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SEMINAR TRANSCRIPT

EDITED TRANSCRIPT OF PROCEEDINGS OF THE LIBERTY FUND, INC. SEMINAR ON LIBERTY AS A VALUE IN CONSTITUTIONAL LAW MARCH 23-25, 1984

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INTRODUCTION

Terrell: My article is something of an analytical thought experiment. My question to myself was: if I were to shatter the liberty "atom", what might I find? Although the effort I made in the paper could be generally classified as "conceptual analysis," it represents two fields of study that should be differentiated: philosophy of language and linguistic analysis. The aspect of philosophy of language that is reflected in my piece is the separation of the definition of a term from its underlying normative theory, the distinction between description and prescription. Linguistic analysis, on the other hand, is a technique for solving philosophical problems. What I have done is to examine the issue in controversy carefully by separating it into its conceptual elements and then reconstruct those elements into a meaningful definition of the term involved. The analysis of language is, I admit, a preliminary and not a final step in the resolution of any debate. But it should at least bring us to some greater clarity concerning the basic issues involved. This is particularly true with regard to legal controversies, for the law consists of language, and words are the stock in trade of all lawyers.

I am not interested solely or even primarily in the question, "What is the *law* of liberty?" I am interested in the broader and prior question, "What is liberty?" This latter question is conceptual in nature, and it is also therefore a linguistic question because our concepts travel and survive only in our language. Instead of trying to find out what the concept of liberty meant regarding each individual liberty mentioned in the Constitution, such as freedom of speech, religion, or press, I instead took on the larger task of investigating the concept of liberty itself and the one place in the text of the Constitution in which the word liberty appears: the Due Process Clause.

With regard to Professor Kmiec's paper, I was disconcerted to see that in my reference to Charles Reich's

recognition of the connections between property and liberty he thought that I was endorsing Reich's political program as well. The reason I cited Reich, and thought it useful to do so, was because of his descriptive analysis of the notion of a "new" property. But Reich's political agenda I do not endorse, and apologize if I conveyed that impression.

As for Professor Graglia's paper, he and I obviously have a very thorough disagreement as to the usefulness of my analytic technique, and as to the meaning of liberty. Assuming that his observations about the narrow historic meaning of liberty are correct and any more expressive analysis is wrong, it is interesting to note that a fundamental historical error has been made on the report of a speech by a famous Virginia country lawyer, not here at Williamsburg actually but at Richmond, in which the gentlemen stood before the gathered folk of that time and apparently said, "Give me 'freedom from bodily restraint' or give me death."

Professor Cass, has done us the worthy service of setting out the traditional categories of constitutional interpretation. But I would like to point out that none of those categories is in fact isolated to the Constitution necessarily. That is, all of Professor Cass' categories apply to *any* document that must be interpreted because it contains language with some degree of vagueness associated with it. Thus, these categories are in fact subsets, or more particular descriptions, of the kind of linguistic analysis that I have employed.

Professor Komesar worries about the connection of my definition of liberty to constitutional concepts of liberty in that he believes that my analysis will be fundamentally incomplete until I examine the institutions associated with the creation and protection of liberty. I do not disagree. My aim, however, was to investigate what those institutions were supposed to be about in some sense. But moreover, institutional questions are also considered in a conceptual context—that is, institutional choice may implicate our later understandings of various definitional elements within liberty, like meaningfulness or the distinction between liberty and license. But I would argue that this feedback effect is not all that dramatic for our purposes. It seems to me that while the existence of particular liberties may at any time depend upon institutional configurations, the concept of liberty

itself will not change with regard to institutions, that it will be largely independent of any particular institutional framework if the conceptual analysis is exacting enough.

Butler: My approach has been to examine the Constitution from a more traditional legal history perspective, after first noting that it contains what I have characterized as a rather meager and lackluster pantheon of basic substantive guarantees of liberty. The question under analysis, therefore, is what inference should we draw from that? And there are at least three alternatives.

The first is based on a notion that the framers entertained a homogeneous moral view. As a result, the further inference is made by Professor Ely, among others, that in the opinion of Jefferson—to take a notable member of the founding generation—“We the People” can safely trust the democratically-elected legislature to implement our shared moral view as to the legitimate ends of government and hence need not fear tyranny from that quarter of government. I think he is clearly wrong. For example, Jefferson observed that 173 despots, referring presumably to the number of assemblymen then sitting across the way in the capitol, would be no better than a single tyrant. Be that as it may, the group that I’ve termed principled positivists, such as Justice Rehnquist and Professor Ely, take the position that the judiciary should not undertake to imply additional liberties into the fabric of the constitutional structure, because judges *cannot* perform that task responsibly—even though these principled positivists acknowledge the existence of *implicit* institutional limitations on legislative hegemony.

A second deduction from the paucity of liberties in the Constitution is made by pragmatic positivists, who take the position that the framers held a decidedly heterogeneous view of the moral universe, given the many factions which had to be compromised in Philadelphia, and that consequently they adopted the Hobbesian position that there could be no unanimity on the moral goals of the new republic. By necessity, therefore, one had to repose ultimate political faith in the workings of the legislature—as constrained by procedural protections, such as bicameralism and separation of powers. These pragmatic positivists, such as Holmes and Frankfurter, have conceded none the less that the judiciary does retain some role in fleshing out the contours of certain personal lib-

erties in the Constitution. But in their role as dispensers of constitutional equity, these pragmatic positivists have taken a very deprecatory view of the equities on behalf of most citizen claims of a *socio-economic* nature, while demonstrating a remarkable sympathy for the competing claims of the state.

A third view is that of the due process absolutists, who would like the Court to flesh out and absolutize, new personal liberties *ad libertum*.

Well, Jefferson has been criticized by Leonard Levy, among others, because historical research indicates that even he, the great libertarian, did not feel that a specific guarantee like freedom of speech should have been an absolute. That paradox supports my notion of the assumed constitutional role of the local jury in fleshing out, through both civil and criminal trials, the implied terms of the social contract. Through jury decisions the existence of the *necessarily unspecifiable* set of liberties adverted to in the Ninth Amendment was to be vindicated. Why necessarily unspecifiable? Because while Jefferson and the other libertarian framers acknowledged the existence of immutable principles of fairness and justice, they recognized that the application of these principles over time would be mutable. In other words, what is fair and reasonable governmental conduct in 1791 may not be what is fair and reasonable in 1984. Who makes this transition? The institution chosen, I suggest, was the jury. In the First Amendment freedom of speech area, for instance, the jury would decide whether or not speech, which is sought to be criminalized or punished, entails "a clear and present danger" to the state. The jury would make this decision, not the judge, after the judge has decided whether as a matter of law the speech in question is protected. The jury gives the defendant "two hits" at the cherry. During the nineteenth century, the jury's role in finding the applicable law in criminal cases was arrogated by judges. But judges are not suited to make these ad hoc equitable decisions, because very soon institutional fatigue sets in. The Supreme Court doesn't have the manpower to make ad hoc judgments about the fundamental fairness of punishing individual defendants. The result is that, after awhile, the court decided to go one way or the other: either they will absolutize protection in a particular area or they will abdicate. For instance, we know that in the area of representation,

the Court decided to absolutize in the direction of "one man, one vote." And in the area of political speech, they have decided to absolutize by not engaging in ad hoc review so that basically anything goes.

But as an institution, the jury can do the balancing that is required to see whether, as a matter of fairness and reasonableness, our liberties are being violated. For the state to punish someone, there first has to be a law. The fact that there is a law, however, does not necessarily mean that a jury can't dispense with it, or except an individual from its operation, if it finds that the law is inequitable or fundamentally unfair as applied. How does jury nullification of the law differ from judicial nullification? It's better because jury nullification leaves the law formally intact, whereas judicial nullification means that the law and the whole statutory scheme are destroyed. Because jury nullification is less drastic medicine, it is more apt to be administered.

As Professor Reid has documented, it was the civil traverse jury during the Revolution that was the chief weapon of the Whigs in fighting Tory repression. How did they do it? By bringing suits against officials who were administering obnoxious laws. If the jury was convinced that a law was fundamentally unfair as applied, it would find that the statute afforded no protection or immunity to the official, and as a result the individual would receive discrete compensation for governmental tyranny. Thus my basic program is to restore the civil jury as a means of constitutional redress against the government for depredations against the innumerable, intangible liberties preserved to the people by the Ninth Amendment. In that way the civil jury offers a constitutional halfway house between the positivists who would limit constitutional liberties to those which are textually or structurally apparent and the absolutists who would trust 5 of 9 unelected judges to intuit an evolving number of absolute new liberties. The unanimous jury, as the dispenser of democratic equity, vindicates liberty on a retail basis, without at the same having to invalidate an entire statutory scheme.

Kmiec: What we have are two authors' very exhaustive and very legitimate attempts to understand what liberty is presently, not what it may have been historically or what it ought to be. With that in mind let's take a look first at Professor Terrell's contribution. We are told that some-

thing called the "new liberty" is the predicate to new property. I think that is something of a chicken-and-egg proposition. It may very well be the other way around, such that the increasing refusal of society to protect property and property rights may, in fact, be largely the cause of the decline of liberty in our society. As you may recall, "new property" is Yale Law Professor Charles Reich's bad idea which should have been forgotten long ago, but which, nevertheless, suggests that there can be no retreat from the ever-expanding public-interest state for among other reasons various corporate abuses. Now, I dispute Reich's notion because I think he all too easily fails to recognize that what he characterizes as one man's abuse is actually another man's liberty. With respect to corporate abuse, it may suffice to say that there has been an enormous amount of academic work that illustrates that corporations are no more than the individuals which comprise them and that corporations, in fact, serve valuable economic purposes in maximizing wealth and minimizing transactions costs, thereby making them a sizable economic plus and not a justification for diminishing our liberty.

Yet the new liberty is less than old liberty because it is premised on confiscation and redistribution, which are just other wrongs. Professor Terrell stated that his purpose was to define liberty and not to accede to Professor Reich's political agenda. I think that's problematic. There are indications that Professor Terrell still subscribes to the ultimate conclusion that Reich is pushing. Namely, Terrell states that "Just as Reich's property was government-related, consisting of various forms of largesse such as licenses, subsidies, and welfare payments, so too our new liberty is a centralized and politicized concept." "However," Terrell continues, "this could be viewed as primarily negative or primarily positive: one focuses on the dramatically expanded role of government in creating constraints on our actions; the other emphasizes the creation by government of new opportunities for individual choice." I have a great deal of difficulty recognizing the positive aspect of government largesse since I can't remember the last time government *augmented* individual choice. Acceptance of a Reichian thesis ultimately leads Professor Terrell to the erroneous conclusion that old and new liberty can be equated. There are obvious costs to liberty in this sense. Economic

liberty is diminished because resources are allocated through the state on totally non-economic grounds. Inevitably, the allocation of resources by the state goes to tremendously non-productive activity. New liberty also has a cost for political liberty, because such liberty can be lessened at the whim and caprice of the State by continuous reallocations of state-controlled new property. This was a problem that Reich, himself, couldn't solve by creating enormous due process mechanisms. It is also a problem that is not particularly well solved by Professor Butler's jury and its substantive compensatory role. At bottom, the notion of new liberty really distorts the concept of liberty. It distorts liberty in the sense that it suggests that one can only be "at liberty" when one is free from all types of restraints, even those attributable to wealth and moral suasion.

Turning briefly to Professor Butler's paper, he reveals in his historical searching that he's very troubled by the existing state of liberty. Thus, he turns to the jury as a substantive protector of liberty. I think the jury has its own problems, however. It is merely a different organ of the state. Moreover, it is clear that Professor Butler accepts a role for the jury in limiting not only invasive conduct but also noninvasive conduct. He suggests that this may be justified on the basis of what we gave up in the social contract. But it has been well shown that, if individuals did not have the capability to control noninvasive conduct in the state of nature, there is no logic that suggests that they can control it as a collective. My own conclusion is that the jury can be just as tyrannical as other public bodies. Professor Butler says the jury would work better than judges or legislators, but in my opinion that doesn't say a great deal. Professor Butler seems to suggest that juries are more detached, more equitable, more likely to award compensation. However, there are a number of studies cited in my paper which suggest that the jury is just as likely to agree with the judge; in fact, in one sample, they were found to agree three-fourths of the time.

Despite these disagreements, I believe the principal papers make an important contribution; namely, that the concept of liberty is best defined by looking at human action. Terrell does this by suggesting that we should define liberty in terms of a "life plan". His suggestion reminds me of Thomas Aquinas' well-known proposition

that one should seek the good and avoid the evil. It also suggests to me Robert Nozick's notion that liberty is related to entitlements: the entitlements that one has in oneself by natural necessity as well as in the things that one acquires by legitimate acquisition or rectification for wrongs.

Thus, in conclusion, my own view is that the way to define liberty—old or new—is in relation to old property, which maintains the independence, dignity and pluralism of society by creating zones in which the majority has to yield, whether that majority is represented by the legislator, the judge or even the jury. Liberty does not result by pretending that state privileges are liberty or that twelve individuals will have the courage occasionally to make up for outrageous infringements of human nature and development.

Graglia: I see an interesting philosophical paper by Professor Terrell, but it is not very useful in constitutional law. The analysis is so complex and difficult to follow that it is not likely to be usable in a legal context. But, more fundamental, we really don't have a problem of defining liberty at all in constitutional law. In law, of course, basically what we're trying to do is to govern the future by rules. The rules necessarily are groups of words. But you have a real problem when you try later to apply those words to disputes, the problem of what those words mean. Nothing is more disappointing than how little help you get from philosophers or philosophers of language. They don't know what meaning means either.

