

## CONVERSATION

*Part Two of the symposium consisted of a conversation among the five panelists. Professor Lawrence Sager moderated the discussion.*

LAWRENCE SAGER: It seems only fair to ask Jeremy [Waldron], before we say anything further, to take ten minutes or so to react to the panel as he chooses, emphasizing two things: one, I don't mean to—and Jeremy doesn't take it as his mission to—respond to everything, every comment favorable and unfavorable, and he is by no means invited just to defend himself, so much as simply to react to points he thought were interesting, for purposes of amplifying his own views.

So Jeremy, thank you for the book and for this opportunity; you have a few more moments to enlighten us.

JEREMY WALDRON: I was touched and heartened by the quality of these observations. Many of them were very provocative and have stirred my thoughts a lot. I hope you won't regard it as an indication of my attention span that I want to really focus most of my comments on one of the questions that John Ferejohn raised at the very end of the previous session, then relate that back to some of what was said by the other contributors. John said we should beware of asking the wrong question. Let's just agree, he said, that in any mature system of politics, in any mature political and constitutional system, there will be a variety of participants in the process of lawmaking. There will be Congress-like or parliamentary-like institutions, with hundreds of members who deliberate and enact formal bills. There will be a great deal of work done by agencies, often under general congressional or parliamentary supervision but responding to rather vague goals in filling in some quite detailed rules; whether made by the FAA, or the FCC, or the Poultry Marketing Board, or whatever. There will be institutions like the Federal Reserve that make decisions from time to time that don't have legislative effect but that have profound effect on what happens in the society. And there might be, John suggested, and there are in many European systems, constitutional courts which make contributions of their own and have authority within the system, too. And he wanted us to ask, "Is there anything in Waldron's book, or anything in general, which should

make us pause before we enthusiastically support the idea of a distinct non-representative institution having some sort of authority over the kinds of issues that we've been talking about today?" That is, are there issues of rights that we should consider? And he wanted us to think less parochially about how this might be done, and I'm grateful for that, but I still want to say something about the general question.

Is there anything about fundamental rights that might make it inappropriate to leave this matter in the hands of the legislature? Various arguments can be made about why detailed rules of airliner maintenance are best developed by bureaucrats in the FAA. You can give good arguments, interesting arguments, and I think not entirely irrelevant to this issue of rights, about why questions about the setting of base interest rates should not be settled on the floor of the House but rather should be handed to an independent panel.

One theme echoed by a number of my friends here was the value of having decisions taken away from a context where they were likely to be made on the basis of self-interest. Chris Eisgruber, particularly, talked about how in many political systems, certainly in the United States but probably also in many European political systems, voters do vote their pocketbooks, and they are not at all ashamed to do so. They think this is perfectly reasonable. And these issues of fundamental rights might well be issues on which we would be very alarmed if we thought people were voting the equivalent of their pocketbooks. I share that alarm—that's what I meant about this possibility that the topical majority might line up with the decisional majority. That's what's going to happen—those two majorities will line up if the members of the majority are voting just their interests. So, I appreciate the real concern, but it does seem to me to be a tremendously important feature even of our practice that the issues on which people are most likely to vote their pocketbooks are issues that are going to be left with the legislature on almost any account, apart from, say, Greenspan—issues of interest rates. And the issues on which they are least likely to vote their pocketbooks, but most likely to vote their considered moral opinions, are the issues of the moment that we tend to take away from them and give to the courts.

So, for example, if the legislature in Texas or Pennsylvania or anywhere passes some legislation on abortion, you and I might disagree with the legislature with the respective legislation that it passes, but there is no doubt that that legislation is motivated by some sincere moral conviction rather than simply an assertion of self-interest on the part of almost all the members of the majority who would support it. When Congress passed the Religious Freedom Restoration Act

(RFRA),<sup>1</sup> by a fairly large majority, in response to a decision by the Supreme Court,<sup>2</sup> there is no doubt that they passed that legislation in response to serious convictions they held about what religious freedom ought to amount to in the Republic. And let's not forget they offered minorities a greater degree of protection than the Supreme Court was prepared to offer them in the case that evoked the legislation, a greater degree of freedom than the Supreme Court was prepared to offer them in the case that struck down that legislation. So it does seem to me that on a broad range of constitutional issues (with maybe the exceptions of property-related issues like takings), a serious question exists of whether these are the sort of issues that we should be most alarmed about people voting their pocketbooks or the equivalent of their pocketbooks.

There's just one more angle to add. Think about the experience this country had for two or three generations (depending on how you count), from about 1880 to about 1935, when the federal courts and also many of the state supreme courts consistently struck down economic and social legislation.<sup>3</sup> Without a doubt, much of that legislation was motivated by pocketbook considerations among working-class men and women who had gained a foothold of representation in the state legislatures, which then passed laws about working hours, and minimum wages, and health and safety, and unionization. In these cases, to argue that it was inappropriate for legislation like this to be motivated by pocketbook concerns is to argue that it was inappropriate for members of the working class to struggle for representation in the legislatures. Such an argument would not allow such citizens to vote their interests in these matters, and that it was better for these decisions to be made by a court that could not relate to the experiences of constituents exhausted from long hours of work or harmed by industrial practices.

We need to be very careful about both sides of this equation: both about the assumption that majorities on issues of rights are always likely to vote their self-interest, and about the assumption that self-interest in legislation is always undesirable and that some degree of

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1. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb et seq.) (*overturned by City of Boerne v. Flores*, 521 U.S. 507 (1997)).

2. *See Employment Division v. Smith*, 494 U.S. 872 (1990) (holding free exercise clause did not prohibit application of state drug laws to respondents' ceremonial use of Peyote, and that therefore state could deny unemployment claims caused by drug-induced work-related misconduct without offending First Amendment).

3. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *see also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 119–22 (1990); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 102–110 (1993).

detachment is always more desirable. The basis on which people fought for universal suffrage, chained themselves to railings and fought at the barricades, and threw themselves under horses' hooves in order to get the vote, was that they thought their interest, experience, convictions, and opinions were entitled to be heard and not dismissed on matters of serious moral concern. These are not technical issues—of course there are technical issues surrounding them—but the question of what character religious freedom should have in our community is not a technical issue. In the end, the issue between say, the Supreme Court in [*Employment Division v.*] *Smith*<sup>4</sup> and Congress in the Religious Freedom Restoration Act, is not a technical issue, nor is it primarily a technical issue of interpretation. Instead, it's a question of how much we as a community are prepared to offer in the way of accommodation. I maintain, and this is against even my dear friend [John] Ferejohn here, that there is something alarming about the view that would shift the last word on matters like that away from explicitly representative institutions.

