UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DINNER TABLE ACTION, *et al.*, Plaintiffs, v. WILLIAM J. SCHNEIDER, *et al.*, Defendants.	Docket No. 1:24-cv-00430-KFW

DECLARATION OF JONATHAN GIENAPP

1. My name is Jonathan Gienapp, and I am an Associate Professor of History and Law at Stanford University. I have been appointed in the Stanford History Department since 2015 and at Stanford Law School since 2024. I earned an A.B. in History from Harvard University in 2006 and a Ph.D. in History at Johns Hopkins University in 2013. I am the author of two books on early American constitutionalism, *The Second Creation: Fixing the American Constitution in the Founding Era* (2018), which received multiple prizes, and *Against Constitutional Originalism: A Historical Critique* (2024). I have also written fifteen scholarly articles and chapters and eight scholarly essays, with four more articles and chapters set to appear later this year.

2. For this litigation, I have been asked to discuss the original meaning of the First Amendment as it might relate to campaign finance regulations. I have based my opinion upon the historical research I have done over the last decade-plus into the original understanding of the First Amendment, constitutional rights, and constitutional governance, research that has undergirded several of my scholarly projects, including especially my most recent book.

3. As compensation, I am receiving a flat fee of $12,500 for this declaration, as well as travel expenses for any subsequent testimony that might be required.

4. If this case is to be determined based on an originalist interpretation of the First Amendment's Free Speech Clause in the United States Constitution, then the original understanding of that provision presents no barrier to Maine's Act to Limit Contributions to Political Action Committees That Make Independent Expenditures (the "Act"). While it can be hard to compare past and present, there is no reason to think that the Act violates the speech protections of the First Amendment as originally understood.[1] That conclusion flows from the particular intellectual-legal context in which the amendment was adopted, which this declaration aims to elucidate.

5. When originally conceived, the First Amendment presupposed a distinctive understanding of fundamental rights, how they were protected, and how and when government could reasonably regulate them. It is impossible to understand the First Amendment from an originalist perspective without bringing that once dominant eighteenth-century constitutional perspective back into focus.[2] What exactly the First Amendment's speech protection originally established and permitted was a function of how those who drafted, ratified, and initially interpreted and implemented the amendment understood the relationship between fundamental rights and republican government.[3]

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[1] On the challenges of comparing past and present in U.S. constitutionalism, see Jonathan Gienapp, *Against Constitutional Originalism: A Historical Critique* (New Haven: Yale University Press, 2024); Jonathan Gienapp, "History, Law, and Constitutional Rupture," *Boston University Law Review* 104 (Sept. 2024): 1350-53, 1360-78; Lawrence Lessig, *Fidelity and Constraint: How the Supreme Court Has Read the Constitution* (New York: Oxford University press, 2019), 49-69.

[2] See Gienapp, *Against Constitutional Originalism*, esp. 39-44, 67-116; Jud Campbell, "Natural Rights and the First Amendment," *Yale Law Journal* 127 (Nov. 2017): 246-321; Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (New York: Oxford University Press, 2021), 11-45; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998).

[3] *See* Gienapp, *Against Constitutional Originalism*, 49-53, 91-100; Jud Campbell, "Republicanism and Natural Rights at the Founding," *Constitutional Commentary* 32 (Winter

6. Today, it is often assumed that constitutional rights are counter-majoritarian limits on popular government that are meant to be enforced primarily by judges.[4] By codifying certain rights in the written Constitution, it is thought that eighteenth-century Americans created zones of liberty that would be free from onerous governmental interference while empowering judges to enforce those rights against the majoritarian political institutions that might seek to curb them.[5] By this thinking, rights are conceptualized as the inverse of governmental powers.[6] But the Founding generation that adopted the Constitution did not understand rights that way. They did not, by-and-large, see rights as the inverse of governmental powers.[7]

7. At the time of the Founding, constitutional rights and republican governance were not thought to be at odds but instead were understood to work in harmony.[8] The purpose of constitutional government was assuredly to preserve individual and collective liberty, but that was not the same thing as protecting core rights from government interference or regulation.

8. When Founding-era Americans discussed fundamental rights, they regularly did so with the aid of a framework known as social contract theory.[9] It was a thought experiment that helped

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2017): 87-99; Jud Campbell, "Fundamental Rights at the American Founding," in *The Cambridge History of Rights*, ed. Dan Edelstein and Jennifer Pitts, vol. 4 (New York: Cambridge University Press, 2025), 182-99; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 330-36.

