

## Exhibit 1



**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 ALL PARTIES APPEARING REMOTELY VIA ZOOM

2 FRIDAY, APRIL 4, 2025

3 12:07 P.M.

4 -- o0o --

5 THE VIDEOGRAPHER: Good afternoon. We are on  
6 video record on April 4, 2025. The time is 12:07 p.m.

7 My name is Campbell Tuttle. I'm the legal  
8 videographer. The court reporter today is Sarah Sage.  
9 We are both here representing Lexitas.

10 This is the beginning of the video deposition of  
11 Jonathan Gienapp in the matter of Dinner Table Action  
12 versus William Schneider. The case number is  
13 24-cv-00430-KFW. We are located today at 2100 Gang  
14 Road, Suite 210, Palo Alto, California.

15 Counsel, would you please identify yourselves  
16 for the record.

17 MR. MILLER: Good afternoon. This is  
18 Charles Miller with the Institute for Free Speech on  
19 behalf of Plaintiffs.

20 MS. AUSTIN: Mackenzie Austin from Millbank on  
21 behalf of Intervenors.

22 MR. LOUVIS: Ezra Louvis from Millbank also on  
23 behalf of Intervenors.

24 MS. HELLER: And Nola Heller from Millbank also  
25 on behalf of Intervenors.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

\*\*\* ROUGH DRAFT - DO NOT CITE \*\*\*

1 MR. BOLTON: And Jonathan Bolton Assistant  
2 Attorney General on behalf of the State Defendants.

3 THE VIDEOGRAPHER: Okay. Will the court  
4 reporter please introduce yourself and please administer  
5 the oath.

6 (Reporter stated name and CSR number for  
7 the record.)

8 -- o0o --

9 JONATHAN GIENAPP,  
10 having first been sworn by the Certified  
11 Shorthand Reporter, was examined and  
12 testified as follows:

13 -- o0o --

14 (Reporter requested recess.)

15 THE VIDEOGRAPHER: Yeah. Should we go off the  
16 record?

17 (Reporter responds.)

18 THE VIDEOGRAPHER: Okay. We're going off the  
19 record. The time is 12:09 p.m.

20 (Recess taken.)

21 THE VIDEOGRAPHER: We're back on the record the  
22 time is 12:10 p.m.

23 EXAMINATION

24 BY MR. MILLER:

25 Q. All right good afternoon Professor Gienapp. I

\*\*\* ROUGH DRAFT - DO NOT CITE \*\*\*

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 just want to kind of go over a couple of things with you  
2 about depositions.

3 First have you been deposed before?

4 A. I have not.

5 Q. Okay. So as you see this is a somewhat  
6 slightly awkward thing we have going on here but the  
7 main thing that we're doing is trying to create a  
8 written transcript that really the work is being done by  
9 our court reporter and because of that, you know, it's  
10 important that you and I try to help her out with that  
11 by speaking in words not utterances or nods and that we  
12 try not to speak over one another. And that we speak at  
13 a reasonable volume and rate so that she can take  
14 everything down.

15 So with the -- with those sort of general  
16 parameters, let's -- let's get going?

17 A. Great.

18 Q. All right. So first, can you tell me a little  
19 bit about yourself your professional background?

20 A. Sure. So I'm an associate professor of  
21 history and law at Stanford University where I've been  
22 ten years for the two years before that I was a  
23 professor of history at The University Of Mississippi  
24 and my educational background is I got my BA at Harvard  
25 university graduated in 2006 and then my Ph.D. in

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 history at Johns Hopkins University, which I received in  
2 2013.

3 Q. Okay. And so do you have a legal degree?

4 A. I do not.

5 Q. All right. So in what capacity are you a  
6 professor at the law school?

7 A. I received a quarter appointment that became  
8 effective I believe January 21, 2024, based on a, you  
9 know, on a full faculty appointment review based on  
10 having spent a lot of time at the law school and doing  
11 legal history and constitutional history but also  
12 constitutional law and constitutional theory and the law  
13 professors there were interested in having me more  
14 involved and being more involved in the educational  
15 programming and the like so formalized it with an actual  
16 appointment.

17 Q. What do you do at the law school?

18 A. One out of the four courses I teach each year  
19 are in the law school they're often cross listed in the  
20 history department as well but I also regularly  
21 participate in law school events workshops I give talks  
22 over there regularly and any number of things that other  
23 law professors do.

24 Q. So what -- could you give me an example of the  
25 courses that you teach at the law school?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           A.    Sure.  So the main course I've been teaching  
2   for many years is called originalism in the American  
3   Constitution history and interpretation which is a  
4   seminar on the making of the U.S. Constitution from the  
5   perspective of the modern debates over originalism and  
6   should play in modern constitutional modern  
7   interpretation.

8           Q.    This may be a tricky question, but so are you  
9   a historian or a legal scholar?

10          A.    I would say I'm both though.  I primarily  
11   identify as a historian but given and I spend more time  
12   with lawyers and historians and more time at law schools  
13   than with -- than in history departments and I routinely  
14   am asked to explain how the historical work I do relates  
15   to modern litigation and thinking on constitutional  
16   interpretation, I feel in many ways I've become as much  
17   a legal scholar as a historian.

18          Q.    And so how -- how do those two fields differ?

19          A.    It's not categorically different but I think a  
20   primary difference is the kinds of questions that --  
21   that predominate within the fields so historians are  
22   interested in what did people do and think and do in the  
23   past and lawyers are primary legal scholars are  
24   primarily interested in what is the law today and then  
25   interested to the extent they are in legal history how

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 does that inform or illuminate ongoing litigation and  
2 adjudication today so there are plenty of points of  
3 intersection but the questions they ask are often  
4 different and then the methods they use as a result can  
5 be different.

6 Q. Okay. Thank you I'm going to hand you what  
7 we'll designate for this deposition to be Exhibit 1,  
8 which is the declaration that you prepared for this  
9 matter?

10 (Exhibit 1 was marked for identification.)

11 BY MR. MILLER:

12 Q. Are you familiar with that?

13 A. I am, yes.

14 Q. All right. Who drafted that document?

15 A. I did.

16 Q. And with alone or with the assistance of  
17 anyone?

18 A. Entirely on my own I think is a fair  
19 characterization.

20 Q. Okay. Stick with what's fair.

21 How long did it take for you to prepare that?

22 A. The actual writing of it took four or five  
23 days though it's based on ten plus years of work so I  
24 suppose I could answer that question in different ways  
25 depending on what -- what you're interested in getting

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 at.

2 Q. So how much work was specifically dedicated to  
3 preparing the declaration?

4 A. Yeah. About four to five days of writing.

5 Q. Was there any additional research or  
6 scholarship that you did outside of those four hours  
7 that was specifically targeted to this?

8 A. Not especially because it just so happened  
9 that I had done so much research already that was pretty  
10 germane to the kind of declaration that I was asked to  
11 prepare. So I didn't need to spend too much time that  
12 week doing additional research.

13 Q. Okay. And when were you asked to do this?

14 A. I guess it was early February of this year.

15 Q. And let's see. I think that there's a date on  
16 here that it was executed the 21st of February.

17 So can you tell me when you prepared this?

18 A. So I believe it would have been first or  
19 basically the first week of February immediately upon  
20 being requested. I think I submitted an initial  
21 draft -- I don't remember precisely. But sometime  
22 around February 11th or 12th or something like that.

23 Q. All right. And what changed between the  
24 initial draft and the final document?

25 A. Nothing other than some typos and formatting

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 it with the numbered paragraphs.

2 Q. Making it look legal?

3 A. I had added some footnotes, too, because I was  
4 encouraged -- I -- I wasn't sure how many footnotes  
5 would be appropriate, and I was told more were better.

6 Q. Okay. All right. So in here, this indicates  
7 that you wrote a book called the second creation.

8 Can you tell me what that was about?

9 A. Sure that book was published in 2018 and it is  
10 a history of debates over the U.S. Constitution  
11 primarily in the decade after it was ratified. So  
12 essentially how did the very first people who tried to  
13 make sense of the Constitution do so and what were the  
14 character of their debates.

15 Q. Okay. In that book, do you talk at all about  
16 when the meaning of the Constitution became fixed?

17 A. I talk about how the idea of what fixed  
18 constitutional meaning consists of changed over that  
19 period. So my argument was not necessarily that the  
20 meaning became fixed that a new way of thinking about  
21 fixed meaning came into focus in the 1790s.

22 Q. Okay. And can you explain that to me?

23 A. Sure so over the course of the 1790s greater  
24 attention or greater significance was attached to the  
25 Constitution as a textual and archival document as I

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 describe it that place greater emphasis on resolving  
2 ongoing constitutional disputes based on what supposedly  
3 had informed its creation years ago which at this time  
4 five six seven years prior but how that modality of  
5 constitutional interpretation became more common.

6 Q. And were people who you considered to be you  
7 know constitutional founders part of that debate?

8 A. Yes.

9 Q. Okay. Like who?

10 A. James Madison. Abraham Baldwin, Georgia --  
11 not as well known. Alexander Hamilton, John Jay,  
12 James Wilson -- could keep going if you would like.

13 Q. I'm just curious was Adams involved in that at  
14 all or had he moved on by then?

15 A. He was vice president of the United States and  
16 then became president so he was certainly though he was  
17 less involved in the debates I chart the main debates  
18 over making sense of the constitution initially took  
19 place in Congress rather than the courts which is really  
20 important because it speaks to a crucial difference in  
21 how people thought about constitutional enforcement and  
22 protection at the founding compared to today.

23 Q. Okay. Was John Marshall a founder?

24 A. You could certainly argue he was. He was in  
25 the Virginia ratifying convention John Marshall I think

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 like a great many others -- their primary contributions  
2 came after ratification so it's actually raises  
3 interesting questions because some of the people who are  
4 actually more important in making the Constitution in  
5 its initial phase have been forgotten and some of the  
6 people most important came later.

7 Q. Okay. All right. So in that -- in that 1790  
8 period -- I'm sorry. You might have said this already  
9 but and maybe I was just -- maybe I just didn't pick up  
10 on it. But exactly what -- let me try it again.

11 So you mentioned in the 1790s kind of looking at  
12 the Constitution as a more archival document. You know  
13 it came to fruition.

14 So -- so what does it mean how they looked at  
15 the document?

16 A. Yeah. So there are a number of things that  
17 enter into this but I think an easy way to think about  
18 it is people began talking more about the specific  
19 moment in which the Constitution was created in a  
20 surrounding archive that illuminated it. So surviving  
21 testimony or memory that people had of the  
22 constitutional convention or the actual debates to the  
23 extent they were recorded the people rightfully  
24 recognize that the records weren't great of the  
25 ratifying conventions could be really illuminating

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 evidence to figure out for instance whether or not the  
2 treaty making power if it was a commercial treaty  
3 allowed the House of Representatives how to play a role  
4 in commercial appropriations to have a say in treaty  
5 making or not which was a major debate in the mid 1790s.  
6 To a great extent, people said the way to understand  
7 this question is to look to the archive six seven eight  
8 years ago and see what people said promised assured in  
9 say the Pennsylvania ratifying convention and that kind  
10 of style had was becoming more common at that point.

11 Q. Okay. I -- typically when you know I have a  
12 declarations and I depose people I'm asking them about  
13 things if they're sort of personal knowledge things that  
14 they've -- they've experienced.

15 Is there anything in your declaration that is  
16 sort of from your personal experience as opposed to  
17 academic research?

18 A. I don't believe anything that I would  
19 characterize that way though I could be mistaken but  
20 I -- I think it's certainly to my knowledge entirely  
21 based on my academic work.

22 Q. Yeah. Let's see. So your -- your second book  
23 against constitutional originalism a historic  
24 critique -- what -- the title probably says it all but  
25 can you just tell me what that book is?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           A.    Sure so it is a historical critique of  
2 originalism my critiques are jurisprudential in  
3 character I approach it from the standpoint of how  
4 originalists in saying that the proper way to interpret  
5 the Constitution is to recover its original meaning or  
6 understanding at the time of adoption how they go about  
7 recovering that constitutional past and the ways in  
8 which they often unwittingly distort or misunderstand  
9 it.

10           Q.    Okay. And do you consider that writing to be  
11 as it says here a historical critique or is it a -- was  
12 it a legal critique?

13           A.    It is a historical critique that adds up to a  
14 legal critique is how I think of it.

15           Q.    Okay. And how does it?

16           A.    Yeah. So it offers -- it offers a historical  
17 critique how do originalists engaged with the past go  
18 about recovering the original meaning but more broadly  
19 how do they even think about what the Constitution is  
20 and the essentially neglect how I argue the founding  
21 generation thought about constitutionalism and law  
22 generally so if I have that right that the founding  
23 generation thought differently about constitutionalism  
24 and the law then I try to explain why that matters to  
25 modern originalism theory why those historical facts and

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 insights can't be bracketed as irrelevant to the  
2 endeavor based on how originalists themselves have  
3 conceived of it.