I notice that Professor Terrell toys with natural law ideas. He is worried that the Supreme Court and *Paul v. Davis* suggest that "liberty" has no independent substance whatsoever other than being a concept derived entirely from existing positive legal sources. But I suggest that Jeremy Bentham was right in his perception that natural law is not only nonsense but nonsense on stilts. It is not helpful to apply the "concept of liberty" to constitutional law because there is no constitutional problem that arises from inability or difficulty in figuring out what we really mean by "liberty".

What does it mean to say that neither the state nor the federal government shall deprive any person of life, liberty or property except by the due process of law? In terms of history, or indeed in terms of plain language, this is not difficult to understand. It means quite simply

that the state may not execute a person, imprison him, or take his land except by ordinary legal procedures. And that, of course, is a very important step in the history of human freedom. The state must behave according to established legal procedures — what the law is, what the legislatures create.

A problem arises only if you try to make the due process requirement a limitation on the legislature. Beginning about 1890, this happened, and it was given the pejorative name of “substantive due process”. Under it, the Court found ways to stop the welfare state, to stop social and economic experimentation, and to do it in the name of the Due Process Clause. It was not a very sensible claim, but the need was felt to be great. And in the history of constitutional law, when the Supreme Court feels the need is great, it acts. The need was felt to be great, for example, to disallow segregation in the schools of Washington, D.C., and so the Supreme Court told us that the Fifth Amendment Due Process Clause did that.

But the idea of substantive due process got the Court into trouble with the New Deal. It almost brought the Court to grief. The Court escaped relatively unscathed, however, perhaps even strengthened, with the arrival of the New Deal justices, the Blacks, the Douglasses, the Murphys, the Rutledges. And all that really came from it was the bad name of substantive due process. One was to never again use the language of substantive due process; one was to behave like a good, proper judge and not be a super-legislator. But, of course, that lasted only as long as it took for a case to appear before the Court that the new justices felt strongly about. As for substantive due process, the Court hit upon three ways to avoid talking about it. First, Hugo Black discovered that the Fourteenth Amendment was meant to make the Bill of Rights applicable to the states. This opened enormous new possibilities for imposing restraints on the states in the name of the Bill of Rights. If that proved not to be enough, Douglas, who wasn't quite as literal as Black, said the Court should also enforce “the penumbra” of the Bill of Rights when necessary. The second major move was the discovery of the Equal Protection Clause and all the marvels that lay therein. The Equal Protection Clause of the Fourteenth Amendment was found to require, for example, “one man, one vote,” despite the fact all the rest of the Fourteenth

Amendment made perfectly clear that this was not intended.

Finally, Justice Brennan discovered that it was ok for the Court to substitute its policy views for the legislature as long as it claimed to be enforcing only "procedural" rights, not "substantive" rights. In the history of constitutional law during the last thirty or so years, when something really intellectually disreputable was to be done, you gave it to Brennan. In the practice of law, the main question is how shameless are you. What is your embarrassment threshold? What can't you argue? The question, I tell my students, is, "At what point would you hide your head in your jacket and snicker?" If you can keep your face straight, it's a good argument. So, it depends on your ingenuity in argument and your embarrassment threshold. Brennan, I think, has the highest embarrassment threshold in the history of the Supreme Court. Much higher than that of Douglas, whose impulse was just to say: Look, why don't you guys just do as I say because it's right, because I tell you it's right and you can take my word for it. Brennan's impulse is to "explain" in detail why all his policy notions are constitutional commands.

Cass: I think it's important to try to put in context the notion of liberty in constitutional law. Quite clearly, liberty in its usual sense was a value embraced by those who framed and ratified the Constitution. Almost everything in the Constitution may be seen as intended to promote liberty. Government power is restrained in all sorts of different ways: the *ex post facto* prohibition, requirements for proof of treason, and amendments guaranteeing freedom of religion and speech and so on all restrain government (or intend to) and so contribute to liberty. Perhaps the most important protection of liberty in the Constitution was the division of power among the three branches of government, and on the legislative side, a division of power among the two Houses in such a way that you have different compositions and different incentives to the people involved. By making it more difficult to govern, you give much greater protection to liberty than you would by an explicit guarantee.

Having said this, it seems to me very difficult to look at the Constitution and to find it enshrining liberty as an ultimate good. Liberty in a generic sense is contradicted by a variety of things in the Constitution. After all, the

Constitution was designed in large measure to give the central government much greater power than it had under the Articles of the Confederation. Moreover, the creation of the two-house legislature was a compromise between the New Jersey Plan and the Virginia Plan. And each of those plans was put forth not to create liberty of the highest order, but to serve the self-interest of the people in those states. Those from Virginia wanted a national legislature that would give them the greatest chance of controlling it. And those from New Jersey and the smaller states wanted a governmental organization that gave the larger states less and smaller state more likelihood for control of the federal government. You can see in arguments over the Constitution and in the history of that time that people were not committed to liberty, but would use whatever power they had to oppress others. The greatest defenders of "liberty," people such as Thomas Jefferson, were opposed to absolute liberty for all; clearly they wanted the liberty to oppress others.

What this means in the constitutional context is that there is no general commitment to liberty; instead, there is a series of compromises borne out of interest in personal aspects of liberty, out of self-interest. The conflict among divergent self-interests is not soluble by means of any general analysis of what liberty is, what it means, or how it can be protected. I think that's true both as to substance and to process. Not only can we not define liberty in a way that makes these definitional issues disappear, we also can't describe any single best process for protecting liberty. While the major protection of liberty is the power-sharing arrangement, we will intervene through courts, and through juries on occasion, to protect certain very specific aspects of liberty. Much needs to be done to identify exactly what occasions are proper ones for judicial intervention, exactly what principles should inform resolution of particular conflicting interests in liberty, and what form of intervention is appropriate in specific contexts. When we get beyond these questions to the more abstract question of what is "liberty," we have reached the realm where discourse becomes quite difficult, and I think not terribly fruitful.

Komesar: It seems to me that we are promoting the idea that there are multiple conceptions of liberty. But how much do any of these conceptions tell us about the Constitu-

tion? We have to conceive of a means to carry out whatever conception of liberty we may have. To be sure, there is no comparative institutional analysis without definition of a goal. As such, it is important to discuss goals like liberty. I think the greatest frustration in my own work has been to learn how little actual results have come from the vast amounts of literature attempting to define goals.

Tim Terrell's paper takes on the difficult task of defining a broad based conception of liberty as a goal. But the apparatus he constructs is so enormous and so unwieldy as, I think, not to be useful. There are two parts to the analysis I suggest: the definition of a goal and the definition of institutions and their comparisons. But the process is not done in isolation. We must be able to ask questions about modern institutional choice. When we ask what is good constitutional law?, or even what is constitutional law? We must recognize the central reality of institutional choice and its role in forming our conception of constitutional rights and even its role in forming our conception of liberty.

Terrell: With regard to Doug Kmiec's comments, he suggests that my definition of liberty is not useful, but he reaches this conclusion not because of my descriptive exercise, but because he has raised a normative issue. That is, he wants the term liberty to mean something in particular, specifying at one point that we should understand liberty in relation to the "old" property. But that is not the exercise in which I was primarily engaged, which was to try to understand liberty in its largest context.

This also relates directly to the issue raised by Neil Komesar—the idea that neither definition of goals nor definition of institutions takes place in a conceptual vacuum. I agree, but my conceptual analysis represents an attempt at least to structure the debate about what our goals are. For example, if your goal is simply to "maximize liberty," that by itself is rather meaningless; but if we understand our goal as "maximizing *choices*," then we can begin to focus on more specific substantive issues.

Professor Graglia has raised some very important points that tie in with Ron Cass's comments. His point that law does not come from sources other than positive sources is one of the most fundamental and difficult jurisprudential issues that we face. That is, what is "law?" Or, more particularly, what is "*constitutional law*?" According

to Professors Graglia and Cass, the term liberty in the Due Process Clause is a different term than that used in the Preamble or perhaps in the Declaration of Independence. That is an interesting linguistic point, with interesting implications. That is, if the "liberty" in the Due Process Clause is only about imprisonment, does that mean that it is *not* about the other substantive liberties specified in the Constitution? I find that rather disturbing.

Even the most famous of modern legal positivists accepts the fact that language and words do not create precise images; they create fuzzy images. In *The Concept of Law*, H.L.A. Hart discusses the inherent open texture of language that dictates that all statutes will inevitably apply to a range of actual instances. This in turn means that the language of the Bill of Rights will also have an open texture, that these rights will have "penumbras"—which is exactly the word that Hart used. Because of vague uses of language, the notion that the Bill of Rights means something absolutely specific in every instance is impossible to defend. It seems to me untenable that "religion" or "speech" mean specific things. Furthermore, you should note that the creation of a new right, like "privacy," from these "penumbras" is not the product simply of a linguistic-definitional exercise, but it requires the use of some normative agenda. It is therefore useful to recognize the difference between these two exercises: one which simply tries to find out what a word may mean in a central case, and the other to find out what you want it to mean because of some set of values you want to impose.

Butler: Doug Kmiec picks up on my suggestion in the paper that the jury is a sort of halfway house between two different approaches. The jury provides the neutral principles. That is, on a procedural basis, what emerges from the jury's deliberation becomes our definition of liberty. The jury is an empirical process for determining, under changing circumstances, what our immutable principles of fairness and justice properly mean. Take the example of the *Penn Central* case, in which New York City passed an historical zoning statute that said Penn Central couldn't build above the existing facade of the Grand Central Terminal because of its unique aesthetics.

Justice Brennan acknowledged Penn Central's contention that its activity was non-harmful and non-inva-

sive, but then he asks, "Who's to say that it is not *harmful* conduct?" In a fit of judicial agnosticism, Brennan, suggests that the failure to provide benefit may constitute a harm, because New Yorkers wants to see this building so badly, etc. If you had a jury in this case, that is, if you had someone putatively disinterested, you could say to them: Ladies and gentlemen of the jury, was it reasonable for Penn Central to expect, under all the attendant circumstances, that it would be allowed to alter the facade in this way? And the State could argue the same point they argued to the court, that the inefficiency of Penn Central's proposed use of the property would cause a legally cognizable harm—that Penn Central was trying to "perpetrate an inefficiency." And if you can sell that argument to a unanimous jury of twelve, good luck. But I say, whatever arguments are to be advanced, submit to a jury the basic politics-ethical question whether what Penn Central wants to do is harmful in the sense that it should be both prohibited from doing it and denied compensation?

Doug, though, clings to the protection of physical property. My suggestion does introduce the possibility that a jury may find that an individual's non-invasive use of his property is nevertheless somehow harmful based on community standards, *i.e.*, commonly accepted standards of what is neighborly conduct. For instance, an inefficiency might be so palpable and gross that it would be considered to be impermissible even though non-invasive. But how sacred is it when today the State can build an improvement in your neighborhood, create a special tax assessment district, and have an *ad valorem* tax levied on your physical property, which you may be unable to pay? There goes your sacred physical property. Historically, in 1791 the practice was to have an *ad quod damnum* jury of twelve people make all special tax assessments. Also in 1791, the pervasive practice in just compensation law was to have this jury decide how much compensation one was entitled to. What happened to the *ad quod damnum* jury? The railroads, who enjoyed the vicarious power of eminent domain, convinced the legislatures, beginning in Pennsylvania, that, since juries tend to award too much money, it was better to appoint a commission to assess damages. The railroads quickly captured the commission. A great popular protest went up that this violated state analogues to the Seventh Amend-

ment; but, of course, the democratic legislature insisted that this was in the true interest of the public. By restoring the right to a jury in matters of taxation, regulation, and condemnation, we have more effective compensable liberties than we do by clinging to the illusory belief in the sanctity of physical property.

As for the institutional qualities of the jury, I think that it has a number of advantages. Normatively, a significant point of my paper was to relate the model of the jury to the eighteenth-century moral-sense school of philosophy on the basis of the assumption that it assumes that a jury of twelve people would be able to recognize, on the basis of aesthetic judgment, when a fundamental injustice was being perpetrated by the government. The jury is also a better institution for this purpose than the appellate courts because judges are subject to institutional pressures that may bias their determination. Therefore, equity should not be administered by judges; equity should be administered by a disinterested group of jurors.

I. THE PLACE OF LIBERTY IN A STRUCTURE OF CONFLICTS AND CONSTRAINTS

Cass: It's important to discuss some of the distinctions about how people go about reading constitutional text. If you asked, what was meant by the term liberty when it was put into the Constitution, I would say that probably — and I can't emphasize the word probably too much — it meant simply freedom from physical restraint. If you wanted to ask a different question, not what was historically intended, but how ought we now look at this, then maybe my answer would be different. Maybe I would say that we should put the Fifth Amendment into the Due Process Clause, since we've read the Privileges and Immunities Clause out of the Fourteenth Amendment and since it's important to me to protect freedom of speech in some respect. But I'd like to emphasize two points. One is that the question of what we ought to do involves a very particular sort of analysis. It's not a definitional analysis. Of course, the meaning of the term "liberty" plays a role. But I'm asking, what ought we to do? I'm not asking, what do we mean by the term? That may be a part of my thinking. It may constrain my thinking in some sense, and it certainly may constrain the courts; but

when someone says that we ought to begin by thinking about what the term "liberty" means today, I want to know why. Why should I care what it means today, as distinct from what it meant when the Constitution was written? The real questions are: What ought we to do, what principles should we advance, and how should we advance them? Second, I think that, to answer these questions, you are invariably driven to very particular sub-issues; you can't answer them at the meta-level. Every real issue in law depends not on the definition, not on our agreement on some abstract formulation of words, but on what you might call theoretical implication.

