No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PROFESSOR KURT T. LASH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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JULY 27, 2021

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Kurt T. Lash is a professor at the University of Richmond School of Law. He teaches and writes about the original meaning of the Ninth and Fourteenth Amendments, and he has an interest in advancing an historically accurate judicial interpretation of both.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court ruled that an abortion law passed by the Texas legislature violated the right to privacy—a right the Court located in either the Ninth or Fourteenth Amendments. *See id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). In *Planned Parenthood v. Casey*, 505 U.S. 883 (1992), a plurality of the Court upheld "the central holding of *Roe*," once again citing the Fourteenth Amendment and the Ninth Amendment. *See id.* at 848. In doing so, the Court reasoned that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the *amicus* or counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs in these matters.

the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Id.*

The *Roe* majority and the *Casey* plurality erred in their reliance on the Ninth and Fourteenth Amendments. The Ninth Amendment, both at the time of its adoption and now, preserves the people's retained right to local self-government. It cannot properly be read as a source of authority to *deny* the rights of local self-government. The Fourteenth Amendment protects substantive rights against the states, but only those previously enumerated, thus leaving all unenumerated rights under the authority of the people of the several states as a matter of constitutional right. This includes the non-enumerated subject of abortion.

ARGUMENT

I. The Ninth Amendment guarantees the right of local self-government in all matters not expressly prohibited to the states or clearly delegated to the federal government.

A. The drafter of the Ninth Amendment, James Madison, expressly described the Ninth Amendment as working in tandem with the Tenth to prevent the national government from interfering with matters constitutionally reserved to the people in the states.

The Ninth Amendment, like the rest of the Bill of Rights, prevents unjustifiably broad interpretations of federal power. Akhil Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 315-16 (2005). When anti-federalists raised concerns about the lack of a Bill of Rights in the

original proposed Constitution, Federalist supporters of the original Constitution defended the omission on the grounds that such an addition was unnecessary in a constitution based on the principle of limited enumerated federal power. Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 20 (1999). According to Alexander Hamilton, adding a list of restrictions on federal power would be "dangerous" since it might be read to imply otherwise unlimited congressional authority. The FEDERALIST NO. 84, at 513 (Hamilton) (Clinton Rossiter, ed., 1961). Nevertheless, to assuage continuing complaints and help secure the ratification of the Constitution, Federalists ultimately agreed to support the addition of a Bill of Rights in the First Congress. Levy, at 34.

On June 8, 1789, James Madison submitted to the House of Representatives a list of proposed amendments to the Constitution. In his accompanying speech, Madison acknowledged Hamilton's warning about adding a list of rights, but insisted he had "guarded against" such a dangerous implied expansion of federal power by proposing "the last clause of the fourth resolution." James Madison, Speech on a Proposed Bill of Rights, *in* MADISON: WRITINGS 448-49 (Jack Rakove, ed.) (1999). That clause ultimately evolved into our current Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people."

Madison explained the meaning of the Ninth Amendment in a speech he delivered while the Bill of Rights remained pending before the states. In that

speech, Madison expressly linked the Ninth and Tenth Amendments as jointly protecting the reserved powers and rights of the people in the states. *See* James Madison, Speech on the Bank of the United States (February 2, 1791), *in* WRITINGS 480-90. Madison reminded his colleagues that the people in the state ratifying conventions had been promised a government of limited enumerated power. *Id*. at 489. The provisions in the proposed Bill of Rights were declaratory reminders that the Constitution carefully preserved the retained powers and rights of the people in the states. Madison "remark[ed] particularly on the 11th and 12th [proposed amendments[2]], the former as guarding against a latitude of interpretation, the latter excluding every source of power not of exercising the within the Constitution itself." *Id*.

Madison's description of the Ninth Amendment as "guarding against a latitude of interpretation" is consistent with his originally stated purpose for "the last clause of the fourth resolution." The Ninth declares that just because the Bill of Rights list *some* constraints on federal power, this may not be construed to imply that federal power is otherwise unconstrained (Hamilton's concern).

The Tenth Amendment further declares that all powers not properly construed as falling within those enumerated powers are reserved to the people in the

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[2] Madison's reference to the Ninth and Tenth Amendments as the "11th and 12th" reflected an early practice of referring to the amendments according to their position on the original list of twelve proposed amendments. *See* Kurt T. Lash, THE LOST HISTORY OF THE NINTH AMENDMENT 197 (2009).

states. Significantly, both the Ninth and Tenth Amendments use the language of popular sovereignty—it is the *people's right* to create a national government of limited power and reserve all non-delegated powers and rights to the people in the states. Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 123 ("the Ninth and Tenth Amendments elegantly integrate popular sovereignty with federalism") (1998).