I want to say one other thing about those institutions. This will address some concerns that Keith [Whittington], Larry [Sager], and Chris [Eisgruber] raised. In *Law and Disagreement*, I didn't develop a theory of representation, nor of bicameralism, nor of legislative structure (particularly legislative procedure), for two main reasons. First, it wasn't my intention to propose a new constitutional order for the United States of America. I value my Green Card too highly to engage in anything like that. [Laughter]. The question was to address the wider community and ask whether we should hesitate before regarding this ethos as something to be exported or something to serve as a platform of criticism, especially in reaction to what seemed to us like half-hearted or confused measures being introduced in Australia, New Zealand, Great Britain, and the European Union. So I was assuming that I was addressing the case and helping to defend well-functioning representative institutions already in operation.

Second, I didn't want to beg any questions about the ideal structuring for a series of representative parliamentary institutions. One of the things that distinguishes legislatures from courts is that everybody agrees it is appropriate to think through issues about the organization and reorganization of legislatures, and of districting, and of the voting and vote-counting systems under the auspices of political equality and the people's voice. Everybody agrees that those are the appropriate values that you should use for the fine-tuning (or occasionally gross-

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4. 494 U.S. 872 (1990).

tuning) a system of legislative representation. So the ongoing debates (which I didn't propose to settle), about whether we should have salamander-shaped districts, or term limits, or how electoral finance laws should work, have one clear advantage: they all happen under this principle of equal respect. Other factors are considered (like stability and incumbency), but it is not out of order to propose the change in the voting system on the ground that it would make us more equal as political agents; whereas, the auspices under which we would criticize and evaluate and reform the Federal Reserve or a constitutional court or the American judiciary are not primarily judged according to values of that order.

So the question really isn't which particular set of parliamentary, congressional, or legislative institutions is ideal, but rather to ask: isn't it a good idea that the institutions which address our most fundamental rights are also the institutions that are most subject to scrutiny on questions of equality of participation? And even if the individual vote seems meaningless to some of us, it's only meaningless under the discipline of equality in that we are sharing it with millions of others. And of course the vote is not the only thing. We participate in all sorts of ways, and the idea is that we want representative institutions that offer multiple points of access, but which somehow relate that multiplicity of points of access through this underlying ethos of equality. And it did seem to me that there is something valuable about associating these fundamental issues of rights on the one hand with this fundamental ethos of equality on the other.

Finally, I want to acknowledge the force of a point that Larry Sager made, which is to warn me, and indirectly you, against thinking that when we talk about judicial review we are talking simply about something like, I don't know, pre-1911 House of Lords, or House of Bishops, simply a second chamber that has a power of review. Larry emphasized that one crucial difference between simply setting up a bunch of aristocrats to have the last word on legislation and setting up, for example, an American-style system of judicial review, is that an American-style system of judicial review is open, it is accessible, it has points of access for the ordinary citizen, and our equality partly resides in that access. We are equal not just as voters, but as litigants. It's a supremely important part of our legal system, of our citizenship system, of our system of equal rights, that a person can go to these institutions, as they can't go to the Federal Reserve or they can't go to the House of Lords. I think it is tremendously important that such access to the courts, to question whether your rights are being upheld, be maintained in any system to be tolerable under these arrangements.

I would be very interested to hear from John how it works with the constitutional courts in Europe.

But let's remember this: under a British-style parliamentary system, you go to the courts to get your rights upheld, but they will refuse to uphold any interpretation of your rights not laid down by the legislature. When you go to the U.S. federal courts, and you are a minority with an unconventional claim of rights, if your unconventional claim of rights is at odds with the established doctrine that the court has established for itself in the area in question, and let's just imagine the hardest possible case, at odds with the doctrine that the court has established in defiance of the suggestions that have come from other branches of government, the court will more or less peremptorily dismiss your consideration. They will say, "We are sticking with our own story." They may be persuaded, I guess in very unusual cases, to amend their doctrine, but we should remember what happened in *City of Boerne*.<sup>5</sup> An archbishop goes to the federal courts and wants to have some religious accommodation that he thinks he is entitled to under legislation passed by Congress. The majority of the Court says, more or less, we are not going to entertain this claim because we have already established our own doctrine on this matter. The courts are therefore meeting the claims of the individual litigant as though the court were a legislature rather than meeting the claim of the individual litigant and saying, how nice, we have a chance to reopen this issue and discuss it and entertain it. Now this is a bit of a caricature, but I just wanted to emphasize that there may not be all that much distance between the right of access and the prospects of successful access for the individual litigator under the one system and those rights under the other system.

SAGER: Thank you Jeremy. In the case of Chris and I, this is pouring gasoline on troubled waters [laughter]—both *Boerne* and RFRA—but perhaps that will come up in conversation. I suggest we start with Chris, then John, then Keith and perhaps me, but perhaps not, and respond briefly to Jeremy's response to us. And then as soon as each of us, or at least my three co-panelists have responded to Jeremy, then I'd like to ask some of you in the audience to ask a couple of questions either to Jeremy, or to anyone else, as you wish. You want to lead off, Chris?

CHRISTOPHER EISGRUBER: I want to say two things. First, I'm happy with the ground on which I understand Jeremy to put the

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5. 521 U.S. 507 (1997) (holding Religious Freedom Restoration Act unconstitutional as exceeding Congress's power under section 5 of Fourteenth Amendment).

disagreement that he has with me and the others on the panel. In his remarks today, Jeremy has emphasized the substantive moral ideals relevant to a strong conception of democracy and participation. He has also emphasized some important empirical features—features about which he and I disagree—of legislatures and judges. More specifically, when Jeremy makes arguments about the likelihood that voters under the American system, or under other systems, would take into account issues of principle, and when he distinguishes between “topical” and “decisional” majorities, he draws attention to a host of pragmatic judgments which could be made in differing ways and which ought to be assessed in light of all the institutional variables that John Ferejohn identified in his remarks. These are issues not sufficiently vetted in the literature as it exists now. It is worth emphasizing, I think, that both Jeremy’s case on behalf of legislatures and my counterargument are contingent on these empirical judgments about how institutions work.

Second, I want to raise one set of doubts, maybe by way of a question about the Religious Freedom Restoration Act,<sup>6</sup> about how strongly Jeremy means to push this particular defense of legislatures and their characteristics. I should first double the caveat Larry Sager offered regarding the Religious Freedom Restoration Act, or “RFRA,” as we in the business tend to call it. Sager and I have been so involved with RFRA and I’ve been living with this issue for ten years. I was at the Supreme Court when it was decided and it never seems to go away. Here it is on today’s panel! I didn’t realize that this was about RFRA, but it always is, or so it seems to me.

