rights in mind, by assuming that they are "the inverse of powers."[13] That is, liberty and government are treated as fundamentally opposed: where one exists the other by definition cannot. This would seem especially true of natural rights—of which the Founding generation so often spoke—since these particular rights existed prior to the formation of government and thus, by definition, were outside of government control. From this perspective, it has been only natural to assume that when the Founders decried tyranny and oppression and clamored for protections for their rights, they were identifying spheres of liberty that ought to be free from government interference or constraint. More specifically, when they invoked retained natural rights and other fundamental customary rights and claimed that they enjoyed, or ought to enjoy, constitutional protection, they were imagining rights much as we do today, as "determinate legal privileges or immunities"[14] or "legal 'trumps'"[15] that drew fundamental limits around governmental authority. In short, rights and government powers interacted in a zero-sum game: to protect one meant to limit the other.

But the Founding generation often imagined the relationship between rights and powers in a profoundly different way, one that is difficult to grasp from a modern perspective that sees liberty and government in such stark oppositional terms. In essence, scholars have not been wrong to emphasize Founding-era Americans' commitment to individual liberty, but early Americans did not think that individual liberty was protected primarily through *limiting* government; rather they assumed that liberty was often best protected by *empowering* government "in the right kind of way."[16] Throughout his earlier work, and again in his latest article, Campbell skillfully shows us how. For most at the Founding, protecting rights was a matter not of disabling government but rather of creating and empowering representative political institutions. Whereas unrepresentative government posed a threat to liberty, representative government was the peculiar bulwark

11. *Natural Rights and the First Amendment*, *supra* note 5, at 251.

12. The literature that could be cited is massive, but for influential examples of this approach to Founding-era rights specifically among constitutional lawyers, see for example RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 31-82 (2016); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 3–6, 17–25 (2014).

13. *The Invention of First Amendment Federalism*, *supra* note 7, at 526.

14. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 86.

15. *Natural Rights and the First Amendment*, *supra* note 5, at 253.

16. GIENAPP, *supra* note 9, at 165–66.

of liberty.

To understand how and why this was the case, Campbell correctly begins with the sources of Founding-era rights. Today, we assume that constitutional rights earn their fundamentality in a specific way, by being enumerated in the Constitution's text.[17] It is commonly assumed that the *raison d'être* of written constitutions—which Revolutionary Americans so famously began writing at both the state and national level in 1776—was to use constitutional language to create fundamental constitutional content.[18] But throughout the 1770s and 1780s, Founding-era Americans understood constitutional "writtenness" in a much different way.[19] Carrying forward longstanding constitutional habits, they readily presupposed that constitutions were comprised of a seamless field of written and unwritten content.[20] In some instances, constitutional text was the source of fundamental authority, but in others it was merely a reminder of a more fundamental authority outside of it. In some instances, text was understood to have enacted certain institutions or legal standards, but in others it was assumed that this text easily blended with other kinds of fundamental authority such as natural law, Magna Carta, "right reason," general law, the law of nations, or just the "Laws of the Land."[21] Perhaps nowhere was this foreign attitude toward constitutional "writtenness" exhibited more clearly than when Americans conceived of their fundamental rights. In the years following the Declaration of Independence, Founding-era Americans assumed that their constitutions, including especially the declarations of rights that accompanied several of them, merely *declared* rather than *created*

17. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 90.

18. On the central importance "writtenness" has long played in understandings of both American constitutionalism and its origins, see GIENAPP, *supra* note 9, at 20–23 (and supporting notes). For a good, earlier distillation, see Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171–72 (1992).

19. For this argument, see GIENAPP, *supra* note 9, at 20–74.

20. GIENAPP, *supra* note 9, at 36–37; Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1590 (2016).

21. *See* KATE ELIZABETH BROWN, ALEXANDER HAMILTON AND THE DEVELOPMENT OF AMERICAN LAW 212–213 (2017); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 41–43 (2004); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1176–1787, at 293–305 (1998); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 473–497 (2005); *see generally* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). After the ratification of the federal Constitution, many legal thinkers readily assumed that general law, and the law of nations in particular, was part of the Constitution. *See generally* WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (2006); WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 130–141 (1995); David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593 (2018). Although whether it was part of the "law of the land" specified in the Constitution itself remains an open question. *See generally* John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659 (2018).

rights.[22] As Alexander Hamilton remarked, "[t]he sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature . . . ."[23] The sources of rights, like so much of constitutional content, preceded the codification of constitutional text.

But, as Campbell so expertly shows, not all fundamental rights enjoyed the same character or came from the same place. Generally speaking, there were two distinct kinds of fundamental rights that Founding-era Americans recognized, celebrated, and assumed were incorporated into their new constitutional orders: natural rights and fundamental positive rights. The former were "any capacities that humans could rightly exercise on their own, without a government,"[24] while the latter were liberties "defined in particular relation to governmental authority."[25]

As Campbell sees it, reasoning about natural rights undergirded the entire project of imagining constitutional governance at the Founding, so he begins there. He also does so to combat a persistent faulty assumption: that when the Founding generation invoked natural rights they did so "in the modern sense" to identify "absolute or presumptive barriers to governmental regulation."[26] Campbell powerfully argues that this misunderstands why the Founders talked about natural rights at all, which was less to identify particular rights than it was to better understand the purpose of constitutional government and the place of rights more generally within such a political arrangement. In this regard, crucially, natural rights embodied "*a mode of reasoning*" more than determinate legal standards and "the crux of the idea—in stark contrast to the modern notion of 'natural rights'—was to create a representative government that best served the public good."[27]

Among members of the Founding generation, natural rights were most often invoked in the context of social contract theory—something Campbell

22. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 90; *see also* GIENAPP, *supra* note 9, at 50–51; Jack N. Rakove, *The Dilemma of Declaring Rights*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 181, 187, 193–194 (Barry Alan Shain ed., 2007); John Phillip Reid, *The Authority of Rights at the American Founding*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 97 (Barry Alan Shain ed., 2007); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 196 (1998).