4 Q. Okay. So are you against constitutional  
5 originalism?

6 A. So how originalism is conceived generally,  
7 there are many different flavors of it, but I try to  
8 identify what I take to be core characteristics that the  
9 vast majority of originalist academic and judicial align  
10 with that at least that conception of originalism is a  
11 historical presupposes a past that did not exist in the  
12 way it conceives of the constitutional the Constitution  
13 and constitutional law. And therefore make the argument  
14 that originalists would either have to concede that  
15 their project is based on a kind of stipulated legal  
16 fiction not the past as it was not what James Madison  
17 and John Marshall actually thought about the  
18 Constitution but an imagined past or they need to  
19 recalibrate and do the history differently so it's  
20 against in the regards that the way originalism is  
21 conceived and practiced based on this history needs to  
22 dramatically change one direction or another.

23 Q. And do you have a preferred direction of  
24 change?

25 A. I would like for the use of history and

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 constitutional interpretation to be understood as a  
2 resource rather than a command. So I think one of the  
3 things originalism does is it doesn't just use history  
4 in constitutional interpretation it conceives in a very  
5 particular legal way as a binding legal command that  
6 supersedes all other potential legal inputs.

7 MR. MILLER: Are -- are we going too fast?

8 (Reporter admonition.)

9 THE WITNESS: My apologies.

10 And so, it's not a matter of should we -- should  
11 modern constitutional interpreters look to history or  
12 not. It's should they think of history as one potential  
13 criteria for illuminating the Constitution's meaning so  
14 you would set it alongside precedent doctrine past  
15 practice public opinion consequences changing social  
16 attitudes what have you. As opposed to evaluating above  
17 all those things and saying any precedent that  
18 contradicts original meaning is unconstitutional any  
19 long-standing past practice that violates original  
20 meaning is unconstitutional I would like history to  
21 inform constitutional interpretation in a big way and I  
22 think one of the things that prevents that is seeing it  
23 in terms of a binding command that is sort of an all or  
24 nothing proposition.

25 BY MR. MILLER:

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. Obviously that was a fulsome answer so I don't  
2 want to seem like I'm trying to change that at all. But  
3 do you view originalism as an overly textualist?

4 A. Yes.

5 Q. Okay. And can you explain why?

6 A. Yes so arguably the foundational premise of  
7 modern originalism again speaking in general terms  
8 because there are a lot of originalists who do things  
9 slightly differently but I think it's a fair  
10 characterization of I think the dominant premise of the  
11 orientation is to start with the idea that the  
12 constitution's distinctive feature is that it is a text  
13 and therefore in being a text tells us in a pretty  
14 robust way what is in the Constitution and how it  
15 acquires and communicates its meaning.

16 Q. Again, I'm not taking away from your previous  
17 answer.

18 Is there a particular sort of brand of  
19 constitutional interpretation an ism that you subscribe  
20 to?

21 A. Not -- there is not an ism that I have been  
22 able to settle on to my liking.

23 Q. That's fair.

24 Now, do you consider your -- and I know this is  
25 a little strange -- but your -- your book says it's

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 against constitutional originalism but do you consider  
2 your scholarship to be originalist?

3 A. Other people have told me that they say this  
4 is not against historical originalism it is for a better  
5 originalism I understand where that comment comes from  
6 because what it seems like I'm trying to do in a lot of  
7 my scholarship is replace a faulty and anachronistic way  
8 of thinking about the American founding with a better  
9 and more accurate one I certainly as a historian believe  
10 that we can recover you know, imperfectly, as all things  
11 are the founding generation's views of constitutionalism  
12 and the original Constitution on its own terms but the  
13 reason I don't then say this is a defense of a better  
14 more historical originalism because I think part of what  
15 doing the history properly reveals is the profound  
16 differences between past and present and the need for  
17 anybody today who's trying to if they are so inclined  
18 draw on that history to inform modern constitutional and  
19 legal thinking has to do a great deal of work to  
20 translate that past into a present that thinks much  
21 differently about a lot of things and that requires a  
22 lot of discretion and judgment which is not inherently  
23 bad but are the precise things that originalism as a  
24 movement has always been trying to cabin so in that  
25 regard I see it if you do the history properly it

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 actually tells us why we should be less originalist in  
2 that standard conception.

3 Q. In the textualist conception?

4 A. Well, in the kind of anti-judicial activist --  
5 what -- what led to originalism as an ism forming in the  
6 70s and 80s was judges in America are not interpreting  
7 the Constitution but making you know basically rewriting  
8 the Constitution based on their own policy preferences.  
9 So the attraction of originalism to a lot of people was  
10 to cabin judicial discretion so judges would just be  
11 calling balls and strikes as Chief Justice John Roberts  
12 put it. But I think doing the history properly shows  
13 that in any contested case any of those areas of the  
14 Constitution that make up 99.9 perpetuate of what we  
15 argue about and require interpretive methods you are not  
16 going to achieve you are not going to achieve that  
17 you're going to be faced still with these complex  
18 questions of they thought about things in the 18th  
19 century we've got a modern case predicated on a much  
20 different way of thinking we have to exercise judgment  
21 if we're going to use the history to have it speak to  
22 the present.

23 Q. Okay. That teed up this question so I'm going  
24 to ask it now even though I feel like we're kind of  
25 jumping ahead a bit. But I --

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           Is there a recoverable definitive meaning of the  
2 First Amendment? The Free Speech Clause?

3           A. I believe so.

4           Q. Okay. And what is that?

5           A. I think it is impossible to talk about what  
6 the meaning is without recognizing in how it was  
7 embedded in a particular way of thinking about  
8 constitutionalism and rights because that, in fact was  
9 its meaning the meaning was in some ways indeterminate  
10 on purpose and the real key question was who would get  
11 to basically determine the operative legal meaning of  
12 the First Amendment its protection of freedom of speech  
13 going forward.

14          Q. Now, isn't that a structural argument not a  
15 one of meaning?

16          A. Its it depends how you define meaning. So  
17 there are certainly ways of thinking of both  
18 constitutional meaning and linguistic meaning that would  
19 question the move I just made. There are also very  
20 important schools in the philosophy of language and  
21 linguistics going back hundreds of years that are  
22 entirely predicated on you cannot separate meaning from  
23 social practice and use in context whether which of  
24 those two sides is right I think as a historical matter  
25 if you're trying to recover something original you can't

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 really understand the meaning if you extract it if it's  
2 not embedded in that context because you are in fact  
3 changing the meaning.

4 Q. Yeah. I'm sorry I was asking a slightly  
5 different question.

6 A. Sorry.

7 Q. When I said structural I meant structure of  
8 the Constitution?

9 A. Yes.

10 Q. So you know the question of who interprets it  
11 can be a different question of what does the right mean?

12 A. Yes so I guess the -- the answer to the  
13 question would be the protection of the First Amendment  
14 was a standard declaratory amendment which was the most  
15 common form of rights provision in early US  
16 constitutions, both at the state level and then the  
17 federal level which was simply a broad declaration of  
18 either a retained natural right or a fundamental common  
19 law right that was seen as a you know by settled  
20 understanding's part of a zone of constitutional  
21 liberty. But beyond that, it was generally  
22 indeterminate the it didn't come with any more specified  
23 meaning about except in certain instances very  
24 particular kinds of activity that did or did not fall  
25 within it so I guess that would be the answer to what

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 was the meaning.

2 Q. Okay. And then so it says here in paragraph 2  
3 of your declaration that you've been asked to discuss  
4 the original meaning of the First Amendment as it might  
5 relate to campaign finance regulation I guess prior to  
6 this declaration have you done any work that  
7 specifically related to campaign finance regulation?

8 A. Not -- I've read extensively on the  
9 originalist literature on say Citizens United but I  
10 don't take up that example for instance in my book  
11 though part of what I found attractive here was it was I  
12 think it was very easy to take the things that I had  
13 thought deeply about in my book and written about and  
14 elsewhere and apply them to this particular context.

15 Q. Do you view Citizens United to be an  
16 originalist decision?

17 A. I do not think it is an originalist decision  
18 on the merits it is described as such by defenders but  
19 I -- I think that is incorrect.

20 Q. Okay. By defenders you mean scholars not the  
21 justices themselves?

22 A. I guess I don't know enough about exactly how  
23 the justices would just I -- I assume some of the  
24 justices would.

25 Q. Yeah. I'm asking who you mean by defenders?

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 A. Oh. I -- I mean both justices and academics I  
2 suppose I was thinking specifically about academics.

3 Q. Okay. All right. But -- but also just to  
4 clarify sitting here today, you can't think of a  
5 particular justice who said Citizens United was  
6 originalist?

7 A. No.

8 Q. Okay. Do you view campaign finance law  
9 outside of Citizens United say Buckley to be  
10 originalist?

11 A. I don't have a clear view on that but I would  
12 be skeptical.

13 Q. Okay. You -- you would be skeptical of it  
14 being originalist?

15 A. Yeah.

16 Q. Okay. What about First Amendment law in  
17 general?

18 A. I think most -- I think a lot of modern First  
19 Amendment law is betrays a different way of thinking  
20 constitutionalism and rights than predominated at the  
21 founding and actually is I think is a really good  
22 example of how we should think seriously about how  
23 originalist we want to be.

24 Q. I think betray there was not intended to be a  
25 pejorative. Am I correct?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 A. No, it was not. Sorry.

2 Q. Yeah. Okay. I just wanted to make sure.

3 A. I just meant -- it is not -- it does not --

4 Q. Evidence.

5 A. Yeah.

6 Q. Okay. All right. That's fair.

7 And do you think that the general framework of  
8 First Amendment law as it exists, you know, evidences  
9 how constitutional law should occur?

10 A. I don't know enough about the subject to have  
11 a clear view on that. It's a huge area and I know how  
12 long it's taken me to get on top of the founding era so  
13 while I know a lot about modern First Amendment law  
14 compared to the average person on the street I know  
15 significantly less than people who have devoted a lot of  
16 time to it so I would want to do my homework before I  
17 made a settled determination on that but there are  
18 certainly many aspects of it that I think are important  
19 to democratic life.

20 Q. Okay. And she can object I don't want to  
21 mischaracterize what was said earlier you weren't here  
22 for it but Professor Rakove you know talked a bit about  
23 the you know I'm just going to let me just strike all  
24 that prefatory --

25 Can you explain to me how the founders would

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 have thought of campaign finance regulation?

2 A. It's a bit of a complex question because they  
3 didn't spend a lot of time thinking about it and I think  
4 the reason why is the very idea of spending money on  
5 political activity would have struck them as deeply  
6 corrupt based on conventional republican thinking that  
7 they had long subscribed to there were no campaigns I  
8 mean campaigning itself was seen as an affront to the  
9 health of the civic policy in the early years of the  
10 republic that began to change over the first 60 to  
11 70 years of the United States such that the 20's 30s 40s  
12 and you get campaigning and electioneering consistent  
13 with modern attitudes. The --

14 Q. Did Jackson campaign?

15 A. Depends who you ask his opponents why he could  
16 not be trusted with power but for the most part he  
17 continued to use rely upon go-betweens,  
18 intermediaries --

19 Q. Intermediates.

20 A. -- proxies. Yeah.

21 Q. Right yeah. And so I was going to ask about  
22 that.

23 So with like Adams and Jefferson?

24 A. Sure.

25 Q. There were activities that occurred where

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 people were trying to kind of, you know, influence  
2 voting but it just wasn't being done by the candidates  
3 themselves is that fair?

4 A. That is more than fair that is exactly  
5 accurate usually the foot soldiers in the nascent  
6 political parties because that two was a sign of deep  
7 corruption are newspaper printers which is relevant to  
8 the First Amendment and they and other party managers as  
9 they were often described though usually not by  
10 themselves scattered around the country to try to  
11 connect support to ensure that their favored candidate  
12 be it Jefferson or Adams, would prevail but it was very  
13 important that Jefferson and Adams not only not be  
14 connected but not in any way seen as campaigning because  
15 that would be the first sign that they were not a true  
16 republican statesman.

17 Q. You know the things I've read about Adams kind  
18 of indicated that he was fairly ambitious.

19 Do you think that's right?

20 A. Well poor John Adams gets a lot of grief from  
21 a lot of people.

22 Q. Yeah.

23 A. Including at the time so I tend to be a little  
24 more of a defender of his I actually think he was in  
25 some ways I can understand the characterization but I

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

\*\*\* ROUGH DRAFT - DO NOT CITE \*\*\*

1 think he also tried to rise above the partisan fray that  
2 he correctly recognized was taking shape and it proved  
3 his undoing so given that he ended up behaving in a way  
4 that directly undercut his ambition I -- I think that is  
5 also part of the ledger.

6 Q. And the reason I -- I asked this is you know,  
7 bat or just person or anybody else, it would seem to me  
8 that --

9 (Reporter clarification.)

10 MR. MILLER: Yeah, I -- I said, you know be it.  
11 Yeah I said be that as it may, you know, whether he or  
12 Jefferson or someone else you know running for president  
13 at the time -- would they have been involved in any way  
14 at sort of directing the foot soldiers?