Maybe I had better give some background, just so nobody is lost. RFRA is the statute passed by Congress in response to the *Smith* decision on free exercise.<sup>7</sup> The issue in these cases was about whether the free exercise clause of the Constitution ever entitles people to claim exemption from neutral and generally applicable laws on the ground that their conduct was religiously motivated. For example, in the *Smith* case the specific issue involved Native Americans who ingested peyote, a drug, as part of their religious rituals.<sup>8</sup> The question was whether the Native Americans could claim exemption from a controlled substances statute in Oregon that criminalized the consumption of peyote. The Supreme Court in *Smith* said no: exemptions are never constitutionally required if the laws are neutral and generally applicable, even if the conduct in the case is religiously motivated.

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6. 42 U.S.C. § 2000bb et seq.

7. 494 U.S. 872 (1990).

8. *Id.*

WALDRON: And even if the law doesn't serve a compelling interest.

EISGRUBER: That's correct. There's no compelling interest test that's required. Neutrality and general applicability is sufficient. Congress then passed the Religious Freedom Restoration Act, which created a compelling state interest test, or more precisely, recreated a test that Congress said had existed as a matter of First Amendment jurisprudence before the *Smith* decision. And here's where I want to press Jeremy a little bit, because some of us thought that the compelling state interest test was poorly tailored to the objectives of Congress. We urged that Congress itself should look at particular cases where exemptions were needed and grant them as needed or at least grant them in response to specific narrow problems. And Congress' answer to this, and this is explicit in the legislative history of RFRA, was, "We as a legislative institution, we as the Congress, and for that matter all of the state governments of the United States, and the city councils of the United States, cannot be trusted with that kind of judgment. That kind of judgment belongs in the judiciary and therefore, what we want to do is restore the test that existed prior to the *Smith* decision." And indeed, Congress went further and said, "We are just restoring the test that the Supreme Court used in the past." Most experts agree that the Court's old jurisprudence was fraught with difficulties and inconsistencies. Congress didn't get into sorting it out. They said, "We just want the judiciary to go back to what it was doing beforehand."

Now I find this particular exercise on the part of Congress to be an odd thing to take as an example of the desirability of legislative as opposed to judicial action. Congress itself seems to be operating on the ground that legislatures can't be trusted with certain kinds of decisions of this kind. There are other ironies here, but I'll just leave it there and add one thing to what John Ferejohn has said about the differences between the United States and other countries. One difference between the United States and any other country in the world is the difficulty of amending our constitution. We have the hardest constitution to amend in the world. I think we still have that title—in any event, if we're not number one, we're close. And this affects, of course, our practice of judicial review. That is, when our judges act, it is very hard to overturn what they've done. Now maybe what Jeremy is saying, in holding out the Religious Freedom Restoration Act as a reason for confidence in legislatures, is that the right balance between courts and legislatures is one governed by a different kind of amendment rule, but nevertheless, one involving courts in administering

these kinds of decisions about which perhaps, as Congress said in RFRA, we can't trust legislatures.

WALDRON: No, it was supposed to be a very, very specific point, which was that sometimes Congress argues for an interpretation of the Constitution which is rather more generous to minorities than the Court does. And secondly, just to illustrate the point that when there is disagreement between Congress and the Court, between the people's representatives and the Court on what the Constitution means, it looks as though we are happy with the situation that the Court's view of that should prevail. But I entirely accept Chris's point. It was part of Scalia's argument in *Smith*, that this is a job for the legislatures. If they want an exception to the peyote legislation or to the narcotics legislation, let them promulgate it.

EISGRUBER: I see, so you agree then that the Religious Freedom Restoration Act in that regard is a bad thing, it ought not to have?

WALDRON: Yes.

JOHN FERREJOHN: I have a couple of remarks. One extends Chris's remark about the Religious Freedom Restoration Act, which is going to get me in trouble—or could get me in trouble. What Chris considers a strange phenomenon is actually pretty common: legislatures often create statutory regimes which set up bodies (for example, Article I courts with lots of process, or administrative processes) that are explicitly reviewable by ordinary courts.

Among what legislatures do is tie their hands in some ways by, at least in the short run, putting other institutions in play, by erecting procedural protections for litigants so that they don't come back to the Congress. Look at the INS; we don't normally think that Congress wants to see every immigration case on the floor, right? Congress sets up institutions for dealing with these cases, partly because of some worry about how the chamber itself might behave when faced with, let's say, unpopular minorities petitioning Congress for this or that ruling. In other words, legislators think they're not well-equipped institutionally to deal with certain kinds of things, so that when they create the Social Security disability process, there's an elaborate setting of hearings and process with which people are provided. And it's made reviewable, right? Lawyers can be there, etc.

In other words, Congress says we could, as a matter of fact, do like we used to do in the old days and decide whether or not you are sufficiently disabled that you can't work, but it seems better to create process which takes that decision away from us. So now sometimes

when Jeremy talks, and sometimes in the book, it sounds as though he has a general criticism that sweeps so widely that it would sweep this in as a bad thing. So for example, one attractive feature of the legislature is that—I'm going to overstate this—everything's in order in the sense that if anyone feels badly-treated in some way, they have a kind of equal right to complain or petition. Well, in a sense, maybe that's true. But when Congress has gone out of its way to delegate authority to another institution and says, "If you've got a problem with a disability claim, go to this hearing process, don't come to us about it," it has basically said, "No, you can't come to us."

Now, is it a bad thing when Congress decides to proceed by setting up a complex institution rather than deciding things itself in the first place? I can't believe that Jeremy would think that's a bad thing because preventing such delegations would be so much worse. One of the things that Congress can do by setting up institutions which take itself out of the action day-to-day, is that it can accomplish a lot more than it could do if it had to do everything itself. Congress, like parliaments generally, is an extremely unwieldy body. Five hundred and thirty-five people having to come to an agreement about something. I mean, you've seen what's happened since September 11th, it's just like they're horsing around and posturing. Whereas, when Congress sets up institutions, including judicial institutions, it sets up processes which can increase its efficiency. It can't be the case that Jeremy wants to say that whenever Congress does something like this, creates a process where people cannot come directly to Congress, but are channeled through some other agency, that that's forbidden, that would be to sort of emasculate Congress, he can't quite mean that.

So now my question is, what is the difference exactly, thinking not about Congress, but about us as a people setting up a process in which we choose to do exactly the same thing? We decide the way we organize our process is to have some institutions which we create as a people that we may call judicial institutions. And they have certain shape, and they can be defective, as I indicated in my remarks earlier, in various ways. But the broad contours as far as I can tell are just about the same as Congress setting up Article I courts or deciding to do what it did in RFRA. I don't see a principled problem with this from a democratic theory point of view. In fact, if the people do it rather than Congress, it seems like it's got a better pedigree. And I think that's the best argument for why it is that we should think of constitution-making as a time when people can make exactly this choice.

