

## LIBERTARIAN LITERATURE REVIEW

Edited by N. Stephan Kinsella\*

### 1997 AND 1996 ARTICLES

**“1996 Survey of Books Relating to the Law,”** *Michigan Law Review* 94, No. 6 (May 1996): 1379–2087. Includes book reviews in several areas, including law and economics, and philosophy and law. Reviewers and authors include Richard Epstein, Richard Posner, H.L.A. Hart, Robert Nagel, and Peter Brimelow.

**Adelstein, Richard, “Language Orders,”** *Constitutional Political Economy* 7 (1996): 221–38. Examines the alternatives of spontaneous order and central planning in the context of human language to cast new light both on the issues raised in the Socialist Calculation debate of the 1930s and 1940s and on the nature of language itself. The evolution of the complex systems of rules that comprise natural languages is discussed, and the process of language acquisition in children is used to illustrate the problems involved in characterizing any spontaneous order as a social contract or convention. Suggests the nature of the obstacles that confront any attempt to overcome or redirect the deeply rooted behaviors associated with spontaneous orders through the imposition of a central plan.

**Barnett, Randy E., “Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction”** [in “Symposium: The Intersection of Tort and Criminal Law], *Boston University Law Review* 76 (February/April 1996): 157. The purpose of criminal justice should be restitutive, to restore the victim to his former position, rather than retributive or punishment oriented. Rectifying rights violations corresponds to the category of torts. Crime prevention itself, however, permits the use of force in self-

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This section provides short descriptions of recent scholarly articles expounding on libertarian theory or otherwise of special interest to libertarians. The articles included are drawn exclusively from non-libertarian periodicals, since specialized libertarian fora are well-known sources of libertarian theory. Any restatement of an article’s premises, arguments, or conclusions should not be taken to imply agreement with the points restated, by the editor of this Literature Review or by the editors of the *Journal of Libertarian Studies*.

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defense. Self-defense may also be used in response to a threat, before harm occurs. The principle of “extended self-defense” would also justify, in certain circumstances, using force to restrain those who constitute threats to others, such as a jailed criminal who announces that he intends to resume committing crimes upon his release. [See Epstein, 1996 (Tort/Crime), below.]

**Barnett, Randy E., “Necessary and Proper,”** *UCLA Law Review* 44 (February 1997): 745–93. The U.S. Constitution provides for a federal government of limited and enumerated powers, and also gives Congress the power to make laws which are “necessary and proper” to carry out these enumerated powers. Barnett argues for a strict conception of each of these requirements. A statute is “necessary” only if it is essential to the pursuit of an enumerated power or end, not if it is merely an expedient or convenient way to accomplish the end. A law is “improper” if it violates the background rights retained by the people. Federal courts should strike down as unconstitutional any federal laws that are unnecessary or improper, and this should be implemented by a presumption of liberty (a device that Barnett has also urged be used as a way to implement the unenumerated rights protected by the Ninth Amendment). Under this presumption, any federal statute that restricts or affects any exercise of individual liberty should be presumed unconstitutional unless the government carries its burden of showing that the statute is both necessary and proper, under the strict conception of these standards.

**Berch, Michael A., and Rebecca White Berch, “The Power of the Judiciary to Dismiss Criminal Charges After Several Hung Juries: A Proposed Rule to Control Judicial Discretion,”** *Loyola Los Angeles Law Review* 30, no. 2 (January 1997): 535. Examines the number of times the state may retry a defendant whom it has been unable to convict. Proposes giving courts discretion to bar reprosecution after one or more trials that result in a hung jury.

**Block, Walter, “Road Socialism,”** *International Journal of Value-Based Management* 9 (1996): 195–207. Road socialists maintain that government is the best manager for the nation’s vehicular transportation arteries. Contrary to their views, Block maintains that the managerial role can best be fulfilled by private entrepreneurs. Under highway privatization, traffic fatalities and automobile congestion will be sharply reduced.

———, **“O.J.’s Defense: A Reductio Ad Absurdum of the Economics of Coase and Posner,”** *European Journal of Law and Economics* 3 (1996): 265–86. In a reductio ad absurdum, applies

the tenets of the Chicago law-and-economics tradition as adumbrated by two of its most distinguished practitioners, Coase and Posner. Shows that on the basis of this canon, a case can be made for freeing O.J. Simpson, even if he did indeed kill his wife. Argues that the libertarian reliance on personal- and private-property rights is a much more robust thesis than the Chicago precept of wealth maximization.