15 THE WITNESS: Definitely not. That would have  
16 been the most grievous political sin imaginable and the  
17 mere -- your mere characterization of running for  
18 president --

19 BY MR. MILLER:

20 Q. Sure.

21 A. -- if either of them said I am running for  
22 president would have immediately in their own eyes and  
23 their peer's eyes disqualified them for consideration.

24 Q. So then all of this activity was done by  
25 independent actors then?

\*\*\* ROUGH DRAFT - DO NOT CITE \*\*\*

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           A.    So it depends how coordinated you take it to  
2   be and how cynically you regard the activities of if not  
3   Jefferson and Adams themselves then those closely  
4   associated with them in the national capitol and there  
5   have been long running debates among historians and  
6   political scientists about what was the case at the time  
7   because people were trying to hide it to the extent it  
8   existed so the record does not make it easy to  
9   understand exactly how coordinated on the ground the  
10   campaigning was.  And I myself have found it difficult  
11   to exactly pinpoint how we should think about any of  
12   these institutions or organizations to the extent we can  
13   even call them that they certainly bore no relationship  
14   to the kinds of things we see today where we don't have  
15   those attitudes towards campaigning or seeking political  
16   office we consider professional politicians and people  
17   running campaigns to be a part of democracy not  
18   antithetical to it.

19           Q.    The newspapers that you mentioned -- were  
20   those expensive to run?

21           A.    Yes for the time.  On the one hand, they were  
22   becoming -- they were less expensive in the sense that  
23   it was now much easier to set up a print shop and  
24   produce a newspaper and they were cheaper to buy so one  
25   of the great you know each decade of the 18th century

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 the number of newspapers printed in America goes  
2 ex-possibly there's an explosion I mean, I often tell my  
3 students it's a bit analogous to the internet it's one  
4 of those moments where the environment of political  
5 speech is changing I mean of all speech is changing  
6 dramatically and this is coinciding with printers  
7 themselves seeing their job is not just making a living  
8 but also ensuring I mean they would not say advancing  
9 partisan interests advancing the true principles of the  
10 American revolution.

11 Q. But picking aside?

12 A. Oh most certainly.

13 Q. Was there a rise of printers that were more  
14 like, you know, Kinko's used to be where anybody could  
15 just go there and they would just sort of print anything  
16 for them or were they all more aligned?

17 A. What was the last part sorry.

18 Q. More aligned?

19 A. There were a lot of printers but generally  
20 speaking they were more aligned it was very hard to  
21 print if you ever want to find out how hard it was to do  
22 work in the 18th industry go print something on an 18th  
23 century printers so it's not like Kinko's the price  
24 needed to be right or they needed to support what they  
25 thought you were trying to get out there to put in that

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 heavy labor.

2 Q. Okay. All right. Let's see. It says here  
3 that you've been compensated with a flat fee of 120500  
4 for the declaration.

5 Are you being paid at all for this testimony?

6 A. No.

7 Q. And sorry I don't recall if I asked you this  
8 before have you done declarations in other cases?

9 A. This is my first I have done amicus briefs of  
10 many amicus briefs to the Supreme Court but this is the  
11 first declaration.

12 Q. And are were those ones that -- were any of  
13 those amicus briefs ones that you wrote versus signed  
14 onto?

15 A. Several of them I was what you could I think  
16 rightfully characterize as a coauthor I've never been a  
17 lead author on an amicus brief.

18 Q. Okay. Which ones do you recall being  
19 coauthors on?

20 A. The most recent one was *Trump v. United*  
21 *States*.

22 Q. Okay. And what position did you take there?

23 A. Our historians's amicus brief denied the idea  
24 that presidential immunity was consistent with the  
25 original understanding of the Constitution.

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

\*\*\* ROUGH DRAFT - DO NOT CITE \*\*\*

1 Q. Okay. Any other cases that you recall being a  
2 principal author?

3 A. One in the *Bruen v. NYSPRA* -- did I get that  
4 right? -- the Second Amendment case.

5 Q. Yeah.

6 A. Also the one that *United States v. Rahimi* I'm  
7 blanking now on the names on the gerrymandering cases in  
8 North Carolina and the one that followed.

9 Q. Yeah. Okay. All right. Turning I guess to  
10 the next page here paragraph 4.

11 If this case would be determined on an  
12 originalist's interpretation of the First Amendment's  
13 Free Speech Clause I'm going to ask you about that first  
14 word, you know, if -- I mean should it be are you  
15 offering an opinion on that?

16 A. I'm not offering a strong opinion on that I am  
17 though alluding to the fact that a majority of the  
18 justices on the Supreme Court have said in different  
19 ways that originalism is the right way to interpret the  
20 Constitution and that a healthy percentage of judges in  
21 the federal judiciary have said the same and that an  
22 enormous number of influential people in the world of  
23 constitutional law in the academy and think tanks and  
24 others have are committed to the proposition that  
25 originalism is the law of the United States.

\*\*\* ROUGH DRAFT - DO NOT CITE \*\*\*

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. Okay. And then you state your conclusion that  
2 the original understanding of that provision presents in  
3 no barrier to Maine's Act to Limit Contributions to  
4 Political Action Committees That Make Independent  
5 Expenditures.

6 Have you reviewed the Act?

7 A. I have not. I mean I -- I don't claim to be  
8 an expert on it.

9 Q. Okay. And you know, no barrier that's a --  
10 it's a, you know very strong language.

11 Why are you so certain -- certain that that's  
12 the case?

13 A. Based on my understanding of what the First  
14 Amendment was trying to do and again more generally the  
15 context in which the First Amendment had meaning which  
16 was based on a particular understanding of  
17 constitutional liberty and rights, it seems to me that  
18 the -- the First Amendment was not trying to  
19 categorically limit or curb this type of activity. But  
20 was instead trying to create a set of representative  
21 Constitution that would be the essential vehicle through  
22 which in this case, you know, there are different kinds  
23 of rights the way people conceive of them this is a  
24 retained natural right, the right to freedom of speech  
25 that you could enjoy in the state of nature the way you

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 retain that is through institutions that properly  
2 represent you. Being the ones engaged in the work of  
3 retaining and regulating that liberty and doing so in  
4 the interest of the public good.

5 Q. Okay. Earlier when you were testifying about  
6 your first book, you stated that what you were doing was  
7 making an argument?

8 A. Mm-hmm.

9 Q. Is that accurate?

10 A. Yes.

11 Q. And is that true of your second book as well?

12 A. Yes.

13 Q. Okay. So when you say that the original  
14 understanding of that provision presents no barrier  
15 that's is that presupposing that your argument is  
16 accepted?

17 A. Yes.

18 Q. Okay.

19 A. I mean if I may.

20 Q. Of course?

21 A. I would say you know as I tell my students you  
22 know history is what actually happened in the past the  
23 practice of history is offering an interpretation of the  
24 past that makes more sense than all the other  
25 interpretations that one might off.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. Rakove said "Madison's razor."

2 What's -- what's his thing?

3 A. That's a good quip.

4 Q. All right. So then, again, I'm sorry to sound  
5 lawyerly about this. But then thus if someone had an  
6 alternative view of what originalism was then they could  
7 reach a different conclusion?

8 A. They could, yes.

9 Q. Okay. Do you view that statement to be a  
10 legal conclusion?

11 A. Of a kind, yes. Certainly if you were going  
12 to rest the legal case on the original meaning or  
13 understanding of the First Amendment. But that of  
14 course becomes the big if.

15 Q. Yeah. All right. Now let's going to start  
16 kind of start getting into sort of the substance of your  
17 position here. I know you said this a little bit  
18 before. But help explain to me I guess I guess you said  
19 enough of it before I can try to skip past a little bit  
20 the introductory things.

21 Explain to me how we could know whether a  
22 fundamental right was also a positive right.

23 A. So the broad categorization of rights that  
24 existed at the founding if we think of the three buckets  
25 are inalienable natural rights alienable or retained

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 natural rights and fundamental positive rights are  
2 common law rights natural rights are things you can  
3 enjoy prior to the existence of political society in the  
4 state of nature so you know imagine we're all living in  
5 the woods on our own we can say what we want do what we  
6 want self-defend.

7 Q. That's what I prefer?

8 A. Other rights that we consider quite central  
9 like a trial, the right to a trial by jury is just not  
10 something that can exist independent of civil society or  
11 the right to print something I mean you can speak but  
12 there are certain -- yeah. So the -- you know, taking  
13 for granted a certain sort of licensing regime say  
14 presupposes aspects of civil society so when they talked  
15 about fundamental rights they talked about them often  
16 grouped together sometimes they took enough for granted  
17 that as a historian you have to try to figure out  
18 exactly where they're drawing the lines but I think  
19 there is you know, an overwhelming amount of evidence  
20 from people with all sorts of different political  
21 beliefs pointing to this kind of classification and a  
22 similar general framework for understanding how we  
23 should think about these rights in the political society  
24 in which we find ourselves what it means to have them  
25 and a retained natural right was different than a

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 fundamental common law right in key respects because a  
2 fundamental common law right usually placed stronger  
3 limits on government regulation than simply a retained  
4 natural right like the freedom to speak. Now that would  
5 depend on other things such as how exactly how that had  
6 been retained you can and you can write constitutions in  
7 such a way that you do more than merely declare a  
8 retained natural right you can also offer more precise  
9 legal determinations you can specify legal rules that  
10 more strongly limit what government can do. How you  
11 tell the difference between a retained natural right and  
12 a fundamental common law right like so many  
13 classifications at the borders it can bleed into one  
14 another but a lot of them are sufficiently obviously  
15 different, again like trial by jury as opposed to  
16 freedom of feature speech that people had no trouble  
17 differentiating them.

18 Q. All right. Thank you for answering a couple  
19 of my follow-up questions?

20 A. Okay.

21 Q. Let me go back a little more general now is  
22 the Constitution law?

23 A. Of a kind, yes.

24 Q. Okay. And what kind?

25 A. That's an open question and was at the time.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 So I think the question it's supreme fundamental law and  
2 it is a law that supersedes all other law. Whether it  
3 is a like in kind to other forms of law, and therefore  
4 is to be interpreted and enforced like other forms of  
5 law contract law statutory law the law of treaties was a  
6 bitterly contested question at the founding and a lot of  
7 people were quite adamant that it was not that kind of  
8 law which was why so many people exactly how many hard  
9 to say but certainly a substantial percentage of the  
10 population rejected the proposition that it was a  
11 legalistic instrument if you will that was primarily to  
12 be interpreted and enforced by legal elites and judges.

13 Q. And when did legal and elites and judges start  
14 treating it as law?

15 A. In a certain respect right away. Though they  
16 would deny that they were doing anything that was  
17 different than what critics were saying. They began  
18 more consciously doing that in the 19th century I would  
19 argue under the Marshall Court precisely because they  
20 were facing this onslaught of popular resistance that  
21 judges need to stay in their lane and not be effectively  
22 I mean the complaint was under the guise of legal  
23 interpretation they're actually making policy  
24 determinations. And this forced judges to retreat and  
25 kind of re-brand but initially but even during that

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 period, still, if the Constitution is a kind of law that  
2 legal officials will take custody of, still, to a great  
3 extent, people assume there were large areas of  
4 constitutionalism that would primarily be enforced  
5 elsewhere by the people themselves through their  
6 representative Constitutions and I think even mostly  
7 legal elites didn't deny that.

8 Q. Just curious, do you think that -- or do you  
9 have a preference between McCulloch and Marbury as far  
10 as what you think which case kind of best represents  
11 that judicial power grab, if you will?

12 A. I wouldn't necessarily say either of them  
13 represents a judicial power grab I think McCulloch is  
14 significantly more consequential for a variety of  
15 reasons. Though I think that is an example not of the  
16 judiciary extending its power and an initial chapter in  
17 how we got a stronger judiciary which was the political  
18 branches and others turning to the judiciary and  
19 allowing them a say that they previously wouldn't have  
20 had.

21 Q. Okay. I'll ask one more question and then we  
22 can take a break.

23 You talked about the Constitution but I just  
24 have to ask the follow-up question is the Bill of Rights  
25 law?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           A. So first point I'd note is it's you know not  
2 called the Bill of Rights or conceived as such until  
3 much later. And that's not to be pedantic. I think  
4 that's part of an answer to your question seeing it as  
5 the amendments they were seen as -- as law in the way  
6 that the rest of the Constitution was law. But the key  
7 question would be how are the amendments written and  
8 what are they trying to do which would be the -- which  
9 upon that analysis you would figure out what am I  
10 interpreting what here is fixed if anything and who gets  
11 to both work out its meaning in practice and enforce  
12 that meaning and that would vary piece of the  
13 Constitution by piece of the Constitution. And I think  
14 judges might say we have -- we can take custody of  
15 certain aspects of the Constitution more easily than  
16 others. And the amendments tended to be written in such  
17 a way that would have made it harder for them to take  
18 custody.