Finally, I agree completely with Chris that the American Constitution—and this is a fact—is the hardest one to amend, and I think that’s a huge defect. It makes some issues which I think are not central issues about judging and legislating really important, like who happens to have the last word. The last word is only an issue when it’s really difficult to amend the Constitution. When it’s relatively easy, as it is in most European countries, if the Parliament has a problem, if the people have a problem with what the court decides, they change the legislation. They change their constitution. It happens. So it’s not so much a question of last words, it’s much more of a practical issue. And it seems to me that a defect of our system is that we make things issues of rigidity and of principle which are not really issues of principle and rigidity at all. They’re really issues of deciding to proceed by particular, rigid institutional forms, and I think that needs practical justification, not necessarily just philosophical justification.

KEITH WHITTINGTON: I guess I’d like to briefly build upon what was just said, because I think there is this problem of the relationship between legislatures and courts and the dynamics between those two institutions. I’ve been trying to work out some of these questions in my own mind. It seems like one of the things that Jeremy would approve of is the idea of the legislature setting a general principle and then letting the courts work out the particular applications. And so one of the problems with the *Smith* case was that the Court adopted one principle, Congress would prefer a different principle, and Congress couldn’t get the Court to alter that principle. Even if it might be the case that the principle that Congress preferred was one that punted a lot of particular issues back to the courts, I would think that such an outcome would seem basically acceptable from Jeremy’s perspective. A lot of these issues would actually, in the end, get hashed out in courts, but those are particular applications of the general principle, and Congress would retain control of the general principle. But it seems to me that this kind of delegation becomes complicated very quickly in practice, once the issues get punted over to the courts. It’s not just a question of applying a preset general principle. The courts necessarily become engaged in reworking the principles themselves in the process of dealing with particular cases. Moreover, to the extent that you accept some kind of mechanism for Congress to go back in and say, “Wait—now that you did that, that’s not the principle we had in mind. Let us correct you and explain better to you what the general principal was that we had in mind for these kinds of cases.” That quickly gets the legislature wrapped up in the particulars of the case. Once particular issues are put on the table,

once a particular situation, a concrete case, gets laid on the table, the congressional dynamics are likely to be quite different in terms of working that out. A congressional correction of the Court is no longer necessarily the legislature coming back and saying, “You’ve got our general principle wrong,” but may simply be the legislature responding and saying, “Well, actually, we particularly like that interest that the Court ruled against and we would like to rule a different way.”

WALDRON: But in that regard, RFRA is again a fine example the other way. The Congress had no particular affection for peyote use in narcotic ceremonies. They advocated a general principle that attempted to relate the peyote decision to some earlier decision about, I don’t know, working practices for pacifists, and the next issue that came up was about town planning for a Catholic church. The issue was one of principle throughout.

EISGRUBER: I don’t think so, actually. With regard to the particular cases: First, on the peyote case, Congress actually had passed even before RFRA, an act providing an exemption for Native Americans from the federal controlled substances statute, and most states had passed similar kinds of exemptions. So the only question was whether or not they would override Oregon which hadn’t passed such an exemption. The politics of this issue involve questions about under what circumstances Native American lobbies are powerful; they also involve questions about peyote’s risk factor as a controlled substance. I’m told that peyote is unpleasant—it induces vomiting—and so there may not be much of a political constituency worried about peyote use. By contrast, there was a lot of adverse political interest, according to Doug Laycock who litigates these cases, in the case of the Santerians who were engaged in the ritual slaughter of chickens, which is what led to the *Lukumi Babalu-Aye* case.<sup>9</sup> Laycock says no congressman was willing to introduce the bill under those circumstances. But I don’t think that the interests were strongly opposed in the case of Native Americans, where there were already exemptions in the federal code for their religious practices.

Likewise, I don’t think it’s right to say that it is principle all the way down in the other cases about land use. Churches are powerful lobbies, especially big ones, like the Roman Catholic Church that was involved in *Boerne*. They are very capable (as Robert Putnam’s study

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9. *Church of the Lukumi Babalu-Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding unconstitutional city ordinance prohibiting ritual animal slaughter because ordinance not neutral and because government interest advanced did not justify targeting of religious activity).

and others show) of mobilizing voters, particularly on issues that they care a great deal about. So what eventually comes out of Congress after *Boerne* is a bill that applies to land use and prisoners' rights. Prisoners' rights is an ACLU issue; depending on how one views the ACLU, whether it's an interest group or lobby of principle, you might think of that part as being about principle. In any event, the prisoners' rights issue comes through only with the land use provisions, which are chiefly beneficial to the largest and most important and powerful churches. I can't abide any longer the claim that it was just principle all the way down. There's an interest group story here, a pretty strong one. Okay, enough on RFRA—I'll be quiet.

WHITTINGTON: As John Ferejohn suggested, from a perspective of constitutional designer, the people in trying to create a particular set of institutions may well think that Congress, or a legislature, is going to make certain kinds of mistakes in a fairly systematic way when faced with concrete problems that are likely to arise over time. It may therefore make sense to create a different and more insulated institution to handle precisely those issues even though it, too, is likely to make certain kinds of errors, but on balance the more insulated institution may be more likely to do the kinds of things you want it to do, providing better outcomes than simply throwing all these issues into Congress. Sometimes it is worthwhile, from a democratic perspective, to tie your hands with the goal of getting certain kinds of outcomes more often than might be the case if you were to simply leave it up to the particular dynamics of legislatures handling many of these issues on a case-by-case basis, or legislatures with the capacity of stepping in or overruling courts on a case-by-case basis. And so ultimately, these choices regarding institutional arrangements boil down to a lot of particular empirical questions that are rooted in particular kinds of national experiences and that will have to be taken into account by particular constitutional designers. These are very difficult empirical questions to get a handle on. One of the virtues of Jeremy's book is that it lays out certain philosophical principles that are underappreciated in the existing literature and that feed into a host of very interesting empirical investigations. I think we could benefit from thinking about these kinds of issues and trying to build off of them and incorporate these kinds of philosophical understandings into a larger empirical project. But ultimately there has to be a back and forth between philosophical concerns and empirical concerns and investigations in terms of what the appropriate institutional mix is, in particular historical contexts, to produce the kinds of overall liberal outcomes that you are looking for.

SAGER: I want to invite and warn you all that I'm going to turn to the floor in moments, and there've been so many threads of conversation, I don't want to go after anything in particular except to say first, I want to join the general chorus here of appreciation for Jeremy's book—precisely for putting these issues on the table and, as Chris has emphasized, putting them on the table in an attractive and useful way. And in that spirit I want to note that—now not directly responding to Jeremy or to the book, but really to conversation among the panelists, that *if* one felt that it was important to make constitutional judgments by a judiciary more open to popular political response, in one way or another, a possibility that I don't resist, but I'm not as quick as most of the panelists I think to embrace, that there are at least three ways of doing that, and they may have really different appeal.