———, **“The Mishnah and Jewish Dirigisme,”** *International Journal of Social Economics* 23, no. 2 (1996): 35–44. Jews are disproportionately liberals and leftists. Milton Friedman previously posed two explanations for this phenomenon: accidental circumstances of nineteenth-century Europe, and “subconscious attempts by Jews to demonstrate to themselves and the world the fallacy of the anti-Semitic stereotype” (i.e. that they are not cold-hearted, concerned with financial exploitation, etc.). Block accepts these explanations, but places lesser weight on the second than Friedman does. Block also adopts two explanations that Friedman rejects: special forces that seem to operate on intellectuals, and the bias of Judaic law towards coercive socialism.

**Cassell, Paul G., “Miranda’s Social Costs: An Empirical Reassessment,”** *Northwestern University Law Review* 90 (1996): 387. Assesses the evidence available on how many confessions police never obtain because of *Miranda*. This evidence “suggests that each year *Miranda* results in lost cases against roughly 28,000 serious violent offenders and 79,000 property offenders and in plea bargains to reduced charges in almost the same number of cases.” Concludes that those costs “are unacceptably high, particularly because alternatives such as videotaping of police interrogations can more effectively prevent coercion while reducing *Miranda*’s harms to society.”

**Cooter, Robert D., “Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant”** [in “Symposium: Law, Economics, & Norms”], *University of Pennsylvania Law Review* 144 (May 1996): 1643–96. Develops an account of decentralized law, which percolates up from the bottom, as opposed to centralized law, which is imposed from above. The justification for centralized law is based on “market failure” in the incentive structure of social norms. Uses game theory and other concepts to characterize conditions under which fair and efficient norms will evolve, and shows how judges and other lawmakers can use this information.

**Corbett, Krystilyn, Note, “The Rise of Private Property Rights in the Broadcast Spectrum,”** *Duke Law Journal* 46, no. 3

(December 1996): 611–50. In the U.S., the Telecommunications Act of 1996 treats broadcasters partially as market participants with private-property rights in airwaves (the electromagnetic spectrum) and partially as public trustees who use the airwaves for public benefit. The article explores how the private-property conception has come to dominate the public-ownership conception of airwave ownership. Also discusses how, for example, stronger private-property rights in the broadcast spectrum have made First Amendment law more consistent, and spectrum use more efficient.

**Covey, Russell Dean, Note, “Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout,”** *Yale Law Journal* 105, no. 5 (March 1996): 1311. Focuses on the 1995 multi-billion-dollar bailout of Mexico, which was arranged by unilateral negotiation of loans by President Clinton from international institutions like the International Monetary Fund, and by a promise by Clinton of \$20 billion from the Exchange Stabilization Fund, a Treasury fund normally used to “stabilize” the dollar on world currency markets. Argues that the package was only incidentally an act of “currency stabilization,” and is more accurately described as an emergency grant of foreign aid, which is not authorized by U.S. law. Covey proposes federal legislation that creates, and limits, presidential “emergency” power to intervene in such crises.

**Duane, James Joseph, “Jury Nullification: The Top Secret Constitutional Right,”** *Litigation* 22, no. 4 (Summer 1996): 6–14, 59–60. Explains American constitutional right of juries to nullify unjust laws. Defends jury nullification against several popular, contemporary arguments. Argues that jurors should be instructed that they should convict anyone proven guilty beyond a reasonable doubt, unless they have a firm belief that a conviction would be fundamentally unjust.

**Ellickson, Robert C., “Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning,”** *Yale Law Journal* 105, no. 5 (March 1996): 1165–1248. During the 1980s, panhandling, bench squatting, and other disorderly behavior became increasingly common in the downtown public spaces of American cities. An individual who chronically interferes with the correlative liberties of other pedestrians causes significant public harms, leading to many cities tightening their controls on panhandling and other street misconduct. Ellickson criticizes judges who have thwarted these cities’ efforts. (Criticized in **Stephen R. Munzer, “Ellickson on**

**'Chronic Misconduct' in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers,** *Harvard Civil Rights-Civil Liberties Law Review* 32 (1997): 1-10.)

**Epstein, Richard A., "Constitutional Faith and the Commerce Clause,"** *Notre Dame Law Review* 71 (1996): 167. Discusses the Commerce Clause of the Constitution and the recent Supreme Court case *United States v. Lopez*, which overruled a federal law purporting to regulate firearm possession in a school zone. Endorses Clarence Thomas's criticism of past Commerce Clause cases, and advocates overruling all the problematic cases and returning to the original 1787 conception of the Commerce Clause and the limited powers it gave the federal government. [See Wille, 1996, below.]