B. Between the Founding and Reconstruction, scholars, lawyers, and judges repeatedly and consistently interpreted the Ninth Amendment as working in tandem with the Tenth to preserve the retained powers and rights of the people in the states.

In the years between the Founding and Reconstruction, scholars and judges repeatedly described the Ninth Amendment as a federalism provision working in tandem with the Tenth to preserve the people's retained powers and rights. In the first treatise on the American Constitution, St. George Tucker echoed Madison's understanding that the Ninth Amendment worked in tandem with the Tenth to preserve the rights of local self-government. According to Tucker, the Ninth and Tenth Amendments jointly established the principle that "the powers delegated to the federal government, [were], in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question." *See* St. George Tucker, *View of the Constitution of the United States*, *in* St. George Tucker, 1 BLACKSTONE'S

COMMENTARIES WITH NOTES OF REFERENCE, Appendix at 154 (1803) (reprint edition Lawbook Exchange, 2006). Tucker's "View of the Constitution" was the most influential constitutional treatise prior to the publication of Joseph Story's COMMENTARIES ON THE CONSTITUTION. *See* Davison M. Douglas, *The Legacy of St. George Tucker*, 47 Wm. & Mary L. Rev. 1111, 1114 (2006). As we shall see, Story himself included citations to Tucker's discussion of the Ninth and Tenth Amendments in his Commentaries.

Other members of the Founding generation shared Madison's and Tucker's view of the Ninth and Tenth Amendments. John Page, a member of the House of Representatives when Madison proposed the Bill of Rights, argued that the Alien and Sedition Acts were "an encroachment on the reserved rights of the individual states (see, the 11th and 12th articles of the amendments)."[3] Hardin Burnley, a member of the Virginia House of Delegates, supported ratification of the Ninth Amendment on the grounds that the provision would "protect[] the rights of the people & of the States."[4] In his opinion in *Glasgow's Lessee v. Smith*,[5] John Overton, a member of the second North Carolina Ratifying Convention, cited Tucker's

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[3] John Page, Address to the freeholders of Gloucester County 14 (April 24, 1799) (available in Evans, Early American Imprints, Series 1). Page was a member of Congress from 1789-1797, and Governor of Virginia from 1802 to 1805. *Id.* at 13, 14.

[4] Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *in* 12 Papers of James Madison 456.

[5] 1 Tenn. (1 Overt.) 144 (1805).

discussion of the Ninth and Tenth Amendments and explained that these two amendments supported a rule of strict construction whenever "the sovereign rights of the states" were threatened.[6] In his opinion in *State v. Antonio*,[7] South Carolina Supreme Court Judge and ratifier of the federal Constitution John Grimke read the Ninth and Tenth Amendments as jointly establishing the principle that if "the individual States were in possession of [a] power before the ratification of the Constitution; and if there is no express declaration in that instrument, which deprives them of it, they must still retain it."[8]

This was not a regional understanding limited to southerners. The most influential antebellum constitutional commentator, Joseph Story, also shared St. George Tucker's federalist understanding of the Ninth and Tenth Amendments. In his 1833 "Commentaries on the Constitution," Story's discussion of the Ninth and Tenth Amendments refers readers to both Hamilton's warning about the addition of a Bill of Rights in Federalist 84, and to St. George Tucker's discussion of the Ninth and Tenth Amendments. *See* Joseph Story, III COMMENTARIES ON THE CONSTITUTION 752, notes 2 & 3 (3 volume edition) (Boston, 1833). The "Commentaries" index headings, "Reserved Powers and Rights of the People" and "Rights Reserved to the States and the People," both refer readers to Story's

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[6] *Id*. at 166-67, note a1.

[7] 3 S.C.L. (1 Brev.) 562 (1816).

[8] *Id*. at 568.

discussion of the Ninth and Tenth Amendments. *Id.* at 773, 774. Finally, if only to underscore Story's federalist understanding of the Ninth Amendment, the Commentaries' headnote above Story's discussion of the Ninth Amendment reads "Non-Enumerated Powers" while the headnote for the Tenth Amendment reads "Powers not Delegated." *Id.* at 751, 753. Story, in other words, understood both the Ninth and Tenth Amendment as having to do with limiting the powers of the national government to enumerated powers and reserving "non-enumerated" powers to the people in the States.