Graglia: Nothing illustrates Ron Cass' point better, I think, than the debate on the Equal Rights Amendment in the Senate. The question was, who's in favor of equal rights for women, and virtually everybody put up their hand. After all, who's against equality and equal rights in this country? Once it was settled that everybody was in favor of equal rights for women, that you shouldn't discriminate on the basis of sex, the very next question was, should we draft women? And the Senate voted no. It just illustrates that when you go from the abstract — so abstract as to be hardly meaningful — to the specific agreement is less easy.

Another point: Does the meaning of the word derive from the result, or does the result derive from the meaning, or is there an interplay? Congress can regulate interstate commerce; so, we have to decide what is and what is not interstate commerce. And we see that Congress regulates a lot of things. Now, can Congress regulate those things because they're interstate commerce, or are those things interstate commerce because Congress can regulate them? Consider some seemingly very clear and specific words "man" and "woman". A person sued to play tennis in the women's division of the U.S. Open. And a state court judge said, yes, you may, because you really are a woman. I found this fascinating because of the famous statement illustrating the omnipotence of Parliament, that Parliament can do anything except make a man a woman. Hell, in this country even a lower state court judge can do that. Was the person allowed to play because the person was a woman, or was the person a woman, at least legally, because allowed to play? This example illustrates how small a role the word can play,

because there are few concepts, I would say, that are clearer than the difference between man and woman.

The meaning of what is "interstate commerce" or "property" is determined by what the courts do. The words provide only as much restraint as the judges wish to have, which today is very little. What then, determines what Congress can regulate as interstate commerce? All one can say is: How its court resolves the conflicting interests involved that cause us to have this problem in the first place, the interest in, say, an efficient national market versus the is local autonomy. Today judges think that an efficient national market is much more important than local autonomy so anything can be "interstate commerce." Evaluation of its conflicting interests—a policy judgment—determines the decision, and the decision determines the meaning of the words.

Kmiec: I think Tim Terrell is putting too much into the definitional category. In allocating some things to the descriptive or definitional and some things to the theoretical and ethical, he gets some of the classifications wrong. Nevertheless, the most important thing is that he is willing to ask the question: Is there a way to decide whether or not something ought to be in the definitional category or whether something ought to be in the ethical category? A tautology—that the law is the law because the law is the law—is insufficient in any ethical sense. It is most insufficient for anyone trying to live within a constitutional government. It doesn't really give one much comfort that someone has asserted, either through force of vote or force of arms, that something is law.

Butler: We say that property connotes facts but denotes legal consequences. So, in reading Tim Terrell's piece, I asked myself, what is the real organizing principle that keeps items within the large circle known as property? He points out that peripheral cases within the circle of liberty may bear no resemblance to one another. In other words, they may share no common element, but they may be within the circle of liberty because they share an element in common with the hypothetical central case. Arguably, then, the question has become: What institution decides in the first place to confer the legal protection which then spells protected liberty? And, of course, for me that institution should include the jury. But my article ties into Tim's in the further sense—and I think it's significant—that his analysis will help lawyers struc-

ture their analogical arguments to the jury. That is, does this person deserve to do what he wants to do under the rubric of liberty? And in reasoning through this question in an analogical fashion, which is the only way twelve people off the street are used to reasoning, lawyers on both sides would employ precisely the sort of model Tim suggests.

Komesar: I am interested in knowing what it is that I observe in the Constitution or constitutional law. Everyone agrees that we want liberty. It is like a shopping list: we want many things. The real test comes when you have to put your budget constraint next to the shopping list. Then comes the battle over meanings. Now, suppose we see the Constitution as a means of telling who won the battle. That is, we know that there is a conflict between notions of what liberty should mean and whose interest should be protected. Given the constraints of society, how will these conflicts be resolved? Which forms of liberty will be or ought to be paramount? It may be that in some instances it is best to keep the government out, and while in others it is best to rely heavily on government. Under these circumstances, I cannot judge what liberty is by looking at what liberty has come to mean in two clauses of the Constitution. My observation of the Constitution has to be a great deal more sophisticated than talking about what liberty has come to mean under these two provisions, because the term is used in a very narrow fashion, that is, protection of a group of people or of an individual against the government. But if we had a sophisticated perception, it might be that there are broader forms of liberty best protected by government. This institutional choice — government's role is central.

Graglia: The question is: Do results define the word or does a definition of the word determine the results in law? It seems to me that the answer is the former. Results define the word. What then determines the results? The deciders' view of the conflicting interests determines the results. Now, what role, if any, does the word play in this? All I can say is that, the way courts operate today, the word provides very little restraint. Of course if a word can mean anything, communication is impossible, and that is in fact the situation in "constitutional" law today; there is no communication between the Constitution and the Supreme Court.

Now, Neil Komesar is wrong in saying that the Con-

stitution represents a vast array of value choices. Realistically considered, the Constitution tells us nothing about almost any real social problem. It tells us we can't have a thirty-four year old president and that we can't have foreign-born Henry Kissinger as president, but those aren't problems. Neil is operating as if we have this magnificent collection of restraints on government, but just look at the Bill of Rights. The Second Amendment for example, gives us some kind of right to bear arms in connection with a "well-regulated militia". Yet who brings that up today except opponents of gun control? Certainly not the ACLU, which otherwise keeps telling us that the Bill of Rights is marvelous. Who needs this amendment? If it really meant that a city could not ban firearms, I would say that proves again that constitutional restrictions are a mistake. Happily, the Constitution in fact restricts very little, so little that real constitutional problems almost never come up. I have never seen an unconstitutional law except once, and the Supreme Court held that one constitutional.

Terrell: Lino Graglia has come down, I think, fairly hard on the proposition that results determine words. And what determines results? Conflicting interests. Thus, he says, words have no important function in this drama. I disagree. How does one frame the interests in the first place? Words are the method by which we frame the conflicting interests whose competition the results then reflect. One could have the impression, of course, from reading Supreme Court decisions that results determine words, but that is only because of the power of language and words to define the issues in the first place. The best example, I suppose, in the Constitution is the definition of the term "speech." That term now includes all sorts of things that have nothing to do with actual verbal, spoken communication. So, it would seem obvious that in some instances words are bandied about with no one paying any particular attention to their "definition". But note that in making this point, you are implicitly criticizing this method of operation, and that is because you have some sense of what it means when, to return to your example, you use the words "man" and "woman." You already have some definition of these words in your mind. How else could you communicate?

Graglia: I really have no interest in whether altered males get to play in the women's division of U.S. tennis. What of-

fends me is that I am governed by Harry Blackmun. I think it is shameful that the basic rules as to my life in this society are made by people like Blackmun, by the majority vote of a small committee of lawyers unelected and holding office for life. Lawyers, for goodness sake! People who avoided education by going to law school; people trained in trickiness, their only area of expertise. These people are making important rules, literally of life and death, governing my life. But I am supposed to be living in a representative democracy. Now, that's my agenda. If we got more specific, that's what I'd complain about.

The plain and simple fact is that the Constitution has nothing to do with constitutional law; it does not bear on any problems that actually arise. What this means is that the decisions are made entirely by judges, not by the Constitution. The only question worth discussing therefore is, should judges be making those decisions? I don't like leaving the decisions to them. Brennan and Marshall and Douglas are just human beings who are willing to decide anything, only people with a high degree of self-confidence. Douglas just knew that if we let him make all the decisions, we'd get better government.

Kmiec: I agree with Lino Graglia that results do define the word. Then the question is: What results are right? Lino tells us there are conflicting claims. I think in order to weigh those conflicting claims, we have to come fully to grips with a particular normative base. We have to identify whether that normative base is consistent and not subject to contradiction. I think that old property does that for us; and I think that natural law does that for us to some degree.

My fundamental difficulty with George Butler's proposition for the jury is that it doesn't address the normative question head-on. Instead, his proposition leaves it to these twelve good men and true to do the best that they can from time to time; and he suggests we will be better off. However, the pragmatic jury can sit back like many planning and zoning commissions and boards of adjustment currently do and say: Well, maybe we want an individual to provide a benefit for us, and we don't want to pay for it. I think juries run a great danger of not being disinterested arbiters of the social contract, but instead just another vehicle for taking property from others without compensation. In Indiana, where we still

believe in the Constitution, our juries may be standard bearers of an objective normative system; they may know right from wrong, and may decide correctly. But out in California, where the People's Republic exists, forget it.

Cass: Lino Graglia made the point that the Constitution doesn't really tell you anything or that what it tells is really not worth telling. I disagree. I think the Constitution sometimes tells us things quite clearly, and they may be important. Take, for instance, the First Amendment's speech clause. Two things are clear: one is that among the exercises of governmental power with which we are peculiarly concerned are those that interfere with speech. The Amendment does not explain why that is so, in what class of cases, or what the operative function of this prohibition is. But it is an important matter to know that interference with speech is at least a flag, a signal for concern. Second, while it is not clear what abridgment is or what freedom of speech is, the First Amendment does make plain that we are talking about the law-making power of Congress. This is the type of governmental action to which the proscription attaches. Of course, these two plain lessons in the First Amendment have received very different treatment. Interference with speech is regarded as special. We have not fully worked out the borders between speech and "non-speech" but for a broad range of controversies over the substance of the constitutional provision this simply is not an issue. On the other hand, we have paid no attention to the fact that by its terms the First Amendment reaches only congressional lawmaking. There may be good reason for ignoring the text, but that does not make any less clear.

Tim Terrell would look to text and begin analysis of it with abstract inquiry into key words' meaning. He says that the reason we have to engage in definition going down to the different elements of liberty is because it gets us to the theoretical issues and to the normative debate. I can't help feeling that this is playing with shadows. When we go about arguing over definition, we are really arguing about applications. Each one of us has different situations, different hypotheticals, different real cases, that we are concerned about. I think the definitional approach miscasts the debate. We ought to move directly to arguing over what is in our minds. What should we do in the different situations that each of us is

thinking about? How should those situations be treated in our use of the Constitution?

As for juries, George Butler tells me that they protect liberty. But I want to know whose liberty is being protected, under what circumstances, and why we think it is a good thing? It is quite clear to me that the jury will not protect my liberty in every instance. Judges will do much better in some instances, particularly when you look at who comprises juries. They are not an even cross-section of the population. Anyone who has been asked to serve on a jury has a good idea why they are not an even cross-section. So, before I know whether we want to use them or not, I need to be told what it is we want them to do. We are not really talking about protecting liberty versus not protecting it. We have conflicts among liberties — yours and mine.

II. ALLOCATING RESPONSIBILITY FOR THE PROTECTION OF LIBERTY

Komesar: The argument in my paper is that given a broad definition of liberty such as Tim Terrell's a great deal hinges on the modes of protecting and, therefore, on issues about liberty the allocation of responsibility to government. Hence, a great deal of what is the police power, what Congress is given to do, is, in fact, a responsibility to protect liberty, as broadly defined by Tim. It has become conventional to talk about protection of liberty narrowly. I believe that protection of liberty is the protection of somebody, from somebody, by somebody. And it is not always from the government that the person or entity is to be protected. Often the protector is the government. The question really comes down to when you want one entity to protect and when you want another. I also think that, we make a mistake if we limit that interpretations of the constitution to simplified notions of the images the framers might have had at the particular moment. We must look instead to possible needs they felt in putting the provisions into place.

Butler: Liberty, I agree with Holmes, is the hypostasis of a prophecy of what you can get away with. What will the courts let you get away with? Or, in my case, what will the jury let you get away with? And how do you frame the debate? You frame the question to the jury using the term "liberty." What should a person be allowed to get

away with? What should he be at liberty to do under the implicit contemporary terms of the social contract? And I make a distinction from the procedures adopted during the nineteenth century, whereby judges arrogated authority from the jury in many areas, but particularly in the area of interpretation of contracts. These judges took away from the jury their historic right to flesh out the implicit terms of a one-on-one commercial context. It was thought that the jury's normative input was inappropriate in a commercial setting, because the parties, in this discrete transaction, were able to set out in great detail all the relevant terms of their agreement and should be encouraged to do so. My observation is that this practice is totally inappropriate in the context of the social contract. It is not a discrete commercial contract. We aren't able in advance to put all the terms down on paper. The framers recognized that. They drafted the Ninth Amendment, which says in essence that the Parol Evidence Rule is inappropriate in construing a social contract. There is a pantheon of unspecifiable liberties out there. How are those liberties identified and applied in discrete cases? By the jury. And so, your confidence as a citizen in undertaking any economic enterprise stems from the fact that, if the government ever tries to tell you "no," you have the opportunity to convince a jury of twelve fellow citizens that you had a reasonable expectation, under the circumstances, of being allowed to continue.

Doug Kmiec, however, is troubled by the fact that maybe standards are different in California. Who knows what a jury of twelve people in California would do? It's impossible to predict. But if you don't like California equity, then I suggest you move to Maine, where you might be better able to predict what a jury of twelve solid, not to say stolid, peers would do. We have the phenomenon, of course, in the Bankruptcy Act that, despite the provision that Congress shall promulgate a uniform rule of bankruptcy, it has been interpreted to contemplate the possibility that diverse state exemption laws can be adopted by Congress as part of national act. An exemption that's appropriate in Texas, a homestead or a farm, may not be appropriate in a more commercialized jurisdiction like New York. That's the sort of diversity the jury provides, and I think it's conducive of liberty.

Cass: George Butler in large measure brings us a choice be-

tween the judge and the jury. But I think that's the wrong issue. It's not just a choice between judges and juries; it comes down to a variety of different things and in different contexts. We're willing to take liberty away, but the important question is, who gets to do it? The social contract, if you want to read the Constitution as a contract of sorts, gives the decision to individuals, to the legislature, and to the courts in some measure. But it is not very good at specifying who gets what. It is quite clear that we do not want the legislature to make absolutely all decisions unconstrained. It is also clear that we don't want the courts to do this either, even if they do it by jury instead of by judge. The difficulty we have is in trying to separate out whom we want to make the decisions and why.