23. ALEXANDER HAMILTON, THE FARMER REFUTED: OR, A MORE IMPARTIAL AND COMPREHENSIVE VIEW OF THE DISPUTE BETWEEN GREAT-BRITAIN AND THE COLONIES**,** INTENDED AS FURTHER VINDICATION OF THE CONGRESS: IN ANSWER TO A LETTER FROM *A.W.* FARMER, INTITLED A VIEW OF THE CONTROVERSY BETWEEN GREAT-BRITAIN AND HER COLONIES: INCLUDING A MODE OF DETERMINING THE PRESENT DISPUTES FINALLY AND EFFECTUALLY 38 (1775).

24. *Natural Rights and the First Amendment*, *supra* note 5, at, 268.

25. *Judicial Review and the Enumeration of Rights*, *supra* note 5, at 576.

26. *Natural Rights and the First Amendment*, *supra* note 5, at 276.

27. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 86.

has spelled out at greater length in his earlier work.[28] As he explains, eighteenth-century thinkers often invoked a hypothetical thought experiment derived from reason, which imagined individuals in a state of nature—where they had enjoyed certain natural rights, such as the right to life, liberty, and property, as well as the right to speaking, writing, and publishing—who had left that state to form first a body politic (or a "social contract") and then a government (or a "constitution"). In exchange for the benefits of society, they surrendered some natural liberty while retaining certain natural rights.

Critically, however, "[t]he point of retaining natural rights . . . was *not* to make certain aspects of natural liberty immune from governmental regulation. Rather, retained natural rights were aspects of natural liberty that could be restricted only with *just cause* and only with *consent of the body politic*."[29] True, as Campbell acknowledges, there were certain retained natural rights, often referred to as "rights of the mind" (such as freedoms of conscience and thought), that were believed to be immune from the same kinds of government regulations.[30] But these were exceptions to the general rule. The broader point of conceiving of natural rights and imagining a social contract through which those rights were partly surrendered and partly retained was to understand the precise conditions under which the vast majority of those rights could be legitimately regulated in political society: to establish specifically *when* these rights could be restrained (when the people legitimately consented), *how* they could be restrained (by legitimately representative institutions that alone captured the people's consent), and *why* they could be restrained (to promote the public good).[31] In short, "[n]atural rights retained by the people were subject to regulation by the people."[32]

This was even true of so-called "inalienable" rights—such as those to life, liberty, and property, or certain expressive freedoms recognized by the First Amendment. These could not be constrained except by lawful, representative government acting in the common good. But as long as these conditions were met, they could be, and *ought* to be restrained. The right presupposed the legitimacy of this specific kind of republican regulation, meaning there was *nothing* contradictory about the people's representatives regulating an inalienable right.[33] At bottom, then, Founding-era Americans

28. *Id.* at 86–90.

29. *The Invention of First Amendment Federalism*, *supra* note 7, at 527.

30. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 86; *see also Natural Rights and the First Amendment*, *supra* note 5, at 280–82; *Judicial Review and the Enumeration of Rights*, *supra* note 5, at 574–76.

31. *See Republicanism and Natural Rights at the Founding*, *supra* note 5, at 92–98; *Natural Rights and the First Amendment*, *supra* note 5, at 265–80.

32. *The Invention of First Amendment Federalism*, *supra* note 7, at 527.

33. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 96–98. As Campbell puts it, "most retained natural rights were *individual* rights that could be *collectively* defined and controlled." *Id.* at 98.

did not identify retained natural rights in order to disable government but instead to discover *which kind* of government could alone protect them.[34]

If protecting fundamental liberty was a matter of establishing and empowering representative institutions, then determining which political institutions were genuinely representative of the people's interests became paramount. And Founding-era Americans (at least throughout the 1770s and 1780s) regularly picked out and celebrated the same political bodies: legislatures and juries. In his famed "Clarendon" letters, John Adams testified to this fact by singling out "two branches of popular power, voting for members of the house of commons, and tryals by juries" as "the heart and lungs, the main spring, the center wheel" of the constitutional system. For, "without them . . . the government must become arbitrary." In "these two powers consist wholly, the liberty and security of the people."[35] Throughout Anglo-American constitutional history, these institutions had proved themselves the most effective defenders of liberty precisely because they best represented the people.[36] Protecting liberty meant empowering these bodies.

