

2009

## Other Rights

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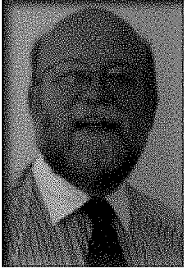
Pat Gudridge, *Other Rights*, JOTWELL (October 27, 2009) (reviewing Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 *Stanford Law Review* 895 (2008)), <http://conlaw.jotwell.com/other-rights/>.

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# Other Rights

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Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 Stanford Law Review 895 (2008).



Pat Gudridge

Kurt Lash starts with a well-known, seemingly minimalist reading of the Ninth Amendment's content, maybe James Madison's own. Whatever rights we conclude the text of the United States Constitution recognizes are not the only rights extant – however originating – and constitutional interpretation should proceed consistently, acknowledge somehow these other rights. “Other rights,” Lash thinks, include collective rights of self-government – the power of people, institutionalized in various ways, to decide for themselves the substance of the particular rights and duties organizing their legal relationships. The Ninth and Tenth Amendments therefore appear to overlap, not just because of the accident of their identical concluding references to “the people,” but because, read together, they describe a joint specification of proper approaches to reading the remainder of the United States Constitution itself: specifications (“enumerations”) of rights and powers should be read as limited – their text should be read restrictively – in order to leave space for “other rights,” including the specifying power to define or not define particular rights and duties. This last proposition, Lash asserts, applies to the Fourteenth Amendment in the same way that it does to any other federal constitutional specification of rights. It may be that this amendment in several ways restricts the ability of state governments and peoples to define individual rights and duties, but it does not deny the primary ability of governments and peoples to engage in rights defining exercises, and therefore the restrictions that the Amendment sets should be read in as limited a way as possible in order not to render meaningless the possibility of continuing self-government.

This account of the Ninth Amendment and its implications may or may not fit well with the thinking of the drafters or ratifiers of the Amendment, the companion Tenth Amendment, and the Fourteenth Amendment. Randy Barnett and Kurt Lash debate the matter in an exchange published in the same issue of the Stanford Law Review in which Lash's principal discussion appears. For present purposes, however, the key fact is the remarkably forceful bias that the juxtaposition of Lash's Ninth Amendment and Tenth Amendments generates: not just suggestive of much of the signal jurisprudence of the late-Rehnquist Supreme Court; not just suggestive of an account of the motivation – the preoccupation with the idea of limitation – evident on the face of the Supreme Court decisions like *Lochner* and *Hammer v. Dagenhart*; but also (seemingly – Lash himself does not push his argument very far in this direction) a point of departure for a defense of the Court's famous Fourteenth Amendment limiting opinions in its *Slaughterhouse* and *Civil Rights* decisions.

Lash confirms Akhil Amar. The juxtaposition of constitutional provisions and consequent attention to their interplay is a richly rewarding mode of identifying possible models of overarching constitutional schemes. And because Lash carefully separates his intratextual work per se from his accumulations of historical data points, it is especially easy to see how his own juxtapositions might be further multiplied – with perhaps surprising results. In this regard, it is important to consider carefully the role that “construal” – interpretation, construction, reading, etc. – plays in Lash's argument. The Ninth Amendment is understood as describing an

approach to interpretation that, when coupled with the idea of collective rights of self government suggested by the Ninth and Tenth Amendments, grounds the larger program of restrictive reading of the rest of the Constitution. But other constitutional provisions fix interpretative biases – not just the Eleventh Amendment (as Lash notes) but also the Fourteenth Amendment, for example. Professor Amar, of course, famously argues that the Fourteenth Amendment prompts a rereading of the Bill of Rights as a possible sometime specification of privilege or immunities of national citizenship, privileges or immunities now enforceable against state governments.

But the amendment's due process and equal protection clauses also oblige state officials to assess the content of state law through constitutionally supplied interpretive lenses – “due process” and “equal protection” – that mark as problematic departures from usual emphases or priorities or gaps in otherwise encompassing schemes specifying rights and duties and the like. These departures or gaps may be the result of the failure of state officials to take seriously federal constitutional or statutory commitments (in this regard the Fourteenth Amendment clauses echo the Supremacy Clause) or shortfalls may originate in failure to carry through commitments owing to state law itself. In this regard, therefore, the Fourteenth Amendment due process and equal protection clauses are themselves versions of Lash's “other rights” strictures – but now exhorting interpreters of state law. These officials must read state law in ways that give force to federal law and to their own law itself along lines suggested by the Fourteenth Amendment provisions, in the process therefore giving those provisions themselves sufficient weight. Any reading of the Fourteenth Amendment, as a result, must begin Lash-like with the interpretive project that the amendment poses for state officials, and therefore also must necessarily specify the substance of the concerns that the amendment would have officials take seriously. This specification will in turn fix the relationship of the Ninth, Tenth, and Fourteenth Amendments. The space left for “other rights” – and thus the legislative jurisdiction (as it were) left to self government – will be residual: whatever organization of rights and duties (or the like) that does not fall within Fourteenth Amendment due process and equal protection concerns.

This conclusion is perhaps consistent with Kurt Lash's own account and at least some of the Supreme Court thinking he highlights. The idea that the Fourteenth Amendment, where pertinent, sets aside ordinary constitutional expectations was, of course, an early contribution of Justice Rehnquist's, and the Supreme Court's later debates about congressional power to enforce the Fourteenth Amendment often quickly moved from musings regarding federalism as such to considerations of the substance – as the Court understood it – of due process and equal protection norms. Now-Chief Justice Rehnquist once more figured prominently. But if we add to the mix the Article VI Supremacy Clause (not much considered in Professor Lash's own discussion), another interpretive point of departure emerges. “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” State judges, plainly, must read state law with an eye to the content of federal law, and seek to avoid conflicts either by restrictively interpreting the content of state law or by simply treating state law as inapplicable insofar as it overlaps federal law. The Ninth Amendment, as Lash understands it, is not inconsistent – it simply obliges interpreters of federal constitutional grants of legislative power to avoid overly broad readings. But this means – for Ninth Amendment purposes just as for Supremacy Clause purposes – the first order of business must be arriving at some sense of what are the concerns prompting the Constitution's affirmative extensions of legislative authority. Neither the state judicial work of avoiding conflict nor the Ninth Amendment work of avoiding overbreadth can start without this analytically prior inquiry. The Ninth (and also Tenth) Amendment analysis is therefore once more derivative.

Constitutional interpretation, Kurt Lash reminds us, is crucially bound up with the question of which constitutional provisions will be treated as shaping the reading of which others. We knew that already, no doubt. But his particular demonstration of the results that appear to follow if the Ninth and Tenth Amendments

are read together is a tour de force. Of course, within the larger project, including not only juxtapositions but also determinations of precedence within and across juxtapositions, interplay becomes also a show of force. Lash's own effort works by surprise – we are struck by how large an impact substantively his austere reading of the Ninth Amendment proves to have given only a few subsequent steps. But other arrangements of constitutional provisions might draw upon other reactions, other interpretive stimulations – horror, suspicion; alternatively, a sense of decency, fellow-feeling, justice; ultimately, perhaps, a sense of resolve. It is the great virtue of Lash's analysis that it is provocative not only in its immediate conclusions, but in the glimpse it affords of its variants – it is itself irreducibly multiple.

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