Kmiec: George Butler raised an important issue of federalism that I want to address briefly. He says that we ought not impose a rigid federal rule on all the States, so that if California wants to be socialistic and Indiana wants to be capitalistic, that's their business. I don't think that is the way to frame the issue. The question is: Whether *any* government, federal or state, can impose itself on an individual? This is the issue that tends to get lost over and over again in the federalism debate.

Bond: I've been intrigued by the discussion about how one attributes meaning to words, particularly words that are found in the Constitution. I confess I have a fairly simple-minded approach to that problem: I assume that when people use words, they intend them to communicate some particular meaning. And in the case of those who drafted the Constitution, it seems to me that the initial inquiry must be to look at what they intended those words to mean. Though there are great difficulties in that kind of historical research, they are not insurmountable. I think that a fair reading will reveal that the framers had a natural law concept of liberty. There is no doubt in my mind, for example, that the people who framed the Fourteenth Amendment and those who were debating it at the state level understood that Section One embodied natural law concepts. Those who defended Section One of the Fourteenth Amendment invariably identified the source of the concepts as the Declaration of Independence. And the Declaration of Independence, in my view, is indisputably a natural law document. So, if we're trying to determine what liberty means in the Con-

stitution, we ought to be asking ourselves what the framers intended it to mean.

Wallin: When I read the first portion of Tim Terrell's paper, I found it not only interesting but very satisfying in one respect. It reminded me a little of reading a Platonic dialogue about the real stuff, liberty — great off-the-shelf, without any amalgamation. Yet, the more I read, the more I realized that I was going to soon reach a point of profound disquietude, which I did. And that has to do with the fact that the paper really is too divided in the sense of having this very abstract articulation of liberty and then talking about the historical development of the court and juries, and so on. But in intellectual discourse, that's not the way things ought to be. One should start first with particular questions and examine them and then on to the universal questions and try to articulate them. The difficulty I found with the paper was that I could not find a way to understand clearly what particular examples of liberty might have been in the minds of those who wrote the Constitution.

The first thing to do, it seems to me, is to find out what was intended in the Constitution. One has to begin with what was intended in order to understand what one is dealing with. A concrete example, a way to approach this question of liberty, might be to ask a question like this: The Constitution has something called separation of powers; what does that mean? And one can begin with something like *The Federalist Papers*, the notes on the debates at the Constitutional Convention, and so on. You may discover that it meant "a," "b," or "c." And then you might ask, now that I understand what separation of powers is, why do we need it? And there's an answer to that. It goes as far back as the Declaration of Independence. Yet, I don't know of any way of getting to this level of understanding — of the particular and the universal — if you begin with the abstract universal; I don't find a way of jumping to it.

Karlin: There was, I believe, little ambiguity as to what was intended by the word "liberty" when the Framers put together the Constitution. The word "liberty," appears in the Preamble; and under 18th Century rules of construction, the Preamble was an extraordinarily important part of the document. It defined what the Framers intended. It is, therefore, not something one can simply gloss over or ignore.

For the Framers, there was a clear identification of property and freedom. If you could own property, it meant you were free. Creditors were protected; there was no intention to provide doctrinal support for the redistributed of property rights. How do we know this? We know it from four clauses in the Constitution and the Bill of Rights: the *Ex Post Facto* clause, the Eminent Domain clause, the Contracts clause and the Due Process clause, the last re-affirmed in the 14th Amendment. Life, liberty and property are all-inclusive; and any law or regulation is to some extent an intrusion on one or another of them, which meant, as Aaron Director put it, that every law or regulation comes into being under a presumption of error. The four clauses were structured to stand as barriers to intrusions on rights owned by the people.

Liberty could then be defined as freedom from restraint. More practically, it guaranteed access to the market and protected minorities from majority factions. What it all came down to, so far as the Framers were concerned, was that a law or regulation would be validated only if the state could show necessity. And here, it should be parenthetically noted, the dubious distinction between property and individual rights was hardly stressed. As a result, neither the Court nor the legislature was supreme. Sovereignty, as the Court noted in *Yick Wo*, remained with the people and people were encouraged to engage in voluntary exchange. The courts were there to resolve disputes—to provide corrective rather than distributive justice. You will recall that there were relatively few judges, and legislators were not supposed to work full time. Given those four clauses, there really wasn't much for them to do.

Now, what happened, I suppose, is that as we kept shifting away from a property rights orientation (liberty) to a transfer society, it became necessary to weaken the barriers that held the legislature in check. The important way this was done was to create the distinction between individual and property rights and then give to the legislature virtually full control over property rights. It is this distinction that has produced most of the problems with which we are currently faced.

As a solution to these problems, the introduction of economics as a reasoning tool has been enormously important because it showed that most laws and regula-

tions, enacted ostensibly to help those in need, usually miscarried and were, for the most part, counter-productive. Redistribution in the name of fairness and good purposes was mainly a myth. This meant, then, that there was a congruence between what the Framers intended and the notion of efficiency. And only in relatively few cases were efficiency and fairness unrelated.

The doctrine which describes this form of constitutional law decisionmaking is "substantive due process." It was simply a process which required of any legislative enactment proof of necessity. If the legislature couldn't make the showing, the enactment was declared invalid. What you really had were forced market solutions to problems. And it seems to me that what was finally created was a political structure that closely resembles what Peter Aranson calls "radical decentralization."

Turning briefly to the jury, the difficulty with enlarging its sphere of influence is that it gives to the jury the right to deal with other people's property, which is precisely what the Framers never intended. Giving this right to the jury will probably result, in George Butler's terms, in taking the law as given. But, what good is that? That is the problem.

In constitutional law, as Edward Levi has explained, it is always possible "to find again" what the Framers "really intended" and, in the process, overturn cases. The four clauses I earlier referred to, were intended to be pillars of strength. I would suggest we move quickly toward their restoration.

Williams: I'd like to start with "liberty" as used in the Fifth Amendment. It seems to me that on this issue Lino Graglia is unquestionably right and Norman Karlin wrong. The two main sources that you can look at are Magna Charta and then the succession of English statutes, which every 50 or 100 years slightly modified the Magna Charta language, and which essentially are aimed at protecting people from having their heads chopped off, being thrown into jail, and having their goods confiscated by means other than the law of the land. You can trace these provisions down, and they flow quite smoothly right into the Due Process Clause of the Fifth Amendment. At the same time, you can look at the state constitutions of the 1780's and early 1790's, and see exactly the same congeries of words at work, clearly aimed at assuring that people in criminal trials are only exposed

to punishment for having violated the positive law of the land. I might say that some of the state constitutions also include natural rights clauses. But a natural rights clause was among the clauses considered at the time of the Bill of Rights and was rejected. So it seems that a very narrow meaning of the word "liberty" was intended. I might add that the history of all this was reviewed in an article in the *Harvard Law Review*, appearing about 1895.

In any event, if you look at the general opinions of the framers, the liberties which they sought to protect, and to which they refer in the Preamble, were negative liberties. They sought to protect liberty not, I think, by means of the Due Process Clause, but by means of allocations of certain powers between federal and state governments — and as for the federal government, between different branches. Liberty as choice — and particularly with the egalitarian wrinkle added — seems to destroy the meaning of liberty as a distinctive concept. Let me take a concrete example: A person is out on the Blue Ridge Mountains in 1791. He hasn't got a gun with which to shoot game. He's a hundred miles from any civilization, and he's not good at picking berries. He is probably going to die very soon. His life plan is zilch. Is there any problem about his liberty? I don't think you could have gotten a single framer to say that he had any problem about liberty. His liberty was absolutely fine; he was just going to die in some painful and unpleasant way. Add to this example: Some horrible person comes along with a backpack full of sandwiches, but won't give any to the starving man. Has the person with the sandwiches taken away our friend's liberty? Not at all. He's a moral leper of the worst sort, but he hasn't interfered at all with the guy's liberty. Yet, I understand that, in Tim Terrell's view, the person with the sandwiches may be in for the death penalty; in any event, he has invaded a liberty interest of the poor, starving beggar. I don't think so at all. The interest intruded upon is an interest in humane treatment, nothing more or less.

Buchanan: I sat in total astonishment as I read Tim Terrell's paper that it could claim to be a philosophical analysis of liberty. It literally ignores a whole tradition of legal and political philosophy. Tim read the wrong philosophers. This linguistic philosophy is way out there and should have been discarded, in my view. There's a whole tradition, that goes all the way back, to which liberty has been

central in the legal and philosophical discussion. But there's absolutely no mention of that tradition.

I think that the-law-is-the-law is the proper approach and the only approach that can be taken. I think that this gives you a criterion for saying when the court or the judiciary goes wrong. It goes wrong when it goes beyond interpretation of what is the law. Lino Graglia seems to say that the law is whatever the majority in the legislature decides. I certainly would get off that. I think the legislature, like everything else, has to be bound by some sort of a constitutional structure. The structure is rules, and the way we make rules should be categorically distinct from the way we operate within the rules, including the way we operate in the legislature. Now, if you stay within the limits of what the judiciary should do, it seems to me that George Butler's question is really just a technical question. Under some conditions, it might be better to have a jury; other conditions might call for a judge. But that's not legislation. It's totally different.

Butler: I don't think it's just a technical question. Some have asserted that property has significant natural law connotations and that we need to preserve the "old property," to coin a phrase. Well, what is the old property? There is a principle of natural law, expounded by all the influential natural law theorists of the eighteenth century, called the rule of necessity. It provides that, if I'm on a mountaintop starving to death through no fault of my own and someone happens along with an extra sandwich, I have a right to appropriate that property. If I'm caught in a storm, as all tort lawyers know, and I am threatened with bodily harm, I have a right to appropriate someone's dock. It is a fundamental rule of property. And what happens after I appropriate the property? I have a natural law obligation, an implied-in-law or quasi-contractual obligation, to compensate for the value of that which I took. What value? Not the monopoly value that one might have charged me for the sandwich. I can pay only what the sandwich was worth to him under the circumstances. Historically, a jury would determine what he could reasonably demand for property. So, all of you who suggest that property is somehow a hard and fast concept, I suggest to you that under the natural law property is fundamentally soft at the core. It embodies equitable doctrines, like the rule of necessity, that give other people the right to appropriate one's property for

what is a fair price under the circumstances, provided the necessity is sufficiently great. You charge a jury or some other arbiter on all points of the rule and then ask: Under the circumstances, was the property unfairly appropriated? And if not, how much does the appropriator owe the owner.

Bond: I just want to respond to Norm Karlin's point about Substantive Due Process. I still adhere to the view that it's a nutty concept. "Liberty" doesn't protect any substantive rights in the Fifth or Fourteenth Amendments. If you look at the Fourteenth Amendment, which was the campaign issue in 1866, and at all the state and congressional elections of that year, no one on either side of the question for or against ratification ever talks about the Due Process Clause. They talk about privileges and immunities, which was clearly intended to cover a broad range of substantive rights, although no one ever suggests that the Bill of Rights was coextensive with privileges and immunities. And they talk some about equal protection. There is no evidence in the records I've examined that the people asking if we should adopt the Fourteenth Amendment believed that liberty protected any substantive rights. If you recall the campaign itself, the Democrats were opposed to ratification because they thought that the Fourteenth Amendment conferred substantive rights on blacks under the Privileges and Immunities Clause. They never suggested that the Due Process Clause conferred any substantive rights on blacks. And if they had even suspected that as a possibility, you can be sure that they would have wrung their hands in horror at the prospect of blacks having all of these rights. No one on either side of the issue thought that "liberty," as used in the first section of the Fourteenth Amendment, embraced any substantive rights.

Ellis: I am not unsympathetic with the use of linguistic analysis, especially when it arises out of the English empiricist mode; and therefore, I approached Tim Terrell's efforts with a great deal of interest and sympathy. However, I think that his effort at definition dooms him to defeat. The definition attempts to include within itself a limitation, the no-harm principle, in an effort to distinguish from license. By doing so it converts itself into a kind of utilitarian notion. But if we think in terms of liberty or freedom as being the absence of constraint on choice and leave for separate determination how much liberty an in-

dividual within the society will be entitled to, then, it seems to me, that we have at least the beginnings of a workable definition. As soon as we start into the process of trying to indicate limits within the definition, the definition then falls of its own weight. And I think this is one of the problems that we have in looking at what the framers were talking about when they talked about liberty. In the original Constitution, the one that was adopted by the framers and was ratified in 1789, before we got the amendments, "liberty" appears only once, in the Preamble. It is true that eighteenth century canons of construction would require that the document be construed consistently with the purposes outlined in the Preamble. We in constitutional adjudication, of course, have ignored the Preamble. But what does the Preamble say about liberty? It says that the purpose of the document is to secure the blessings of liberty. What is that likely to have meant to the framers? It is those blessings of liberty, which, as Ron Cass indicated, oppress others. And it seems to me that, once you begin to plumb beyond that, all you come up with is a series of rather specific provisions within the original Constitution having to do with *ex post facto* laws, the definition of treason, and so forth.

I think it possible — and maybe this is Lino Graglia's point — that the vast bulk of the debate about constitutional theory is just worthless, and that what we ought to do is to decide what kind of goals we really are interested in protecting. If, indeed, the framers were not interested two hundred or so years ago in the kind of liberty that I'm interested in protecting, then I want to find out what I can do to get the blessings of that kind of liberty today. If it means that the Supreme Court is going to run a little wild and sometimes come up with a legally and technically indefensible suggestion like Substantive Due Process, so be it. There isn't any easy solution to these issues that is going to grow out of the words that exist. I suspect that what we know about economics, economic theory, and economic philosophy today will lead us to a more salutary result than what the Founding Fathers knew or thought about liberty in 1787.