Founding-era Americans identified other fundamental rights beyond retained natural rights, as Campbell explains, namely positive rights that derived not from the state of nature but political society itself. Often referred to as common law rights, these were customary protections such as the right to trial by jury or habeas corpus or prohibitions against ex post facto laws that over time had become cherished features of the British constitutional tradition in which Revolutionary Americans had long been steeped. They were treated as inviolable, fundamental liberties that had existed since "time immemorial" and were every bit as essential to human freedom as retained natural rights. These fundamental positive rights had long been considered core features of the customary (and largely unwritten) British constitution and, following the Revolution, were incorporated into Americans' new constitutional order.[37]

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34. Campbell puts it well: "[N]atural rights called for good government, not necessarily less government." *Id.* at 87.

35. John Adams, Earl of Clarendon, to William Pym III (Jan. 27, 1766), *in* 1 THE PAPERS OF JOHN ADAMS 164, 169 (Robert J. Taylor ed., 1977).

36. *The Invention of First Amendment Federalism*, *supra* note 7, at 527–28; *see also*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996). As Campbell correctly notes, during the Founding era, juries were imagined less as procedural safeguards than as genuinely representative institutions meant to embody all of society. For more on the eighteenth-century Anglo-American meaning of juries, see WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 20–30 (1975); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 50–52 (1986).

37. *Judicial Review and the Enumeration of Rights*, *supra* note 5, at 576–79; *Natural Rights and the First Amendment*, *supra* note 5, at 287–90; *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 92, 98–99. On the ancient British constitution that allegedly existed since "time immemorial," see JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 28–40 (2005); J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND

Unlike natural rights, however, fundamental positive rights "were defined in terms of governmental authority," which meant they tended to create more determinate legal rules that imposed firmer constraints on governmental authority.[38] As Campbell notes, these "rights operated more in the mode of 'rights as trumps,'" familiar to modern times.[39] And, as Revolutionary Americans began to lose faith in their state legislatures, judges began to play a more significant role enforcing these fundamental constitutional rights against intrusion of legislative bodies.[40]

But no matter what distinguished them from retained natural rights—and often I think the distinctions separating them were not particularly sharp anyway[41]—fundamental positive rights, as Campbell shows, were conceived in a way that largely reinforced, rather than contradicted, conventional Founding-era understandings of liberty and governance. Considering the speech and press freedoms at the heart of Campbell's work best illustrates how. Founding-era Americans non-controversially recognized both a retained natural right to "speaking, publishing, and writing" as well as a common law right to the freedom of the press.[42] The retained natural right was less determinate and merely identified (like all retained natural rights) a fundamental right that could only be abridged by genuinely representative institutions acting in the general welfare.[43] In contrast, the common law right, which grew out of the retained natural right,[44] recognized a more determinate rule—what William Blackstone famously referred to as a ban on prior publishing restraints—and, in so doing, often placed limits on what certain governmental institutions could do.[45] Governments could pass narrow sedition laws, but they could not censor writers before they published their arguments. However, this meant that the only way to regulate the press was through libel prosecutions after the fact, which "put juries in control of governmental efforts to regulate expression."[46] So even though positive

THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 30–55 (1987). On its customary content, see KRAMER, *supra* note 21, at 9–34. And on its development in the North American colonies, see for example WILLIAM E. NELSON, 4 THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE (2018). On eighteenth-century common law rights, see for example Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

38. *The Invention of First Amendment Federalism*, *supra* note 7, at 528.

39. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 99.

40. *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 395–461 (2008); WOOD, *supra* note 3, at 453–63; Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997).

41. *See* GIENAPP, *supra* note 9, at 32–33. Campbell himself acknowledges this. *See Natural Rights and the First Amendment*, supra note 5, at 290–94.

42. *The Invention of First Amendment Federalism*, supra note 7, at 532.

43. *Id.* at 529.

44. *Id.* at 529–31.

45. *Id.* at 531.

46. *Id.*

common law rights appeared to function as a distinct kind of governmental restriction, in most instances they actually presupposed the same constitutional logic that informed other kinds of fundamental rights—liberty was protected through representative institutions. In this case, juries rather than legislatures afforded the crucial bulwark, but the idea was much the same—"popular control" over popular liberty.[47]

None of this makes much sense from a modern perspective that understands rights as fundamental claims against the exercise of political authority and assumes a combative relationship between liberty and power in which less government necessarily equates to more freedom. To quite the contrary, by-and-large the Founding generation assumed that legitimate government acting in the people's interest best protected the people's liberty. Steeped in longstanding Anglo-American intellectual habits, they often conceived of liberty primarily as a state of being determined by a people's relationship to their government; that the only way to protect fundamental individual rights—like those to life, liberty, and property—was by living in a free state, one in which robust representative institutions ensured that the people were governed subject to their own wills and thus laws of their own making.[48] This is why during the leadup to the American Revolution, the primary issue had not been parliamentary regulation per se but that, unlike in their local assemblies, the colonists were not represented in Parliament; Parliament embodied a will foreign to their own.[49] This is why, beginning in 1776, early state constitutions vested local legislatures with sweeping authority, not because Revolutionary Americans were indifferent to individual liberty but because they assumed that empowering the people's representatives was the same thing as preserving the people's rights.[50] This is why, even after many Americans grew disillusioned with the state governments in the 1780s and leading constitutional reformers like James Madison decried the manner and extent to which faction-driven state legislatures were trampling on individual rights, the Constitution's framers sought to better protect individual liberty by improving republican representation itself such that a new national government would represent all of society and not merely factions within it.[51] This is why, during ratification,

47. *Id.* at 532.

