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Book Review: "The Lost History of the Ninth Amendment"

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200—not 1,200—law schools. In an era when the public believes that lawyers are overproduced, this sort of mistake can only compound that perception, particularly when marketed to a general audience.

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Kurt T. Lash, *The Lost History of the Ninth Amendment*, Oxford: Oxford University Press, 2009. Pp. 360. $85.00 (ISBN 978-0-19-537261-8).
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Kurt T. Lash's *The Lost History of the Ninth Amendment* confirms that the Ninth Amendment was written as a "federalism" provision to offer, with the Tenth, a "dual security" for state and popular sovereignty and limited federal power; obliterates the standard view that the Ninth Amendment had lain dormant until recently; demonstrates that the courts followed the original understanding until well into the twentieth century; and, finally, shows how this original understanding might be synthesized with a sound reading of the Fourteenth Amendment

The Ninth Amendment tracked amendments proposed by state conventions to assure that the Constitution's rights provisions would not produce an inference of enlarged national powers (20–26; xvii). Contrary to the advocacy of scholars, it was not James Madison's original contribution to the Bill of Rights (15–16). Proponents of ratification had feared that "adding a bill of rights might be construed in a manner that would undermine the principle of limited enumerated power" (14).

In opposing Hamilton's national bank, James Madison said that the Tenth Amendment excluded "every source of power not within the constitution itself," while the Ninth guarded "against a latitude of interpretation" (38). Some would quibble that Lash refers equivocally to the construction of federal power required by the Ninth Amendment. In emphasizing Madison's theme of avoiding a "latitude of construction," Lash sometimes claims that the Ninth Amendment calls for strict construction of federal power (e.g., xvii, xix, 20–21, 95, 204), even though he just as often suggests that strict construction is a reasonable inference from the enumerated powers scheme itself rather than the amendment (37–39, 45, 251). Although he correctly observes that New York, as an example, proposed strict construction of federal power, he omits to stress that its proposal referred to powers "clearly delegated" in a provision anticipating the Tenth Amendment, while forbidding only an inference of "powers not given by the said Constitution" in its Ninth equivalent (21).

The final text of the Ninth Amendment does not dictate strict construction, and Lash says it prohibits "any *implied enlargement* of federal power because of the addition of an enumerated list of rights" (ibid., (emphasis added); see also 13–14, 16–17, 22–23, 26, 45).

Lash's analysis and summary of the history yields the conclusion that the key to understanding the "other[] [rights] retained by the people," referred to in the amendment, is to realize that it was, after all, "the people," as sovereign, who had delegated powers to the national government and "retained" all nondelegated power as among their rights (26–36; see 89–91) Lash correctly perceives that, though it uses passive voice and does not name the institutions bound by its injunction, contrary to the assertions of several major Ninth Amendment scholars the amendment is appropriately governed by the rule of *Barron v. Baltimore* (38). He may not be right, however, that "*almost all* Ninth Amendment scholars agree that the Ninth Amendment's provisions bind only the federal government and not the states" (ibid., (emphasis added); cf. 177)

In turn, he relates, virtually for the first time, how the balance of the Ninth's history, which went into the middle of the twentieth century, shows that the courts have largely followed what history shows to have been its original purpose. He even includes a chapter on "the Eleventh Amendment as a retained right of the people" (95–138). An important difficulty, he explains, is that only ten of the original twelve proposed amendments were ratified, so the provision ratified as the Ninth Amendment was often referred to in the early republic as the "eleventh proposed amendment" (xv, 40). A consequence was that early references to the Ninth, in speeches and written arguments, often referred to the "11th Amendment" (141). Exemplary was the opinion offered by Justice Story in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 47 (1820) (Story, J., dissenting), where he reasoned in favor of concurrent state and federal authority based on "the letter and spirit of the eleventh amendment of the constitution" (200) (quoting 18 U.S. [4 Wheat.] at 49). One reason this has not previously received much attention is that the reasoning in Story's opinion in *Moore*, and the Ninth Amendment, was ignored by the nationalist Chief Justice Marshall (206–11), even though in time others picked it up, and argued for, Justice Story's theme of concurrent power (211–16, 223–25).

Lash nicely summarizes the continuing federalism reading of the Ninth Amendment as the Civil War approached, including reliance on its language by advocates of secession. He also shows that, even in states that included provisions based on the language of the Ninth in their constitutions, the federal Ninth Amendment continued to be construed as a federalism provision. Moreover, in the Reconstruction era it was the first eight amendments—and not the ninth or tenth—that were associated with the privileges or immunities of American citizens protected by the Fourteenth Amendment. Lash also offers some insightful theorizing about how the Ninth Amendment might

most effectively be synthesized with the Fourteenth Amendment and the privileges or immunities of citizenship.

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Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law*, Cambridge: Cambridge University Press, 2010. Pp. 266. $95.00 (ISBN 978-0-521-11686-2).
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Historians of European empires have tended to absorb the subject of white violence into a narrative about colonial repression without probing the origins, scope, or effects of this history. Elizabeth Kolsky's welcome study, *Colonial Justice in British India*, of the phenomenon in colonial India establishes everyday violence as an important topic of separate and sustained analysis. Her book adds a significant chapter to the historiography on crime in empire.

Kolsky argues that white violence was simultaneously a crucial support for colonial rule and a potentially destabilizing force. The failure of colonial courts to hold European British subjects accountable for violent crimes contrasted with claims about the virtues of British-installed rule of law. The need to control unruly Britons—who composed what Kolsky calls "the third face of colonialism"—ultimately served as a rationale for expanding the reach of British authority (5).

The book's methodological premise is that small acts of violence, and the trials that brought them attention, sustained colonialism and were collectively more important than the prominent violent encounters historians have regarded as turning points in British rule in India. A consistent claim of the book is that the violence crystallized racial categories, especially by defining and protecting the value of whiteness.

Kolsky has carefully mined a fascinating set of documents. She traces the anomalous treatment of nonofficial Europeans under East India Company rule and shows that they were not fully under anyone's jurisdiction in the interior districts. The result was a spree of misconduct, theft, and violence, enough to fill a twenty-five-volume collection compiled by Company officials. Kolsky draws effectively on this and other sources to document the disorder and to show that British officials considered it a serious problem.

In a compelling chapter on codification, Kolsky analyzes the fraught attempts to alter the criminal jurisdiction of district courts and argues that the goal of controlling white criminality informed the movement for