19           I think that was purposefully so.

20           MR. MILLER: All right. Thank you.

21           As promised, we'll take a break now.

22           THE WITNESS: All right.

23           THE VIDEOGRAPHER: We're going off the record  
24 the time is 12:57 p.m.

25           (Recess taken.)

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 THE VIDEOGRAPHER: We're back on the record the  
2 time is 1:03 p.m.

3 BY MR. MILLER:

4 Q. You mentioned that the Bill of Rights was  
5 initially simply called the amendments but like I  
6 initially they included a couple of amendments that were  
7 sort of structural in nature? Is that fair?

8 A. Yes.

9 Q. Is that maybe why?

10 A. I think so and also because -- well, you could  
11 have added it as a conventional declaration of rights  
12 though the distinctive feature there is they came at the  
13 beginning rather than -- than the end they weren't an  
14 appendix which is among the reason the Federalists  
15 called for it, said this is not a true Bill of Rights  
16 but I think your point is actually more important in  
17 some ways that they're doing more than just declaring  
18 rights.

19 Q. But it was -- part of the reason that this  
20 is -- that these ten amendments were put on was because  
21 the anti-Federalists demanded a Bill of Rights?

22 A. That's part of the reason it's a classic  
23 historical question. Why do we get the amendments is  
24 this because the ain't Federalists get what they asked  
25 for or did the Federalists led by James Madison sort of

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 successfully outmaneuver them and give the -- the  
2 appearance of amendment without actually doing the  
3 things the amendments were supposed to do which is what  
4 most anti-Federalist said after the fact we've been  
5 tricked we didn't get what we asked for.

6 Q. What did Madison say after the fact?

7 A. She said because the first federal Congress  
8 that added the amendments they had, you know more or  
9 less made promises you know campaign promises being what  
10 they are in the ratification debates, that they would  
11 take recommended amendments seriously they wouldn't make  
12 ratification of the constitution contingent or  
13 conditional on amending it but after ratified in good  
14 faith they would take all the lists of amendments drawn  
15 up by the state ratifying conventions and take it  
16 seriously the vast majority in Congress were not  
17 interested in doing that they said maybe we made those  
18 promises but who cares we have a huge majority in  
19 Congress and more importantly we have so much to do to  
20 fix the issues of the nation that have led to the  
21 restructuring of the constitutional system and it's only  
22 because Madison insists over and over again if we don't  
23 do this, if we don't appease enough people have the  
24 appearance of trying then a second constitutional  
25 convention might be called there are murmurings right

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 now to call one and all our work will be lost so Madison  
2 would say this was a great triumph because it put an end  
3 but he wouldn't have necessarily disagreed with the  
4 anti-Federalist's objections that the amendments didn't  
5 actually amend the Constitution.

6 Q. My question is did he say anything one way or  
7 the other to the that effect after the amendment process  
8 was done?

9 A. I mean, he underscored the -- that it was a  
10 right decision to do it and that he at least initially  
11 after the fact. I mean, Madison whether he changes his  
12 mind cross the 1790s is a long-standing matter of  
13 historical debate the James Madison problem is how it's  
14 been characterized but at least initially after he was  
15 emphatic the great value of the project is we merely  
16 made explicit what was already implicit we didn't  
17 actually change the Constitution which is what was  
18 anti-Federalists were hoping for structural changes that  
19 would amend and alter the way the government worked and  
20 the kind of powers it had.

21 Q. And what position did he take at the time of  
22 the Sedition Acts?

23 A. So by that time, he had very much changed his  
24 mind about how to think about the First Amendment. And  
25 had adopted a jurisdictional argument that he had

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 previously denied both he and Jefferson about how First  
2 Amendment the First Amendment should be understood.

3 Q. Are you familiar with the legal concept of  
4 liquidation?

5 A. Yes very familiar.

6 Q. Can you explain that?

7 A. So well if we take it from James Madison's  
8 Federalist 37 in the face of anti-Federalists complaints  
9 that among the many, many, many, things that made the  
10 proposed Constitution so horrifying was the fact that it  
11 didn't just say things that were terrifying setting up  
12 the centralized government that was going to take away  
13 people's liberty but also how it said them but the way  
14 in which it was written was unnecessarily and they  
15 argued purposefully ambiguous and vague why did you  
16 write something that is -- can be interpreted in so many  
17 different ways and wasn't clear enough and Federalist 37  
18 is Madison's response that says human beings are  
19 imperfect. The mechanism by which we communicate is  
20 imperfect language itself and that is especially true  
21 when we are dealing with complex concepts and  
22 constitutionalism is full of them so it is impossible to  
23 lay down a constitutional instrument of any kind that  
24 will not be in crucial respects indeterminant and vague  
25 and will have to be worked out the meaning of it will

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 have to be liquidated over time through several  
2 discussions and adjudications as he referred to it what  
3 exactly he meant by that what would be the character of  
4 that meaning upon being liquidated I don't think he ever  
5 offered a definitive answer to even though he continued  
6 to return to the theme throughout his life, throughout  
7 his presidency through his retirement years  
8 William Baude the leading original as scholar at The  
9 University Of Chicago is best associated with the  
10 concept today as he wrote a 2019 article in the Stanford  
11 Law Review called constitutional liquidation that very  
12 consciously tried to draw on Madison's idea and explain  
13 how it should supplement originalist interpretation  
14 today. And here he picked up on the prior work of  
15 Caleb Nelson another very talented originalist at  
16 Virginia Law School who had been the first I think it's  
17 fair to say in modern times to deploy it about 20 years  
18 prior in an article the key difference here being that  
19 Caleb Nelson argued when the meaning of the Constitution  
20 vague and ambiguous liquidated it is thereafter fixed.  
21 So you could imagine, like drawing cement William Baude  
22 did not support that conclusion he suggested that  
23 liquidated mean could be reliquidated if the right  
24 conditions were met. So exactly how liquidation works  
25 and what results from it I think is unclear when we're

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 talking about Madison and also seems to be unclear in  
2 originalist scholarship today though it is clear that a  
3 lot of justices on the Supreme Court are interested in  
4 the concept. Amy Coney Barrett has alluded to it now  
5 several times in concurring opinions so it's certainly  
6 part of our constitutional vocabulary.

7 Q. Has her reference mainly been in the form of  
8 reliquidated at the time of the civil war amendments?

9 A. Well, she has raised two separate issues. One  
10 is in light of Dobbs, Bruen, and Kennedy if we're going  
11 to talk about what is or is not deeply rooted in the  
12 nation's historical traditions what is the relevance if  
13 one is an originalist when looking at practice in the  
14 20, 30, 80s or certainly not analogous concealed carry  
15 laws at the maybe the state level maybe in the  
16 territorial governments and she was saying is this a  
17 form of liquidated are we trying to understand are we  
18 looking at something different it's a separate matter  
19 which is if we assume as it seems the Supreme Court  
20 does, I mean, you know they've said they believe that  
21 the original Bill of Rights was incorporated through the  
22 14th Amendment what exactly was incorporated in 1868 was  
23 that the meaning ratified in 197 is or the meaning as it  
24 had been up to 1967 at some point we're going to have to  
25 figure this out and I think that's related to liquidated

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 but different.

2 Q. Okay. But do you have a position on  
3 liquidated?

4 MS. AUSTIN: Objection. Scope.

5 THE WITNESS: I think it is a certainly  
6 important concept from the founding. Whether -- well,  
7 I'll actually re -- that's not quite right. It's  
8 certainly important to the thinking of James Madison and  
9 it certainly mattered to a few other people whether it  
10 mattered more generally is a harder question to answer  
11 because few people seem to talk about it the way we he  
12 did certainly the idea he was getting at though which I  
13 think was very common and is very important to  
14 understanding the original Constitution as originally  
15 understood it cannot be finished or complete. Simply  
16 can't. There must be these areas that are worked out in  
17 some way over practice he says discusses and  
18 adjudications is it more discussions is it more politics  
19 is it more adjudications in courts unclear but that idea  
20 was common.

21 But I think the even if the framework that  
22 liquidated opens up is of paramount significance it's  
23 not obvious to me in the very good scholarship but I  
24 don't fully support the conclusions that I've read I  
25 don't think has been able to pinpoint exactly how it

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 should work in a systematic way so I would object to  
2 that as a -- as a historian.

3 BY MR. MILLER:

4 Q. With respect to that, the second issue as far  
5 as incorporating the Bill of Rights against the states,  
6 have you taken any position on whether -- the  
7 incorporation was done as the amendments were understood  
8 at the time of the enactment of the reconstruction  
9 amendments or whether it was limited to the  
10 understanding at the founding?

11 MS. AUSTIN: Objection. Scope.

12 THE WITNESS: I have taken no firm professional  
13 position because I believe the kind of work one would  
14 have to do to offer a deeply informed determination on  
15 that matter would be extensive and I have not done it  
16 though the work I have read suggests there is a strong  
17 case to be made if not accurate and I -- I really I  
18 think it's uncertain at this point exactly what was  
19 understood at the time in 1868 I think the best answer  
20 is people understood different things.

21 BY MR. MILLER:

22 Q. And who were the scholars you'd cite to for  
23 that?

24 A. Let's see. I'm trying to think who the best  
25 ones are so Kurt Lash has a -- I'm not sure if it's

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 published yet a forthcoming article it's re-ratifying  
2 rewriting the Bill of Rights that takes very seriously  
3 the updating quality I think it's a very strong argument  
4 I'm not sure I agree with it other constitutional law  
5 scholars like I believe Lawrence Lessig Fidelity and  
6 Constraint talks about it there are a number of them.

7 It's a robust hit literature but it's growing  
8 and I think it's complicated.

9 Q. Okay. So I understand here that you reject  
10 the notion that constitutional rights?

11 A.

12 (Reporter admonition.)

13 BY MR. MILLER:

14 Q. Constitutional rights are counter-majoritarian  
15 limits on popular government that are meant to be  
16 enforced primarily enforced by judges?

17 A. Yes I think that is the standard way of  
18 thinking about them today and that was not the standard  
19 way of thinking about them broadly conceived at the  
20 founding.

21 Q. Okay. You have a couple of concepts in there  
22 so the enforced primarily by judges aspect of it you  
23 think that that part is wrong; is that right?

24 A. Yes.

25 Q. Okay. And why is that wrong?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           A.    Because people at the time thought that the  
2   primary way in which fundamental rights would be  
3   enforced and protected was through the institutions that  
4   most directly represented the people.

5           Q.    The Federalist Papers discuss the importance  
6   of the judiciary, you know being able to determine the  
7   meaning of the Constitution; right?

8           A.    They talk about the importance of an  
9   independent judiciary having an important role in the  
10   constitutional system, yes.

11          Q.    But was that role interpreting the  
12   Constitution?

13          A.    At times, yes.

14          Q.    And how do they qualify that?

15          A.    Well, the most famous statement of the  
16   Federalist Papers is Federalist 78 which is often seen  
17   as the sort of central touch stone which paves the way  
18   to Marbury V Madison in which Hamilton specifies a  
19   conflict of laws thought experiments and says when there  
20   is clear error when a law violates very clearly and  
21   unambiguously the manifest tenor of the instrument what  
22   choice do judges have but to set it aside. So then it  
23   is a matter of what counts as a clear error and when  
24   does that arise.

25          Q.    All right. And are you also disagreeing that

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 the constitutional rights were counter-majoritarian  
2 limits on popular government?

3 A. So in a general sense yes you can do different  
4 things with rights from a constitutional standpoint that  
5 makes them more majoritarian in fact that is what  
6 Thomas Jefferson hoped for when he asked James Madison  
7 to take seriously the idea of adding a Bill of Rights I  
8 think what's really consequential is Madison rejects  
9 Jefferson's desire. So to make something more  
10 counter-majoritarian rather than having a broad  
11 declaratory right which is the standard way of including  
12 a rights provision, most of the state constitutions have  
13 broad declarations of rights a paradigmatic example of a  
14 broad definition of a liberty principle it does not then  
15 go on to offer detailed legal determinations on what we  
16 would call legal rules that help within the space  
17 created by that liberty clearly draw the line between  
18 legal and illegal behavior Jefferson was hoping for  
19 something much more specific and more precise with more  
20 rules precisely because that was the only way in his  
21 estimation judges could enforce it because if it was  
22 just Congress shall make no law abridging the freedom of  
23 speech that is a declaratory amendment that merely  
24 points out upon entering into political society we have  
25 a general right to free speech it is essentially to the

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 political community we formed and this is there to  
2 remind people that that is -- that only a government  
3 that -- that respects that or is set up to respect that  
4 because it expresses the people's will is therefore  
5 legitimate it doesn't then go on to say this exact kind  
6 of licensing regime for printers or this exact kind of  
7 content is or is not legitimate you know you can make a  
8 more detailed determination like the amounts and  
9 controversy requirement in the 7th Amendment that is  
10 doing more than declaring a right that is offering a  
11 legal rule and Jefferson and others thought those are  
12 the only thing judges can enforce it had to be that  
13 specific and clear and that I think that's what  
14 Hamilton's talking about in Federalist 78.