48. See QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998), which expertly lays out the development of this distinctive approach to liberty and governance, primarily in seventeenth-century England but with allusions to its later impact on Revolutionary America, while explicating why this approach is largely unintelligible from a liberal or libertarian perspective on freedom that fixates on the number of laws and amount of coercion rather than on who has been empowered to make the laws, the latter of which was the Founding generation's recurring obsession.

49. *See generally* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986).

50. *See* WOOD, *supra* note 3, at 127–255.

51. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 104–05.

Anti-Federalists' favored remedy to protect the liberty they believed so threatened by the proposed federal Constitution was to enhance not the power of individuals, but the power of the state governments.[52] All told, through the early 1790s, despite burgeoning disagreements about how best to build representative, republican institutions, Revolutionary Americans tended to understand liberty and government in decidedly non-oppositional terms. Protecting fundamental rights typically meant empowering government in the right kind of way. A generation that clamored endlessly about the need to safeguard core rights and designed constitutions in the hopes of protecting them almost invariably assumed that individual liberty and representative government went hand-in-hand.

II. The Transformation of Rights

Reconstructing Founding-era attitudes toward rights helps illustrate the foreign conceptual world from which the federal Constitution emerged. But it also reveals how those attitudes began changing in the 1790s, particularly toward the end of the decade when, as Campbell so persuasively shows, Jeffersonian Republicans issued a novel reading of the First Amendment. In so doing, I suggest, Republicans were also beginning to anticipate a more familiar, modern conception of constitutional rights. Precisely because it seems so familiar, scholars have failed to recognize how dramatically Jeffersonians were breaking with—not only an earlier understanding of the First Amendment—but with that an earlier, and far less familiar, understanding of rights themselves.

As originally conceived, Campbell argues, the First Amendment's Speech and Press Clauses reflected conventional Founding-era thinking about rights. When James Madison led the effort in the First Federal Congress to amend the Constitution and enumerate certain fundamental liberties, it was assumed that the purpose of this endeavor was merely to declare well-acknowledged rights.[53] Throughout the ratification debates, Anti-Federalists had demanded a federal declaration of rights, insisting repeatedly that the federal Constitution ought merely to recognize the same fundamental rights that dominated so many of the state constitutions.[54] And former Federalists in the First Congress—sensing that such provisions would be redundant and thus harmless—eventually complied. Accordingly, these federal rights provisions were not supposed to work any differently than those at the state level. Generally, they permitted representative institutions at both levels to regulate certain rights in the interest of the public good, and where the provisions limited certain government action, they empowered

52. GIENAPP, *supra* note 9, at 82, 165.

53. *The Invention of First Amendment Federalism*, *supra* note 7, at 537; *Natural Rights and the First Amendment*, *supra* note 5, at 295.

54. *The Invention of First Amendment Federalism*, *supra* note 7, at 536.

juries to ultimately regulate the right in question. As Campbell shows, this certainly seems to have been true of the First Amendment. At this time, nobody argued that federal speech and press freedoms worked differently than their state counterparts: governments could regulate expression while juries would arbitrate sedition cases.[55]

That changed in the 1790s, Campbell brilliantly demonstrates, not because of the Sedition Act of 1798 but rather thanks to an earlier, lesser-known issue: the problem of partisan jury selection. Famously, in the years immediately following ratification of the Constitution, political parties unexpectedly emerged in the United States. And, as the 1790s unfolded, Federalists and Republicans grew increasingly suspicious of each other.[56] Fearful that Federalists posed a mortal threat to the republic, Republicans grew more outspoken in their criticisms of the federal government. And convinced that Republicans' explosive rhetoric was fraying the nation's social fabric, Federalists began cracking down on expressive freedom. Amidst this escalation, the Cabell affair proved an especially explosive episode. In 1797, having been encouraged by Justice James Iredell's ominous charge, a federal grand jury in Richmond returned a presentment denouncing congressman Samuel J. Cabell—who had published a series of fiery circular letters criticizing Federalists' pro-British foreign policy—for spreading "unfounded calumnies" against the federal government.[57] Suddenly, Republicans fearfully recognized, one of the entities they had long trusted to regulate key rights—juries—had, at least at the federal level, been hopelessly compromised. Because the Federalist-appointed federal marshals hand selected these jurors, they now functioned as little more than Federalist pawns.[58] This especially impacted expressive freedom, not only because juries had long been the institution that had policed this right but also because divisive partisanship, and with that Federalists' willingness to censure speech, increasingly underscored the perils of political dissent. When Federalists passed the Sedition Act the following year, as Campbell shows, the novel First Amendment arguments Republicans generated in opposition to it were driven by the realization, which had crystallized during the Cabell affair, that traditional safeguards could no longer be trusted.[59]

Republicans' innovative First Amendment argument—articulated on the floors of Congress by Albert Gallatin and Edward Livingston, and then especially by James Madison and Thomas Jefferson in the Virginia and

55. *Id.* at 536–39.

56. On the development of the first party system, see for example ELKINS, *supra* note 3; JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS (1993).

57. *The Invention of First Amendment Federalism*, *supra* note 7, at 541.