Judges, politicians, and lawyers throughout the antebellum period echoed Tucker's and Story's view that the Ninth Amendment worked in tandem with the Tenth as one of the twin guardians of federalism. *See* Lash, The Lost History of the Ninth Amendment at 160-225. This understanding of the Ninth Amendment did not change with the advent of Civil War. In 1863, the Indiana Supreme Court linked the Ninth and Tenth Amendments as jointly calling for a narrow construction of federal power over navigable waters within the state. *Barnaby v. State*, 21 Ind. 450, 452 (1863). In the 1864 case *Philadelphia & Railroad Co. v. Morrison*, 19 F. Cas. 487, 489-91 (C.C.E.D. Pa. 1864), federal judge John Cadwalader declared that the federalist understanding of the Ninth and Tenth Amendments was so well known as to constitute a "truism:":

> [T]he ninth and tenth amendments of the constitution . . . whether their words are to be understood as restrictive or declaratory,

> preclude everything like attribution of implied residuary powers of sovereignty, or ulterior inherent rights of nationality, to the government of the United States. . . . That the amendments were thus intended for security against usurpations of the national government only, and not against encroachments of the state governments, may be considered a truism. But recurrence to historical facts which explain constitutional truisms, cannot be too frequent, if they are in danger of being overlooked in calamitous times, or of being crowded out of memory by any succession of appalling events.[9]

In *The Legal Tender Cases*, 79 U.S. 457, 634 (1870), Supreme Court Justice Stephen J. Field insisted that the majority's approach violated the rule of construction demanded by the state ratification conventions and declared by the Ninth Amendment. Recounting the history behind the adoption of the Bill of Rights, Field repeated Story's "Hamiltonian" argument that the initial rejection of a Bill of Rights "was upon the ground that such a bill would contain various exceptions to powers not granted, and on this very account would afford a pretext for asserting more than was granted." *Id*. at 865. Field then cited, among other sources, "Story on the Constitution, Sections 1861, 1862, and note." This citation is to Story's description of the Ninth Amendment in his *Commentaries* and includes Story's citation to Tucker's

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[9] *See also Anderson v. Baker*, 23 Md. 531, 624 (1865) ("prohibitions on the states, are not to be enlarged by construction" according to the "spirit and object of the 9th and 10th Amendments").

federalist analysis of the Ninth Amendment in his "View of the Constitution."

In sum, from 1791 to 1870, scholars and judges commonly interpreted the Ninth Amendment as a federalist provision working in tandem with the Tenth Amendment to protect the people's reserved powers and rights. This was the consensus understanding of the Ninth Amendment at the time of the framing and ratification of the Fourteenth Amendment.

C. Antebellum Republicans relied on constitutional federalism in their opposition to the spread of slavery.

Although federalism is often portrayed as a constitutional principle embraced only by the slave holding south, this is not the case. Prior to the Civil War, northern abolitionists expressly relied on principles of constitutional federalism to resist the expansion of slavery and preserve the retained rights of the people in the northern states to oppose the "peculiar institution." Eric Foner, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 210 (1995 ed.).

Despite furious denunciations by southern slaveholding states, northern free states passed personal liberty acts protecting their Black citizens from being kidnapped into slavery. *See, e.g.*, Pennsylvania Personal Liberty Act (1854), *in* Kurt T. Lash, 1 The RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS 234 (2 vols.) (Kurt T. Lash, ed.) (2021). The principles of constitutional federalism supported the efforts of northern states to refuse to

assist the enforcement of the Fugitive Slave Act. *See In re Booth*, 3 Wisc. (1854) (purporting to overrule the Supreme Court's decision in *Prigg v. Pennsylvania* and invalidate the federal Fugitive Slave Clause), *in* 1 Reconstruction Amendments at 284. These same federalist principles supported the decisions by courts in northern free states to emancipate any enslaved person brought voluntarily into the state. *See, e.g.*, *Commonwealth v. Aves*, 35 Mass. 193 (1836); *Lemmon v. People*, 20 N.Y. 562 (1860).

Antebellum constitutional abolitionists embraced the principles of federalism as an essential tool in their struggle against slavery. According to the abolitionist Wendell Phillips, "I love state rights; that doctrine is the corner stone of individual liberty." Quoted in Lash, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 80 (Cambridge, 2014). Even Radical Republicans like Charles Sumner accepted the importance of federalism in the struggle against slavery and the Fugitive Slave Act. In his 1852 speech, "*Freedom National, Slavery Sectional,"* Sumner quoted the Tenth Amendment and then declared:

> Stronger words could not be employed to limit the power under the Constitution, and to protect the people from all assumptions of the National Government, particularly in derogation of Freedom. Its guardian character commended it to the sagacious mind of Jefferson, who said: "I consider the foundation corner-stone of the Constitution of the United States to be laid upon the tenth article of the amendment." Charles

> Sumner, Speech of August 26, 1852, at 29 (published in pamphlet form) (Ticknor, Reed & Fields, 1852).

In 1860, Republicans declared their commitment to constitutional federalism in their national Party Platform, which stated "[t]hat the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of powers on which the perfection and endurance of our political fabric depends." 1860 Republican Party Platform, *in*, 1 Reconstruction Amendments, at 320.