III. ENFORCING THE CONSTITUTION: OF INSTITUTIONS AND HUMAN PREROGATIVE

Komesar: In institutional terms, I think it's accurate to say

that the Due Process Clause borrowed language from an institutional historic setting, wherein the major problem was fear of the executive and the remedy was the legislature. Is it equally appropriate to say that all that was meant by due process protection was that one only has a right to what the legislature gives him — not to what the king gives, but what the legislature gives? By the time I get to the Fourteenth Amendment, I have great doubt that the framers were saying that state legislatures would be the determiners of what process meant. I'm now not talking about Substantive Due Process, but about procedure. Surely, there was a tremendous distrust of state legislatures which underlay the drafting by the 39th Congress of the Fourteenth Amendment. So, I have a difficult time believing that the Due Process Clause and its institutional underpinnings have quite the clear intent that has been indicated here. I guess I'm saying that I don't believe those who tell me that the history is that clear.

Graglia: As for the Constitution and what the framers and ratifiers intended, it is clear that the limitations in the original Constitution and the Bill of Rights were meant to limit only the federal government. When there are meant to be restrictions on the states, that is explicitly stated the restrictions are extremely few, and I can't emphasize too much how few and unimportant they are. I mean, a thing like the prohibition of granting "titles of nobility" is repeated twice; once for the federal government and once for the states. Also, the idea that the ratifiers of the Fourteenth Amendment meant to limit themselves is not a very plausible one. If anything is clear about the whole history of the Fourteenth Amendment, it is that it was a time of extreme chaos, a time of high moral fervor. It takes high moral fervor to abolish slavery and bring on and win a Civil War. And you're not going to get the most balanced judgments with that kind of fervor.

John Marshall established judicial review. For goodness sake, it's not at all clear the framers and ratifiers meant there to be judicial review. Is it not astounding that judicial review was not mentioned in the Constitution? If it was intended, I would certainly expect to see a very clear statement, and it's not there. Then, when Marshall read it in, all he said was, if the Constitution says that the crime of treason requires two witnesses and

the statute says one witness, then we don't enforce the statute. He was talking about very specific restrictions. A real constitutional problem arose when Senator William Saxbe wanted to be Attorney General, and President Nixon wanted him to be Attorney General, and unlike the present situation with Ed Meese, nobody was opposed to his being Attorney General. Everybody agreed that would be just fine, but it turned out to be unconstitutional! Can you imagine? Much finagling was necessary because the Constitution provides that one cannot hold an office if he voted to raise the salary of the office while he was in the Congress. I thought this was fascinating: the Constitution really was relevant to something, and all it did was create an unnecessary problem.

Wallin: There are two questions before us. One, what did the framers understand by the Constitution, and what do we understand? Secondly, should we abide by it? I am persuaded that the framers meant for the federal government to do far less than it does today. They didn't expect the price of milk in Iowa to be set in Congress.

But the question that interests me more is whether we should abide by the original Constitution, if we can understand what it means. And it seems to me that we have to be careful about saying: No, because we are interested in other kinds of liberty today. That ignores the distinction between legitimacy and illegitimacy. The Constitution not only separates powers and says what institutions will do what; it also sets up legitimate bounds of obligation in this country. We live in a country based upon consent. And so long as the Constitution holds as the fundamental law of the land, there is a legitimacy to regular law, positive law. That doesn't mean we can't change it. We can change it, and there is a mechanism for changing it. But simply to ignore it because it doesn't seem to meet our needs now is to open up the very thing that the framers and the people who ratified it wanted to tighten down. They were frightened of whimsical, changing, tyrannical majorities, of which any of us could be a part at any time. We just decide that we want something; and wham, we go after it and be judges in our own case. The Constitution is intended to retard that pernicious desire of democratic peoples. And that's one reason why it was intended to be a much less direct form of democracy than, in fact, it is.

Manne: Let me be ultra-cynical. I think that people decide, in

effect, whether to grant more emphasis to intent and historical circumstance or to what is passing at the moment simply by virtue of which of those approaches serves their interests best. We may argue as though, in good faith, we are examining what the founders' intent really was in order to enforce it; but the only people who seem to want that are those who want the results such an approach gives. Now, as for so-called judicial conservatives who feel bound by precedent, I wouldn't want one of them on the Court because they wouldn't cure anything. They would feel bound by what has been going on for the last fifty years and presumably would follow it.

Bond: I would never assert that history is always clear, but the fact that it may be unclear on certain points doesn't mean that it's unclear on every point. With respect to the question of due process, I think there is a reasonable degree of clarity.

The question was raised of whether a change in institutions or a change in attitude translates that language used at one period into something other than what it originally meant. I think the internal structure of the Bill of Rights is against the suggestion that the Due Process Clause was intended to protect certain substantive rights from legislative infringement. The Fourteenth Amendment was intended to prohibit the states from doing certain things substantively and certain things procedurally. It was intended to nationalize the protection of civil liberties, at least in Section One. As for the question, what difference does it make, I think it makes an enormous difference if you believe in the rule of law. If you are talking about living under a rule of law and not under a rule of judges, you have to adhere to the original understanding insofar as you can ascertain it and insofar as you can apply it sensibly and reasonably to current problems before you.

Butler: In terms of the Seventh Amendment, I think the Due Process Clause was really an afterthought. The people wanted to see the right to a jury trial clearly stated. It is the jury as an institution that, through its power to judge mixed questions of law and fact, implements assumed notions of what liberty is. The jury will not allow the government, in the popular parlance, to screw its fellow citizens. The jury will not let the government get by with oppression. The jury has the right to decide that a statute is invalid because of its *ex post facto* effect, that is to

say, because the statute nullifies a legitimate pre-existing expectation, whether we call it a privilege or an entitlement or a property right—or, compendiously, one of our intangible liberties.

Komesar: Let me clear up two points. First, when I spoke about the Due Process Clause in the Fifth and Fourteenth Amendments, I was not speaking of substantive process. I was speaking about Procedural Due Process. Second, I think it does not follow that constraints upon the legislature necessarily mean judicial review. Enforcement of constitutional provisions can come through the political process, by people who believe that, as part of their political and voting power, the Constitution ought to be obeyed.

My concern, with narrow historical interpretations has come to be associated with Raoul Burger's interpretation of the Fourteenth Amendment. He has argued that the framers and ratifiers never intended that voting rights or school desegregation or public facility desegregation would be covered. Let's assume for the moment that that's clear and that we have an interpretist judge sitting, who is aware that the intent of the framers and ratifiers was to protect the basic civil rights of blacks, which meant the ability to sell one's labor, make contracts, etc. Let's also assume for the moment that the States, aided by slippery and tricky lawyers, are able to continuously and subtly impose restrictions, and that the federal courts recognize that, for a number of reasons, they are unable to overturn those decisions. Suppose they recognize that the only way, in fact, to deliver those rights is by providing better education and better access to the political process. What will this mean to an interpretist judge? Is a law unconstitutional because it violates the intent of the Congress and the ratifiers as to voting and schools, or is it constitutional because it achieves the end that they sought? It seems to me that there are, in the process of interpretation a whole range of possible conflicts between objectives and constraints.

Cass: Neil Komesar raises the difficulty of interpreting the Constitution by reference to history. But if one's agenda is maximizing efficiency, it may very well be that a written document, which spells out as clearly as we can rules for decision-making and which offers some content for those rules, is the most efficient way to proceed, particularly when we disagree on what we ought to be doing.

Granted that the historical record is not absolutely crystal clear and granted as well that we want today different things; but that is very different than saying that it is wrong or inefficient to have rules to begin with.

Aranson: There is a fundamental error in referring to the legislative intent of the Congress, intent of the courts, intent of the framers, or intent of the ratifiers. Intent is a quality of individual human beings and not of institutions. It is an organic fallacy to impute intent to institutions. This is not just a totally disconnected, methodological point. Subcategories under this general species of error concern such concepts as consent and legitimacy. Liberty may require consent, but I doubt if more than ten or twenty percent of us here in any meaningful sense of the word, really consent to the Internal Revenue Tax Code. Liberty may require consent, and consent may rest on legitimacy. Yet, the question remains concerning to what and whether we are consenting. If we look at the process by which the Constitution was framed, William Riker, has forcefully demonstrated that large parts of the Constitutional Convention, where votes were taken, reflect cyclical majorities; that is, situations in which Motion A defeated B, B defeated C, and C defeated A. And so, agenda manipulation, some sophisticated voting, some bundling, and certain parliamentary artifices were going on. Hence to speak in any meaningful sense about the intent of the framers is nonsense. There was no real mechanism for revealing intent. And indeed, there is no way of counting up to find the majority motion that would defeat any other motion.

We might claim that written rules are necessary; we claim that consent requires a certain kind of legitimacy in the process, and legitimacy requires that we go by intent. We can even draw the arrows differently, that consent requires a certain attention to legislative or constitutional intent. And yet, these very concepts, which reflect back to an older public interest standard have absolutely no meaning in this discussion. One is led back to Henry Manne's view (and Chief Justice Hughes's view as well) that the Constitution is what the judges say it is. There exists no fixed anchor of preferences revealed by organic bodies.

Gellhorn: Returning briefly to Tim Terrell's discussion of whether words have meanings outside of the results for seeking them, it is interesting, for example, how the Fed-

eral Trade Commission and the federal courts have applied the meaning of "false and deceptive advertisement." Rather than looking at the understanding of the audience to whom the advertising is directed, they look primarily to the dictionary as to what were the possible meanings. From this come some strange results. One case found that any claim that hair coloring is "permanent" means that, in terms of the dictionary, it promises that the hair thereafter will always be the new color. It is therefore deceptive, of course, because it doesn't color the hair that hasn't grown out yet. That ruling can be upheld, even though all the evidence in the hearing might point the other way. The basic law here was made in the *Charles of the Ritz* case, in connection with women's facial cream, the advertising of which was found impermissible because it was labeled "rejuvenescence." It was relabeled, and is currently sold under the title of "revenescence." That is okay, because if you look up the dictionary definition of "revenescence," it's not a word but was derived from "revenant," which means to have a ghost-like quality. The fact that the public doesn't interpret it that way is unimportant. All I mean to suggest is that it seems to be somewhat doubtful to take a look at the meaning of words separate from context, because various understandings, of course, can only be developed in context of reliance upon other areas of law. Dictionary definitions, it seems to me, have been most unfortunate.

I also would suggest that the interpretation of the term "liberty" is quite different now, because the substantive law is quite different. For example, we have changed the understanding of the term "liberty" in connection with public employees, because we've changed the meaning of the First Amendment by adding First Amendment limitations on the removal of public employees. That is, after elections, we cannot throw out low-level employees for political reasons. We can only throw out confidential employees in policy-making positions.

Ellis: I guess I'm very skeptical of George Butler's view that the framers' intent was that the jury would decide the law as well as the facts. That skepticism begins from the text of the Seventh Amendment itself, which notably does not say that the jury shall be the judge of the law and the facts, although there was precedent for that kind of specification. I think this is consistent with the kind of

political bargaining that was going on. In the colonial, revolutionary, and early constitutional periods, there was a persistent tension between centralization and decentralization of power. Should the colonies have the ability to make decisions? Should those decisions be made by the Board of Trade? Should they be made by Parliament? Should they be made by the Proprietor? A lot of that tension was reflected, first in the Articles and then in the Constitution, with a shift in the balance of power from those who saw advantages in being decentralized to those who saw advantages in having centralized power. The jury's role is very significant because the jury embodies decentralized decision-making, as opposed to the judge who is likely to reflect more centralized concerns. In the Amendments, we see a shift back toward more decision-making at the decentralized level. Throughout this period, two of the groups in opposition were creditors and debtors. The creditors and those people engaged in providing capital, and that includes owning land, tended to argue for centralized power. The debtors tended to argue for decentralized power. So I see the role of the jury, not as an embodiment of high principles of liberty and of moral common sense, but as the outcome of a tension between people who saw their self-interest as having centralized or decentralized loci of power. You end up, of course, with a compromise. But I don't think the compromise — the Constitution — puts nearly as much power in the hands of the civil jury as George has suggested.

Wheeler: I am struck each time I pick up Elliot's *Debates* or the *Annals of the Congress*, which admittedly are not my normal bedtime fare, by the paucity of references in those documents to the word "liberty." Nonetheless, I think certainly the concept transcends the number of times it is mentioned in those documents or in the Constitution. For example, just because we find the term "brandy tax" indexed by Elliot and the term "liberty" not indexed, we cannot assume that the Founding Fathers were more concerned with drink than with liberty. We do find hot-heads like Patrick Henry talking about liberty. But we also find others, such as the more reflective James Madison, who, though not to my knowledge in the *Federalist Papers*, certainly in his correspondence about "liberty" and the Declaration of Rights. It may be true, as one Convention correspondent claimed, that the Amend-

ments were taken up only in the last three days of the Constitutional Convention. But nevertheless, Madison saw them as of paramount importance. He did not call them Amendments but rather the Declaration of Rights; and he comes on very hard to the effect that the Constitution simply wasn't going to get through — the States, he claimed, would not ratify it — without attachment of the Declaration of Rights.

As to "liberty" today, I for one am not overwrought by the complexity of the term. It seems fairly easy to talk about "liberty" and systems of liberties. Certainly, I think there is some rough consensus as to what free speech means, what freedom of association and freedom of religion mean. The more interesting question, though, and where I would hope to redirect some of our discussion, relates to promoting guarantees of liberty. How do you ensure it? Or can you? Now, George Butler says that the panacea is the jury system, or at least that it is extremely prominent among guarantees; but I would like to hear also from Tim Terrell on what he sees as the central ways to guarantee liberty.