One way is to make the constitution more amendable. The second way is to give legislative entities a response to constitutional judgment in one form or another; Canada's "notwithstanding provision" or other possibilities: special majorities, special times and so forth. The third way is to take a view of judging which says that constitutional judges should take the distribution of popular views into account—at least under some circumstances, widely held increasingly by some constitutional theorists in the United States. Without going into detail, let me say I personally have rather strong preferences, or I should say judgments, among these three.

The worst, it seems to me, is to ask constitutional judges to take popular views into account, in some tacit or express way, because it creates a kind of corruption of institutional integrity and asks judges to do something they seem extremely poorly deployed to do. This is especially true on accounts like Chris's and mine of the advantages of judges in some important ways. For me, the next that I would turn to, still somewhat reluctantly, is John's, which is to make the Constitution more freely amendable. It's not the moment to launch into that, but I think there are real virtues to an obdurate Constitution, especially if, as I think an obdurate Constitution is likely to be, it speaks at a very high level of generality and invites discussion under its general and rather durable terms. And the third, and actually for me the most attractive of these, is in some ways the most radical—which is to create formal mechanisms of legislative response to constitutional judgment. But for the moment, I just wanted to point out that there was a lot of institutional possibility here—either for design or reform, and indicate the kinds of things we might think of. Now some questions.

PASQUALE PASQUINO (N.Y.U. Global Law Faculty): I would like to make some comments for Jeremy's consideration. The first point, which has already been spelled out, is that some of Jeremy's criticisms of the idea of constitutional adjudication are specifically related to the American system of judicial review. And philosophically, this impoverishes your argument. You have an interest in disentangling your criticism from the peculiar, though venerable institution, of the American Supreme Court. I'll give an example of this limit. I believe that what you said about the *Lochner* Court is perfectly justifiable historically. In addition we know that the *Lochner* Court is at the heart of a strong liberal resistance in Europe for the introduction of constitutional adjudication. But, this argument is irrelevant today. Currently, almost no one in Europe thinks that the most important human rights are property rights.

This approach was typical of a society in which rights were identified with property. And we have a parallel case that shows this was not only an American approach but a general tactic in 19th century society. We can actually compare the United States with Norway, because Norway developed judicial review in the second half of the 19th century. Now, the Norwegian judicial review followed exactly the same patterns. Between the 19th and the 20th century, they tried to reject social democratic legislative reforms in order to protect property rights. But, I repeat, nowadays this seems an irrelevant point. It's just important for historians, because no constitutional court, at least in Europe at the beginning of the 21st century, reduces human rights to property. In no balancing system will you find the idea that property rights as such overrule social rights of citizens. So, I think that the example of the *Lochner* Court is not very instructive in the philosophical debate Jeremy opened.

The second point, also philosophical and general, is that I believe Chris Eisgruber is right in claiming that "equal respect" is not the same as "majority rule." As you rightly insist, majority rule is connected to another principle, the principle of *quod omnes tangit ab omnibus approbetur*, dictating that something, which concerns a group of people, has to be approved by all of them. This principle, born in the classical Roman legal system, "was a mere technicality of the private law of co-tutorship."<sup>10</sup> Now, my question is, why should we think that this Roman legal principle ought to trump in our constitutional systems the principle of "equal respect"? Why should we think, for

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10. See BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650, at 24-25 (1982).

instance, that the right of a minority to have, for instance, in France, his own language protected by the government, has to be decided by all the French citizens—or even the majority of their representatives? That seems to me slightly unfair.

A final consideration. Even in the only true democracy I know of, the old Athenian democracy, there were complex and sophisticated legal institutions designated to check the decisions of the majority of the popular assembly: the *dicasterion*, for instance, was a sort of constitutional court. So, I'm very skeptical about this idea that democracy doesn't need some form of judicial protection that goes beyond majority rule; among other reasons because of the Athenian example that I have not the time to develop here. Thank you.

SAGER: Thank you, Pasquale. Jeremy, do you want to respond to the second of Pasquale's points, concerning the French—whether there is a comparable principle or an appealing principle that says all members of the French political community should decide the question by majority vote as to whether a subcommunity of France should have distinct linguistic rights?

WALDRON: Yes, I certainly want to respond to that. I also want to respond to the first one.

SAGER: Fine.

WALDRON: On the second point: It's true that the origin of the Latin slogan *quod omnes tanget ab omnibus approbata* stems from Roman law cases about inheritance. I think it would be unwise to confine it to those circumstances, because the general idea was that if some issue really affects the interest of a person, that person should be entitled to a voice in the decision, along with the voices of all the others affected by the decision. And since the decision has to be one in which we reach a decision, and we want some neutrality among the various options, it does seem to me appropriate to see it as majoritarian. Now, of course, in every political system, there will be questions about centralization and decentralization of certain decisions. And so it may well be, just to vary your example slightly, whether there should be rules restricting English signage in Montreal, maybe should be discussed and debated among the inhabitants of Montreal as a municipality, rather than among the entire Canadian electorate. That's a question about scope of democracy; that's not a question that we're considering here. It's certainly a very important question, but nobody denies that there would be some appropriate

value to having the voice of whoever is affected being taken into account in this matter.

The one thing I wanted to say about the first point: “Why do you harp so much on the disgraceful record of the United States Supreme Court when nobody is seriously proposing to reproduce that record anywhere else?” There are several reasons. When the *New York Times* writes preachy editorials reproaching the British Parliament for failing to enact a system of judicial review, it says the lovely thing about the United States system is that it does protect minorities against heinous civil rights abuses, and it does protect against hasty legislation that might damage the interests of a minority. And it is worth telling the world that it has done no such thing! It didn’t do it in *Korematsu*.<sup>11</sup> The Court didn’t lift a finger against slavery, which is the most vicious human rights violation this country has known. It lifted several fists in defense of the institution. The Civil Rights Act was not an act of the United States Supreme Court. The Emancipation Proclamation was not an act of the United States Supreme Court. It is worth telling the world that, as a matter of fact, the record on these matters has not been such as to inspire anything like the confidence that Keith or Chris have had in the Supreme Court’s ability to protect minorities. Normally, as you would expect, powerful and prestigious members of the political class have been willing to be complicit in whatever the political class in general wants to do for minorities, whether they are in Congress or whether they are in the Supreme Court. And of course, there are differences around the margins, but we need to understand those differences.