In sum, at the threshold of the Civil War, moderate Republicans (who, according to Foner, "held the balance of power within the Republican Party," Foner, FREE SOIL, at 205) had no intention of abandoning constitutional federalism or reinterpreting the Ninth and Tenth Amendments. These Republicans believed that the slave holding southern states had fallen away from the original federalist principles of the Constitution and had continuously violated the personal rights enumerated in the Bill of Rights. *See* Michael Kent Curtis, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 266-70 (2000). The Republicans who framed and advanced the Fourteenth Amendment sought only to enforce those original rights while maintaining the basic principles of constitutional federalism announced in provisions like the Ninth and Tenth Amendments.

II. The Fourteenth Amendment neither enforces unenumerated substantive rights against the states nor alters the federalist meaning of the Ninth Amendment.

A. John Bingham, primary draftsman of Section One of the Fourteenth Amendment, sought to apply enumerated constitutional rights against the states while preserving the structural principles of constitutional federalism declared in the Ninth and Tenth Amendments.

Adhering to the basic principles of constitutional federalism was particularly important to the Republican who drafted Section One of the Fourteenth Amendment, Ohio Representative John Bingham. In his speech introducing the initial draft of what became Section One of the Fourteenth Amendment, Bingham explained that such an amendment was needed precisely *because* of the federalist structure of the Constitution. Rejecting the more Radical Republican views of unlimited federal power, Bingham insisted that the original Constitution left the regulation of civil rights to the control of the people in the states. In support, Bingham quoted Madison's explanation of constitutional federalism in The Federalist No. 45: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Bingham, Feb. 28, 1866, *in* 2 Reconstruction Amendments, 116.

It was because of his continued belief in Madisonian federalism that Bingham refused to support the passage of the 1866 Civil Rights Act prior to the adoption of the Fourteenth Amendment. In his 1866 speech opposing that Act, Bingham explained that "in view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States." Declared Bingham, "[w]ho can doubt this conclusion who considers the words of the Constitution: 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people?'" Bingham, March 9, 1866, *in* 2 Reconstruction Amendments at 136.

Bingham agreed with his more Radical colleagues that the personal rights listed in the Bill of Rights should bind the states. However, according to antebellum Supreme Court rulings like *Barron v. Baltimore*,[10] accomplishing such a result required the adoption of a constitutional amendment. Accordingly, in the early months of 1866, Bingham directed his efforts towards drafting and passing an amendment to the Constitution that would supply what Bingham described as "the want of the Republic, . . . an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to *these requirements of the*

[10] 32 U.S. 243 (1833).

Constitution." Bingham, Feb. 26, 1866, *in* 2 Reconstruction Amendments at 100 (emphasis added). Two days later, Bingham explained:

> The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day. It hath that extent—no more. Bingham, February 28, 1866, *in* 2 Reconstruction Amendments, 109.

Bingham would never have proposed an amendment federalizing the unenumerated subjects of local municipal law. Any such attempt would have offended Bingham's belief in the values of constitutional federalism. Bingham insisted that his colleagues in the Thirty-Ninth Congress remain true to "our dual system of Government by which our own American nationality and liberty have been established and maintained. I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe." Bingham, March 9, 1866, *in* 2 Reconstruction Amendments at 140. The problem to be remedied was the southern states' refusal to respect the rights enumerated in the original Constitution:

> The House knows, sir, the country knows, the civilized world knows, that the legislative, executive, and judicial officers of eleven States within this Union within the last five years, in utter disregard of these injunctions of your Constitution, in utter disregard of that official

> oath which the Constitution required they should severally take and faithfully keep when they entered upon the discharge of their respective duties, have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality. Bingham, February 26, 1866, *in* 2 Reconstruction Amendments at 100.

Consistent with his continued belief in the reserved rights of the states over all unenumerated subjects, Bingham proposed a constitutional amendment that would enforce the first eight amendments in the Bill of Rights against the states but leave the substance of all unenumerated rights under the control of the people in the States.

None of Bingham's Republican colleagues in the Thirty-Ninth Congress objected to the idea of enforcing the Bill of Rights against the states. Some members, however, worried that the wording in Bingham's initial draft might empower Congress to define what counted as federally enforceable "privileges and immunities." Republican Giles Hotchkiss suggested he would support an amendment that clearly announced "a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress." Hotchkiss, February 28, 1866, *in* 2 Reconstruction Amendments at 117. In the face of similar Republican criticism, Bingham agreed to withdraw his proposal. Bingham then redrafted his proposal which the Joint Committee on Reconstruction

ultimately adopted as Section One of the Proposed Fourteenth Amendment. *See* Proceedings of the Joint Committee on Reconstruction, *in* 2 Reconstruction Amendments at 154. *See also* Lash, The Fourteenth Amendment at 108.

