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Would the Court Get Procedural Due Process Cases Right If It Knew What Liberty Really Means

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WOULD THE COURT GET "PROCEDURAL DUE PROCESS" CASES RIGHT IF IT KNEW WHAT "LIBERTY" REALLY MEANS?

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Professors Terrell and Butler are concerned, as surely we all are, to protect and expand human liberty. Being constitutional scholars cognizant of the remarkable things courts have achieved in the Constitution's name, they naturally turn to the apparently limitless potential of constitutional law as a means of advancing their worthy end. Our authors apparently see the problem of protecting liberty as a particularly pressing one at this time. Although Terrell "intuit[s] that over the span of our country's history the *ratio* of [liberty and governmental power] may have remained relatively constant"—a proposition I neither dispute nor understand—he believes that government has continued to grow in "power and pervasiveness." Further, according to Butler, government is less restrained than formerly by *"isonomia,"* the ideal that law be general. The present need for innovative efforts to protect liberty is therefore clear.

Professor Terrell's proposal is that the meaning of "liberty" in the Constitution's due process clauses be explored in depth so as to arrive at its "focal definitional meaning." This new definition or "description" of "liberty" would, he believes, aid in the decision of certain constitutional cases involving restrictions on liberty, and the cause of liberty would thereby be advanced. Professor Butler's proposal, on the other hand, is that a combination of constitutional provisions—the seventh amendment, the fourteenth amendment's due process clause, and the fifth amendment's just compensation clause[1]—be reinterpreted so as to give every person adversely affected by any change in the law or other government action "a truly libertarian inverse condemnation remedy." The proposed remedy is a constitutional right to sue the government for "just compensation" and to have the

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1. The ninth amendment is also found to be helpful, apparently acting as a catalyst.

claim decided by a jury free to determine the applicable "law" as well as the facts, a jury, that is, free to decide the case according to its view of "natural equity."

Insofar as Terrell and Butler seriously purport to base these proposals on the Constitution—on a claim that the Constitution, properly understood, requires or supports them—they are clearly mistaken. Except that the national government's legislative authority is limited to its delegated powers, the Constitution restricts governmental action and protects individual liberty very little.[2] Insofar as Terrell and Butler are offering pure policy proposals rather than constitutional analysis—making the fact that they are constitutional scholars merely coincidental—their proposals cannot be disposed of quite so peremptorily. The Terrell proposal is objectionable, however, on the ground that as a practical matter it amounts to approval of and a warrant for policy-making by unelected, life-tenured judges, and I prefer policy-making by electorally accountable officials.

The Butler proposal addresses what is perhaps the most basic problem of government: What, if anything, justifies a change in the law that disadvantages some individuals, and when, if ever, should those disadvantaged by the change be compensated? I do not know the answer to these questions, but very much doubt that it is to give every adversely affected person a cause of action to be tried before Butler's "libertarian jury." The main advantage of that, I think, would be to solve our serious and growing problem of a glut of lawyers.

I. Liberty and The Constitution

My difficulties with the Terrell and Butler papers began with what was originally their joint title, "Liberty As a Fundamental Constitutional Value." It suggested that the Constitution has more to say about liberty than it does and that the Constitution is in general a grander and more expansive document than it is. The title seemed to reflect the mistaken notion of all proponents and defenders of judicial policy-making that the Constitution is some sort of compendium of "values" or principles which, if only properly identified and understood, would aid significantly in solving current social problems. The Constitution, however, is a very short, simple, and straightforward document—and several of its lengthier

2. See Graglia, *Was the Constitution a Good Idea?*, Nat'l Rev., July 13, 1984, at 34.

passages are obsolete—originally proposed and adopted primarily for the very mundane and practical purpose of creating a central power adequate to prevent impediments to a national common market.[3] The most "fundamental constitutional value," therefore, I am tempted to suggest, is the value of free trade.