15 Q. Okay. So even the statement Congress shall  
16 make no law abridging is in your view is not a rule?

17 A. No. I think it's a principle. As they  
18 understood it. It is a clear -- so what I am trying to  
19 draw attention to is we would see that as a clear limit  
20 on what government can do with peoples' rights in their  
21 world they are describing the -- they are -- they are --  
22 they are underscoring the conditions under which the  
23 right can be regulated by whom and how and I think it's  
24 because they have a -- they have a very different  
25 understanding of liberty that we no longer broadly

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 speaking find intuitive.

2 Q. How did they understand "abridge"?

3 A. They under -- I -- yeah. So I think that's  
4 the key word. So if -- if we think of the concept of  
5 liberty, in broad strokes but I think this is the sort  
6 of central background to all of it. We live in a world  
7 in which we understand liberty in the liberal rights  
8 tradition is noninterference so that's how abridgment  
9 would be understood I'm free if I'm not interfered with  
10 I'm unfree if I'm interfered with so it's just a measure  
11 of me it's it is a matter of measuring coercion how much  
12 are you being in interfered with prevented from doing  
13 things you were physically or mentally able to do in  
14 their world the dominant concept was not coercion but  
15 domination the idea that the people who make the laws in  
16 your community since law making was the ultimate  
17 sovereign power are they or are they not representative  
18 of you? Do -- did you or did you not consent to them in  
19 a real sense are they you a good representation like if  
20 you hold a mirror up to someone that's a good  
21 representation of you a good political representation  
22 worked no differently.

23 So the American revolution is prosecuted under  
24 the mantra no taxation without no representation it's  
25 not no taxation it's who gets to do the representation

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 the British Parliament they have made them political  
2 slaves it's not that they're being taxed it's who's  
3 taxing them the colonial legislatures, they say time and  
4 time again can levy the exact same duties in the exact  
5 same way but it will not be political slavery because  
6 the people will be doing that to themselves. So  
7 Congress shall make no law abridging would have to  
8 satisfy two prior requirements that Congress would have  
9 to be truly representative and would have to be passing  
10 the law that regulated retained natural liberty in the  
11 interest of the common good if it could be demonstrated  
12 that they failed either criteria then they would be  
13 abridging the right.

14 Q. Okay. I forgot my question.

15 Let me just ask this one then.

16 You mentioned common good there. I see common  
17 good mentioned a few times. In your -- your declaration  
18 here. But I just want to specify are you a common good  
19 Constitution list?

20 A. Not as that term has been come to be  
21 understood today.

22 Q. Okay. I just wanted to clarify that?

23 A. Though I don't necessarily think there's  
24 nothing wrong in the general manner minus that  
25 attribution that forever now forever more, it seems will

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 be its --

2 Q. It's not the label it's the definition.

3 A. Yeah. The -- what every what you know it to  
4 mean and therefore what I know it to mean makes it a  
5 problematic term.

6 Q. Okay. So within the -- the first  
7 amendments -- excuse me -- the First Amendment, there  
8 are a number of rights listed; correct?

9 A. Yes.

10 Q. Are any of those positive rights? I could go  
11 through them?

12 A. Yeah. I haven't given as much to the right to  
13 the assemble I think that would be more in the line  
14 of -- well, yeah I think you'd call that potentially a  
15 that would just a civil right rather than a natural  
16 right.

17 Q. All right. What about the -- the prohibition  
18 on the establishment of religion is that natural or  
19 positive?

20 A. I think it -- I -- I -- I mean this is one of  
21 those where you can find different people at the time  
22 kind of classifying it differently but I think a  
23 conventional way for ease of understanding we can call  
24 it more like a civil right.

25 Q. And you prefer civil to positive?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 A. The terminology is tricky they often call them  
2 common law rights though the meaning of common law today  
3 is so fraught that I sometimes hesitate to use it. So I  
4 think any of those terms interchangeably don't suffice.

5 Q. All right. Petition?

6 A. Yeah. So that is a classic example of a civil  
7 right because you need to have a government to have that  
8 right.

9 Q. Okay. I think I'm tracking on most of these.  
10 What about the press?

11 A. So again, I mean, it's in some ways understood  
12 as an extension of the right to speak and therefore is a  
13 kind of natural right but also within the technology and  
14 especially the sort of regulatory scheme of it that --  
15 that presses operated under it was often viewed as  
16 something more akin to a civil right.

17 Q. Were the founders concerned about the tyranny  
18 of the majority?

19 A. Yes. Some of them.

20 Q. Okay. And wouldn't concerns over the a  
21 potential tyranny of the majority be a reason to have  
22 enforceable rights?

23 A. It could potentially be a reason though I  
24 don't think it was most people's answer to that dilemma  
25 that emerges in the 1780s when a lot of state

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 governments are in the eyes of certain political and  
2 legal elites James Madison are concerned that these  
3 majorities are overrunning majority rights his solution  
4 to that is to create a different kind of majoritarian  
5 government that will not insulate rights from the people  
6 but will reconstitute the people so the government  
7 better represents their more moderate impulses rather  
8 than the more passionate impulses so Madison's great  
9 innovations was to say we talk about the people and  
10 whether we want to represent them or not but the people  
11 actually have many different forms all of us have within  
12 us the capacity to grab pitchforks and join a mob and  
13 all of us have within our capacity to very reasonably  
14 deliberate with people we might not agree with the job  
15 of constitutional design is to create a set of  
16 institutions that better represent one image of the  
17 people rather than another so it's not the people so  
18 Madison would you say it's the tyranny of the passionate  
19 majority because Madison's whole point is you can just  
20 give up on republicanism and majoritarian government  
21 protect rights that's easy the great problem we have is  
22 the majoritarian government is the reason we fought a  
23 revolution we believe in that so how do you have both  
24 and his solution was by extending the sphere as he  
25 called it by having larger electoral districts a

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 national government you would get a different kind of  
2 representative that was better representative of the  
3 people's more moderate selves guardians of the people's  
4 liberty so his solution was certainly not treat rights  
5 as zones of noninterference that certain institutions  
6 that are insulated from the people such as the judiciary  
7 will enforce. That is not any -- that is not anything  
8 he promotes.

9 Q. All right. We just a few minutes ago sort of  
10 listed out aspects of the First Amendment that are  
11 natural and aspects that would be civil rights would  
12 that mean that the civil right portions of the First  
13 Amendment are enforceable in court?

14 A. It depends on their nature and how they're  
15 expressed and how people understand their content  
16 because a common law right can still be in -- it can  
17 still be under determined, is the way to think about it.  
18 So it's -- it is clearly a right and the broad principle  
19 is fixed but the legal determinations that will -- that  
20 will actually give the right substance are under  
21 determined and must be worked out and in those cases an  
22 a lot of people were very skeptical of judge's capacity  
23 judges themselves were skeptical of that. I mean *Calder*  
24 *v. Bull* the Supreme Court case just taught in law  
25 schools why the ex post facto applies to criminal laws

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 and not civil ones complicit with the original meaning  
2 of the Constitution the debate backs out especially  
3 Samuel Chase and James Iredell in this case is you know  
4 is about a kind of basic fundamental positive right that  
5 they both recognize as being clearly part of the social  
6 compact that ex post facto laws are bad their question  
7 is -- is it clear enough that what the Connecticut  
8 legislature in this instance has done has violated that  
9 right that we as judges can step in and Chase thinks it  
10 is clear enough that they can. Iredell is quite adamant  
11 no it just hasn't met that Federalist 78 standard of  
12 clear error rule I -- I have big doubts about what the  
13 Connecticut legislature did but I just don't think we  
14 can enforce it so I think that's a good example from the  
15 period of how it wasn't clear even with common law  
16 rights who would enforce them you had to do subsequent  
17 analysis.

18 Q. All right. But if the common law right was  
19 sufficiently articulated it could be enforced by the  
20 courts?

21 A. I believe so. So in the case of the First  
22 Amendment the clear example would here would be no prior  
23 restraints on printers which was so deeply rooted in the  
24 Anglo American tradition that people generally thought  
25 that that particular requirement that if a legislature

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 violated that so just passed a law saying that printers  
2 can't print anything -- you know, no matter what happens  
3 to them after they print it just they can't print it as  
4 a matter that would be the kind of thing that many  
5 people James Madison others would think was clearly  
6 enough determined that judges could enforce it.

7 Q. Okay.

8 MR. MILLER: How is everyone? Okay?

9 BY MR. MILLER:

10 Q. I have a conceptual question for you.

11 Which is why is it that with sort of legal  
12 documents legal histories and constitutions it's perhaps  
13 difficult to understand their meaning today but at the  
14 same time, you know, if we pick up like a philosopher  
15 like Hume or Locke we can read it and we think we  
16 understand it just fine like why is there a disconnect  
17 there?

18 A. Well, I think that some of my students might  
19 object to the idea it's easy to understand.

20 Q. Might be impenetrable.

21 A. No your point is well taken because, as I tell  
22 my students I can hand you a letter from James Madison  
23 to his dad talking about crop rotation at Montpelier and  
24 we're not going to have urgent interpretive debates  
25 about what it's saying. Like we get it right the sense

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 and reference of the words like it's pretty clear I  
2 think the reason why is the kinds of technologies that  
3 constitutions especially are this might be true of law  
4 generally but it's generally true of constitutions and  
5 it's especially true of ours that there is lots in the  
6 U.S. Constitution that is written in determinant legal  
7 rules that have never needed any theory of  
8 interpretation to interpret. We -- we've never had  
9 debates over how many senators each state gets people  
10 might think it's a very bad rule but the rule is clear  
11 and how it applies as the world changed is not hard to  
12 figure out nobody in the late 18th century but it's  
13 pretty easy to understand how a rule not written for  
14 those facts would be applied to those facts but that  
15 doesn't describe any of the stuff that makes up  
16 constitutional law and the fights over it and why we  
17 need interpretive theories. I think the reason would be  
18 not that we're you know that we're interpreting  
19 something written a long time ago but what we're  
20 interpreting which is usually written at a higher level  
21 of generality written in the language of standards  
22 rather than rules or even higher than standards  
23 principles which even if you can figure out to some  
24 extent you've got two problems in figuring out its  
25 original meaning unlike Locke of Hume single authors,

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 this is written by I mean the legal authors we the  
2 people of the United States but if we're being more  
3 concrete we're talking about 55 framers at the  
4 Philadelphia convention the 1700 individuals who sat in  
5 the ratifying conventions anybody else who expressed an  
6 opinion in between who could be said to influence we've  
7 got a lot of authors if you will who had different ideas  
8 of what exactly executive power meant or legislative  
9 power meant or the power, you know, to make all laws  
10 necessary and proper. General welfare so on. But even  
11 if we find a reasonable amount of agreement, it's an  
12 abstract enough concept at a high enough generality that  
13 unlike the two senators rule which I think people from  
14 all who disagree on lots can understand how you apply  
15 that to unforeseen facts it's really hard to know how to  
16 apply general welfare are necessary and/or freedom of  
17 speech to unforeseen fact patterns so I think it that is  
18 precisely why we have the interpretive debates we do  
19 whereas I can find 18th century documents that we can  
20 much more easily I agree on what they mean. I mean I'd  
21 like to think my declaration is a much easier thing to  
22 figure out what it's saying whether it's right or not,  
23 being a separate matter.

24 Q. We'll have to ask in 200 years?

25 A. Exactly. But my hope would be because of the

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 character of the document I mean my thought would be  
2 that it would be different than the Constitution but  
3 I -- I think also the recognize that. The First  
4 Amendment was written by James Madison and others in  
5 such a way that it was not laying down determinant legal  
6 rules they could have done that they could have tried to  
7 do that they very consciously did not they wrote a broad  
8 standard to be worked out through republican politics.

9 Q. I noticed through here that most of your  
10 citations are to work either by yourself or your  
11 colleague Judd Campbell.

12 Can you explain why that is?

13 A. For ease of reference since I just finished  
14 this book that mounted so many of these arguments in  
15 exhaustive detail I thought that was the easiest way to  
16 reference but then also I think so many of these ideas  
17 I'm deeply, deeply indebted to Judd Campbell for them  
18 and I also think his work is the best place to go to  
19 find their explication. I think that would be the  
20 answer to why you see certainly an abundance of  
21 citations to the two of us.

22 Q. Yes. So the -- I guess the question of that  
23 leads to me asking is does this imply that you're in a  
24 minority of scholars who believe this?

25 A. It depends what this is.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. Okay.

2 A. I think there are aspects of this that no I  
3 think there are other aspects that this is challenging  
4 certain -- well, I -- the way I'd put it is there are  
5 certain First Amendment scholars who have gone back to  
6 the 18th century to try to understand its original  
7 meaning who I think have made mistakes because I think  
8 they've presupposed too much about modern constitutional  
9 doctrine but that doesn't necessarily put us in the  
10 minority because we are also in league with historians  
11 who around read by those constitutional law scholars  
12 because of the disciplinary differences who would agree.  
13 So I think it's hard to sort pinpoint exactly who's in  
14 the minority.