58. *Id.* at 545–47.

59. *Id.* at 549–51.

Kentucky Resolutions and the Virginia Report that followed—denied the federal government *any* right at all to regulate speech or press freedoms.[60] State governments could continue to restrain these rights in the public good, Republicans argued, but the federal government enjoyed no such jurisdiction. Prior disagreements over speech and press liberties had not been conceptual in nature; virtually all earlier constitutional thinkers had recognized the government's authority to regulate these rights in the name of the public good, so the disputes had turned on the meaning of the public good and the best way to maximize it.[61] Now, however, Republicans were making an entirely distinct conceptual argument; one that denied the federal government's right to regulate speech in the interest of the public good *however construed*.

Republicans, as Campbell demonstrates, were turning the First Amendment into a federalism rule, one that, in comparison to the state governments, substantially limited the federal government's jurisdictional authority to regulate the provision.[62] While Campbell is no doubt correct to stress the novelty of this position, it is important to note the ways in which Anti-Federalists, nearly a decade earlier, had begun to lay the groundwork for it. While it certainly seems right that during the ratification debates nobody suggested that the First Amendment imposed a categorical ban on the federal government's power to regulate expression, nonetheless it is crucial to appreciate the broader context in which Anti-Federalists called for a federal bill of rights. They did so primarily as a last resort. Throughout ratification, above all they had sought core structural changes to the proposed Constitution. Like most Americans of the time, they assumed that representative institutions offered the best protection of individual liberty. But, unlike Federalists who were confident that the new Constitution would enhance the nation's republican institutions, Anti-Federalists were convinced that the instrument's fatal flaw was how inadequately it represented the American political community. If this defect could not be remedied—by dramatically increasing the size of Congress, weakening the executive and judicial branches, returning core powers back to the state governments, or ideally all of the above—then, as a last-ditch effort, perhaps the Constitution could at least explicitly protect certain fundamental liberties.[63] Yet, as one Virginian put it, capturing Anti-Federalists' prevailing assessment, "[t]here would be no need of a bill of rights, were the states properly confederated."[64]

60. *Id.* at 554–60.

61. *Natural Rights and the First Amendment*, *supra* note 5, at 279.

62. *The Invention of First Amendment Federalism*, *supra* note 7, at 517.

63. GIENAPP, *supra* note 9, at 165, 192–93.

64. Denatus, *Virginia Independent Chronicle, 11 June 1788*, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1599, 1602 (John P. Kaminski et al. eds., 1993).

Because of their diagnosis of the Constitution, and because none of the original amendments altered the instrument's structure, most Anti-Federalists were deeply disillusioned by the amendments Madison and the former Federalists eventually shepherded through Congress.[65] No matter what the amendments said, the federal government was still not capable of representing the people at-large. Many Anti-Federalists would join the Republican ranks over the course of the 1790s and Republicans' novel brand of First Amendment federalism seemed to build from Anti-Federalists' earlier, latent condemnation of the new federal government's non-representative character.[66] If the federal government was in fact unrepresentative, then it could not protect liberty in *any* of the ways Founding-era Americans had long celebrated. In the late 1790s, Republicans would have seemingly agreed with this assessment and fleshed out its implications: that preserving liberty meant drawing an invidious distinction between the national and state governments and imperiling the capacity of the former to act like the latter.

Meanwhile, beyond questions of federalism or the First Amendment, Republicans in 1797-1800 were, it seems, more broadly anticipating certain modern rights assumptions. While they were only talking about the federal government, nonetheless they were conceiving an important set of liberties as absolute barriers against government interference, as discrete privileges or immunities that stood in opposition to the very thrust of government power. No matter their immediate intention, what Republicans were beginning to do during the crisis over the Sedition Act was turning the Founding era's logic of rights on its head by anticipating a new organizing idea: that liberty was best protected, not by empowering government in the right kind of way, but instead by disempowering it in core areas of life. According to the conceptual framework that had accompanied the writing of the state and federal constitutions, identifying specific rights had fed naturally into a larger project of gaining a better understanding of the interconnected, structural relationship between liberty and government—to see the whole based on the workings of the parts.[67] Now, Republicans were pointing toward something new, something that would eventually predominate in American constitutional thinking: that attending to rights individually identified discrete areas of human life and activity that government could not touch. To be sure, as Campbell emphasizes, a decade prior Madison and Jefferson had

65. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 583–85 (2016).

66. On the connections between Anti-Federalism and Democratic-Republicanism, see for example SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999).

67. On Madison's prior, holistic understanding of rights, see GIENAPP, *supra* note 9, at 190–93.

defined religious freedom in this "jurisdictional" sense—as comprising a space utterly immune from government intrusion.[68] But there appeared to be something different about their new argument about the First Amendment. Not only was it defended by countless Republicans (unlike their earlier religious freedom argument which remained unconventional[69]), but it was not centered on "rights of the mind," which had always enjoyed a distinct characterization.[70] The Republican argument generated in the face of the Cabell affair and the Sedition Act thus carried broader implications than those earlier arguments had and, consequently, marked a fresh departure in American rights thinking.