Terrell: Very briefly and quickly, perhaps the only truly effective way of guaranteeing liberties, particularly liberties that are in the Constitution, is to return to the way in which the document was structured in the first place. That is, although there was a granting of power to the central government, it was a very carefully limited one. Certain powers were bestowed on the federal government, with the clear negative implication that other powers were *not* so granted. So, one could take the First Amendment—"Congress shall make no law abridging the freedom of speech"—to mean exactly that: The *federal* Congress could make no law with regard to speech. That matter was left for the States. Thus, one way to guarantee liberties is to deny power in the first place.

Manne: How are you going to bell that cat? How are you going to get there? You have basically an agency-cost problem. People in government are going to do things in their own self-interest. What can we do to guarantee that people will behave consistently with protections of liberty of the sorts we have been talking about?

Morgan: Before Edd Wheeler spoke, I thought I was alone in my position and was reluctant to interject, because the discussions have been very interesting; but I think we make a mistake when we focus exclusively on the ques-

tion of the meaning of the term "liberty" as it is used in the Fifth and Fourteenth Amendments to the Constitution. It seems to me that there is a difference between the notion of liberty as a value which underlies our understanding of a great many issues in Constitutional law, and the question of exactly how we would interpret that given term in a given situation. I think that inherent in the concept of a good and just society is the concept of liberty. If you do believe that values are important, then it becomes essential, not just useful, to have some sense of what liberty might mean in a broader context than simply the way it was used or the way it was understood by a particular majority of the Founders at particular moments in the Constitutional Convention.

When I come back to Tim Terrell's paper, I find it to be a very useful effort, not so much to describe the thought processes of the drafters of the Constitution — I am certain that it doesn't describe that — but to try to put some kind of sense in the term "liberty," something that can be used at least as a point of departure. The process of trying to understand what liberty means as a word on the one hand, and as a concept on the other, is one that is worth undertaking—partly from the historical interests, but, inevitably, as several people have suggested, to think about current issues as well. I grant all of the difficulties of having Justice Blackmun or whomever deciding today what the Constitution means in his own terms rather than in the terms of the founders. And, inevitably, there is a fundamental tension: How much interpretive power you want to give to the Court; how much you want to give to the legislature? But these last, I would suggest, are separate questions from the more general issue of what liberty means as a value.

Kmiec: Despite Peter Aranson's insistence that attributing intent to the founders is nonsense, I nevertheless think it is extremely important to look at the original intent of *individual* framers for an understanding of an historical perspective of the Constitution and to discover the ethical values that undergird the document itself. Peter's premise was: Since groups do not have intent and individuals do, the Constitution, therefore, is nothing more than what the judges say it is. That is clearly judicial activism at its worst. Assuming a lack of collective intent should lead us back to an examination of what individual framers actually did in light of then-existing external con-

straints. These constraints focus upon the individual in the sense of natural law, natural rights, or property rights. It all ties back to individual human action. And in those individual, rather than collective, terms, the concepts of consent and intent, constitutional or otherwise, are very useful, because they define clearly, I think, what the framers as individuals did or did not consent to in any meaningful sense of a social contract.

Gellhorn: I want to respond to the point in Tim Terrell's paper that the concept of liberty is an expansive notion, and that as government grows in power and pervasiveness, then liberty must also expand to meet the challenge. It is very attractive, and I liked the statement until I started to go back historically and think — in terms of Administrative Law and Constitutional Law — how the concept of liberty was expanded by the Supreme Court in the 1960's. Prior to then, we had a concept of a right-privilege distinction; that is, to go back to a Holmesian aphorism in the 1890's, that we all may have a right to free speech, but we don't have a right to be a policeman. Therefore, a policeman does not have all rights of free speech. That concept was eroded in the 1960's by the idea that there is a liberty interest in public employees that undercuts the concept of the right-privilege distinction. That is, as government undertakes a greater role in terms of employment, we have to provide constitutional protections, because if one is, say, a nuclear physicist working on defense-related matters, there is no employer other than the government. That kind of analysis got the Court into trouble, and they ultimately withdrew from this position. But the issue that they never addressed is: If the monopoly position is the underlying concern, why does not the same Procedural Due Process, as interpreted in this fashion, apply also to General Motors or to other private employers who get a lock on a major position in the market? If you start to develop a liberty concept as an expansive notion, it is not necessarily a one-way instrument. There is no reason that it might not be turned around. And, to follow up on one of Lino Graglia's points, if you are having the judges apply the concept, then you have no systemic constraints.

Harris: A couple of comments. One of the points of Constitutional Law is to provide as secure a framework as is reasonably possible for us to carry on our activities. One of the big issues before Congress now is bankruptcy law,

which is an area of uncertainty that has not been taken care of. Another big issue has been the failure of modern governments to preserve the value of the currency. Constitutional Law, it seems, has failed us in this country and elsewhere in this aspect of governmental life. And there is another whole range of issues which hasn't been brought up here, and that is the role of the civil service. The bureaucracy, in its discretion, both limits and enhances our liberty from case to case. But I suppose the majority of these cases never get to court for a decision. Finally, we see that most of the world is not living under constitutions, or at least ones which really serve liberty very well.

IV. THE ALTAR OF EQUAL LIBERTY AND THE SHRINE OF EFFICIENCY

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Buchanan: We've been discussing liberty, but not once have I heard the word "equal" put before liberty. And to me that is amazing. Some have called it the first principle of justice, and I think we would get a lot further if we think in terms of equal liberty. The real issue is: To what extent can Substantive Due Process or protection for economic property rights be a viable normative principle? We seem to have departed grossly from the concept of equal liberty with things like progressive taxation.

Butler: I suggest that the problem with Substantive Due Process is that it's not viable; it's too blunt an instrument. A more discrete instrument is needed. Let a jury compensate on an individual basis, if a plaintiff can prove to the satisfaction of the jury, not that the law on its face is somehow violative of natural law principles in the abstract, but that in the particular case plaintiff's expectations were legitimate and founded upon sufficient detrimental reliance, and hence that it would be unfair to deny him equal liberty by failing to compensate.

Aranson: To say that substantive due process is too blunt an instrument is to fail to put on the backs of the Congress the job of writing legislation that is not going to be overturned or that is not going to be too expensive. If you say to Congress, anytime you err there may be a little compensation paid, then its members' incentives to write good legislation that is going to stand up is less than if you say, if you err we shall overturn the whole statute.

Butler: There is a libertarian ideal of *isonomia*, or having

equal law of generalized impact (Professor Hayek, for one, is particularly enamored of this idea); and if you subscribe to this ideal, you don't want Congress writing particularized statutes. Because once we concede that *isonomia* is no longer an attainable ideal, we open the door for Congress to single out only unpopular people for statutory deprivations. Because of this ideal, we want to encourage Congress to pass laws of a high level of generality, which inevitably means that the law, while just in most cases, will have an unfair impact on some. That problem of over-inclusiveness creates the need to have someone, I say the jury, dispense discrete equity through compensation.

Liebeler: I want to go back to a state of nature, if you will, and ask what arrangements we might expect to come out of that kind of environment. In this state of nature, presumably we're all expending resources defending ourselves from predators who are trying to take away from us that which we have wrenched from the earth. In this situation, everyone could gain from establishing government. The question is, what terms are likely to arise out of the contract that would arise from this situation? There would be those who have more power, I suppose, than others, and who would have taken into their possession something that we might call property or material possessions. These persons would not be likely to agree to a regime in which their goods might readily be taken away by predators. The purpose of establishing a constitutional regime is to reduce the transactions costs of protecting your holdings against others; that's why we establish a rule of law. The parties to this contract that arises from the state of nature might agree that the contract could only be changed by unanimous consent. Unanimous consent, however is often difficult to obtain, so you need some alternative arrangement that permits the government to make collective decisions in a way that has lower costs than unanimous consent. It seems to me that due process, or something like Substantive Due Process, can be seen as a substitute for the requirement of unanimous consent for change, or the taking of property, which is what I mean by change. Due process is one way of doing this, because it acts as a limit on government, whether the government is the king or the legislature or the courts.

But the question is: Even if we build into our charter

the requirement of due process, how do we know when process has been due? Thinking about that as an economist, I would say that due process cannot occur unless the act of the government that we're examining has some chance of increasing the total welfare of the community. That looks very much like an efficiency criterion, and as a first cut, that's what it is. If the proposed act of the government appears to have some chance of increasing the gains which the members of the community can obtain from private transactions, then it is a valid governmental act. It need not actually succeed; but it at least must have a chance of enhancing the total welfare of the community by increasing the available gains from private transactions for the individual members of the community. Obviously, that would include all governmental regulations or laws that reduce the cost of conducting private transactions. To list briefly the kinds of transactions in which this government could engage: it can set up a monetary system; it can enforce contracts; it can establish weights and measures. Other transactions are out if they do not meet the due process standard; for example, an act of the legislature that interferes with trade or has the effect of reducing gains from trade. Anything that the government does that interferes with or potentially reduces the gains of private transactions does not meet the test of due process under this standard. This model, however, leaves us with a category of transactions that I don't know how to handle. I would characterize these as welfare-state-type programs. By this, I do not mean a proposal that pays milk farmers for not producing milk, or grape farmers for not producing grapes, but rather a program that transfers, either directly or in kind, money to the "poor." I don't know what to do about those transactions using my basic model, because they in themselves don't appear to increase gains from trade in the community. I don't know what their efficiency is. But it wouldn't bother me if the regime I'm describing had the power under this due process provision to make transfers like this, as long as there was some kind of limitation on it. What I want to do is distinguish the milk producers, the tobacco farmers, the wheat farmers, and the people who benefit from tariffs and other restrictions on free trade from those who are "truly needy," if you will. I am not, however, able to find a principled way to do that.

I've described what I would insist on if I were negotiating to move from a state of nature. Aside from that academic exercise, however, it is worth noting that we actually have due process provisions in the Constitution. What do these provisions and their predecessors mean? Could the king give due process in a decision that he made by himself? I have always supposed that he could. That suggests that due process is necessarily at least in part substantive. If the king could give due process without regard to the procedures he followed to reach a decision, presumably the legislature can too. And both the king and the legislature can make decisions that do not provide due process, once again without regard to the procedures by which they reach a decision. The king can violate the law of the land; so can the legislature.

Butler: It seems to me that Substantive Due Process, as administered by five of nine Supreme Court justices, doesn't cut the mustard. I think that a surrogate requirement, administered by a unanimous jury of twelve, has a certain appeal, since the unanimous jury of twelve is not afflicted by the hold-out and other phenomena that afflict a society-wide, Paretian unanimity requirement. If we had the jury apply Substantive Due Process, it would be allowed to set off, as it historically has done, benefits against burdens in deciding what just compensation is due. So, if the jury evaluates a regulation and decides that the individual, because of the benefit he will derive, should be reasonably content to suffer a majority-imposed restriction, then the jury can apply this reasonable man standard. The prominent excuses for allowing a majority to impose uncompensated, intangible sacrifice on an individual are largely based on the notion that when we entered into a social contract, we agreed to assume the risk of randomly imposed sacrifices for the public good. Therefore, Justice Frankfurter argued that when those randomly imposed sacrifices materialize, an individual should not feel that he's the victim of an inequity. But when are uncompensated harms a reasonable sacrifice based on the hypothetical notion of social compact? When is it reasonable for a person to expect that, by submitting to this type of sacrifice, he will be better off? Some argue that it should be a legislative question, since there are no neutral standards. I say it should be a jury question.

Liebeler: Let me give you a case. There is an ordinance in

Brattleboro, Vermont, that says you cannot run a taxicab unless you get permission from the selectmen of the town. There are two taxicab companies in town now, and the selectmen announced, upon application by a woman, that they were not going to allow anymore taxicabs because they would just lose money. The woman responded, beautifully, I thought, that that was her business. The selectmen finally relented. But what if this woman comes before a jury of her peers in Brattleboro, Vermont, and says: I have a reasonable expectation that I can run a taxicab in the town of Brattleboro. Where in the hell did she get it? The statute has said for years that she cannot do it without the permission of the selectmen. How does she raise the question? What does she try to tell the jury? She hasn't got a chance.

Butler: She might argue, for instance, detrimental reliance—that there is a consistent history of the granting of these applications; that she has already gone out and purchased her taxi; and that it is unfair for the city to squelch her expectations without compensation.

Liebler: That approach is not satisfactory. It is clear that, on an efficiency basis, there is no public good to be derived from preventing taxicab companies from entering the market in Brattleboro, Vermont. It is a common calling; it is a business that anybody should be free to engage in.

Butler: Well, our tests differ, because I am not worshipping at the shrine of efficiency. I am worshipping at the shrine of individual liberty. If this individual woman can show, using Professor Terrell's taxonomy, that her personal liberty has been significantly infringed upon, that she had a justifiable expectation, then that would provide an informed debate before the jury.

Aranson: I cannot imagine making the economic argument and having it stick a fair number of times with the jury. Jim Buchanan's work over a lifetime, and certainly mine and that of several others over the past ten years, suggests that our present institutions of government are just incapable of replicating economic results. They are engines of creating private benefits at collective costs. There are no exceptions. The second problem is more severe. I refer to the work of Hayek and others, which has become increasingly attractive in certain of its aspects. One of those aspects reinforces the notion that the sort of thing that Jim asks the government to do looks like central planning under another name. Now, it would

never be called central planning, because it looks like traditional, old-fashioned legislation. But, it is in essence central planning when it says: This is our plan; this is what we want to accomplish; these are the provisions of policy; and, the legislature or courts or juries, at least at the federal level, say we are going to try to do this. The remedy to this is the most radical decentralization possible. The juries are advantageous, but put them at the local level. The legislature is acceptable, but they should be in the smallest towns possible. What I mean by the smallest town possible is that unit which encapsulates the externality or the benefit to be produced, and nothing larger. Indeed, the burden of proof should be on those who want something larger whenever they recommend any kind of consolidation. In a sense, George Butler's juries are attractive, because they produce this kind of decentralization automatically.