15 Q. Yeah. So I -- let me ask that better then.  
16 So I -- I think that you have in here what I'll roughly  
17 characterize as sort of a descriptive element as far as  
18 what the founders were thinking and views of social  
19 contract theory, et cetera, at the time.

20 A. Yes.

21 Q. So I assume that something like that would be  
22 fairly generally accepted?

23 A. I think so. Certainly I don't see how anyone  
24 could deny the idea that the social contract theory  
25 however we want to refer to it was a foundational

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 framework.

2 Q. Right. But then, when you -- when you turn to  
3 you know your discussion about the implications for you  
4 know particularly here when we're carried by this case  
5 the First Amendment I in that sense at least within the  
6 legal community this would be an either a minority or if  
7 you want to say emergent view is that fair?

8 A. Can you say a bit more about when you say when  
9 we turn to the legal community you mean in on this  
10 particular issue or.

11 Q. Yeah.

12 A. Or pertaining to just the First Amendment  
13 generally.

14 Q. On this particular issue?

15 A. The main Citizens initiative or campaign  
16 finance? Or --

17 Q. And Okay. Again I'm speaking of I guess I'm  
18 speaking more generally about the First Amendment?

19 A. Yeah.

20 Q. Specifically the Free Speech Clause?

21 A. That could well be the case I'm not -- I'm not  
22 sitting here right now exactly I -- I mean I think there  
23 is far more support for my position, Judd Campbell's  
24 position than such a characterization would let on but  
25 I -- I can accept the premise that there are plenty of

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 people who are modern lawyers looking back at the 18th  
2 century who have viewed it differently.

3 Q. Yeah. And you know maybe I -- I stated that  
4 in a poor way but it seems like this is something  
5 that -- that you and Mr. Campbell are currently sort of  
6 leading the charge on against other things that are out  
7 there?

8 A. I -- I -- I think that's a fair  
9 characterization. I think one of the reasons I wrote  
10 the book I did against constitutional originalism was  
11 precisely because I detected a failure among a great  
12 many talented scholars to take seriously the ways in  
13 which 18th century Constitution that will thinking was  
14 different and I think this is a particularly good  
15 example of that so certainly the motivation for it is  
16 that there is a certain amount of misunderstanding that  
17 has led to some conclusions or I mean people have found  
18 themselves tied in knots where they don't know how to  
19 square the evidence in part because they're asking the  
20 wrong questions.

21 Q. Okay. You know, earlier we talked a little  
22 bit about Federalist 78. Is that in your literature at  
23 all that sort of analysis that you gave in?

24 A. Is -- what? Sorry?

25 Q. Did you like the analysis that you gave --

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 have you written that anywhere or is that and I didn't I  
2 don't recall that in this report or is that in your  
3 book?

4 A. Certainly the ideas I was alluding to are a  
5 big part of the book and I talk about them elsewhere but  
6 definitely in the book that understanding of how  
7 judicial power would work and under what conditions.

8 Q. Okay. But did you directly sort of take on  
9 Federalist 78?

10 A. I do allude to it. I think more important  
11 than Federalist 78 is what precedes it which is  
12 James Iredell address to the people and then subsequent  
13 exchange with the Richard Dobbs Spaight James Iredell  
14 one of the first appointees to the United States Supreme  
15 Court he makes many of the arguments that most Americans  
16 they've never heard James Iredell but they are the  
17 arguments that Hamilton and John Marshall later make  
18 famous and I talk about this at length in the book when  
19 there is clear error and here he's talking about  
20 examples such as the Constitution says you get 12 jurors  
21 in a jury trial and the state government has passed a  
22 law saying you get nine he's saying in those conditions  
23 judges can -- can set aside the law and he's saying this  
24 because most people are saying they can't in North  
25 Carolina.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. It took until a couple years ago to get  
2 straightened out in Louisiana?

3 A. Ongoing dispute.

4 Q. All right. All right. So I guess through  
5 sort of paragraph 8 you kind of lay out the this sort of  
6 natural rights approach and then beginning on kind of  
7 paragraph nine, is where you say exactly how exactly  
8 natural rights such as these were retained is critically  
9 important. And I -- I apologize we're kind of going  
10 back over territory but I'm trying to kind of go through  
11 this.

12 But I -- I guess just to clarify, I -- it's sort  
13 of starting here at paragraph nine and going down is  
14 sort of your contribution to the legal scholarship  
15 currently; correct?

16 A. Yeah. I -- I think what -- some of what comes  
17 before it too but yeah I think this is you could in a  
18 certain respect this is the meat of it.

19 Q. Yeah. I don't mean to minimize what was above  
20 but okay.

21 A. Yeah.

22 Q. All right. Now, you mention here being able  
23 to protect rights through juries and militias.

24 Can you explain what you mean there?

25 A. Sure so when people said for rights to be

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 retained so again getting back to that idea of abridged  
2 and different ideas of liberty well we would think how  
3 is a natural right retained if it can be regulated and  
4 I'm trying to draw attention to regulating is not the  
5 kind of thing that signals that's not been retained you  
6 retain it if the regulation is being done by yourself.  
7 Oak okay so that means the people themselves are  
8 regulating their own rights who gets to speak for the  
9 people themselves the paradigmatic is the Legislature  
10 unlike today juries were understood as representative  
11 institutions they were not procedural safeguards though  
12 they also serve that function they were primarily  
13 representatives of the people so John Adams for  
14 instance, said there's really only executive and  
15 legislative power you know there's not even judicial  
16 power and judges exercise executive power juries  
17 exercise legislative power which is an interesting  
18 concept the reason being that juries were often tasked  
19 with making those legal determinations that, you know,  
20 most rights provisions didn't provide. Militias is more  
21 complicated.

22 Q. All right. Well, let's stop at juries let's  
23 stick with that one for a moment I read this to mean  
24 that there was an endorsement of jury nullification.

25 Is that what you're saying?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 MS. AUSTIN: Objection. Scope.

2 THE WITNESS: They would say -- I just had a  
3 fantastic student write a final paper on this so I've  
4 been thinking about it it's a complex question because  
5 they would usually they would not accept that phrasing.

6 BY MR. MILLER:

7 Q. They wouldn't call it that?

8 A. They wouldn't say the juries are not  
9 nullifying the law they're determining the law.

10 Q. Right. But -- but would -- but the concept  
11 the modern concept of jury nullification is one way that  
12 the juries would enforce these rights?

13 A. Potentially though when people called it that  
14 in those terms or I mean alluded to that in a more  
15 aggressive way people rebuffed and only the more radical  
16 sorts.

17 Q. I'm picturing a Monty Python skit no we don't  
18 call it that.

19 Okay all right and then so this is my question  
20 if -- if juries, you know, could have determined what  
21 the law of -- or excuse me what the right of free speech  
22 was and enforced it in a case well first of all are you  
23 saying that that's what this meant they could do  
24 something like that?

25 A. Certainly that's in the tool kit and that's an

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 understood way in which this would be sorted out.

2 Q. Okay. Then why not judges?

3 A. Because judges were not seen as parting matter  
4 representatives of the peoples themselves the story of  
5 how judges become something other than an instrument of  
6 the Crown the lesser magistrates of the chief  
7 magistrates I mean of the creation of an independent  
8 judiciary in the early United States is a long and  
9 complex process but certainly at this time in the early  
10 republic there's still a sense judges they are executive  
11 agents executive agents don't have a will of their own.

12 Q. So even after article three that was the  
13 predominant view of the founders?

14 A. Well, the people themselves have given cart  
15 car length three judges the judicial power to adjudicate  
16 cases and controversies.

17 Q. And they gave them life tenure.

18 A. Well, they gave them good behavior tenure.

19 Q. Sure.

20 A. Getting anyone to serve on anything for more  
21 than a few years was hard.

22 Q. Right.

23 A. Whether we call that life tenure certainly it  
24 has come to be understood as such they didn't you know,  
25 they certainly were eager to have them insulated in just

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 the way Hamilton described in the Federalist papers.

2 Q. And but could that have been because they  
3 wanted them to serve this right determining role?

4 A. I don't think so. And I think I've had  
5 trouble finding anyone who quite conceived of it that  
6 way because again legislative power was so robust it was  
7 the center I mean you go back to Locke sovereign  
8 authority is the power to make law the people who were  
9 most defensive of judicial power were just trying to  
10 bring it up to kind of fighting weight to give it, you  
11 know, a say of in the constitutional process at all  
12 which is again the clear error rule if you look at  
13 judicial review cases at the founding and you look at  
14 them today and you built a Venn diagram not quite but  
15 it's close to an empty set because the things they're  
16 describing we would consider so different than the kinds  
17 of cases that our federal judiciary have come to take  
18 custody of today that are very contested questions that  
19 tended not to be adjudicated in court questions of sort  
20 of real questionings of fundamental constitutional  
21 issue.

22 Q. Okay. Let's see. I'm still looking I guess  
23 at paragraph nine but I'm looking on page 6 now you  
24 mentioned George Hay.

25 Who is he?

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 A. George Hay was just a political writer and  
2 printer an at the time. Who you know in this context in  
3 the late 17 late 18th century is in the midst of the  
4 Sedition Act controversy.

5 Q. Okay. And do you recall what he was writing  
6 about?

7 A. He is defending the liberty of the press  
8 against the Sedition Act.

9 Q. All right. So if he was defending the liberty  
10 of the press, why would he advocate extending the  
11 legislative power to all that the public good requires?

12 A. Well he's you can talking about the general  
13 condition under which this sort of thing can be  
14 regulated. Because I think the key issue here which is  
15 informing the debate over the Sedition Act is which  
16 institutions best represent the people. So I mentioned  
17 earlier that James Madison changed his mind though  
18 claiming not to and began making a jurisdictional  
19 argument about the First Amendment which was importantly  
20 not transforming the First Amendment into a categorical  
21 trump that created limits on what government could do  
22 and tasked other entities such as judges with  
23 enforcement and power what he's saying what Jefferson  
24 says what other people say who challenged the Sedition  
25 Act is saying the federal government can't pass these

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 laws only the state governments can and all the state  
2 governments more or less had sedition laws in place at  
3 the time and Thomas Jefferson who's often regarded as  
4 this great defender of freedom of speech Sedition Act  
5 all the state government sedition laws were  
6 constitutional I think for just the reasons that  
7 George Hay is saying that if you believe that the  
8 federal government is representative of the people as  
9 Federalists claim and not different in kind from the  
10 state governments then it has broad capacity to regulate  
11 those rights if you don't think that if you think that  
12 only state governments can do it as the Jeffersonian  
13 republican party is suggesting, then you end up in a  
14 very different calculus but it's the -- still lacks  
15 basic framework it's who represents the people and then  
16 they get to in the public good regulate these rights.

17 Q. And what side was Hay on?

18 A. Sorry hey is a Federalist right no I'm  
19 blanking on George Hay I apologize.

20 Q. Okay. Let me see here.

21 So reading through this it says as far as the  
22 legislative power shall say the public good requires  
23 that is to say the freedom of the press will be  
24 regulated by law in the same manner as the freedom on  
25 all other subjects to be regulated by law then it says

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 if the word freedom was used in this sense by the  
2 framers of the amendment they meant to say Congress  
3 shall make no law abridging the freedom of the press  
4 which freedom however is to be regulated by law folly  
5 itself does not speak such language.

6 It sounds like he's rejecting that theory?

7 A. Rejecting what theory in what way.

8 Q. He says that folly itself does not speak such  
9 language?

10 A. Regarding what.

11 Q. Regarding the statement that the legislative  
12 power shall say that the public good requires?

13 A. Well, he's denying the proposition that the  
14 federal government can act in this manner.

15 Q. Right?

16 A. He's not denying the proposition that the  
17 state governments can he's talking about how the  
18 categories that are necessary to determine whether the  
19 government has the capacity to meet the requirements to  
20 regulate national liberty are satisfied in this respect  
21 and he's reading the amendment to be a jurisdictional  
22 claim has had become the standard you know republican  
23 position by the period as a statement by the people  
24 themselves of why the federal government was limited in  
25 respects the state governments weren't but it wasn't a

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 statement generally on government regulation.

2 Q. Okay. As I see here, it continues on page 40.  
3 But if it be regulated by law, they limit the amendment  
4 which declares that Congress shall make no law to  
5 abridge the freedom of the press which freedom however  
6 may be regulated by law is the grossest absurdity?

7 A. Yeah.

8 Q. That ever was conceived by the human mind?

9 A. Yes so that's that jurisdictional argument  
10 that is saying what it meant to add the First Amendment  
11 as a restriction on the federal government and  
12 separating it from what the state governments could do  
13 so this is the standard I -- I'm sorry I misspoke  
14 earlier saying he was a Federalist that was meant he was  
15 this is the republican position that has emerged that  
16 James Madison and others have articulated.