That May, the Joint Committee on Reconstruction submitted to Congress a five-sectioned amendment which included Bingham's redrafted language for Section One:

> "No state shall make or enforce any law abridging the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, or deny any person the equal protection of the laws." *See*, 2 Reconstruction Amendments, at 155.

This final phrasing uses language with deep roots in antebellum legal debates as a reference to the enumerated rights of American citizens. *See* Lash, The Fourteenth Amendment, at 47-66; *see also McDonald v. Chicago*, 561 U.S. 742, 813-22 (2010) (Thomas J., concurring). As Bingham explained three years after the ratification of the Fourteenth Amendment:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the

> United States. Those eight amendments are as follows: Article I. Congress shall make no law respecting an establishment of religion, . . . [Bingham then quotes the language of the first eight amendments] *See* Bingham, March 31, 1871, *in* 2 Reconstruction Amendments, at 625.

Throughout the debates of the Reconstruction Congress, Bingham repeatedly described his efforts in 1866 as directed at passing an amendment that would enforce the enumerated rights of the first eight amendments of the Bill of Rights against the states. Not once did Bingham refer to the Ninth Amendment as one of the enumerated personal rights covered by Section One. This is consistent with the antebellum and Reconstruction era understanding of the Ninth and Tenth Amendments as structural guarantees of constitutional federalism. Lawyers like Bingham would know this common understanding of the Ninth Amendment from their study of the third volume of Joseph Story's Commentaries on the Constitution—a volume Bingham himself owned and used in his speeches before Congress. *See* CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (speech of Rep. Bingham) ("It has always been well understood amongst jurists in this country, that the citizens of each State constitute the body politic of each community, called the people of the State; and that the citizens of each State in the Union are ipso facto citizens of the United States. (Story on the Constitution, vol. 3, p. 565.)").

B. Senator Jacob Howard introduced Bingham's redrafted Privileges or Immunities Clause as protecting the first eight amendments and other enumerated constitutional rights.

John Bingham's fellow member on Joint Committee on Reconstruction, Michigan Senator Jacob Howard, also described Bingham's Privileges or Immunities Clause in terms that involve only constitutionally enumerated rights. *See* Speech of Jacob Howard, May 23, 1866, *in* 2 Reconstruction Amendments, at 187-88. In his speech introducing the Fourteenth Amendment to the Senate, Howard explained that the privileges or immunities of citizens of the United States included the right of traveling citizens to receive equal treatment enumerated in Article IV's Comity Clause (and described in antebellum cases like *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823)) as well as those rights "secured by the first eight amendments of the Constitution." *Id*. at 188. Every single privilege or immunity listed by Howard in his extended speech involved a guarantee enumerated in the original Constitution. Howard's speech is important: It was so widely read and republished that during the ratification debates speakers often referred to the proposed Fourteenth Amendment as "the Howard Amendment." *See, e.g.*, North Carolina House of Representatives, July 2, 1868 ("Mr. Seymour introduced the following resolution, ratifying the fourteenth article of the Constitution of the United States, the article known as the Howard Amendment."), *in* 2 Reconstruction Amendments at

418. *See also*, 2 Reconstruction Amendments at 185 n.* (listing newspaper coverage of Howard's speech).

C. The ratifying public was well informed of the speeches of John Bingham and Jacob Howard.

Unlike the secret proceedings of Philadelphia Constitutional Convention, the proceedings of the Thirty-Ninth Congress were public. Newspapers reported on the speeches and debates, often with verbatim transcripts, on a daily basis. *See* Introduction to the Collection, 1 Reconstruction Amendments, at *ix.* Bingham's speeches of February 1866 were published in the New York Times,[11] The New York Herald,[12] The Vermont Watchman and State Journal,[13] The Philadelphia Inquirer,[14] and Philadelphia's Illustrated New Age.[15] Bingham himself published his February 28, 1866 speech separately and distributed it as a campaign document. *See* John A. Bingham, Representative from Ohio, One Country, ONE CONSTITUTION, AND ONE PEOPLE: IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS (Feb. 28, 1866) (pamphlet printed by the Congressional Globe). Jacob Howard's speech

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[11] Feb. 27, 1866, p. 8; March 1, 1866, p. 5.

[12] February 27, 1866, p. 1; March 1, 1866, p. 1.

[13] March 9, 1866, p.1.

[14] March 1, 1866, p. 1.