The point should not be overstated. By no means had Republicans either fully arrived at such a strikingly new position or completely abandoned their earlier attitudes toward rights. They had merely reimagined how a particular set of rights interacted with one level of government. That said, they were beginning to rework core constitutional concepts in the process. In addition to breaking with earlier understandings of the First Amendment, they were also beginning to anticipate a conception of rights more broadly defined in opposition to political power—the exact formulation that had made so little sense just a decade before.

And the implications were potentially far-reaching. Eventually, this understanding of rights would transform core features of American constitutionalism. Madison, Jefferson, and their allies of course had no immediate interest in circumscribing the authority of the state governments. But as Americans increasingly internalized the logic of their position and extended it to more areas of rights and governance, it would eventually (many decades in the future) help the federal government incorporate core federal rights provisions against the state governments as well.[71] If rights were presumptive barriers that government could not breach, then why not all governments? Arguably even more consequential, conceiving of rights as the inverse of powers helped make modern judicial review more intelligible. Had Republicans not driven a wedge between liberty and the representative institutions that had long been viewed as central to its protection, it would have been harder to ever arrive at our familiar sense of judicial power—not merely the older idea that judges upheld fundamental law but the newer idea that judges were somehow specially tasked with protecting minority rights from popular encroachment.[72]

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68. *The Invention of First Amendment Federalism*, *supra* note 7, at 538–39, 550–51.

69. *Id.* at 538–39.

70. *Republicanism and Natural Rights at the Founding*, *supra* note 5, at 92, 111.

71. *See generally* GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS (2018).

72. On the older conception of judicial power, see for example HAMBURGER, *supra* note 40. On the modern conception of judicial review, see for example JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (2004).

Of course, the Republican position, no matter how abstracted, could not on its own effect such dramatic transformations. But the point of connecting the novelty of late eighteenth-century Republicans' arguments about rights to these features of constitutional law is to better see how far Republicans had veered from an earlier conventional wisdom that they had once instinctively championed. However partially and haltingly, they were beginning to turn a foreign idiom into a more familiar one.

III. The Transformation of Fixity

Republicans' novel arguments during the Sedition Act crisis were revealing in still another way. Here the importance lay not in what they were advocating but in *how* they were justifying it. Rather than embracing their own innovation, Republicans claimed merely to be restoring the original fixed meaning of the First Amendment. Stripping themselves of any creativity or agency, they professed simply to be carrying out the original purpose of those who had constructed the provision almost a decade before. Whether unwilling or unable to acknowledge the novelty of what they were arguing, Republicans were illustrating just how dramatically the concept of constitutional fixity had transformed since the Constitution first appeared. How Republicans defended their conception of a particular constitutional right thus helps illustrate broader, consequential changes in the language of American constitutionalism.

Republicans' decision to cast their argument in historical terms is striking because, as Campbell shows, they consciously latched onto a new kind of constitutional problem, generated by core changes in the structure of American politics, and recognized that the novelty of the issue demanded an innovative tactic.[73] Even though, then, "Republicans had a plausible case that the emergence of political parties had transformed constitutional meaning," they "resolutely avoided casting their argument in terms of constitutional change."[74] Instead, notably, they appealed to the Founding, and to the ratification debates in particular, to defend their case.[75] Consciously or not, by engaging in this kind of historical excavation, they were suggesting that constitutional meaning was distinctively locked in the past.

By my reading, Campbell's account of the Sedition Act crisis and my own account of earlier debates in the 1790s[76] are perfectly compatible. But, I would slightly modify how he interprets Republicans' behavior and what it reveals about constitutional culture more generally. I think Campbell is exactly right in claiming that "[t]he position of Madison and his colleagues

73. *The Invention of First Amendment Federalism*, *supra* note 7, at 523.
74. *Id.* at 565–66.
75. *Id.* at 566.
76. *See generally* GIENAPP, *supra* note 9.

. . . was constrained by a constitutional culture that prized historical argument over openly acknowledged shifts in constitutional meaning,"[77] and in which the "incipient notion of a fixed constitution, limit[ed] their ability to articulate a case for interpretive change."[78] I also think he is right to stress the "sharp disjunction" between their actual constitutional position and how they were choosing to justify it.[79] When, however, he concludes that "the Founders" were being "originalists and living constitutionalists at the very same time," I would put the point differently.[80] Because, as I see it—and based on what I have otherwise argued about the development of a particular brand of fixed constitutionalism that emerged in the 1790s—Jeffersonian Republicans were not so much caught between competing constitutional impulses that powerfully collided during the Sedition Act crisis as they were showing how constitutional fixity and change had fatefully been turned into antagonists. The most revealing aspect of their discursive behavior is that they could no longer openly embrace fixity and change at the same time. Whatever they were actually doing in practice, in describing and defending their activity, they now had to choose: either they were changing constitutional meaning, or they were restoring fixed meaning.

Perhaps this is merely a quibble, but it is worth highlighting if only to help clarify what I have had to say about the transformation of constitutional fixity in the 1790s and why it carried such immense and enduring consequences for American constitutional argument. Because to my mind, Campbell's wonderful explication of Republican argument during the Sedition Act crisis perfectly captures the phenomenon I have otherwise attempted to trace. And it is a phenomenon that cannot be emphasized too much. Constitutional scholars talk endlessly about fixity and fixed meaning, none more so than originalists, but without adequate appreciation for how those concepts once implied very different things.

