FOREWORD

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The United States Supreme Court is not supposed to render any part of the American Constitution a nullity. Yet the Court has rarely employed or mentioned the Ninth Amendment[1] or the Fourteenth Amendment's Privileges or Immunities Clause.[2] Former federal appellate judge Robert Bork testified before the United States Congress that the Ninth Amendment was like an unintelligible "ink blot."[3] Interestingly, the Supreme Court's relatively liberal Justices have also failed to utilize these amendments. Indeed, only Justice Clarence Thomas signaled the possibility of rehabilitating one of these provisions in recent years.[4]

This year's Drake Constitutional Law Center Symposium explored these relatively forgotten constitutional amendments. Professor Daniel Farber began the Symposium by arguing that the Court should employ the Ninth Amendment to support unenumerated rights such as privacy, as well as a positive duty of the federal government to protect its citizens. He recently published an important book making these arguments.[5] In his paper, Farber makes textual, historical, precedential, and policy arguments to support his position. One of his most important points is that the Ninth Amendment merely reflected the preexisting reality of the recognition of certain fundamental rights—it did not create them. He also asserts that no comprehensive formulaic approach can be used in constitutional

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1. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

2. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1, cl. 2.

3. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 234 (2004).

4. *See* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) ("I would be open to reevaluating its [the Privileges or Immunities Clause] meaning in an appropriate case.").

5. DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE (2007).

interpretation. Inevitably, the Justices must make difficult decisions based on considerations suitable for the legal community of interpreters. The Justices should also employ foreign law in their decisions if useful.

Professor Kurt Lash uses important historical evidence, in addition to other evidence, to support his contrary view that the Ninth Amendment was more limited. Echoing Justice Hugo Black's famous dissent in *Griswold v. Connecticut*,[6] Lash argues that the Amendment restricts the national government's power to intrude into areas that the states were meant to protect. He also says the Ninth Amendment joins with the Tenth Amendment as guarantors of federalism.

Lash points out that James Madison originally proposed a Ninth Amendment specifying that the addition of certain rights should not be construed to enlarge the federal power. Lash relies on Madison's speech opposing the Bank of the United States, and on important statements made by the anti-federalist Thomas Tucker. Lash further argues that the Supreme Court referenced the Ninth Amendment in numerous twentieth century cases, so that its reputation as forgotten is not entirely accurate.

Professor Randy Barnett explains that his view is closer to Farber's; however, he asserts that the Ninth Amendment protects all fundamental liberties—not just some. Barnett asserts that Lash incorrectly views the Ninth Amendment as protecting state majoritarianism rather than individual liberties. Barnett's argument relies on historically significant writings by Philadelphia Constitutional Convention delegate Representative Roger Sherman.

Barnett responds to critics who worry that his broad view of liberty could permit courts to impede the workings of government by saying that rights do not receive absolute protection. Instead, his approach sensibly places the burden on the government to justify its restrictions on individual rights. Barnett provided a detailed explanation of his theory in a significant recent book.[7]

Several months after the symposium took place, the Supreme Court decided a case that may affect this debate. In *District of Columbia v. Heller,* the Court ruled that the Second Amendment guaranteed an individual's right to bear arms; it was not a collective right.[8] Justice Scalia's

6. Griswold v. Connecticut, 381 U.S. 479, 519–20 (1965) (Black, J., dissenting).

7. *See generally* BARNETT, s*upra* note 3.

8. District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008).

opinion also contained dicta stating that the Ninth Amendment supported individual, rather than collective, rights.[9] Scalia's discussion provides ammunition for the Barnett side, but the debate is far from over.

The subsequent papers shift focus to the Fourteenth Amendment's Privileges or Immunities Clause. Professor Michael Kent Curtis's encyclopedic article describes the history behind the Clause and critiques a more recent form of originalism known as the "expected application" approach. He says that "movement conservatives" have pushed originalism to turn back the clock on the Warren Court's progress. Curtis argues that the best historical and policy arguments show the Clause was designed to promote transformation in areas such as racial inequality. Indeed, Curtis argues that a truly originalist Supreme Court would have rendered some abhorrent decisions.

Professor Rebecca Zietlow argues that Congress—not the Court—is the superior institution to enforce this Clause. She echoes a trend in progressive American constitutional scholarship embracing "popular constitutionalism" outside the courts.[10] Zietlow elaborates that Congress should utilize the concept of citizenship to expand social inclusion, especially since the Supreme Court has restricted the use of equality. The Privileges or Immunities Clause, combined with Section 5 of the Fourteenth Amendment, license Congress to act because the Clause is about citizenship. Moreover, Zietlow shows that Congress has a long history of acting in this area, especially with the adoption of the Civil War Amendments during Reconstruction. She advocates a broader "belonging" approach that transcends the formalistic notion that non-citizens must be denied protections.

In the final paper, Professor David Bogen offers a controversial view of the Supreme Court's decision in *The Slaughter-House Cases*.[11] Most scholars assert that the *Slaughter-House* Court mistakenly rendered the Privileges or Immunities Clause of the Fourteenth Amendment a nullity.[12]

9. *Id.* at 2790.

10. *See, e.g.,* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 246–48 (2004) (explaining the history and practice of popular constitutionalism); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181–83 (1999) (explaining how the judiciary should not be relied upon so readily as the guarantor of rights).

11. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

12. *See generally* Bryan H. Wildenthal, *How I Learned to Stop Worrying and Love the Slaugher-House Cases: An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241, 241 (2001) ("All the scholarly greats . . . have condemned it

Yet Bogen is sympathetic to Justice Samuel Miller's majority opinion.

Bogen argues that the decision had minimal impact because the Supreme Court has interpreted the Equal Protection and Due Process Clauses of the Amendment to promote equality and fundamental rights. He says that scholars can use part of Miller's opinion to confer an international dimension to privileges or immunities, such as those available under customary international human rights law. Miller's opinion permits this because it says that people are citizens of the entire United States, not just individual states.[13] Bogen's approach supports those Supreme Court Justices who have been citing foreign law in their constitutional decisions.[14]

These diverse papers show that Judge Bork was right in one sense—the Ninth Amendment and the Privileges or Immunities Clause have certainly led to disagreement. Hopefully the ink spilled in this symposium has taken us a bit closer to sorting out their meaning. On behalf of Drake Law School, I would like to thank all of the above-mentioned scholars for their interesting and important articles. I also want to congratulate the editors of the *Drake Law Review* for their tireless work and their professionalism. Lastly, I want to express appreciation to the distinguished Des Moines law firm of Belin, Lamson, McCormick, Zumbach, Flynn, P.C., for its continued sponsorship of this event.

for so narrowly construing the Privileges [or] Immunities Clause of the Fourteenth Amendment as to render that provision a nullity, a dead letter, a piece of constitutional road-kill.").

13. *Slaughter-House*, 83 U.S. (16 Wall.) at 79–80 ("[A]ll rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.").

14. *See generally* Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citation of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007) (discussing the controversy surrounding the use of foreign law by the Supreme Court in constitutional law cases).