17 Q. Okay. And then, who was this parsons?

18 A. Theophilus Parsons is a Massachusetts juris  
19 who's best known for writing this, I guess we can call  
20 it a pamphlet called the Essex Result. When the  
21 Massachusetts Constitution was first drafted and  
22 submitted to the towns for consideration and rejected a  
23 great deal of constitutional commentary was generated  
24 and this is probably the most famous of the statements  
25 to emerge from that process.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. Okay. And so each individual surrenders that  
2 power of controlling his natural -- excuse me -- his  
3 natural alienable rights only when the good of the whole  
4 requires it. Okay. And is -- is that not a very  
5 restrictive reading? Or excuse me a very restrictive  
6 argument as far as when rights can be alienated?

7 A. I think it can appear that way. I think what  
8 the standard statement he is making though in the  
9 context and you can see lots of people making it is  
10 underscoring the requirement that only when the good of  
11 the whole is -- is required by the law only when it's in  
12 the interest of the public good not the good of some or  
13 others but only when the good of the whole requires it  
14 when it meets that condition, can you control natural  
15 inalienable rights.

16 Q. And wouldn't that mean that that condition  
17 would be rare to occur?

18 A. I don't think so. I can understand why people  
19 today would read it that way I don't think that's what  
20 he's saying.

21 Q. Yeah I guess it means like what did requiring  
22 mean?

23 A. I think what he's alluding to what most people  
24 in the generation were alluding to is most of the  
25 history of government was nonrepresentative government

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 not making law for the common good so he is saying we're  
2 going to do something different here following this  
3 revolution we're going to create true self-government  
4 based on popular sovereignty and I think in that context  
5 only when the good of the whole requires it reads  
6 differently it's not -- he's not trying to as I  
7 understand him laying down a restriction on what  
8 American government can do he's trying to explain why  
9 American government will be this profoundly different  
10 thing from British government and all government that's  
11 preceded it.

12 Q. Okay. His next sentence read the very next  
13 sentence over the class of an unalienable rights the  
14 supreme power hath no control and they ought to be  
15 clearly defined and ascertained in a -- in all caps Bill  
16 of Rights previous to the ratification of any  
17 Constitution?

18 A. Yeah. So he's talking about -- sorry.

19 Q. Yeah.

20 A. If you had a question.

21 Q. I think you know the question?

22 A. Yeah. There he's picking out the class of  
23 unalienable natural rights the people again disagree on  
24 the lists the standard one being the rights of  
25 conscience rights of the minds rights to think things

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 without being controlled.

2 Q. But that isn't another way to view it is that  
3 when you put it in the Bill of Rights that's the  
4 evidence that it's unalienable?

5 A. Well, that would be supporting evidence of the  
6 right existing and it being a fundamental character  
7 that's one of the reasons why he and others thought a  
8 Bill of Rights a declaration of rights should be added  
9 to the Massachusetts Constitution as it was but I don't  
10 think that that means that in any way he's saying the  
11 rights will only be inalienable or only have those  
12 features if they're added or that he's saying that it in  
13 some way you know, meaning that, you know, he's not  
14 necessarily they're commenting on other kinds of rights.

15 Q. Okay. So after -- after reading both of these  
16 statements I don't quite understand and maybe you can  
17 help me understand how they support your next sent  
18 sentence here that the rights were retained so long as  
19 the people themselves maintain control over the  
20 regulation of those rights through the power of  
21 self-government because both of these people were  
22 advocating for the rights.

23 A. These people -- well, I take these statements  
24 to be the particular statements that I think you're  
25 focusing -- I mean, the particular arguments that you're

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 focused on follow the more general concept that they're  
2 alluding to which is what I'm getting at George Hay does  
3 not deny the proposition that the people's retain  
4 natural liberty would be retained through the process of  
5 self-government he is disputing how self-government has  
6 been set up and will work in the federal U.S. system.  
7 In the context of the Sedition Act he is supporting the  
8 premise even if Federalists would have disagreed with  
9 him pertaining to the Sedition Act exactly who has a  
10 right to legislate for the public good.

11 Q. Wasn't he mocking the very argument that the  
12 rights were not binding and enforceable?

13 A. He is mocking the idea that the First  
14 Amendment does not exempt the federal government from  
15 that standard regulatory role that state governments  
16 otherwise enjoyed and he's going so in the face of  
17 federalists saying that people like him and others do  
18 not properly understand what it meant to draw up the  
19 First Amendment the way they did.

20 MR. MILLER: Okay. All right. I think this is  
21 a good time for a break.

22 MS. AUSTIN: Great.

23 MR. MILLER: Sure.

24 THE VIDEOGRAPHER: We're going off the record  
25 the time is 1:57 p.m.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 (Recess taken.)

2 THE VIDEOGRAPHER: We're back on the record the  
3 time is 2:04 p.m.

4 BY MR. MILLER:

5 Q. Okay Professor, I'm going to try to do what I  
6 can to move through the rest of this quickly because I  
7 think we've covered a lot of what I would want to ask so  
8 I may have some pauses as I try to skip around but I'm  
9 trying to be as efficient as possible?

10 A. Sure.

11 Q. So I guess just moving not very far but moving  
12 to page seven I see a spot here that were you say the  
13 people decided that certain kinds of regulations of  
14 liberty were presumptively problematic hence making it  
15 part of the fundamental common law of the polity and I  
16 could point to a few different things that you have here  
17 and written elsewhere that I have I'm going to try to  
18 avoid doing that but I just want to sort of ask a  
19 question.

20 But, you know, isn't it -- weren't there people  
21 at the time of the founding that believed that political  
22 free speech was one of those items?

23 A. One of those items being.

24 Q. The items of which the regulation of liberty  
25 would be presumptively problematic and thus making it

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 part of the fundamental common law?

2 A. Well, I think what I'm trying to allude to  
3 here is -- is more clearly settled rules. Something  
4 that had more precise legal content. Like restrictions  
5 on printers before they printed say. You didn't need  
6 that kind of -- there were certain kinds of restrictions  
7 on political speech that I think would satisfy that that  
8 were more categorical in nature but I don't think that  
9 doesn't necessarily contradict the idea there's a broad  
10 category of political speech that it is going to be  
11 regulated worked out in the way most fundamental rights  
12 are.

13 Q. Okay. So did the founders believe that an  
14 important part of republican government would be  
15 elections?

16 A. Yes.

17 Q. Okay. And did they believe that speech  
18 surrounding elections should have the utmost protection?

19 A. It depends how they understood speech they  
20 thought a lot of speech could be corrupting and  
21 problematic for a number of reasons some of those being  
22 surrounding electioneering and campaigning they  
23 certainly thought people's ability to freely vote was  
24 important they thought the integrity of elections had to  
25 be was very important it was more of an open question of

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 what counted it as important kinds of political speech  
2 to the health of the republic.

3 Q. Okay. Tell me about well looking at I guess  
4 maybe on the press side of this you know all the  
5 printing the newspapers surrounding ratification there  
6 was lots of political dialogue that happened in the  
7 press and otherwise about those issues; correct?

8 A. Yes.

9 Q. And the founders believed it important to  
10 protect the ability to engage in that dialogue; correct?

11 A. Generally speaking, yes.

12 Q. Okay. And were they even willing to tolerate,  
13 you know, falsities in political speech?

14 A. Depends who you asked. A lot of people  
15 thought that wasn't protected.

16 Q. But a lot did?

17 A. Some did. I think it's hard to pinpoint and n  
18 exactly when you're asking now about ratification. I  
19 think attitudes began to change in the 1790s as precinct  
20 became so entwined with emerging partisan warfare which  
21 paves the way so the to the Sedition Act we were talking  
22 about and leads to new understandings of those  
23 protections at least vis-a-vis the federal government.

24 Q. And I I think I read somewhere that you know  
25 some scholar was saying that they believe the Sedition

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Act was a major contributing force to Adams not being  
2 reelected do you think that's true?

3 A. I think that's fair.

4 Q. And so arguably that could be an example that  
5 you would use to say this is the political process  
6 protecting those rights?

7 A. Potentially, yeah. How exactly what you take  
8 to be settled coming out of that process would be a  
9 complex question, but yes.

10 Q. Mm-hmm and should we understand or I guess let  
11 me just ask you this way do you understand the Sedition  
12 Acts to have been unconstitutional?

13 A. At their time?

14 Q. However you want to answer?

15 A. Yeah. So at their time I think it's  
16 complicated. Because the basic Blackstonian common law  
17 rule federalist lawyers who were among the best legal  
18 elites at the time I don't think were making bad faith  
19 or specious arguments when they said there's nothing  
20 problematic about the Sedition Act in light of how we  
21 understand regulations of speech and printing at the  
22 same time I think the 17 the 0s has created a new  
23 dynamic of understanding how republican political speech  
24 will work but then the real question just comes back to  
25 the very argument that I argue is at the core of it all,

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 which is how do the people themselves best express  
2 themselves who gets to best speak for them and I think  
3 what it's best understood at is not really a case over  
4 how we should understand political speech but instead a  
5 case of to what extent does the national government  
6 represent the people in a real way or does it only  
7 represent them in a kind of I mean perfect way that  
8 should limit its law making jurisdiction and in some  
9 ways that's the question that courses through America up  
10 to the civil war is it is this one nation? Is it a set  
11 of states that have compacted together and that again  
12 was where social compact theory was so essential  
13 Jefferson's main argument is there is no United States  
14 nation it is a collection it's a confederacy.

15 Q. These United States?

16 A. We the People's of the states or we the states  
17 made the Constitution but what that means is that all  
18 that -- none of that is a rejection of the basic way of  
19 regulating speech or liberty I'm describing it simply  
20 says the state governments, which have the full and  
21 perimeter of the people's sovereignty are therefore  
22 which is why a letter to Abigail Adams when she is  
23 lamenting Jefferson how he treated John Adams and  
24 provoked this response to the Sedition Acts what do you  
25 think about all those Sedition Acts in the states and he

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 says those are all fine which is I think is a clear  
2 indication of he's not rejecting the idea that  
3 government can regulate these things he's rejecting a  
4 kind of government.

5 Q. Which was the federal government?

6 A. Exactly.

7 Q. And what was the basis of that?

8 A. Sorry.

9 Q. Yeah. And what was the basis of that  
10 rejection?

11 A. A jurisdictional argument based on federalism  
12 that was novel and was absolutely different than what  
13 Madison and others had argued ten years earlier during  
14 ratification okay they claimed it was consistent with  
15 the original meaning but they were forgetting their own  
16 original meaning.

17 Q. Okay. So now on page 8, let's see you have a  
18 quote from lee vie heart. Do you recall who that was I  
19 don't recall who lee vie heart was?

20 A. He's a preacher. And some of the best  
21 political writing from the period of the American  
22 revolution comes from the pulpit and from sermons. The  
23 revolution probably wouldn't have been successful  
24 without the support of such figures and this is like so  
25 many sermons it was published as a pamphlet.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 Q. Mm-hmm.

2 A. You know, he was from Farmington, Connecticut  
3 I mean, he's sort of you know more broadly explaining  
4 the peril of American liberty in the face of what has  
5 been the imperial crisis with British intrusion into  
6 American affairs.

7 Q. When I here Farmington I think Massachusetts  
8 but I guess I did not realize there was a Farmington  
9 Connecticut?

10 A. There are many yes.

11 Q. So here he says a civil liberty doth not  
12 consist in a freedom from all law and government but a  
13 freedom from unjust law and tyrannical government and  
14 freedom to act for the general good.

15 And then you then say that the people's liberty  
16 was protected through government. Government that  
17 maximized the general welfare. But and when I read his  
18 quote it seems to me that he's talking about the freedom  
19 to act the for the general good was an individual  
20 freedom. Right? Is that what this says?

21 A. I don't think it's individual or collective in  
22 this framing would be my argument what I'm drawing  
23 attention to is what he means by unjust law and  
24 tyrannical government that the key here in understanding  
25 civil liberty is understanding again back to that idea

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 of liberty as domination is the government  
2 representative of you does it have your consent or in  
3 not having your consent is it by definition tyrannical  
4 by whatever it does so what makes the law unjust is that  
5 unrepresentative agents have made it.

6 Q. So an a sermon a preacher would think that  
7 what is just depends upon who enacts it?

8 A. In the political space I think in his capacity  
9 as a religious minister he had -- he had -- he had more  
10 complex views but also part of those complex views that  
11 he and others sort out is how does one's broader  
12 conceptions of justice interact with views of political  
13 justice.

14 Q. And again there could be a tyrannical  
15 government of the majority?

16 A. Well, here and again this being 1775 so this  
17 is before that concept is I mean one of the dominant  
18 quotes from Massachusetts nearby in 1775 is a democratic  
19 despotism is a contradiction in terms. The primary way  
20 in which they're thinking because this is the American  
21 revolution I mean this is the lead up to the American  
22 revolution is about why Parliament's ability to regulate  
23 and tax the colonies is unjust.