[4] Jud Campbell, "Determining Rights," *Harvard Law Review* 138 (Feb. 2025), 923-24, 933; Jud Campbell, "Originalism and the Nature of Rights," *The Panorama*, Nov. 27, 2023, https://thepanorama.shear.org/2023/11/27/originalism-and-the-nature-of-rights/.

[5] *Id.*

[6] Campbell, "Determining Rights," 924.

[7] Gienapp, *Against Constitutional Originalism*, 50, 92; Campbell, "Determining Rights," 924.

[8] Gienapp, *Against Constitutional Originalism*, 49-50; Campbell, "Republicanism and Natural Rights at the Founding," 87-99; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

[9] Campbell, "Republicanism and Natural Rights at the Founding," 87-90; Campbell, "Fundamental Rights at the American Founding," 183-85; Gienapp, *Against Constitutional Originalism*, 93-95; Wood, *The Creation of the American Republic*, 282-93; John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (Madison, WI:

people reason through the origins of legitimate government to better understand the proper workings and limits of public power.[10] The framework began by postulating that human beings had once resided in a state of nature that lacked society or government and in which people enjoyed natural freedom constrained by nothing save natural law.[11] Because human beings were inherently social beings who could only fully flourish in a political community, however, it was believed that they left the state of nature to form political society.[12] They did so, the framework posited, through two discrete steps. First, human beings left the state of nature to form a political society (what they called a social compact).[13] As the Massachusetts Constitution of 1780 declared, "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."[14] Second, the people who had formed that political community then established a government for themselves (or a constitution).[15] Upon entering into political society, the people retained many fundamental rights they had enjoyed prior

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University of Wisconsin Press, 1991), 112; Thad W. Tate, "The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument," *William and Mary Quarterly* 22 (July 1965): 375-91.

[10] Campbell, "Fundamental Rights at the American Founding," 183; Gienapp, *Against Constitutional Originalism*, 93.

[11] Campbell, "Republicanism and Natural Rights at the Founding," 87; Gienapp, *Against Constitutional Originalism*, 93.

[12] Campbell, "Natural Rights and the First Amendment," 271; Campbell, "Determining Rights," 933-34.

[13] Gienapp, *Against Constitutional Originalism*, 93; Campbell, "Republicanism and Natural Rights at the Founding," 88; Campbell, "Fundamental Rights at the American Founding," 183-84.

[14] Massachusetts Constitution of 1780, Preamble.

[15] Gienapp, *Against Constitutional Originalism*, 93; Campbell, "Republicanism and Natural Rights at the Founding," 89-90; Campbell, "Fundamental Rights at the American Founding," 184.

to that point.[16] That included important natural rights such as the freedom of speech that they had enjoyed before entering political society.[17]

9. How exactly natural rights such as these were retained in political society was critically important. Crucially, these rights were not retained as counter-majoritarian trumps that individuals or groups could wield against government to sharply limit the majority's power to control them.[18] Rather, natural rights were retained through republicanism.[19] The government could regulate and constrain natural rights as long as two conditions were met: first, that the political institutions in question (paradigmatically, the legislature, but also juries and militias) genuinely represented the people,[20] and second, that the regulation had been enacted in the interest of the public good.[21]

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[16] Gienapp, *Against Constitutional Originalism*, 93; Campbell, "Fundamental Rights at the American Founding," 183-97.
[17] Gienapp, *Against Constitutional Originalism*, 93-94; Campbell, "Republicanism and Natural Rights at the Founding," 91-92; Campbell, "Natural Rights and the First Amendment," 268-70.
[18] Campbell, "Originalism and the Nature of Rights."
[19] Campbell, "Originalism and the Nature of Rights" ("At the Founding, however, retained natural rights generally lacked this anti-regulatory character. So long as the people themselves maintained control over these rights through self-governance, their rights were 'retained.'"); Campbell, "Determining Rights," 934; Campbell, "Natural Rights and the First Amendment," 276. On republicanism *see generally*, Wood, *The Creation of the American Republic*, 46-82.
[20] Campbell, "Republicanism and Natural Rights at the Founding," 86-87, 92-98; Campbell, "Fundamental Rights at the American Founding," 190-91; Campbell, "Natural Rights and the First Amendment," 272-73. On the institutions that were believed to best represent the people, see Campbell, "Determining Rights," 935-37; Gienapp, *Against Constitutional Originalism*, 145-46; Kramer, *The People Themselves*, 24-34, 44-57; Gerald Leonard and Saul Cornell, *The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders' Constitution, 1780s-1830s* (New York: Cambridge University Press, 2019), 13, 94. On the importance of representation generally at the time, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 2017), 161-75; Gordon S. Wood, *Representation in the American Revolution* (Charlottesville: University of Virginia Press, 2008).
[21] Campbell, "Republicanism and Natural Rights at the Founding," 86-87, 92-98; Campbell, "Fundamental Rights at the American Founding," 190-91; Campbell, "Natural Rights and the First Amendment," 272-73; Campbell, "Originalism and the Nature of Rights." On the importance of the public good to Founding-era political and constitutional thought, see Wood, *Creation of the American Republic*, 53-65; James T. Kloppenberg, *Toward Democracy: The Struggle for Self-Rule in European and American Thought* (New York: Oxford University Press,