I think the other point that is worth making, and this goes back to Chris’s Bartolus point: why aren’t I just getting with the program, everybody is limiting legislatures all around the world. In fact, legislatures are being limited all over the world, in their ability to control social and economic issues, but mainly the toll of such limitation is by treaty, particularly WTO treaties. And I see an interesting resonance between the urge to limit them on that basis—to make sure that the ordinary people of the countries cannot decide the issues about social and economic policy—and also this general position that we’ve had canvassed here today: that of course as soon as they get the vote, the wisest thing for the people to do would be to take the fundamental issues of their rights and give them to someone else to decide. And of course that would be the sensible and intelligent way for them to or-

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11. *Korematsu v. United States*, 323 U.S. 214 (1944) (affirming, pursuant to war power of Congress, exclusion of persons of Japanese ancestry from West Coast war area during World War II).

ganize it. So I do think the experience of, not the *Lochner* Court, but the two generations of labor activists who were demoralized by the success of *Lochner* Courts, is relevant in assessing the general ethos of denigration of legislative competence that is at large in the world today.

SAGER: Other questions from all of you patient folk? And will you introduce yourself please?

MELISSA SCHWARTZBERG (Doctoral Candidate, Department of Politics at N.Y.U.): I wanted to ask, and this is largely directed to Professor Waldron and Professor Sager, but not exclusively, whether the presence or absence of correct answers to certain fundamental questions is doing any work in any of the arguments presented here. It seems to me that this is antecedent to the question of who might get the answer right, or how to decide among competing claims to truth. And we might well want to hand over the decision to the body most likely to get the answer right, which might depend on the question. It could be the judiciary, it could be the legislature, it could be any other body. So first, I want to ask whether this question is foundational, and second, whether it is implicitly motivating the debate on the second question, that is, who is going to get the answer right?

SAGER: That is an extremely well-put question, thank you. Jeremy, do you want to?

WALDRON: I have tended to take the line that the existence of right answers makes no political difference, so long as there is sincere and intractable political disagreement as to what the right answer is. So that if, for example, we thought that we couldn't tell which institution was most likely to get the answer right, unless we could agree on what the right answer was, then we would be no further ahead. But suppose there were a right answer, but just that there was no way of reliably identifying it? It might be possible to say, well then we want to try and develop some wholesale rather than retail theory of institutional competence, right? We want people who are intelligent, rather than unintelligent. We want people who are undistracted, rather than distracted. We want people, maybe, who are insulated rather than vulnerable to address this objective question. And you can imagine developing a sort of wholesale theory of epistemic confidence that had that character, and people have developed that and tried to relate it to the virtues of the judiciary. And I think Larry made such an effort this afternoon. I remain suspicious of it, partly because among the partisans of different broad arrays of answers to the questions of what rights we have, there are different views about appropriate epistemic

strategies. So, for example, for those who believe strongly in social and economic rights, it seems to them unthinkable that the epistemically wiser strategy is to have those decisions addressed by people who have no experience, for example, of social and economic deprivation or desperation. They regard, as it were, the knowledge and experience that would be associated with, say, working-class legislators as infinitely superior to the detached and rather lofty attitude of an independent judge. So you can imagine how that goes: different theories of rights carry different epistemologies with them.

SAGER: I want to start by responding to Jeremy, and this element in his book, and then come back to your question, Melissa. Something I had planned to say, sort of in the margins of my talk, but got a five-minute signal when I was just taking a deep breath and really getting started, which happens to me surprisingly often. I don't know what it is about the outside world that causes this.

FEREJOHN: I thought it was your family. [Laughter].

SAGER: And that is, I think Jeremy makes this argument that in effect, says that we can't talk very usefully about institutional design, and what institutions are better and worse, because disagreements about the nature of rights will run right down to disagreements about the nature of institutions. I think, actually, that's perhaps one of the weakest arguments in Jeremy's book and is not really getting to the foundational level, and really very badly overstated in the sense that I think people can disagree a great deal about the substantive content of rights and agree about general features of those rights, and indeed about general features of the institutions that would do best given those general features. And again I want to commend Chris' book,<sup>12</sup> because Chris makes this argument at length. Namely, features that many people would agree are true about the nature of rights, even though they might disagree a great deal about the substance of them, should be included in any system. And I actually meant to say that the argument I put on the table on behalf of the judiciary did not seem to me to be content-sensitive, and I think this element of Jeremy's argument is substantially overstated.

Now, the more foundational question, which is Melissa's, is do you have to believe that, in some sense or another, there are better or worse answers, or there are objective truths? I don't think you have to have a particular metaphysics. I think you do have to believe that in some important way, on at least a broad political community basis,

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12. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001).

there are better and worse answers to questions of political justice. I actually think that that runs very deeply, and I'm not a moral skeptic in these regards. But I think you do have to think that there are better and worse answers to have this conversation. If you had a much more relativized view of justice than that, then I think either you would think that the conversation was frivolous, or you would have some notion about micro-communities and temporarily shared values, and you would talk about institutional arrangements. I certainly don't think the division between Jeremy and me can be accounted for at the foundational level, if only for this reason: an important, very important, strand of Jeremy's bow, it seems to me, is about the entitlement of people to stand before their political community as rights-bearing equals. Now that has to rest on something, and it has to rest at least on an appeal that that is a powerful truth in our political community. So that commits him to a fairly robust foundational view, again not necessarily at the metaphysical level. So that, I think, cannot account for this division. But it might account for other interesting divisions and other critiques of constitutionalism. I could go off in directions of sort of micro-cultural communities and things about that, but I'd have to see them and think about it.

EISGRUBER: May I just follow on that? In his response to the question, Jeremy has come back, I think, to the line of argument in his book that tries to extract too much from the sheer fact of disagreement. I agree with Larry that the connection between the content of rights and the epistemic virtues of particular institutions is probably not so great as Jeremy says. Suppose, though, that it were very great. I'm inclined to ask, "So what? Where does the fact of disagreement leave us?"

As I said in my prepared remarks, that issue seems to me to come up in two places, at least, in the course of argument in the book, where it gets handled in two different ways. In one place, the claim is that precisely because there is disagreement about even the virtues of particular institutions, we're somehow thrown back on majority decision as something that doesn't privilege any of the competing views. And then later, on page 300 of the book, there is a claim that if disagreement runs so deep, we're stuck in a pragmatist, legitimacy-free zone.

WALDRON: That's separate language.

EISGRUBER: Well, alright, it seems to me that both of these arguments are mistaken in the sense that if we have disagreements that go all the way to disagreements about the virtues of particular decision procedures, there is no way to get anything neutral out of it. And the

fact that there is no way to get a neutral solution doesn't mean we can't argue for particular solutions. So it seems to me that all any of us can do, and what I think Jeremy has quite laudably done through most of the session today, is to argue on behalf of a particular controversial position on the basis of his or her controversial values and his or her controversial judgments about what legislatures do well. But the fact that people who recommend judiciaries as pragmatically well-suited to get right answers are making controversial claims—that fact alone doesn't seem to me in any way sufficient to disqualify those claims. I think the argument has to be based on something different than the mere fact of controversy or disagreement.