How can liberty be a "fundamental constitutional value" or, even more impressively, "one of the core, foundational elements of the American constitution," when the word is not mentioned in the body of the original Constitution and appears only as part of the rhetorical flourish ("the Blessings of Liberty") that makes up the preamble? Where and how, it would be interesting to know, do our authors find their fundamental constitutional values? Could they provide a list of them and perhaps another list of those that are not fundamental, or can these values only be discovered as particular occasions demand?

My point is that problems of social choice are often difficult, not because of a failure to identify or understand the values or principles involved, as Terrell's paper and other defenses of judicial activism suggest, but on the contrary, because we have a plethora of values and principles, *i.e.*, of interests, and they inevitably come into conflict. One might have expected that, in this post-Holmesian world, all legal analysts would accept that these conflicts cannot usefully be resolved by attempting to distill the essence of a word or concept. There is no escaping that value judgments will have to be made, and the only real question involved in nearly all areas of constitutional law is simply who should make those judgments. More specifically, the question is what, if anything, in a democracy justifies unelected, life-tenured judges in invalidating the policy choices of the elected representatives of the people. The "official" answer is, of course, "the Constitution." The fact, however, as the Terrell and Butler papers illustrate, is that the Constitution has little to do with constitutional law except that it provides a few peculiar phrases (due process," "equal protection") for defenders of judicial review to work with.

The framers and ratifiers of the Constitution were undoubtedly very much concerned with protecting individual

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3. See, *e.g.*, Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337 (1934). ("The Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate interstate commerce.")

liberty. Their principal means of doing so, however, was simply to limit the new and strengthened national government to specified powers, leaving the bulk of policy-making authority—the "general welfare" or "police" power—with the states. This constitutional scheme is, of course, inconsistent with the possession of a large and undefined policy-making power by the national judiciary—which is nonetheless our present situation. If one should look to the Constitution, therefore, for aid in the cause of liberty, the principal aid one can realistically claim to find is support for the argument that much of the policy-making power currently exercised by the national government—and especially that exercised by the electorally irresponsible national judiciary—should be returned to the states. One could argue, for example, that under the Constitution the national government should not dry up state tax resources only to return the money to the states with national strings attached. Or one could argue, with an even clearer constitutional basis, that the first amendment was intended to protect the people of each state from national interference in matters of religion and that they are therefore deprived of a most important liberty when that amendment is used, perversely, to justify such interference. To argue instead, as Professor Terrell in effect does, that the Constitution, properly interpreted, supports still further enhancement of the policy-making power of the national judiciary is to get the matter exactly backwards. It is to turn the Constitution against itself.

Professor Terrell recognized that, apart from the preamble, the word "liberty" appears in the Constitution only in the due process clauses—no person shall be deprived of "life, liberty, or property, without due process of law"—of the fifth amendment, applicable to the federal government, and the fourteenth amendment, applicable to the states. As already noted, Terrell nonetheless asserts, without explanation, that liberty is "one of the core, foundational elements of the American Constitution." The Supreme Court, however, he believes, has been and continues to be "remarkably inconsistent" as to the meaning of this important term. The purpose of the essay is then announced as "to confront some aspects of this confusion directly." Terrell apparently believes that if the Supreme Court could just be brought to understand what liberty *really* means, to define it correctly, this confusion would be cleared up, some serious constitutional difficulties would disappear, and human liberty would be enhanced.

Terrell therefore undertakes a "brief analysis of the con-

cept of liberty as a whole," which nonetheless occupies twenty some pages. Although most people, I imagine, would have no difficulty in understanding "liberty" as freedom, the absence of restraint, Terrell considers it a term of "daunting ambiguity," which it certainly is by the time he is through with it. We are told that the term "liberty" states a broad principle, but we are never told just what that principle is. The discussion relies on "the very basic philosophical proposition that there is significant, although not necessarily absolute, distinction between the *description* of what a term means and the *justification* of that meaning"—a proposition, I must admit, I never heard of and am not at all sure I understand.