Even though it is common to assume otherwise, Founding-era Americans did not invent the concept of constitutional fixity; rather, they fundamentally remade it. According to conventional wisdom, the largely unwritten and customary British constitution that had governed American lives prior to the Revolution was unfixed and perpetually changing. When Revolutionary Americans decided to write their own constitutions down, or shortly thereafter when they came to terms with the full implications of this act, they created constitutions that were, by contrast, fixed and unchanging (save formal amendment). By electing to have written constitutions, they

77. *The Invention of First Amendment Federalism*, *supra* note 7, at 566.
78. *Id.* at 523.
79. *Id.*
80. *Id.* at 566.

elected to have fixed constitutions.[81] This popular and influential portrait, however, misunderstands the kind of constitutionalism that Americans inherited and, because of that, the precise ways in which they changed it. Founding-era Americans did not transition from thinking constitutions were unfixed to demanding that they be fixed. Rather, they gravitated from one particular way of thinking constitutions were fixed to a wholly different way of thinking that. Over the course of the eighteenth century, commitment to a fixed constitution was constant; but what it meant for a constitution *to be* fixed dramatically changed.[82]

In fact, there was nothing new in 1765, 1776, or 1787 about thinking that constitutions ought to be fixed. For as long as anyone could remember, it was utterly commonplace in the English-speaking world to describe constitutions in this way. Even though the British constitution was largely unwritten, that did not stop anybody from assuming it was fixed. "By constitution we mean," Henry St. John, Viscount Bolingbroke explained in 1733, "that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason."[83] And "[t]he experience of many hundred years hath shown, that by preserving [the British] constitution inviolate, or by drawing it back to the principles on which it was originally founded…we may secure to ourselves…the possession of that liberty which we have long enjoyed."[84] Similarly, not long before independence was declared, members of the Massachusetts House of Representatives pronounced in an immensely important circular letter, "in all free states the constitution is fixed," making that true of "the fundamental rules of the British constitution."[85]

But when members of this Anglo-American world spoke about constitutional fixity, they had a different concept in mind than the one that would eventually come to structure American constitutionalism and with

81. This conception of fixity is fundamental to virtually all forms of originalism. *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015). It has been supported by several influential originalist accounts of the Founding. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); HERMAN BELZ, A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE 1–39 (1998); GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 48–54, 222–226 (2010); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 47–61, 124–127 (1999).

82. For a complementary—and in certain ways fuller—discussion of what follows, see Jonathan Gienapp, *The Founding and the Origins of Our Constitutionalism, Part II: Fixity and the Inevitability of Our Constitutionalism?* BALKINIZATION (Oct. 30, 2018), https://balkin.blogspot.com/2018/10/the-founding-and-origins-of-our_30.html [https://perma.cc/5VUZ-X8TS].

83. Henry St. John, Viscount Bolingbroke, "A Dissertation on Parties" (1733), *in* 2 THE WORKS OF LORD BOLINGBROKE 5, 88 (1841).

84. *Id.* at 112.

85. *Ma. Circular Letter to the Colonial Legislatures* (Feb. 11, 1768), *in* SPEECHES OF THE GOVERNORS OF MASSACHUSETTS FROM 1765 TO 1775 134 (1818).

which we are far more familiar. In contrast to what eventually emerged, this earlier, foreign brand of fixity was perfectly compatible with the idea of evolutionary constitutional change.[86] As one British writer put it, "an enquiry into the nature of our ancient constitution…discovers what improvements have been made, and learns us to value and esteem them."[87] This might seem hopelessly paradoxical, but through metaphor, the English common law jurist Matthew Hale captured how this worked: "Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament," he explained, "might introduce some *New* Laws, and alter some *Old* . . . But tho' those particular Variations and Accessions have happened in the Laws," nonetheless, "we may with just Reason say, They are the same English laws now. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials."[88] In other words, even though the British constitution's component parts had changed through so many accretions and modifications, in essence it remained the same constitution it had always been. Changes in the law had only clarified the law that had always been. Throughout the seventeenth and eighteenth centuries, when novel constitutional controversies and the debate they generated changed constitutional meaning, it was second nature to assume that as the constitution evolved through usage it converged on permanently fixed principles. Constitutional innovations thus invented something wholly new while simultaneously restoring something ancient. This was how constitutions could be at once fixed yet changing.[89] The same Massachusetts leaders who so confidently declared that all constitutions in all free states—including especially the British constitution to which they were appealing—were fixed, at the same time would have happily endorsed a contemporary Massachusetts essayist when he noted how "[t]ime and a change of circumstances" could alter the constitution as "successive usage…ratified by repeated authoritative acquiescence" could transform that which had been an "indulgence into a right."[90] A fixed constitution was also an evolving constitution. No matter the dramatic changes in American constitutionalism following independence, up through at least the drafting of the federal Constitution in 1787, this earlier conception of fixity and the logic that

86. GIENAPP, *supra* note 9, at 32–34.

87. EDWARD KING, AN ESSAY ON THE ENGLISH CONSTITUTION AND GOVERNMENT 3 (1767).

88. SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 40 (Charles M. Gray ed. 1971).

89. For an illuminating discussion of this distinctive brand of eighteenth-century Anglo–American constitutional thinking, see REID, *supra* note 37, at 17–22.