24 Q. There was also a quote from Massachusetts at  
25 the time about tyrannical government something about

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 angels. Do you know what I'm talking about?

2 A. I know the --

3 Q. Yeah I think?

4 A. The quote from the Federalist papers.

5 Q. Okay. That was a Federalist papers that was a  
6 Madison thing yeah?

7 A. Yeah.

8 Q. So what was that?

9 A. I don't know if I'll get the quote exactly  
10 right, but if all men were angels government wouldn't be  
11 necessary. Do you have it handy?

12 Q. If angels were to govern men --

13 A. Yeah.

14 Q. -- then constraints on government would not be  
15 needed.

16 A. Mm-hmm.

17 Q. So there was concern at the time about evils  
18 being done by government?

19 A. Absolutely.

20 Q. And thus the need to have constraints in the  
21 federal Constitution.

22 A. I think again what he's alluding to is the  
23 idea that the way you protect liberty primarily there  
24 are other ways is structurally by building a government  
25 that will remain close to the people and their best

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 interests. What I -- part of what you're getting at is  
2 that even if you set up a representative government  
3 there are many ways in which it can become  
4 unrepresentative so there was great concern over what  
5 are the best structural features to put into  
6 constitutions to ensure that the representative chain  
7 does not break down and a legitimate government does not  
8 become tyrannical so most of the state governments have  
9 annual elections if representatives had to seek  
10 reelection every year rotation of office or what we  
11 would call term limits somebody passes a law in 1776 the  
12 best way to ensure it's a good law is if they're  
13 required to live under it as a civilian in 1780 they  
14 spent much of the period debating what are the best  
15 structural mechanisms but I think what Madison is  
16 alluding to what Levy Hart, and others are alluding to  
17 is it is not hard for even good representative  
18 institutions to become corrupt and unrepresentative it  
19 is no guaranty that setting them up right means they  
20 will continue to be good so but I don't think it  
21 necessarily means we therefore need limits on what a  
22 government can do not at least because Madison talked  
23 endlessly about parchment barriers he says if you just  
24 put down limits on paper I assure you those won't do  
25 very much you don't get the structure right text will

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 not save you so I don't see Madison in that federal  
2 paper or Levy heart here making a particular kind of  
3 argument that deviates from that basic structural logic  
4 about how political freedom works.

5 Q. Okay. I wanted to make sure I had that quote  
6 right so I pulled it up so this was so I'll go a little  
7 bit before that but from Federalist 51 but what is  
8 government itself but the greatest of all reflections on  
9 human nature if men were angels no government would be  
10 necessary if angels were to govern men neither external  
11 or internal government controls would be necessary when  
12 framing a government to be administered by men over men  
13 the great difficulty lies in this and the next place  
14 oblige it to control itself.

15 So that sort of bundled some words there but you  
16 know, I think that I just want to make sure we had the  
17 concept accurate?

18 A. Yeah so I think the con question becomes and  
19 how do you get government to control itself and I do not  
20 dispute for a sec that is the problem of the  
21 constitutional governments in the era the question is  
22 what are the right mechanisms to ensure it controls  
23 itself?

24 Q. All right. And I guess the next sentence here  
25 says a dependence on the people is no doubt the primary

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 control on the government but experience has taught  
2 mankind the necessity of auxiliary precautions?

3 A. Yep.

4 Q. So that would be something other than just  
5 relying upon the electorate to control the government?

6 A. Madison and others certainly did not think  
7 that was -- was sufficient in its own regard.

8 Q. Okay. All right. But so couldn't, you know,  
9 people at the time, you know, conclude that just a  
10 violation of the Free Speech Clause is itself unjust and  
11 tyrannical?

12 A. So can you say a bit more about what -- what  
13 you would mean -- what you mean by a violation of the  
14 Free Speech Clause?

15 Q. Sure. You know, if there was some government  
16 action that people determined or excuse me that a court  
17 determined was violative of the Free Speech Clause, it  
18 couldn't be decided and determined that that action was  
19 unjust and tyrannical?

20 A. So it would -- would it be because the  
21 Constitution that regulated the speech and therefore  
22 made it a violation was not sufficiently representative  
23 or was not acting in the public good or would it be as I  
24 think you're getting at that the character of the  
25 regulation would be such that it would so grossly

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 violate the retained natural right that it would need to  
2 be set aside? I think in that last case, it would have  
3 to be so egregious but even then people would you say  
4 that is clear example that we don't have a  
5 representative legislature acting in the common good and  
6 there would be a debate over who would properly step in  
7 to enforce it. The standard way in which people and  
8 speaking in generalities because they're having ongoing  
9 debates about this question with some people saying  
10 under those conditions like what Samuel Chase says in  
11 *Calder v. Bull* a judge steps in because it's so extreme  
12 but others would say no this is a perfect example of why  
13 the people need to sound the alarm why there needs to be  
14 petitioning and protesting and writing and then you have  
15 elections.

16 So I think you know one particular example here  
17 which is indicative of a period not at least because we  
18 couldn't fathom such a thing happening today was in  
19 Georgia in the mid 1790s over the Yazoo land scam I  
20 misspoke there with scam but it's actually correct  
21 because basically all Georgia has all the land that  
22 present day Mississippi, and they sell it to these  
23 speculators they're basically bribed and the public  
24 catches wind and they're outraged. And they immediately  
25 call for elections and then vote them all out and then

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 the new legislature comes in I mean at no point do  
2 courts get involved and the new legislature convenes  
3 itself and says, we are convening ourselves not as the  
4 legislature of Georgia but as the people's supreme  
5 constitutional tribunal we are not going to simply  
6 overturn the Act selling the Yazoo lands with a  
7 rescinding act we're going to make a sort of judgment on  
8 the basis of the sovereign people that it was never  
9 legitimate to begin with and that must culminate in  
10 taking it outside and burning it so this is the people  
11 themselves enforcing what is an egregious violation they  
12 think of the public trust, even if it was lawfully done  
13 by a duly enacted state legislature.

14 Q. Sure?

15 A. I think is an example.

16 Q. Like -- right. Another example would be when  
17 Congress I think ordered reparations for violations of  
18 the Sedition Act; right?

19 A. Yeah.

20 Q. Yeah. All right. So returning to the heart  
21 quote I pulled it up here I'm curious why you'd kind of  
22 cut that last fragment there short because the quote is  
23 it says in freedom to act for the general good without  
24 incurring the displeasure of the ruler or censure of the  
25 law.

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1           Why would you have left that phrase out?

2           A.    I think I just did it for space requirements I  
3           don't see it as complicating the idea.

4           Q.    All right.  But doesn't that make it very  
5           clear that it's the individual's freedom to act without  
6           fear of censure of law?

7           A.    Well, I think what he's talking about is  
8           acting inconsistent with laws of one's own making.  
9           Which again.

10          Q.    That would be the definition of civil liberty  
11          for a preacher?

12          A.    Yes.  I mean, well I think what he's getting  
13          at is the idea that the key determination here is  
14          whether or not government is tyrannical or not.  So  
15          you -- I mean I think you're alluding to a context in  
16          which people are, you know, this is 1775 in new England.  
17          And parliament is really trying to crack down on  
18          opposition and resistance.

19          Q.    Have you given any thought to what precedence  
20          would be overturned if the originalism would be followed  
21          the way that you articulate by the court?

22          MS. AUSTIN:  Objection.  Relevance scope  
23          expertise.

24          THE WITNESS:  I've given it some thought but it  
25          is not my primary focus part of the reason I framed it

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 as I don't think the First Amendment as originally  
2 understood would present a barrier to the citizens  
3 initiative as I understand it is because I am remaining  
4 agnostic on broader questions pertaining to the First  
5 Amendment. I certainly appreciate the spirit of your  
6 question being that if we were fully originalist it  
7 would require thinking about lots of areas of law not  
8 just in the First Amendment. Though as a historian part  
9 of you know part of what I think that suggests is one  
10 should then think about whether they want to be an  
11 originalist.

12 BY MR. MILLER:

13 Q. So what are some of the cases you've thought  
14 of?

15 MS. AUSTIN: Objection. Relevance scope  
16 expertise.

17 THE WITNESS: I don't necessarily again as I  
18 said earlier I'm not an expert on First Amendment law  
19 and don't claim to be. So I'm a little wary --

20 BY MR. MILLER:

21 Q. Okay. All right?

22 A. -- weighing on them.

23 Q. Okay. How would one like determine this?

24 A. What is -- can you say what this is sorry.

25 Q. Yeah sure so if we were to follow the

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 originalist etch approach which I understand you're not  
2 advocating, but if we were to follow that, how could we  
3 determine when we go and look at a case if it was  
4 originalist or not?

5 A. Well, we would have to -- so if -- if -- there  
6 would be the consideration of exactly what we take  
7 originalism to be and exactly what kinds of evidence  
8 determine the law that originalism succeed to find but  
9 assuming that that has something to do with how the  
10 public understood the meaning of key constitutional  
11 provisions and more importantly the sort of set of  
12 constitutional assumptions that sort of gave them  
13 meaning and force we would have to recover that  
14 reconstruct it we would then have to understand how that  
15 worked in its time and then we would then have to  
16 understand how that spoke to the issue at hand which  
17 could be complex if the issue at hand is not obviously  
18 analogous to something from the time we would also  
19 potentially have to consider some of those questions you  
20 raised earlier about could the meaning and understanding  
21 have been one thing at one time and supposedly  
22 liquidated it later though then you would need a very  
23 clear sense of what it meant to say that meaning is  
24 liquidated in one instance and not another you would  
25 also presumably have to have a clear understanding of

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 whether things can be reliquidated you would also given  
2 this area need to think about that big question that a  
3 lot of people try to ignore sometimes about what exactly  
4 the reconstruction amendments did to this. You would I  
5 mean to do it faithfully honestly fully I think we'd  
6 have to go through all of that but as a starting point  
7 you might say is this the kind of activity that was left  
8 to the people's representatives to kind of regulate in  
9 the public interest or not. And is that at the outer  
10 boundary where it's more complex or sort of more  
11 comfortably with within the kind of general scope of  
12 what I think most people thought was left to the  
13 people's representatives and in my estimation in this  
14 case it's more the latter. But yes the analysis would  
15 then have to follow how exactly do we get from those  
16 historical findings to a robust understanding of law  
17 which is you know is what the legal decision makers and  
18 interpreters have to sort out based on this historical  
19 information.

20 Q. So then regardless of whether that process  
21 would result in upholding or overturning the particular  
22 precedent it would certainly require a new analysis?

23 A. Quite possibly it seems to me it would have to  
24 take seriously how the 18th century thought about  
25 speech.

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

1 Q. Yeah. And to the extent that did not happen  
2 in *New York Times v. Sullivan*, it would have to occur  
3 now?

4 MS. AUSTIN: Objection.

5 BY MR. MILLER:

6 Q. If we were to follow that process?

7 MS. AUSTIN: Relevance.

8 THE WITNESS: Again not being expert on *New York*  
9 *Times v. Sullivan* sure.

10 BY MR. MILLER:

11 Q. Okay. What about Citizens United?

12 A. Well, I -- I -- I mean from again I don't have  
13 deep, deep knowledge of Citizens United but I think it  
14 lacked some of the context I alluded to here in its  
15 original discussion so if it's interested in basing this  
16 you know that kind of ruling on how people at the  
17 founding thought I -- I think at minimum it would need  
18 to take more seriously at minimum some of the things I  
19 try to call your attention to here.

20 Q. All right just a couple questions in  
21 conclusion for today.

22 Just to be clear, you are not advocating that  
23 the court undertake an originalist analysis of the law  
24 before the court in this case, are you?

25 A. I'm not expressly advocating that I am trying

—\*\* ROUGH DRAFT - DO NOT CITE \*\*—

**\*\* ROUGH DRAFT - DO NOT CITE \*\***

1 to offer an understanding of the history should that  
2 history be deemed important to the case.

3 Q. Okay.

4 MR. MILLER: All right no further questions.

5 MS. AUSTIN: Nothing from me.

6 MR. BOLTON: Nothing from me.

7 (Reporter inquired about transcript  
8 purchase orders.)

9 MR. MILLER: Yes please.

10 MS. AUSTIN: Yes for me as well thank you.

11 MR. BOLTON: Same for me just PDF is fine.

12 THE VIDEOGRAPHER: And can I get video orders as  
13 well.

14 MR. MILLER: Please.

15 MS. AUSTIN: Yes.

16 THE VIDEOGRAPHER: Same as before.

17 MS. AUSTIN: That's fine.

18 Also, for the record, we would like the  
19 transcripts to be read and sign.

20 MR. MILLER: When can I get roughs?

21 THE REPORTER: Monday.

22 MR. MILLER: That'd be great.

23 THE VIDEOGRAPHER: Okay. We are going off the  
24 record. The time is 2:33 p.m.

25 (Proceedings conclude at 2:33 p.m.)

**\*\* ROUGH DRAFT - DO NOT CITE \*\***