The "focal definitional meaning" of liberty, it unhappily turns out, has no fewer than nine (extremely fuzzy) elements and even then "it lacks. . .some crucial relational elements that would transform it into a true 'moral' or 'political' situation." When we learn that "the central case of liberty demands not only a set of choices" within each of four basic "domains" of life, but also "somewhat separate sets of *both* general and specific alternatives within these areas," we have no difficulty in agreeing with Terrell that "liberty becomes a very rich concept indeed."[4] Whatever its philosophical merits or demerits, Terrell's analysis of liberty is of such mind-boggling complexity as to preclude its use by judges or usefulness in any legal setting.

II. The Rise and Fall of Substantive Due Process

There is a much more fundamental problem with Terrell's effort, however: the entire enterprise is based on a false premise and, therefore, totally misdirected. It is *not* the case that any constitutional difficulty exists because of an inability on the part of the Supreme Court adequately to define or understand the word "liberty" in the due process clauses—even though it is probably true that the justices are unaware of the basic philosophical proposition underlying Terrell's analysis. The Court's difficulties and inconsistencies concerning the due process clauses stem, as do virtually all other problems in constitutional law, from an entirely different source. They are the result simply of the Court's unwill-

4. Anyone who simple-mindedly thinks that a right is simply a protected interest will be equally distressed to learn that "the concept of a right is mult-faceted in much the same way liberty is," consisting of no fewer than seven elements.

ingness to confine itself to enforcing the Constitution and its need to pretend that the Constitution, nonetheless, has something to do with its constitutional decisions.

There is certainly no more fascinating or more frequently told tale in constitutional law than the history of the due process clauses. As a matter of both history and plain language, there is no uncertainty as to the intended meaning of those clauses or of the word "liberty." The clauses have been traced back to the "by the law of the land" language of Magna Carta, the purpose of which was to restrain the king and his agents, the judges, from acting against specified interests of his subjects (life, liberty, estate) except in accordance with established legal procedures.[5] The phrase "due process of law," used for the first time in a 1355 statute,[6] was understood from the beginning as the equivalent of the Magna Carta language.

The inclusion of the due process clause in the fifth amendment in 1791 was, therefore, uncontroversial and the occasion of no debate. It was understood to mean what it had always meant in its already long history, that no one could be deprived of any of the specified interests—and, although it is not important for our purposes, "liberty" meant simply the absence of physical restraint—except by the ordinary legal process. Alexander Hamilton stated: "The words 'due process' have a precise technical import, and are only applicable to the proceedings of courts of justice; they can never be referred to an act of the legislature."[7]

There is no reason to think that the due process clause was intended to have a different meaning when it was repeated in almost identical language in the fourteenth amendment in 1868. The purpose was obviously to impose on the states the same restraint that the fifth amendment's due process clause imposed on only the federal government, as part of the fourteenth amendment's overall purpose of granting certain basic civil rights to blacks.[8] There is therefore no apparent need for a "deep theory of the Due Process Clause"

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5. See CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

6. 28 Edward III: "No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law."

7. 4 WORKS OF ALEXANDER HAMILTON 35 (Syrett & Cooke eds., 1962).

8. See, *e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

and not the slightest basis for Terrell's assertion that the clause is "a device for restoring equilibrium to the relationship between the individual and the state."

In the late 19th century and the first third of the 20th, however, the Supreme Court, in one of the most remarkable developments in constitutional law, succumbed to the urgings of lawyers for the railroads and other defenders of property and business interests that the Court should prevent Congress and state legislatures from engaging in social welfare experiments.[9] Seizing upon the due process clauses as the most likely vehicle because they at least contained the words "liberty" and "property," the Court found that they placed "substantive" as well as procedural limits on government action, requiring that all laws be "reasonable." The result was to permit the Court to substitute its policy preferences for those of other government officials whenever it chose to do so.