Preserving most natural rights, including the freedom of speech, was thus not a matter of disabling the government's right to regulate those rights.[22] These rights could be regulated, as George Hay explained in 1799, "as far as the legislative power shall say, the public good requires."[23] Or, as Theophilus Parsons, the Massachusetts jurist, had written in 1778, "Each individual surrenders the power of controuling his natural alienable rights, *Only* When The Good Of The Whole *Requires* it."[24] The rights were "retained" so long as the people themselves maintained control over the regulation of those rights through the power of self-government.[25]

10. Importantly, not all rights were the same.[26] And some rights were thought to place firmer limits on the exercise of governmental power. In addition to retained natural rights, there were so-called inalienable natural rights—such as the freedom of conscience—that individuals could not relinquish.[27] On account of this character, these rights were largely beyond political society's control, even if the political community still enjoyed the right to locate the boundaries of these rights and legislate on them in certain respects.[28] In addition to inalienable rights, there were also fundamental common law rights, or civil rights, which, unlike natural rights, had not been enjoyed

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2016), 349-63, 367, 428-30. On how robust legal regulation in the interest of the general welfare was consistent with liberty, see Novak, *The People's Welfare*.

[22] Campbell, "Originalism and the Nature of Rights"; Campbell, "Natural Rights and the First Amendment," 276.

[23] [George Hay], *An Essay on the Liberty of the Press* (Philadelphia, Aurora, 1799), 38.

[24] [Theophilus Parsons], *The Essex Result* (1778), in *American Political Writing During the Founding Era, 1760–1805*, ed. Charles S. Hyneman and Donald S. Lutz, 2 vols. (Indianapolis: Liberty Fund, 1983) 1:487.

[25] Campbell, "Determining Rights," 934 ("it was up to the people to determine their own rights"); Campbell, "Originalism and the Nature of Rights" ("Preserving rights largely meant preserving self-rule"); Gienapp, *Against Constitutional Originalism*, 94 ("retained natural rights were preserved through republicanism—the act of empowering representative institutions to regulate retained natural liberty in the interest of the public good").

[26] Campbell, "Fundamental Rights at the American Founding," 183-97.

[27] Campbell, "Fundamental Rights at the American Founding," 185-88.

[28] Campbell, "Determining Rights," 974.

in the state of nature but were instead the product of political society.[29] These included the right to trial by jury or the right of habeas corpus. Unlike natural rights, common law rights placed clearer limits on governmental power.[30] Though, importantly, these customary limits on the government's power were sanctioned over time by the people themselves—further evidence, that is, of how the people remained in control of their own rights and liberty.[31] The people had decided that certain kinds of regulations of liberty were presumptively problematic, hence making it part of the fundamental common law of the polity; but that also meant that the people could revise their own work and alter the scope and effect of such customary restrictions.[32] Those limits were made by the people, not judges.[33] Despite these important caveats, at the time of the Founding, most fundamental rights remained subject to regulation by the people's representatives in the interest of promoting the public good. And that was certainly true of the retained natural right to free speech that was enshrined in the First Amendment in 1791.[34]

11. This understanding of constitutional rights was predicated on a distinctive understanding of political liberty.[35] Based on deeply rooted assumptions, by-and-large, Founding-era Americans did not understand liberty as non-interference—that is, freedom *from* government coercion.

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[29] Campbell, "Fundamental Rights at the American Founding," 195-97; Campbell, "Republicanism and Natural Rights at the Founding," 98-99.
[30] Campbell, "Fundamental Rights at the American Founding," 195; Kramer, *The People Themselves*, 9-34. In the context of the First Amendment, see Campbell, "Natural Rights and the First Amendment," 287-90.
[31] Campbell, "Determining Rights," 934-35; Campbell, "Originalism and the Nature of Rights."
[32] Campbell, "Originalism and the Nature of Rights."
[33] Campbell, "Determining Rights," 934-35, 970.
[34] Campbell, "Natural Rights and the First Amendment," 268-70, 76 ("Consequently, even though the Founders broadly acknowledged that speaking, writing, and publishing were among their natural rights, governmental limitations of expressive freedom were commonplace").
[35] Gienapp, *Against Constitutional Originalism*, 49-51; Jonathan Gienapp, "The Foreign Founding: Rights, Fixity, and the Original Constitution," *Texas Law Review Online* 97 (2019): 118–26.