[15] March 1, 1866, p.1.

introducing Bingham's final draft of the Privileges or Immunities Clause was also published in multiple newspapers, including the Philadelphia Inquirer, the National Intelligencer, the Hillsdale Standard and the New York Herald. *See* 2 Reconstruction Amendments at 185 n.*

In this way, the speeches and declarations of the members of the Thirty-Ninth Congress, including John Bingham's insistence that he sought an amendment that would do nothing more than enforce enumerated constitutional rights against the states, became a well-distributed part of the public record as the country considered whether to ratify the Fourteenth Amendment.

D. Nothing about the ratified Fourteenth Amendment affected the original federalist meaning of the Ninth Amendment.

1. Members of the Reconstruction Congress distinguished the federalist Ninth and Tenth Amendments from the personal rights enumerated in the first eight amendments of the Bill of Rights.

Members of the Reconstruction Congress distinguished the federalist Ninth and Tenth Amendments from the "personal rights" of the first eight amendments. In the Thirty-eighth Congress, for example, New York Democrat Fernando Wood declared that control over "domestic and social relations of the people of the respective States, was not and never was intended to be delegated to the United States, and cannot now be delegated except by the consent of all

the States. Articles nine and ten of the Amendments to the Constitution are conclusive on this point."[16] In the Thirty-Ninth Congress, Pennsylvania Democrat Benjamin M. Boyer quoted the Ninth and Tenth Amendments as evidence that Congress had no right to "disfranchise the majority of the citizens of any State on account of their past participation in the rebellion."[17] One finds similar Democrat references to the Ninth and Tenth Amendments throughout the Reconstruction debates. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. app. at 354 (1870) (remarks of Sen. William T. Hamilton) (quoting the Ninth and Tenth Amendments in support of a narrow reading of federal power).

Rather than disagreeing with the Democrats' federalist interpretation of the Ninth and Tenth Amendments, Republican advocates for constitutional reform focused on the need to protect the personal rights listed in the first eight amendments. As noted above, both John Bingham and Jacob Howard omitted the Ninth and Tenth Amendments from their list of constitutional rights protected by the Privileges or Immunities Clause, and instead expressly named the rights enumerated in the first eight amendments. As Bingham explained, "these *eight* articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment." Bingham, *in* 2 Reconstruction Amendments at 626.

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[16] CONG. GLOBE, 38th Cong. 1st Sess. 2941 (June 14, 1864).

[17] CONG. GLOBE, 39th Cong., 1st Sess. 2467 (May 8, 1866).

Bingham and Howard's omission of the Ninth Amendment from their list of protected enumerated rights makes perfect sense given the common Reconstruction-era understanding that the last two amendments in the Bill of Rights were distinguishable from the personal rights protected in the first eight. In the same speech quoted above, Bingham explained "[o]ne word further as to the gentleman's statement that the provision of the eighth amendment has relation to personal rights. Admit it, sir; but the same is true of *many* others of the first ten articles of amendment." Bingham, *in* 2 Reconstruction Amendments at 626. Bingham, in other words, understood that *many*, but not *all* of the ten amendments involved personal rights. Similarly, Jacob Howard described the Privileges or Immunities Clause as protecting "*the personal rights* guaranteed and secured by the first eight amendments to the constitution." Howard, May 23, 1866, *in* 2 Reconstruction Amendments, at 187-88.

Distinguishing the Ninth and Tenth Amendments did not mean these provisions were not part of the Bill of Rights.[18] It simply reflected a widely recognized distinction between the personal (individual) rights of the first eight amendments and the federalism-based rights of the last two. Put another way, there is no historical evidence that between the time of the

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[18] Nor does it mean that states are not bound to respect the federalism principles of the Ninth and Tenth Amendments. *See, e.g.*, *New York v. United States*, 488 U.S. 1041 (1992) (rejecting the idea that states can waive the Constitution's federalist separation of powers represented by the Tenth Amendment).

Founding and Reconstruction a new consensus understanding of the Ninth Amendment had emerged which viewed the provision as a font of unenumerated personal rights that could be applied against the states. In fact, only a few days prior to Howard's speech naming the first eight amendments as enumerated privileges or immunities that would now be enforceable against the states, Democrats complained that the proposed amendment amounted to an abridgment of the rights of states protected by the Ninth and Tenth Amendments. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Boyer).

2. The Fourteenth Amendment's Due Process Clause does not protect unenumerated substantive rights.

The Supreme Court has never defended *Roe's* reliance on substantive due process on the basis of an historical investigation of the original understanding of the Fourteenth Amendment's Due Process Clause. *McDonald v. Chicago*, 561 U.S. 742, 811, (2010) (Thomas, J., concurring in part and concurring in judgment) ("the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights. *See, e.g., Lochner v. New York; Roe v. Wade*.") (cleaned up).