It is more than a little ironic that Professor Terrell should quote with approval, though not by name, Justice James McReynolds, one of the leaders of the Court's effort to stop the welfare state, on the meaning of "liberty" in the due process clause. McReynolds' expansive view of liberty is in full accord with Terrell's; they could hardly agree more on appropriate techniques of constitutional interpretation and the role of the Court in policy-making, even though they could hardly agree less on the policies to be furthered. This fact alone should give us some concern as to the soundness and the dangers of those imaginative and expansive techniques.

"Substantive due process" judicial review led to a major constitutional crisis in the 1930's when the Court, with McReynolds in the forefront, undertook to halt President Franklin Roosevelt's New Deal. President Roosevelt was reelected frequently enough finally to be able to replace McReynolds and his cohorts with justices more in accord with the President's views on economic and social change. Substantive due process was thereupon denounced as an abomination, never again to be permitted to rear its head,[10] and vows of abstinence were taken that the Court would never again act as a super-legislature to disallow the policy choices

9. See TWISS, LAWYERS AND THE CONSTITUTION (1942).

10. See, *e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Met. Co., 335 U.S. 525 (1949) (no "return. . .to the due process philosophy that has been deliberately discarded").

of the people's elected representatives.[11]

A. *Substantive Due Process by Other Names*

It soon appeared, however, that all that had been foresworn by the new justices was the name and language of substantive due process and the ends—primarily resistance to the welfare state—that their predecessors had labored to serve. The new justices soon asserted and exercised policy-making powers McReynolds could not have dreamt of, although now in the cause of egalitarianism rather than individualism. It was only necessary that the new era of judicial activism be given a different doctrinal basis—that a new rhetoric be adopted—and this was accomplished through three major techniques.

First, the justices discovered, with the help of Justice Black's historical researches,[12] that nearly all of the provisions of the Bill of Rights (but not the seventh amendment, which even Justice Black considered an embarrassment) were "incorporated" in the due process clause of the fourteenth amendment and thus made, contrary to their original purpose, federal limitations on state power.[13] It was a terrible thing—totally without constitutional warrant—all now agreed, for the Court to disallow, say, minimum wage legislation as an unreasonable restriction on liberty because constituting an obvious piece of special interest legislation inimical to the general welfare. It was a very different thing, however, and entirely consistent with representative self-government for the Court to disallow, say, state laws restricting the distribution of pornography, because the Court was then simply enforcing the first amendment. When even the most imaginatively interpreted provisions of the Bill of Rights proved insufficient for the Court's social reform objectives, the Court decided that it was also authorized to enforce constitutional rights found only in the "penumbras, formed by emanations"[14] of the Bill of Rights. Thus the Court's holding that state laws restricting the availability of abortion violated a constitutional "right of privacy"[15] must not be thought to be a return to the type of judicial arrogance that characterized the discredited substantive due process era.

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11. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).
12. Adamson v. California, 322 U.S. 46, 68 (1947).
13. See Duncan v. Louisiana, 391 U.S. 145 (1968).
14. Griswold v. Connecticut, 381 U.S. 479 (1965).
15. Roe v. Wade, 410 U.S. 113 (1973).

Second, previously unimagined wonders—such as a requirement of "one man one vote" and the prohibition of nearly all distinctions on the basis of sex, alienage, or legitimacy—were discovered in the equal protection clause of the fourteenth amendment. The equal protection clause, of course, applies only to the states and, unlike the fourteenth amendment's due process clause, has no counterpart applicable to the federal government. As the "incorporation" scam demonstrates, however, the presence or absence of constitutional provisions is a small matter in the development of constitutional law. By another stroke of good fortune it was discovered that all the requirements and prohibitions of the equal protection clause had been included in the due process clause of the fifth amendment in 1791 and so were and always had been applicable to the federal government after all.[16]