———, **"The Tort/Crime Distinction: A Generation Later"** [in "Symposium: The Intersection of Tort and Criminal Law], *Boston University Law Review* 76 (February/April 1996): 1. Explores the distinction between criminal law and tort law, which governs non-intentional violations of others' rights. Discusses the reason that deliberate or intentional harms are governed by criminal law, i.e. public control. Argues that the domain of both tort and crime should be reduced. [See Barnett, 1996, above.]

**Gardbaum, Stephen, "Rethinking Constitutional Federalism,"** *Texas Law Review* 74 (1996): 795-838. Detailed discussion of various conceptions of federalism. Presents a "third" model of federalism which holds that just because Congress is given power to legislate in a given area, this does not necessarily mean that it may preempt or override state control or laws in this area, as has been traditionally thought. Under this model, jurisdiction need not be exclusive; states and Congress may concurrently share power in some areas. In particular, Congress's power of preemption and the power to regulate local activities affecting interstate commerce should be constrained by this approach. This is because these powers are based not in the Supremacy Clause and Commerce Clause, but in the Necessary and Proper clause, which places limits on how Congressional power may be exercised.

**Garrett, Elizabeth, "Term Limitations and the Myth of the Citizen-Legislator,"** *Cornell Law Review* 81 (1996): 623. Adoption of term limits will not eliminate professional politicians. Also discusses how term limits would likely affect the seniority system and special interest groups' relationships with legislators.

**Hardy, Trotter, "Property (and Copyright) in Cyberspace,"** *University of Chicago Legal Forum* (1996): 217. Discusses how property rights, such as copyright, should be applied in cyberspace. Examines property theory generally and from an economic approach, and applies the Calabresi and Melamed approach to property to the protection of informational works in cyberspace. Analogizes property rights in informational works to property rights in tracts of land. Advocates a regime of private property in cyberspace.

**Katz, Avery Wiener, "Positivism and the Separation of Law and Economics,"** *Michigan Law Review* 94 (June 1996): 2229–69. Modern economics adheres to positivism: the view that fact and value can be distinguished from one another. Economics can be used to provide better understanding of factual/descriptive issues, which should help to resolve or clarify normative disagreements. However, critics of the law-and-economics paradigm are skeptical of this approach. One reason for this misunderstanding is that lawyers and economists view positivism differently. Katz explores the differences between classic legal positivism, logical positivism, and law-and-economics-type positivism which simply logically separates is-statements from ought-statements. Argues that one's opinion of the worth of economic analysis to lawyers depends on one's view of the merits of positivism in law. H.L.A.-type legal positivists will favor the law-and-economics approach; Lon Fuller's "natural law" position is opposed to the law-and-economics perspective.

**Kinsella, N. Stephan, "A Libertarian Theory of Punishment and Rights,"** *Loyola Los Angeles Law Review* 30, no. 2 (Jan. 1997): 607–45. Develops retributionist or *lex talionis* theory of punishment and related principles of proportionality, which defines a theory of rights. An aggressor cannot coherently object to punishment for an act of aggression since an objection would require the aggressor to adopt the position that the infliction of force is wrong, which is contradictory since the aggressor initiated force. Thus, aggressors may be punished in a manner proportionate to the aggressors' initiation of force since the aggressor is dialogically "estopped" from denying the legitimacy of being punished.

**Klarman, Michael J., "Rethinking the Civil Rights and Civil Liberties Revolutions,"** *Virginia Law Review* 82 (February 1996): 1. The Supreme Court's capacity to protect minority rights is more limited than is usually assumed. Instead of protecting minority rights from oppressive majorities, the Court usually (a) takes a strong national consensus and imposes it on isolated dis-

senters; or (b) resolves a divisive issue that alienates half the population. Neither role protects the minority from the majority. The myth of the Court as counter-majoritarian savior should be examined to identify how judicial review actually operates.

**Klein, Daniel B. and Chi Yin, "Use, Esteem, and Profit in Voluntary Provision: Toll Roads in California, 1850–1902,"** *Economic Inquiry* 34 (October 1996): 678–92. Early Californians took stock in toll roads for a variety of reasons: use of the road, esteem of fellows, and profits from stock. Whatever the motivation, in operation all toll road companies felt the profit motive. This paper presents a historical survey of voluntary organizations taking the stock-corporation form. These cases demonstrate how various motivations and incentives intermingled and supported one another in the days before the corporation was legally bifurcated into either "for-profit" or "not-for-profit" enterprise.