Nor could it. At the time of the Fourteenth Amendment, the term "due process of law" was "universally understood to guarantee individual rights of legal process that only courts could provide." Michael McConnell and Nathan Chapman, *Due Process as*

Separation of Powers, 121 Yale L. J. 1672, 1727 (2012). To the degree that the framers of the Fourteenth Amendment viewed the Due Process Clause as providing *any* kind of substantive protection, it would have done so only as a kind of separation of powers requirement preventing legislatures from acting as courts of law. *Id*.

Antebellum lawyers were taught to view the rights of due process as procedural protections against the unjust deprivation of life, liberty or property. *See* James Kent, COMMENTARIES ON AMERICAN LAW (1827), *in* 1 Reconstruction Amendments at 97 ("The words, by the law of the land, as used in Magna Charta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words."). To Republicans, such procedural rights were the inherent right of all persons, regardless of citizenship. In 1859, for example, John Bingham "invit[ed] attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen— as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that 'no person shall be deprived of life, liberty, or property but by due process of law.'" Bingham, 1 Reconstruction Amendments, at 153-54. This made slavery the ultimate denial of Due Process as it deprived persons of life, liberty and property without any procedural protections whatsoever. *See,*

e.g., Joel Tiffany, Treatise on the Unconstitutionality of Slavery (1849), *in* 1 Reconstruction Amendments, at 252.

In the Reconstruction Congress, even the most radical Republicans described the rights of due process in procedural terms, citing well-known treatises and case law. In the debates over the Thirteenth Amendment, for example, Massachusetts Senator Charles Sumner declared:

> [The Fifth Amendment's Due Process Clause] was a part of the amendments to the Constitution proposed by the First Congress, under the popular demand for a Bill of Rights. Brief as it is, it is in itself alone a whole Bill of Rights. Liberty can be lost only by "due process of law," words borrowed from the old liberty-loving Common law, illustrated by our master in law, Lord Coke, but best explained by the late Mr. Justice Bronson, of New York, in a judicial opinion where he says: "The meaning of the section then seems to be, that no member of the State shall be disenfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of common law." Sumner, April 8 1864, *in* 1 Reconstruction Amendments at 435.

During the Fourteenth Amendment debates, when asked about the meaning of due process, John Bingham declared that "the courts have settled [the meaning of due process of law] long ago, and the gentleman can go

and read their decisions." CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

In sum, nothing in the text or history of the Fourteenth Amendment's Due Process Clause supports *Roe's* use of the "legal fiction" of substantive due process and the judicial invalidation of duly enacted state laws regulating abortion. *See, McDonald v. Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment) (This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the "legal fiction" of substantive due process."). The Due Process Clause requires states to provide all persons critically important procedural rights, but nothing more.

E. In *The Slaughterhouse Cases*, this Court correctly rejected an effort to read the Fourteenth Amendment as protecting unenumerated rights.

In *The Slaughterhouse Cases*, 83 U.S. 36 (1873), the Supreme Court rejected a claim by Louisiana butchers that a state-enacted monopoly violated, among other things, the Privileges or Immunities Clause of the Fourteenth Amendment. In his opinion for the court, Justice Samuel Miller acknowledged that the right to pursue a trade was one of the many subjects covered by Article IV's Comity Clause which, if granted by a state to its own citizens, must be equally extended to visiting out-of-state citizens. *Id.* at 75-76 (citing *Corfield v. Coryell*). The privileges or immunities of citizens of the United States protected by Section One of the Fourteenth Amendment, however, were altogether

different. *Id.* at 74. The rights of national citizenship involved those rights secured in one manner or another by the actual provisions of the federal Constitution. *Id.* at 79. (those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."). *See also id.* at 77 (rights which "depend[] on the Federal government for their existence or protection").

According to Justice Miller, these privileges include subjects covered by either enumerated congressional authority or enumerated constitutional rights. In terms of the former, Miller named the right "to transact business with the federal government," "free access to [the federal] government's seaports through which all operations of foreign commerce are conducted," access to the federal "courts of justice in the several States," and "[t]he right to use the navigable waters of the United States, however they may penetrate the territory of the *several* States." *Id.* at 79 (emphasis added). All of these powers fall within the enumerated authority of Congress, whether by way of the Commerce Clause or some other provision, with which states may not interfere. *See McCulloch v. Maryland*, 17 U.S. 316 (1819). In terms of enumerated rights, Miller named "[t]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution." *Id.* at 79. Since the right to pursue a local trade was neither an enumerated federal responsibility or enumerated federal right, the subject remained under the regulatory control of the people in the several states.

In support of his reading of the Fourteenth Amendment, Justice Miller relied on the basic principles of constitutional federalism. According to Miller, interpreting the Privileges or Immunities Clause as somehow nationalizing the unenumerated subjects of municipal regulation, especially when combined with the congressional enforcement powers granted by Section Five of the Fourteenth Amendment, would obliterate the federalist structure of the Constitution. Miller was unwilling to accept an interpretation that "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughterhouse*, 83 U.S. at 78.