SAGER: Jeremy, do you want one last word?

WALDRON: Just very briefly. I don't disagree with either of those points, Chris, actually. I mean I didn't at all want to be disqualifying anybody else from making any claims, even claims about the virtues of a particular set of procedures that were predicated on beliefs about a particular set of right answers to substantive questions. That was one of the reasons why I wanted to insist in the very opening remarks I made today that these comments about what would be good procedures by me were intended as comments that one citizen might make in response to other citizens' views about what would be good procedures. But the suggestion about legitimacy-free zones was that if the citizens disagree about what would be good procedures and disagree about the conditions of good procedures, and they get involved in a sort of circle that resembles some elaborate argument of Dworkin's, it might well be the case that some move has to be made in that situation which can't be made by the society on the basis of any shared values about procedures or substance. But some move needs to be made and then we can go on from there. And it is probably fatuous of anybody to claim any particular legitimacy for that move, for all that they will have particular views about it.

EISGRUBER: Can I pursue this a little further? Let's leave legitimacy-free zones aside. It's certainly embedded in a larger argument about Dworkin, but let me stick with this. I don't see how saying that your argument is considered to be one argument made by citizens answers the question that was asked from the audience. As John points out in his comments, citizens can make these arguments in periods of constitutional creation, or constitutional reform, or in the context of a question about whether or not the legislature ought to delegate certain authority to an adjudicative institution, rather than continuing to exercise it on its own. And when citizens do that, it seems to me that all

the arguments about institutional competence become relevant as ways of justifying adjudicative institutions as pragmatically well-suited at getting right answers. They all still seem to me to be on the table in such circumstances.

WALDRON: No, I think that's exactly right. So one bunch of citizens who believe very strongly in property rights make an argument for a particular set of political institutions, whether at the founding or later, a particular set of political institutions that would be most likely to achieve what they thought was the right answer, so far as the prediction of property rights was concerned. And another bunch of incendiaries who believe in social redistribution make an argument for a different set of procedures based on what they think would be the most equitable. Both moves are legitimate, but Melissa asked whether the metaphysical hypothesis that one of them is right and one of them is wrong, even if we didn't know which, makes any difference in how we should respond to those moves. And I say the answer is no.

SAGER: You know, I want to note about the notion that making these arguments to citizens, that there are two levels on which one could be saying that. One could be saying that the only possible body to commend these questions to are the citizens of old, as a matter of political justice. The other would be that it's the only possible body to commend these to because, by hypothesis, if you're at a moment of constitutional change, or a pre-constitutional moment, they are the only people. The only entity is everyone. And I actually want to note that even the mix of institutions, and the practical and moral mix of institutions we've been describing, is somewhat more complicated, even at early constitutional moments. There is, for example, this quite extraordinary event that took place in South Africa in the most interesting sort of modern constitutional process that we've seen, although not necessarily the best, in which a group of sort of warring suspicious political groups joined together and announced a set of pre-constitutional set of premises, in effect, that a constitutional group must arrive at, and then they create a constitutional drafting and ratifying process. But then they stipulate the existence of a constitutional court to measure the final constitution against these pre-constitutional principles. And the constitutional court proceeds to do exactly that, and in fact, find some of the constitution's principles inconsistent with the germinating pre-constitution and reshapes them. I mean, you see a mix of institutions at this very early stage.

WALDRON: You're absolutely right, and in a way Larry's too modest on behalf of law professors. When I was at Oxford and Ron-

nie Dworkin was my doctoral supervisor, we used to meet for sessions, discussion sessions, not unlike this, in Professor Honoré's rooms at All Souls. And in a glass case there, was something which under inspection, proclaimed itself to be the constitution of Tangenika or some such thing, or other. I said to Honoré: "What's the constitution of Tangenika doing in your glass case?" And he said, "Oh, that was one of mine." [Laughter]. And I do think that one thing we need to beware of as law professors, is to adopt the sort of lofty tones of, I don't know, John Stuart Mill talking about the government of India, as though we were colonial masters who were drafting a constitution, and we would make wise decisions about how much these natives can be allowed to decide and how much must be taken away from them and given them. That sort of "from on high to the low," as an attitude towards one's fellow citizens, is very seriously troubling.

FEREJOHN: Can I say something about this? It seem to me that part of what's gone on today is that people worry about Jeremy's placing of the legislature particularly in a more special place than some us think that it can occupy comfortably. And our reasons are different. My reason is that it seems to me what's fundamental to democracy is one of the reasons that Jeremy puts forward: this sort of equal situation of citizens, or what I would call popular sovereignty or something. And I think that it's always a question of how it is that any sort of institutions embody the principle or the principles of popular sovereignty or equality of situation. And in that respect, it seems to me that we're always in a constitutional moment. That is to say, that it's always the case that whatever the distribution of authority is, whatever kind of authority we're talking about in a government, there's always a critical perspective that people have some kind of responsibility, or it's part of being a citizen to hold that perspective. I'm not comfortable with the idea of situating constitution-making or designing in a moment and holding it there. It seems like you could find moments sometimes at which special things happen. But there's lots of times when things don't happen which are constitutionally significant as well. And so just recently, and I'm sorry about bringing up a current event, but we talked briefly today at lunch about this presidential initiative or order to permit trials, on his own finding, military trials of people who are allegedly involved in terrorist attacks of a certain kind. And Chris is appalled and I'm appalled, incidentally.

SAGER: There wasn't high enthusiasm at the table. [Laughter.]

FEREJOHN: I never said there was. And he lamented or somebody lamented the relative silence of law professors. One feature of

our system of judicial review is that the Court isn't going to get to see anything about this until possibly a *habeas* petition way down the road, right? Other systems, this would be reviewable right away. So there would be a minority who didn't like it, they'd refer it to a court. There would be an initial determination. We have no technology for that at all. There's many things to be said about it in the American constitution tradition. But in almost every other system, you can get an answer from a constitutional court a lot faster than we do. And you're talking about perpetrating a major constitutional outrage, a really major constitutional outrage on people who have no voice whatsoever. We're talking about a major thing, and here's something where it's clear a court cannot speak to it at all. It's just not clear that it can speak to it at all, and in any event, they can't speak to it in a timely fashion. And I think that is a deplorable, another deplorable feature that I forgot to deplore. [Laughter]. But now I'm deploring it. [Laughter].

WALDRON: Duly deplored.

SAGER: How are we doing on time? Do we have time? Any other questions from you all? Then we'll take a question from the front over here from my right.