Buchanan: I think that efficiency outcomes will emerge if you stick with the equal-liberty notion. What are the means by which you can limit and secure liberty as a constitutional value? It seems to me that it is possible in terms of equal liberty — by thinking of liberty simply as a range of choice. If you require equal liberty, if you can't go beyond equal liberty, you get essentially a meaningful concept of individual liberty. Anybody would have a right to have a taxicab company; you couldn't have tariffs or minimum wages; anybody could contract with anybody else. There are lots of these things from which efficiency would emerge as an outcome.

Cass: It seems to me that there may be considerable differences between the equal-liberty notion that Jim Buchanan is putting forward, the efficiency notion that Jim Liebler is putting forward, and the compensation-by-juries notion that George Butler has put forward. Even if we can identify in the abstract what we want, we have a terrible time knowing when we have got it. I don't see how any of the proposals put forward really solves the problem of getting us to these different ends. If we are trying to identify an efficiency norm for society, how do we have the legislature or the juries or the courts make the interpersonal comparisons that are necessary to get to the sort of social welfare curve that I think Jim Liebler is proposing? If we move either to judges, as Jim Buchanan suggests, or to juries, as George suggests, we still don't get out of the box. Judges give much to criti-

cize. We view them either as abdicating responsibility to review what other branches do or as selectively intervening to promote personal values. In large measure, both criticisms flow from judges' inability to work out principles to screen good legislative decisions from the bad. As for juries, they really scare me. Having talked with people who have served on juries and having gone to a courthouse to see who gets selected to sit on juries, I find these to be much more unsatisfactory as decision-making bodies than almost any of the others. Certainly, if we combine the jury with a compensation scheme, whereby the jury gets to compensate people out of government funds, that seems to me to set up a real negative-sum game. We tax all of us; and, then, the jury, which doesn't have to bear more than a small fraction of the cost, gets to say who gets that money. We don't require winners to buy out losers. We tax everyone and then give it all to the jury, which on *ad hoc* bases determines, on who knows what grounds, which people will receive particular shares of the general fund. We have a serious problem here.

Bond: I think that Jim Buchanan's concept of equal liberty is the way to solve a whole range of problems. Equal protection, unlike due process, is historically a relatively new concept. It certainly is not in the original draft of the Constitution. It really does not become a topic that is discussed very widely until the abolitionists are searching for some way to construct a legal argument to support their position. The Republicans consistently quoted Abraham Lincoln when trying to explain what equal protection meant. Abraham Lincoln had said: I believe that every man has the right to be the equal of every other man, if he can. And whenever that quotation from speeches on the stump was cited in newspapers, there were parentheticals (great cheering, thunderous applause), indicating to me that the point was reasonably well understood, that the equal protection concept as embodied in the Fourteenth Amendment was interpreted by the people as meaning an equal chance insofar as the law is concerned. And so you take the Brattleboro cab example and say: Look, everybody ought to have a chance to drive a cab. And if they don't, it is a violation of equal liberty. You don't have to rely upon Substantive Due Process. You don't have to turn to juries for compensation. It is a simple question of equal protection.

Williams: It seems to me that a method which successfully protects efficiency will coincidentally protect liberty and vice versa, but I think the idea of either judges or juries doing this very successfully is improbable in the extreme. The jury will deteriorate to super-micro considerations such as whether the woman had bought her taxicab yet and all kinds of things which are utterly irrelevant to the efficiency argument — and, I think, equally irrelevant to the liberty argument. I don't expect much better from judges. Certainly, I think the idea of their being able to make serious judgments about efficiency is likely to deteriorate, as George Butler's paper suggests, into essentially bland acquiescence in the legislative decision. That takes me to Peter Aranson's proposal on decentralization. It seems to me that competitive restraints, restraints arising out of interjurisdictional competition, are likely to be successful in a decentralized setting, because at least to the extent that the jurisdictions involved are small, both productive labor and productive capital can flee; and that means essentially that productive labor and capital will flow to the jurisdictions which do not go in for rent redistribution on a grand scale. The difficulty with the large entity is that it suffers much less from the competitive restraints and the ability of productive labor and capital to flee, although the interesting thing is that with the development of modern transportation and communications, there has been substantial ability of labor and capital to flee from the United States. And that probably has had a significant effect in constraining the tendency of the American Congress to enact destructive legislation. It isn't self-evident just how you draw these jurisdictional lines, at what point a court constrains Congress from interfering with local matters. But I think that in asking a court to draw that line, you can legitimately say that the burden is on the higher level jurisdiction to show a need to displace the powers of the lower level jurisdiction, and that the line can be enforced with a good deal less data gathering and probably a good deal less ideological noise than any kind of direct effort to get judges to protect efficiency or liberty.

Kmiec: I must disagree with the earlier suggestion of using compensation as a substitute for unanimous consent. The suggestion is a great expansion of the concept of eminent domain. In fact, it gives to the collective a power of eminent domain which the private individual did not possess.

There was not in the state of nature, in any ethical sense, a private power of eminent domain, except for purposes of rectification and the prevention of invasive harms. Since the individual didn't have "the despotic power" in the state of nature, I don't see how the state gets it once we collectively agree to form the republic. Thus, the notion of compensation as a substitute for consent, at its core, is fundamentally illegitimate.

Morgan: Jim Liebler has outlined well the substantive approach to the idea of due process but I must say that I come down on the institutional side, because I think the "proper" substantive approach to resolving these issues is ultimately almost impossible for the courts to decide.

I hesitate ever to come in favor of regulation, but I think I ought to articulate for a moment the argument in favor of regulating taxicabs. We have heard everyone concede apparently that you can't do that—that it is the one universally recognized instance of a restraint on human freedom. [Laughter] But in Atlanta, at least, the situation is that a person comes into the airport, goes to the taxi ramp, and gets into the first cab in line. That cab may be driven by an honest and trustworthy individual or by a rogue and a thief, someone who might drive the passenger to a dark part of town and murder him. Hence, in order to stimulate confidence in coming to Atlanta and reduce passenger search costs, the city tries to assure that there is a reliable supply of taxicab drivers and that the drivers who are on the streets are reliable.

My point is not to sell the validity of this argument; it is to sell the notion that one can make a theoretical construct, not saying the rule serves only the existing industry, for almost all kinds of regulation. The question is not: Should we only permit regulation that is favorable to all efficient working of the market? It is: How does a court go about deciding, in a particular case, whether a given approach to regulation, a given action of government, is one that is, in fact, enhancing of liberty or not enhancing of liberty?

And that's why I'm taken by George Butler's suggestion, not because I think juries are inevitably right or inevitably consistent — they aren't. But the world is composed of people trying to struggle with realistic alternatives for imperfectly doing jobs. And I am struck by the notion that juries are a relatively low level, relatively reasonable group of people, who are likely, in the

aggregate, to tend to make reasonably good decisions. Use of the jury is also likely to create a context in which the person deciding whether to adopt a given regulation has to think of the fact that one day he is going to have to take this case to a jury of reasonable people and explain it to them.

If you accept the proposition that there is going to be some government, and that government is going to make decisions which affect the common good and liberty, then the question becomes: What mechanism is best for trying to resolve the questions at the margin? Of course, Henry Manne is right: Ninety-nine percent of the cases aren't at the margin; they are sub-marginal. But some questions are at the margin, and I think that for resolving those, the jury may well be the best mechanism.

Aranson: The problem with criticism of interjurisdictional competition and decentralization is basically that it compares the good with the perfect, rather than comparing the array of possible institutions available in the real world. Every institution has its characteristic costs and benefits, which may be very difficult to calculate. And, surely that is the case with radical decentralization. One problem is defining the size of the jurisdiction; another is that a given jurisdiction may go astray; another is that a spillover, an external benefit of policies, may apply so widely that one cannot legitimately centralize. However, I do not think these questions challenge the essential point. And that is: Are we to accept the government as it is now—an entire government going astray with everybody affected—or in the worst case, do we want a narrow group of people affected? The object, of course, is not merely radical decentralization of governmental functions, but also to keep government to a minimum size to begin with. I think that radical decentralization helps to do this, because it limits the possibilities for cost spreading—for spreading the costs of collectively provided private benefits around. Second, those who make a mistake at the local level will bear the cost of making that mistake. And, third, while I subscribe to Jim Buchanan's notion of equal liberty, I think that we have to have some people available all of the time who are departing from that standard, merely to have an example of what happens when you do depart from it, because I think that lesson is easily forgotten.

Liebeler: Could I just get Jim Buchanan's view once more on the content of that equal liberty?

Buchanan: I'm not sure I can elaborate much more on it. It seems to me that, if you start arraying liberties, you're on a diagonal — think of a two-person box and matrix in which your liberties are arrayed on one side and somebody else's on the other. Equal liberty requires you to be on that diagonal: if you have the right to vote, I have the right to vote; if you have the right to speech, I have the right to speech; if you have the right to enter a business, I have the right; if you have the right to enter a contract, I have the right; if you have a right to secede, I have the right.

V. JURISDICTIONAL CLAIMS VERSUS THE CLAIMS OF LIBERTY

Butler: I endorse Peter Aranson's notion of decentralization, and I confess that I do so because it will make efficient central planning much more difficult—whether that planning be by Posnerian judges, in whom I have absolutely no confidence, or by legislators learned in welfare economics, in whom I have also absolutely no confidence. If somehow the decentralized jury becomes tyrannical in its balancing—inclined to make interpersonal comparisons on a micro level—then the decentralized nature of the jurisdiction would make it easier for the individual simply to move to a more liberal jurisdiction. The Founding Fathers talked often about the critical right to immigrate to different states to seek freedom, whether it be religious or economic freedom.

Ron Cass suggested that juries are more apt to run away, and so that it would be easier to handicap a judge. I disagree. I think it would be much easier to handicap a jury. When we become a member of society, we are not free to park our pickup truck wherever we want. We implicitly submit to certain social norms. If our conduct is judged by that society, it is much easier to predict whether or not what we want to do really is in accord with the reasonable expectations of our neighbors. Therefore, when we choose to live where we do, we do so in part because we feel relatively confident that a jury of our peers will agree that what we want to do is a reasonable extension of the implied terms of our local social compact.

The difficulty I have with Posnerian judges or other

centralized bodies invoking broad efficiency notions to justify the imposition of uncompensated losses on individuals is that human dignity and the micro-efficiencies that support it get balanced out of the equation. Micro-efficiencies have been sacrificed on a mammoth scale in our society on the basis of abstract, high-level notions of macro-efficiency. It is part of the Keynesian phenomenon that any individual act, even something as ostensibly virtuous as putting money under your mattress and saving it, can be recharacterized as, somehow, in the aggregate, violating the public welfare. I don't like the idea that Posnerian judges can say: We agree with the legislature that there is a macro-efficiency concept involved here that justifies this act. Instead, let a jury decide whether or not there is a sufficiently compelling and perceptible macro efficiency involved to justify the imposition of uncompensated sacrifice on their neighbor. The jury is able to put themselves in the shoes of this neighbor, and ask themselves conscientiously: Is this uncompensated sacrifice consistent with our societal norms of fairness and justice?

Manne: I think there is a danger of losing some of the benefits of George Butler's idea about the jury by pointing too much. He doesn't give adequate consideration to the virtues that Peter Aranson sees in a scheme of decentralization. And that leads to another question: If we want decentralization of a certain category of decisions, why not start fresh rather than be bound by some questionable history of what was the role of the jury in the seventeenth and eighteenth century? It is clear that a lot of things are very different today than they were in an overwhelmingly agricultural society of the eighteenth and early nineteenth century. Therefore, we may very well want something that would perform the function that I think some of us see as desirable in George's suggestion, without being bound to the notion of the jury, and particularly with all the legal patina that has been attached to it over centuries.

Komesar: The only problem I have with Peter Aranson's thoughts on decentralization is that I keep having this feeling of *deja vu*. It occurs to me that, after all, this was the experiment we had with the Articles of Confederation. We had a small set of jurisdictions which were too small in one important sense. They were too small in dealing with questions of tariffs against one another. And

we had at that point a difficulty associated with the prisoner's dilemma. Now, clearly there's a benefit to all jurisdictions in not imposing tariffs, but if tariffs are imposed, it's very likely that it's not to the advantage of any given jurisdiction to withhold from those tariffs. The big problem is that, as long as you have the possibility of an authority in charge of managing problems, you are going to run the risk that it will evolve into a larger system, which is central even though you had hoped it would be otherwise, and even if it would have been better if it had not evolved into such a system. What you really have then is the same problem of difficult decisions, that is, courts — decision makers — forced to decide intangible issues and possibly deciding them wrong. You have that problem if you begin with a desire for decentralization.

Terrell: This notion of equal liberty has some interesting implications. One of them is related to a point raised by Peter Aranson: the idea that people might want unequal liberty. Quite the contrary, doesn't our system suggest that one of its basic tenets is that we are not only to have liberty, but liberty that has the specific characteristic of being "inalienable"? That is, have we determined that we should not be able to trade off liberties for something else, that we should not be able to opt out of our political system and its responsibilities? Presently, of course, there are many basic liberties that are, in fact, inalienable; for example, we are not permitted to sell ourselves into slavery. Do we think of liberty as thus being different from property, which in most instances is salable? I argued in my paper that property, properly understood, is a kind of subset of liberty. That is, if liberty is a set of rights, then property is also a set of rights associated with tradeable things. Property and liberty are, in fact, very closely related, and to see them as distinct entities entirely is to make a very fundamental conceptual error.