Justice Miller's opinion closely tracks John Bingham's own interpretation of the Privileges or Immunities Clause, Jacob Howard's description of the Clause and what we know about the generation of Americans who adopted the Fourteenth Amendment. Only two years prior to Miller's opinion, Bingham publicly distinguished the state-enacted "privileges and immunities" of Article IV from the constitutional "privileges or immunities" protected against state abridgment by the Privileges or Immunities Clause. In his 1871 Speech on the Enforcement Act, in words that anticipate Miller's later opinion in *Slaughterhouse*, Bingham explained:

> Is it not clear that *other and different privileges and immunities* than those to which a citizen of a State was entitled are secured by the provision

> of the fourteenth article, that no state shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations? Bingham, March 31, 1871, *in* 2 Reconstruction Amendments at 626.

Justice Miller also was correct to insist that the Fourteenth Amendment be interpreted in a manner consistent with the traditional understanding of constitutional federalism. Bingham himself had no intention to obliterate constitutional federalism and he insisted that his proposal imposed no rights upon states which they were not already constitutionally oath-bound to protect. Like other moderate Republicans in the Reconstruction Congress, Bingham *valued* constitutional federalism, describing it as "our dual system of Government by which our own American nationality and liberty have been established and maintained. I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe." Bingham, March 9, 1866, *in* 2 Reconstruction Amendments at 140.

Finally, Miller was right to limit the privileges or immunities of citizens of the United States to those rights actually enumerated in one form or another in the federal Constitution. It had long been settled law that no state was permitted to make or enforce any law that conflicted or interfered with a proper exercise of enumerated federal power. *See McCulloch v. Maryland*,

17 U.S. 316 (1819). The problem in the 1860s was the lack of federal power to enforce enumerated federal *rights*. As Bingham explained early in the debates of the Thirty-Ninth Congress, "it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution." Bingham, February 26, 1866, *in* 2 Reconstruction Amendments at 100. Although Miller does not expressly declare that the Privileges or Immunities Clause applied the first eight amendments against the states, Miller does name enumerated First Amendment rights as protected "privileges or immunities." Nothing in his opinion closes the door on incorporation of the Bill of Rights. *See*, Lash, THE FOURTEENTH AMENDMENT, at 252-65. That door was erroneously closed in a later case, *Cruikshank v. United States*, 92 U.S. 542 (1876). *Id.* at 265; *see also McDonald v. Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J. concurring).

Reading the Privileges or Immunities Clause as protecting previously enumerated constitutional rights does not render the clause "a vain and idle enactment." *Cf.*, *Slaughterhouse*, 83 U.S. at 96 (Field, J., dissenting). Such a reading remedies a major constitutional omission that Republicans had long complained about—the lack of federal power to enforce the enumerated rights of the Constitution. As Bingham explained, "[t]he proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of

rights as it stands in the Constitution today." Bingham, *in* 2 Reconstruction Amendments at 109.

No moderate Republican in or out of Congress in the 1860s would have approved of a constitutional amendment that bound the states to enforce an undefined set of substantive rights and gave Congress the power the nationalize the same. This includes the otherwise unenumerated "right to abortion."

CONCLUSION

The Ninth Amendment as originally understood stands as a rule of construction: The enumeration of certain limitations on federal power shall not be construed as implying otherwise unlimited federal power. When paired with the Tenth Amendment, these two provisions have the effect of retaining the right of the people to local self-government. This is how the Ninth Amendment was understood for more than a century after its initial adoption and this was the common understanding of the Ninth Amendment during the framing and ratification of the Fourteenth Amendment. As a matter of historical understanding the Ninth Amendment cannot be read as authorizing the enforcement of an unenumerated right *against* the states.

Section One of the Fourteenth Amendment, as originally understood, bound the states to respect enumerated constitutional rights, including those enumerated in the first eight amendments. The Amendment, however, left the control of non-enumerated rights to the people in the states, subject only to the procedural requirements of due process and

the equal protection of the laws. This limited, though critical, advance in constitutional liberty reflects the Republican insistence that the enumerated personal rights listed in the first eight amendments be enforced against the states without erasing the principles of constitutional federalism declared in the Ninth and Tenth Amendments.

The majority in *Roe v. Wade*, and the plurality in *Planned Parenthood v. Casey* therefore erred in relying on the Ninth and Fourteenth Amendments in support of their decision to prohibit the people in the states from exercising their constitutionally retained right to pass legislation for the protection of unborn life.

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Dated: July 27, 2021