**Kreshek, Bradley H., Comment, "Students or Serfs? Is Mandatory Community Service a Violation of the Thirteenth Amendment,"** *Loyola Los Angeles Law Review* 30, no. 2 (January 1997): 607–45. The Thirteenth Amendment prohibits involuntary servitude, i.e. slavery. Concludes that mandatory community service programs are contrary to the spirit of the Thirteenth Amendment and should be held unconstitutional.

**Krotoszynski Jr., Ronald J., "Fundamental Property Rights,"** *Georgetown Law Journal* 85, no. 3 (February 1997): 555–625. The U.S. Supreme Court's modern "substantive due process" jurisprudence protects "fundamental" liberty interests from government abridgment absent a "compelling" governmental interest. This strict standard of protection has never been extended to encompass "fundamental" property rights, which are treated like a "poor relation" compared to so-called "liberty" interests. Argues that fundamental property interests, like civil liberties, merit judicial protection from legislation that would unduly burden their enjoyment, and should therefore also be protected by the substantive due process standard.

**Landsburg, Steven E., "The Perfect Tax,"** *Slate* www.slate.com, 10/11/96. Proposes constitutional amendment capping everyone's tax bill at (say) five times the average. This would force many taxpayers to share the cost of any new government spending, and so ensure broad opposition to the growth of government.

**Leipold, Andrew D., "Rethinking Jury Nullification,"**

*Virginia Law Review* 82 (March 1996): 253. Jury nullification—the jury’s ability to judge the law as well as to judge the defendant, and to acquit even defendants whose guilt is clear—imposes significant costs on the criminal justice system but does not yield substantial benefits. It is also doubtful whether the Constitution protects this institution. An affirmative “nullification defense” should be enacted that allows the jury to acquit against the evidence on approved grounds. Error-correcting procedures should also be permitted in criminal cases, such as prosecutor appeals from groundless acquittals.

**Lindgren, James, “Why the Ancients May Not Have Needed A System of Criminal Law,”** *Boston University Law Review* 76 (1996): 29. Some have argued that a criminal system may not be necessary, since a pure tort system, in which wrongdoers pay fines, may be more efficient. However, it is also argued that many defendants are judgment-proof since they are poor, so there is a need for imprisonment and criminal law. In ancient systems, however, people were even poorer, but there were few prisons and more reliance on a tort system. Nevertheless, there was still deterrence, because the ancients had a range of tort penalties available to them—with or without state help or approval—including debt slavery, chattel slavery, killing, beating, mutilation, public disgrace, outlawry, and the blood feud. These brutal penalties under tort schemes meant less need for prisons and criminal law.

**Machan, Tibor R., “What is Morally Right with Insider Trading,”** *Public Affairs Quarterly* 10, no. 2 (April 1996): 135–42. Insider trading is obtaining information from non-public sources and using it for financial gain. It is not immoral to use such information, which may be learned ahead of others by good fortune or by achievement, and can be prudent to do so, when it does not violate others’ rights. Insider trading laws rest on the unsound view that others have a right to one’s revealing to them information one has honestly obtained ahead of them.

———, “**Individualism and Political Dialogue,**” *Poznan Studies in the Philosophy of Science and the Humanities* 46 (June 1996): 45–55. Exploration of the nature of dialogue presupposes a view that human beings are essentially both individuals and social beings, as opposed to the Marxian idea of “specie-being.” Arguments are a type of creative activity that thus presuppose individualism. Arguments that deny individuality fail to make room for the individuality behind arguments. The prerequisite for dialogue, including “political dialogue” or democratic



decision-making, is not welfare rights as espoused by Jürgen Habermas but the negative rights of libertarianism, which are needed in order to facilitate democratic discourse.

**Mayer, David N., “Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment,”** *Capital University Law Review* 25 (1996): 339–423. The prevailing interpretation of the Tenth Amendment as a guarantee of only federalism is mistaken. Rather than being only about “states’ rights,” the Tenth Amendment was originally meant to provide a rule of strict construction of federal powers. Hence, Thomas Jefferson’s characterization in 1791 of the Amendment as the “foundation” of the Constitution is essentially correct. Further, Justice Thomas is the justice on the Court today who best understands (and perhaps the only justice who fully understands) the meaning of the Tenth Amendment, as his concurring opinion in *Lopez* and his dissenting opinion in *U.S. Term Limits* show. Provides the first comprehensive history of the Tenth Amendment to be published in a law review, and analyzes Thomas’s opinions and jurisprudence.