This observation then has implications concerning the notion of equal liberty. If you accept the idea of equal liberty, and property is a subset of liberty, then perhaps you are also arguing for equal property. But this would be a conceptual error as well, as any analysis demonstrates. Liberty is about *choice*, and if equal liberty is about equal choice, then property in such a system would be about equal choice *concerning* our things — but it would not require equal things. Thus, the notion of equal liberty would not, in fact, lead toward some sort of

redistribution.

Wallin: Two things were going through my mind when I read the paper on the jury. One was just the novelty of the concept. The other question was: Is he right historically? And frankly, I haven't come to a conclusion on that. But even if George Butler is right about the jury, I still want to know how they're going to vote, whether they're going to come up with conclusions that I'm inclined to like better than the ones we get from judges now. We use the word "liberty," but I believe that others are more inclined to use the word "right," and this may foul the water. Let's say that Congress decides to cut back on the welfare state. Someone comes into court and says: I've been living this way for seven years; I have a certain life-style based upon it; I get a certain check every month; it's my expectation that I will continue to receive it. Yet the people of the United States have elected a legislature and a president who decide to start cutting this back. What's the jury going to decide in that case?

Ellis: Well, I want to go back to pick up on Peter Aranson's plea for radical decentralization. I find myself, I admit, both attracted and repelled by the notion, and it often depends on the issue. The question of centralization or decentralization is not one that can be answered in the abstract; it must be answered depending on the issue, such as the organization of the industry in question. In some industries, we're better off if we have national firms; in others, we're better off if we have smaller local firms. But whereas the market can decide the issue with regard to industry, we need some other mechanism, some non-market mechanism, when talking about governmental decision making. To what extent do we need national or centralized decision making in order to promote the national common market, in recognition of the fact that we have a movement of people and of goods that cut across political jurisdictions? The regulation of taxicabs is a phenomenon of decentralized decision making. That is the kind of results one gets with decentralized decision making, and like the California Grape Board, it's a situation where the local decision makers are in a position to capture some rents from people who are outside their jurisdiction and who are not in a position directly to influence the decision-making. But I do think that we have tilted the balance excessively in the direction of centralized decision-making. The framers

were, in fact, trying to sort out in the Constitution a mechanism for allocating decisions between centralized and decentralized decision-making. They may or may not have intended the court to be the decision-making body, but what we have seen is that the mechanism they worked out appears to have failed in that the restrictions, such as interstate commerce regulation, seem to have become a nullity; and the federal government recognizes no bars to regulating. But even decentralized decision-making, without some kind of constraint to protect liberty, is still going to result in a continual process of reducing individual liberty.

Cass: I want to come back to something that I think is close to the core of the discussion about liberty, and that is my freedom to read James Joyce or to have access to it. Is there some reason why we should treat my liberty to read James Joyce differently than the liberty of those around me to keep me from reading him? One of the phenomena that we've gotten out of local regulation time and again is a freedom to oppress, not just a freedom to have access to different things. It may be that, even though the market works in the sense of allowing people to vote with their feet and to go places where most of their preferences can be satisfied, it's not a perfect market. At any rate, I think the solutions regarding the notion of equal liberty require that we treat all preferences alike; and that includes preferences to oppress others as well as preferences to be free from oppression.

Gellhorn: I wanted to raise a question about Peter Aranson's solution of decentralization. I think, in part, that Peter's is a romantic notion to try to apply 18th-century solutions to a 20th-century society. I'm not going to suggest that I would disagree completely with the idea of decentralization, but I'm not certain it applies everywhere. I think we have a very different community. Transportation and communications are very different today; and as a consequence, I pay much more attention, for example, to elections at the national level than I do to those at the local level. In part, that is an end result of giving decisional power to the national level, but also it is because I am more interested perhaps in broader questions than in the location of dry waste or the grading of streets. One of the problems is that we have structured our communications, particularly television, to focus on national issues, because the three networks get their share of the

market only by focusing on larger issues. A question I would raise in connection with the focus on decentralization of the selection of juries is that it certainly does increase the transaction cost of using public bodies to create private goods; and in light of our communications and transportation mechanisms, it's also harder to observe what's going on. I would suggest that, if we were to go more toward a regional approach, at least the costs that are imposed by regulation might be more readily identified, followed, and observed, and thereby attacked. I don't want to suggest that I would necessarily favor regionalism, but at least I want to raise the question about the so-called desirability of the local community.

Finally, I want to focus on the issue of institutionalism and suggest the importance of doctrine in our interpretation of the Constitution. I have serious questions about the utility of the jury as the mechanism to get decisions correct, at least if it is a Cleveland jury. I've spent time observing them, the way we have constructed them, how they are selected, who is excluded, and who's willing to participate. It seems to me we couldn't devise a better system to find the lowest common denominator. I would almost call it "institutionalized mob rule." And that applies certainly in the economic area of plaintiff's antitrust juries. There is something institutionally inadequate in the jury system to decide these questions. The jury is constructed to decide individual facts—adjudicative facts—of who did what to whom where, why, and how. It is not good at deciding policy questions—legislative facts—which are dependent upon expertise, study, and hearing economists out.

Now, I certainly don't want to be understood as suggesting that the administrative regulatory body is the sole vehicle for decision making, because I am not at all confident that it is the solution. I would be much more enamored of using the legislatures—and, indeed, judges—in that respect, because I think they are more effective in the dispassionate type hearing than are juries. The answer is in the institutional structural mechanisms requiring that decisions be made on a shared power basis. We need, primarily, to limit the potential exercise of arbitrary power by government vis-a-vis the individual. Therefore, I would look to doctrines that try to foster that. I have always liked the proposal of requiring the judicial review of statutes that have wide public applica-

tion—forcing debate in the courts or in some body of what are the public goods or goals that are being achieved versus the private ones. It would force the issues out into the open, and that would be an enormous forward step. It seems to me that this would be a realistic mechanism to get at the question of protecting individual liberty and that it might be more fruitful than efforts to totally restructure our government and go towards decentralized approaches.

Aranson: I cannot resist the temptation to say that I find the Articles of Confederation a wholly adequate document for governance. Our Founders gathered to amend them, and as it turned out, they pulled the wool over our eyes. Many of the supposed evils of the Articles, including the alleged widespread production of tariffs, may have been a myth. People can and will bargain out mutually agreeable arrangements, and there was nothing under the Articles that prevented that bargaining. There really were not serious problems. (Even under the present constitutional arrangement, the courts have been very weak in preventing problems stemming from taxation and tariff arrangements. As I read the interstate tax cases, they pay less attention to economic incidence and more to examination of the language of the state statutes at issue.)

I emphasize that I do not claim that decentralization will cure cancer. It is not a panacea, nor is it an absolutely perfect arrangement. No institution is. But, much of the criticism of decentralization is derived either from inapposite kinds of comparisons or from a failure to recognize the historical record.

Wheeler: I am slightly incredulous that one might wish to resurrect the Articles of Confederation. This is the system that divided geographical entities into irrational time zones, that taxed the movement of commerce literally on the basis of what the traffic would allow, and that made it exceedingly difficult for even a relatively unsophisticated society such as that of the 18th-century America to operate on anything like an efficient basis. The constitutional conventions were not simply assemblages of ideologues; they were meetings by some hard-nosed pragmatists who knew they were charged with correcting a flawed system, a system that recognizably threatened the coherent conduct of government.

Admittedly, the road from Philadelphia has been a long one, and I am as unhappy as the next person at

what I see as unhealthy and often unjustifiable tendencies toward too much centralization. But the solution, at least regarding individual liberty, would seem to lie along the path of establishing an agenda to correct some of the wrong turns we have taken rather than in attempting to return to the starting point. I certainly do not think it a misreading of the historical record to say that the government of the Articles was one of inertia, provincialism, confusion, and a good deal of neglect of real liberty.

Komesar: Let's assume for the moment that one ought to have decentralization. I see certain advantages to that — not that decisions will be good or bad but rather that there will be a mechanism to discipline those decisions. The question I have is: How will you write your Constitution? One way is to have an entity which defines geographical jurisdictions over time and has continuing discretion to do so. Another way would be to define all jurisdictions in specific terms and not leave it for future discretion. That, of course, has the difficulty of not being flexible enough to meet changes in circumstances. If you look at the Constitution, oddly enough, the framers did have instances in which they wanted to take decisions away from future decision makers altogether. Now, many of us believe that there are many less than specific phrases in the Constitution, which were meant to divide the decision making process among future decision makers and not make it all legislative. But there is the choice as to who will decide: Will it be those writing the initial document, in which case it has to be specific; or will there be an assignment to a future entity, in which case you run into problems with imperfections in the defining institutions.

Aranson: There are several mechanisms to use in addressing Neil Komesar's question — and, again, not all of them are perfect. The simplest way is to leave things alone and to allow secession by simple majority, with the provision of the development of a common law of interjurisdictional externalities. In other words, if Sandy Springs, Georgia, wants to secede from Fulton County, then we get our neighbors together and we so vote. If we get, say, two-thirds of the votes, we would secede. Then, Fulton County might say: You own some of our property, some of our schools, and so forth. And, if it could not be bargained out, we go into court and make some kind of an allocation, depending upon how much in taxes Sandy Springs has paid. Having done that, for example,

you would probably find that Fulton County owed Sandy Springs money.

Morgan: I suggest that whatever we assume the constitutional agreement to be, it has to be something that we would all agree makes us better off. It has to be a notion, in which we all agreed to give up some of our total freedom in exchange for the ability to take freedom from others sometimes, whether by super-majorities or some other mechanism. That leads us, I suggest, to the proposition: How much is too much taking of liberty? And, ultimately, that question becomes an institutional one of who decides. As Lino Graglia has said, it really comes down to what decision you would snicker up your sleeve at. There is a whole range of regulation: some is liberty-intrusive and some is less so. Which brings you to the question of who decides which is which. I also agree that you are going to have some liberty-intrusive decisions on the local level. The question is: Are you going to have fewer of them at that level and are you going to be able to deal with them better than you might have otherwise?

In response to Ernie Gellhorn's point on the juries being institutionalized mob rule, there is always the possibility that juries have a less than a perfect understanding of all the questions which they might be forced to address. But judges aren't perfect either; and judges have a substantial interest, whether institutional or personal, in being assertive. I have not seen that judges are wiser or less intrusive or less willing to tolerate a state invasion of individual rights, at least in the economic area, than juries might be. I don't know if there is any specific basis for saying for sure whether a legislature, a jury, or a judge is most likely to be liberty-protective, but it ought to be explored.

Harriss: One of the questions I want to raise is, what are the implications of the ability of a person to set up a perpetuity which has effects throughout endless time if the investment is successful? How does that square with the issue of equality? As for the question of decentralization, I was on one of President Reagan's committees that tried to deal with this issue. One of the reasons that it failed was that it could not find perfection. No plan devised — and the computers ran off dozens of them, attempting to match responsibilities and revenue sources — could satisfy everyone who had some influence. Remember, every state has two senators; and this fact

presents a real problem. My guess is that we will continue to talk about decentralization, as will our grand children, but that not much will happen.

Butler: Peter Aranson's preference for the Articles of Confederation leaves out of account what Alexander Hamilton perceived as perhaps the biggest single benefit of the Constitution, namely the ability of the federal government under the new Constitution to tax individuals directly and not to be beholden to requisitions from the States to finance real public goods like national defense. In the *Federalist Papers*, Hamilton noted that a lot of discontent with the Constitution centered around the potential denial of a civil jury in tax collection cases. He countered with the observation that a lot of the states deny the right to a jury in such cases—with the clear implication that states' rightists who criticized the Constitution on this score were hypocrites. Another early writer, Saint George Tucker, wrote in his 1803 edition of *Blackstone* that you should have a right to a jury in a tax collection case. Tucker also made the point, and it responds to Ernie Gellhorn's observation, that the only trouble with juries was that they were being sabotaged by the legislatures, which don't like them and therefore underfund them. According to Tucker, juries provide a wonderful public good—that is, individualized justice, hence we shouldn't impose a disproportionate sacrifice on jurors in the provision of this public good. If we want justice, we should pay for it. Tucker concludes that jurors need to be better funded. If we re-adopt the libertarian model of the jury, we will get better results, I suggest, not only because juries would be better paid, they would also be better instructed. Judges will no longer treat the jury disdainfully—as a rubber stamp. They would have to treat the jury with a great deal more consideration, both because the jury would be more representative, which better pay will help ensure, and because the judge would have to advise the jury: The ultimate decision is yours, but I respectfully suggest to you that the best view of the law is as I am giving it to you. As a result, jury trials would be a much more invigorating exercise, because you would have a genuine democratic dialogue on the mature of the social compact.

Manne: I think we have to put to rest any notion of the zero-transaction-cost system government. Also, it seems that we have got to start off with the same kinds of notions

that economists have traditionally used. And that is, everybody has a certain degree of freedom — in the sense of having some choices. Now, people are going to make the choice that they want some government; they are not going to opt for anarchy. As soon as they opt for government, they implicitly agree that they are going to make an arrangement with the governors. Too often, we sit around complaining bitterly about the way these people in government are behaving. That is very silly talk. These are people who have elected to make their living being government officials. The point is that, in focusing on ultimate ideals, states of nature, and the improvements we are going to make in government or in human liberty, we must take into account the here and now, the existing distribution of power — or, as I would view them, property rights, properly conceived. At any given moment, everybody faces some transactions costs, people in government, people out of government. It is not worth it to me to go out and devote my life to stirring up a revolution to get rid of some Supreme Court cases I don't like or the FDA or the FTC. All we can really achieve is tiny incremental or marginal movements towards individual liberty.