90. Aequus, *From the Craftsman*, MA. GAZETTE, OR BOSTON NEWS-LETTER, Mar. 6 1766, *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1815, at 62–63, 65 (Donald S. Lutz & Charles S. Hyneman eds., 1983).

undergirded it largely persisted.[91]

But then—as I have attempted to demonstrate at length elsewhere—debates following ratification profoundly remade the concept of constitutional fixity. As the United States Constitution was increasingly imagined as a discrete object circumscribed in both space and time, fixity took on new form. It was now tethered to a distinctively textual and archival conception of constitutionalism. Thanks to these changes, fixity was no longer seen as compatible with constitutional change—at least not like before. The Constitution's fixed meaning was now locked in a distinct physical locus (the language of a text) as well as a distinct temporal one (the putative moment of the founding) and changes from this original fixed meaning were now seen as deviations from rather than deeper elaborations of it.[92] Unlike before, the Constitution could not be imagined as simultaneously fixed and evolving. Once conjoined features had been transformed into antagonists. During the 1790s, it is not quite right to say that Americans fixed either the Constitution or its meaning; what they fixed was a novel understanding of fixity. In so doing, they changed the parameters and possibilities of constitutional argument and disagreement.

Consequently, the common portrait of constitutional fixity that juxtaposes an unfixed, unwritten British constitution to a fixed, written American one, despite misunderstanding the actual comparison between the two, nonetheless speaks to something meaningful. The ways in which Americans reshaped core constitutional assumptions in the 1790s helped make the previously unthinkable increasingly undeniable. It was precisely because of how they remade constitutional fixity that it *became possible to think* that the British constitution had never been fixed *because it was unwritten and thus constantly in flux*. It was now intuitive to observe, as Supreme Court Justice William Paterson did in 1795, that, "in *England* there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain," whereas "[i]n *America* the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision," all of which meant that "[t]he Constitution is certain and fixed."[93] By fixing a new kind of fixity in the 1790s, American political leaders made it possible to stipulate that the Constitution was fixed in such a narrowly textual and historical way, erasing earlier forms of fixity in the process.

How Jeffersonian Republicans handled the Sedition Act controversy vividly illustrates the novel constitutional imagination born of this dramatic transformation, and with it the considerable ways it had restructured the boundaries and logics of legitimate constitutional argument. Facing a novel political threat, Republicans fashioned a brand-new constitutional

91. GIENAPP, *supra* note 9, at 35–74.
92. *Id.* at 11–12, 289–90, 326.
93. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795).

interpretation. Previously they could have characterized their argument as new and old at once—avowedly claiming that the Constitution's meaning had evolved in the face of novel circumstances, thus legitimizing their innovative understanding, while simultaneously insisting with confidence that this change in constitutional meaning otherwise restored deeper constitutional principles. But now, living in a constitutional world structured by a new conception of constitutional fixity, Republicans cast their argument as anything but novel and instead claimed that it was entirely derivative of the Constitution's original meaning. Republicans now faced a stark choice that would have been unintelligible just years earlier: either they could claim that the Constitution had evolved in the face of novel circumstances and, as a result, fundamentally changed, or they could call to reestablish the Constitution contingently fixed at ratification. Every bit as important as the novelty of Republicans' First Amendment argument, then, was the novelty of the choice they faced in making it: either they would honor or they would denigrate the original fixed Constitution, with no room in between.

Rather than concluding that Republicans were "originalist" and "living constitutionalist" at once, then, I would argue that their behavior helps reveal how that modern distinction upon which so much of American constitutional disagreement has come to turn ever became thinkable in the first place. Had fixity and change not been turned into antagonists over the course of the 1790s, Republicans likely would have made facially similar yet distinctly different kinds of arguments; they would have stressed the novelty of their constitutional position while simultaneously claiming that it captured the fixed principles of the Constitution. In so doing, they would not have been part "originalist" and part "living constitutionalist" but rather would have betrayed an understanding of fixed constitutionalism that preempted the very possibility of those labels. That, in contrast, they had to strip their position of all its novelty and insist that it merely captured the original understanding of the Constitution's framers disclosed a profoundly different conception of fixed constitutionalism: one where the difference between a fixed constitution and an evolving one was not only logical but urgent.

Republicans in the late 1790s were remaking the concept of constitutional rights, but in so doing they were also showing how much the concept of constitutional fixity had already been remade. In both regards their arguments capture and speak to certain assumptions that organize our constitutional world today. In fact, scholars have had a hard time detecting the novelty of Republicans' First Amendment arguments—either regarding rights or fixity—because they seem so conventional. But appreciating how much they departed from arguments that Americans would have made a decade prior when the Constitution first appeared is essential to a deeper understanding of early American constitutionalism. Because only by seeing how the familiar was once strange and novel can we also see how the peculiar was once utterly familiar. Founding-era Americans originally conceived of

rights and fixity in ways that are largely foreign to us today. Only by understanding their earlier thought can we adequately reconstruct the original Constitution that they made. And only then can we tell the full story of that original Constitution, by grasping how those foreign concepts and assumptions gave way to more familiar forms. Jud Campbell's article on the remaking of the First Amendment helps us understand exactly this. For that reason, it is a vital contribution to our constitutional history.