**McAfee, Thomas B., “A Critical Guide to the Ninth Amendment,”** *Temple Law Review* 69 (1996): 61–94. Summarizes the debate regarding the Ninth Amendment to the U.S. Constitution, such as whether the Ninth Amendment should be used to apply unenumerated or natural rights to legislation.

**McGee, Robert W., “Some Tax Advice for Latvia and Other Similarly Situated Emerging Economies,”** *International Tax and Business Lawyer* 13 (1996): 223. Presents guidelines for the construction of a tax system in emerging economies. Considers both the economics and ethics of taxation from a hard-core libertarian perspective, and criticizes systems such as the U.S. income tax. Guidelines recommend noncoercive revenue sources such as lotteries and user fees be resorted to first, and that public spending be reduced. For coercive taxation, the cost-benefit view is morally and economically superior to the “ability to pay” view. Taxes should be visible, not hidden; neutral, not used to encourage or discourage; uniform, not discriminatory; simple, not complex; earmarked for specific purposes, rather than poured into a common fund; and as low as possible, to minimize inevitable distortionary effects. Tax rules should be clear, not vague; and stable, not frequently changed. Also recommends complementary measures such as privatization of social security.

**McGinnis, John O., “The Once and Future Property-Based Vision of the First Amendment,”** *University of Chicago Law*

*Review* 63 (1996): 49. For the last 50 years, the right of free speech in the First Amendment has been seen as the supreme right, and has been expanded due to two fairly recent theories. First, free speech supposedly guarantees political discourse, enabling collective democratic processes to perpetually revise economic societal arrangements. Second, even nonpolitical speech was understood to provide a personal sphere of autonomy distinguishable from regulated “commercial speech.” These foundations are collapsing with the decline in confidence in centralized planning, and with the rise in importance and recognition of information as facilitating economic activity. Thus, the left is becoming more willing to regulate speech and the right less. McGinnis explains the First Amendment’s true origins as a Madisonian property right of the individual, to provide a model for an emerging laissez-faire jurisprudence.

**Pilon, Roger, “Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues,”** *American University Law Review* 45 (1996): 775–90. If private individuals and institutions are to be free and sovereign, they must have a right to discriminate in favor of or against other private individuals or institutions, for any reason, good or bad, or for no reason at all. By contrast, public officials may not discriminate except on grounds that are narrowly tailored to serve the functions for which they were elected, appointed, or created in the first place. Explores how the Civil Rights Act of 1964 prohibited forced racial segregation, and how this has evolved into affirmative action and prohibitions on even private discrimination.

———, **“A Court without a Compass,”** *New York Law School Law Review* 40 (1996): 999–1011. Part of a dialogue on *The Center Holds: The Power Struggle Inside the Rehnquist Court*, a recent book on constitutional law by James Simon. Discusses the roots of modern constitutional law and how and why the Constitution has been politicized and misinterpreted to secure the foundations for the modern welfare state. For example, the Court has broadly construed the Commerce Clause and eviscerated the doctrine of enumerated powers, and has limited the scope of rights protection for property- and commerce-related rights. Under proper judicial review of legislation, the court should first ask whether a power was granted to Congress to enact the law; if so, whether the means employed both “necessary and proper”; if so, whether the measure violate either enumerated or unenumerated rights. Justice Clarence Thomas offers some promise of helping to move constitutional jurisprudence in the right direction.

**Rose, Carol M., “Property as the Keystone Right?”** *Notre Dame Law Review* 71 (1996): 329. The crucial role of property rights in the generation of wealth is gaining greater appreciation in the West and in the developing world, but property rights are still largely seen as “mere” economic rights that take a back seat to more “fundamental” rights in terms of political importance. Yet, Adam Smith and others contended that property rights are not poor cousins to other rights, not even merely equally important to other rights, but the most important of all rights, the linchpin, the pivot, the central right on which all others turn—the “guardian of every other right.” Rose explores seven permutations of this basic claim, along with the caveats and critiques that they raise. Rose argues that property only has a modest claim to being a keystone right, as an educative institution, “the gentle and somewhat fragile persuader, rewarding the character traits needed not only for commerce but also for self-government.”