Instead, they defined liberty as freedom from domination—that is, freedom from external control by a will alien to oneself.[36] In the first instance, liberty was a function of how much a person was coerced. In the second instance, by contrast, liberty was measured not by coercion but consent—of whether the government that enacted binding laws legitimately represented those people it regulated.[37] If the government legitimately represented the people, then their liberty was preserved, because *they* would be coercing *themselves*. They would not be subject to an alien will but rather governed by their own will and consent.[38] This is exactly what Levi Hart meant in 1775 when, in a formulation that saturated Revolutionary-era political writing, he declared that "civil liberty doth not consist in a freedom from all law and government,—but in a freedom from unjust law and tyrannical government:—In freedom, to act for the general good."[39] The people's liberty was protected *through* government—government that maximized the general welfare.[40]

12. Based on this understanding of retained natural rights and republican liberty, the original Constitution left regulation of the people's fundamental rights primarily in the hands of the people

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[36] Quentin Skinner, *Liberty as Independence: The Making and Unmaking of a Political Ideal* (New York: Cambridge University Press, 2025), 1-170; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1997), 17–79; Annelien de Dijn, *Freedom: An Unruly History* (Cambridge, MA: Harvard University Press, 2020), esp. 1–5; John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988), 55–59

[37] On the importance of consent at the time of the Founding, see Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005); Barbara Clark Smith, *The Freedoms We Lost: Consent and Resistance in Revolutionary America* (New York: New Press, 2010); James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978).

[38] Skinner, *Liberty as Independence*, 141-70.

[39] Levi Hart, *Liberty Described and Recommended: in a Sermon Preached to the Corporation of Freemen in Farmington* (1775), in *American Political Writing during the Founding Era*, 1:310.

[40] Novak, *The People's Welfare*; Pamela Brandwein, "The *Slaughter-House* Dissents and the Reconstruction of American Liberalism," *American Political Science Review* 118 (May 2024): 1005-19.

themselves.[41] It certainly did not envision that judges would be the primary guardians of those rights, empowered to protect individuals from political majorities.[42] Judges would have a vital role to play, especially if and when political institutions enacted laws that failed to advance the public good.[43] But that role would be secondary and complementary. It was widely assumed at the Founding and for decades to follow that the people would themselves safeguard their own liberties through their representative institutions.[44] As long as those institutions regulated liberty in the interest of the public good, there would be no cause to question the legitimacy of how they had struck the balance between the good of the whole and the rights of the few.[45]

13. From an originalist perspective, therefore, the First Amendment's protection of free speech presents no barrier to the Act. To violate this standard, one would need to show that the process through which the Act was passed was either not representative of the people or not in the interest of the public good. Short of that, however, nothing about the original First Amendment, or the method for preserving fundamental rights that it presupposed, undermines the people's essential right to regulate their own liberty.

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[41] Gienapp, *Against Constitutional Originalism*, 145-46, 158-59, 216-17; Campbell, "Originalism and the Nature of Rights"; Kramer, *The People Themselves*.
[42] Campbell, "Originalism and the Nature of Rights"; Campbell, "Determining Rights," 949.
[43] Gienapp, *Against Constitutional Originalism*, 105-08; Campbell, "Fundamental Rights at the American Founding," 187-88, 193-95, 197; Jud Campbell, "Judicial Review and the Enumeration of Rights," *Georgetown Journal of Law & Public Policy* 15 (Summer 2017): 583-91; Campbell, "Determining Rights," 970-73; Campbell, "Natural Rights and the First Amendment," 276 ("Decisions about the public good, however, were left to the people and their representatives—not to judges—thus making natural rights more of a constitutional lodestar than a source of judicially enforceable law").
[44] Campbell, "Determining Rights," 977 ("At the Founding, the task of determining rights belonged to the people themselves").
[45] Gienapp, *Against Constitutional Originalism*, 145-46, 158-59, 216-17; Campbell, "Originalism and the Nature of Rights"; Novak, *The People's Welfare*.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 21st day of February 2025 in Palo Alto, California.

/s/Jonathan Gienapp
Jonathan Gienapp