IDDO PORAT (JSD Candidate, N.Y.U.): My question goes to an earlier comment by Professor Waldron that specifically, in the case of rights, we should be less worried about the legislature deciding not on moral grounds but more on short-term grounds. And the last comment, and also comments by Waldron earlier, about the record of the U.S. Supreme Court, seems to run contrary to that. My intuition is that maybe your intuition saying that was about the different set of cases more like abortions or death penalty, in which we don't have exactly the tyranny of the majority problem, but another intuition. How does that count into your scheme, more or less?

WALDRON: I think you raise an important question that there may be other worries than simply the tyranny of the majority or the issue being decided by pocketbook issues. The issue of hasty decision-making has been raised on a number of sides, and I think that is important. And it's interesting about the death penalty cases and what to think about those, because I've been trying to put my finger on, even if just to do justice to my friends and interlocutors here, what might be the residual source of difficulty, say, in the abortion cases and the death penalty. And then there's perhaps the suggestion, and I'm foisting this on you or on my colleagues, that maybe the one thing about courts is that, sort of like can openers, they can pry open hard-

core moral convictions, simply as an aspect of the legal process, which sort of requires you to take propositions apart and look at them from all angles and hold them up to the light. And so maybe that's a virtue that could be claimed for adjudication even though it has nothing to do with pocketbook point and not necessarily anything to do with the acting-in-haste point.

WHITTINGTON: Related to that, I think that one argument that might be made for judicial review—and actually it's specifically American-style judicial review, that is not shared by a lot of the abstract review that goes on in Europe—is a kind of informational advantage that arises through the process of adjudication. That courts hear the particulars about individual cases and expose what might be perceived in hindsight to be particular injustices that may have been done to individuals, but that may not have been evident simply in looking at the general rule before its application. Legislators may not appreciate that a proposed rule is going to create these kinds of situations in practice or appreciate the kinds of situations on the ground that an existing rule is in fact creating. The courts can help publicize and expose those injustices, and may get political responses as a consequence. Actually, both abortion and death penalty cases seem like potential examples of that, where a court could use those kinds of cases to publicize what's happening on the ground and calling such cases to the attention of the general populace or legislator who might not otherwise be aware of the situation on the ground and, as a consequence, alter the kinds of decisions that will be made in the political arena. Now that doesn't necessarily require judicial review, the actual capacity to veto the general rule, in order to make that happen, although an actual power of judicial review may be the most effective way of getting those kinds of things on the table.

It may also be the case that the kinds of arguments Jeremy offers may be more or less applicable depending on the kinds of rights, or the scope of rights, that you have in mind. One kind of question that might arise about the death penalty debate, for example, is that you might think that most people who are engaged in it are not only acting on a moral principle, but are also acting on a presumption that they're never going to have to face the situation of potentially having the death penalty imposed on them. To some degree, they are making decisions not for themselves but for what they quite clearly regard as some other population that will have to actually suffer the consequences of the decision.

WALDRON: You notice how this goes against the independence of the judiciary argument.

WHITTINGTON: How so?

WALDRON: Well, we are in fact immunized from those who might have the real experience of the sharp end of these—

WHITTINGTON: Yeah, I think that that's right. Though that's often true in a purely democratic system as well. To that extent, most legislators, most of the people who would be making up a popular democracy, can rest assured that they're not going to face those situations where the law is actually being applied. And a similar argument could be made even in the context of abortion, that, whether for reasons of economic class or something else, lawmakers are often not going to be directly affected by this legislative decision and, therefore, in some ways, do not have to really grapple with the kinds of principles involved.

WALDRON: It wasn't just a mischievous point, though. It was really intended that one of the things that we really value about large and representative legislatures drawn from the community is that there will be limits on the oppressive legislation that gets enacted by virtue of the members having to go back into the community or having wives and girlfriends in the community or whatever it is.

EISGRUBER: Let me just suggest, though, that sometimes assuming personal responsibility for a decision (because one's vote is crucial to the outcome) may have the same effect as imagining yourself being subject to the decision. I think this may be especially true of decision-making by jurors and judges, but, because the institutional issues that we have been raising here are genuinely hard, I want to make this point in way that is not specifically related to judicial review versus legislatures. One of the very interesting pieces of research to consider with regard to voter behavior is Jim Fishkin's work on deliberative public opinion polling. Fishkin polls people and then brings them together as a group to discuss the issues in some depth. And of course the mentality that they have afterward is different in two ways from a typical public opinion poll. One is that they have been flattered by this kind of attention and this discussion—people are just glad to be taken so exceptionally seriously—and secondly, they have been exposed to a lot of arguments. Fishkin documents very interesting shifts in how the people respond to questions after deliberation; the shifts are consistent with his views about justice and some of ours as well, I expect. It is an interesting experiment. It is some-

thing worth thinking about in terms of how people cast votes and why they do.

FEREJOHN: Does he have any placebos? Does he give them bad arguments? I'm just curious. [Laughter].

EISGRUBER: No.

FEREJOHN: It's just a joke.

EISGRUBER: Oh.

FEREJOHN: Sorry.

SAGER: Any other questions? This is our last ups.

WALDRON: The sun has set and we're very sorry.

SAGER: Pasquale, a quick question, please.

PASQUINO: I want to return to your answer to my question about Corsica, because your argument addresses only one aspect of my concerns. The problems we are discussing—the rights of minorities—can be approached from two points of view. You argue that in France, for example, a majoritarian decision of the French people will establish whether Corsicans themselves can make a decision concerning which language they are going to learn in school. But suppose that the issue at hand is the protection of a constitutional right of a citizen from the government, because this is in fact the core of the contemporary post-Hobbesian theory of rights. So, supposing the existence of these post-Hobbesian rights, and citizens who want to be protected against their own government—something inconceivable in the Hobbesian language—what should we do? Leave that decision to the Parliament? It seems more sensible to leave that decision to a neutral judge, a figure not biased toward either the citizen or the government. Do you want really oppose this idea?

SAGER: Jeremy, that's unfair to ask for a brief response, but I do, and I want to give you the last word of the day, so why don't you take this occasion to have that last word.

WALDRON: Well thank you Pasquale. People don't have the rights necessarily that they think they have, even rights against the government that they think they have. And it would be intolerable to have a situation in which the mere fact that a person had a right entitled them to complain of tyranny whenever a social decision was made that they didn't have that right. So of course we want somebody to be judge. But we also want the notion of a self-governing community, and I believe very strongly—and this is really the very last sentence

I'm going to bore you with this evening—I believe very strongly that the question of self-government which we value in the name of democracy is and includes the question of what rights we have against our government. It sounds paradoxical to put it that way, but since that is something that is in contention, the notion of a democratic community is a notion of a community which decides that question as well—at least decides by whom that question is to be decided. But it is not decided independently of anything that is done among the citizens. I am enormously appreciative of the audience's time and effort and their patience in putting up with us, and the energy and kind words and insights of my colleagues.