**Seto, Theodore P., “Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More),”** *Yale Law Journal* 106 (March 1997): 1449. Proposals for a constitutional amendment to require a balanced federal budget have received little technical review. Discusses various problems facing those who wish to draft an effective balanced budget amendment, such as problems concerning defining a budgetary target, how to impose a remedy when Congress fails to comply with such targets, use of debt-ceiling limitations for this purpose, etc.

**Sherry, Suzanna, “The Sleep of Reason,”** *Georgetown Law Journal* 84 (1996): 453–84. During the Enlightenment, reason replaced faith as the guiding epistemology, and even religion became largely “rational” in response, and the antirational kind of religiosity gradually diminished. Yet, in an odd coupling, both radicals on the left and conservative religionists on the right are attacking the Enlightenment tradition. The former—critical legal scholars, radical feminists, critical race theorists, and gay and lesbian theorists—attributed Enlightenment epistemology to powerful straight white men, and argued for epistemological pluralism or relativism. Conservative scholars recently similarly argue that enlightenment reason is just one of a number of alternative epistemologies, not superior to faith and revelation. Both left radicals and religionists use their epistemological critique of the Enlightenment to advocate legal change. Sherry argues for Enlightenment and its reason-oriented epistemology. [See Zapf, 1996, below.]

**Shivakumar, Dhananjai, Note, "The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology,"** *Yale Law Journal* 105, no. 5 (March 1996): 1383–1414. Provides overview of Hans Kelsen's "pure theory of law" and his analysis of legal systems. Attempts a theoretical reconciliation of Kelsen's pure theory with Weberian methodology, and defends as successful ideal types two fundamental components of Kelsen's pure theory: his analysis of legal norms (static legal theory) and his analysis of legal validity (dynamic legal theory). An emphasis on the instrumental usefulness of his concept of law makes Kelsen's theory more attractive than other theories of law.

**Stacy, Tom, "Does Federalism Promote Liberty?"** *Kansas Journal of Law and Public Policy* 5, no. 3 (Spring 1996): 15–20. Outlines a framework for evaluating the competing claims about whether and how the allocation of authority between state and national governments promotes liberty. Concludes that the question has no clear, categorical answer, because the answer turns on the meaning that one assigns to the meaning of liberty and the relative importance of structural checks in advancing one's conception of liberty.

**Steele, David Ramsay, "Nozick on Sunk Costs,"** *Ethics* 106 (April 1996): 605–20. Robert Nozick has argued that the economic doctrine of sunk costs is untenable. Steele argues that Nozick's criticisms fail and that the economists' doctrine emerges unscathed.

**Wille, David G., "The Commerce Clause: A Time for Reevaluation,"** *Tulane Law Review* 70 (March 1996): 1069–96. Current Supreme Court interpretation of the Constitution's "Commerce Clause" contradicts the text of the Commerce Clause and the scope given to other enumerated powers under Article I. It also upsets the balances of power between the federal and state governments embodied in the constitutional structure. The Court has erred in interpreting the Necessary and Proper Clause and in giving deference to congressional judgments of jurisdiction under the Commerce Clause. The Court should scrutinize such assumptions of jurisdiction, and should resume its role in preventing Congress from exercising powers not entrusted to it under the Constitution. [See Epstein, 1996 ("Constitutional Faith"), above.]

**Zapf, Christian and Eben Moglen, "Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein,"** *Georgetown Law Journal* 84 (1996): 485–520. Under the traditional understanding of the Rule of Law,

precedent uniquely determines the outcome of legal cases. Skeptics such as Critical Legal Scholars and their intellectual ancestors, the Legal Realists, attack this conception, arguing that law is indeterminate in outcome, and thus, the supposed constraints of the Rule of Law are fictions. Some of this skepticism relies on linguistic indeterminacy, which maintains that a “consensus of an interpretive community” is needed to determine how a word should be applied; the application of words cannot be “read off” from those words in a straightforward way. The authors attempt to refute the linguistic indeterminacy argument, in part drawing on Wittgenstein’s philosophical work. [See Sherry, 1996, above.]

**Zywicki, Todd J., “A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems,”** *Case Western Reserve Law Review* 46 (1996): 961. Conventional wisdom holds that legislation is often adopted when the common law fails, for example with respect to externalities such as pollution, or when there are high transaction costs. However, this misunderstands the common-law process, which is actually applicable in many areas where it has been ignored. Develops a unanimity-reinforcing model of the common law which challenges the presumption favoring legislation to correct externality problems. Suggests that the common law is superior to legislation in many circumstances traditionally thought to require legislative intervention.