Finally, and most relevant for our purposes, it was discovered that there is a crucial difference between "substantive" rights and "procedural" rights. To disallow legislative choices on the basis of the latter was, therefore, not to return to the evils of substantive due process, but only to insist, as is particularly appropriate for judges, on "procedural due process," as redundant as such a requirement might sound. *Goldberg v. Kelly*,[17] was a landmark in the development of this third technique. In an opinion by Justice Brennan, a latter-day McReynolds, the Court held that although Congress was of course not constitutionally required to provide welfare benefits, the due process clause prohibited it from providing for the termination of benefits without granting the recipient a prior hearing. Although the law was in fact invalidated on no other basis than the Court's view of its "reasonableness," the Court was to be understood as having found only a "procedural" defect and as imposing a requirement of only additional "procedural" protection.

In this context at least, the procedure-substance distinction created by the Court is essentially meaningless. The essential fact of the *Goldberg* decision is that the justices had disallowed a policy choice made by Congress in setting up the welfare rights system and substituted their own policy choice. The justices decided, in effect, that more money should be spent to avoid mistakes, even if this meant that less money was available for benefits, while Congress had, as a matter of

16. Bolling v. Sharpe, 347 U.S. 497 (1954).
17. 397 U.S. 254 (1970).

policy, opted for a different trade off. As Professor (now Judge) Frank Easterbrook has succinctly put it:

> Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained. The body that creates a substantive rule is the logical judge of how much should be spent to avoid errors in the process of disposing of claims to that right.[18]

The *Goldberg* technique immediately proved immensely popular with several of the justices, and it was rapidly put to use in a wide variety of situations. For example, it permitted the Court to supervise, disapprove of, and revise even so purely local and non-constitutional seeming a matter as a state's program for the granting and suspension of drivers' licenses.[19] Indeed, the technique's potential to constitutionalize virtually all government-citizen relations apparently caused some of the justices to seek a way to limit its application even if they could not bring the Court to abandon it altogether.

B. *"Property" as a Limit on Substantive Due Process*

Justice Stewart, writing for the Court in *Board of Regents v. Roth,*[20] with Justices Douglas, Brennan, and Marshall dissenting, found such a way. As is often the case, the Court limited one irrational doctrine by means of another. Plaintiff Roth, hired to teach at a state university under a one-year contract, challenged as a denial of "procedural due process" the university's refusal to hire him for a second year and failure to give him any explanation. The simple and logical response, it would seem, is that the only right the state had granted to Roth was the contract right to teach for one year, and that right had been fully honored. He had not been granted the different and additional right to teach for a second year unless given an explanation. In short, the state had given him all that it had contracted to give, and nothing in the Constitution or elsewhere obligated it to give him anything more. Because of *Goldberg,* however, this simple and

18. Easterbrook, *Substance and Due Process,* 1982 SUP. CT. REV. 85, 112-13.

19. Bell v. Burson, 402 U.S. 535 (1971).

20. 408 U.S. 564 (1972).

logical response was not available; under that decision once a state grants a right, it may, strangely enough, be constitutionally obligated to grant additional rights. If a welfare recipient could be constitutionally entitled to payments not provided for by the government's welfare arrangements, why could not Roth be constitutionally entitled to employment not provided for by the government's employment arrangements?

The Court avoided this result in *Roth* by holding, in effect, that the constitution does not add rights to *all* government-created rights, but only to some. It all depends on the nature of the right plaintiff is asserting: the due process clause does not come into play unless the right asserted is a *real* right and not merely a legally unprotected interest. It was not enough that Roth had an "abstract need or desire" for the additional employment or a "unilateral expectation of it"; it was necessary that he have "a legitimate claim of entitlement to it." Otherwise his interest would not amount to a "property" interest protected by the due process clause. But this, of course, is perfectly circular: Roth was not entitled to an explanation before his interest in continued employment could be denied because that interest was not sufficient to entitle him to an explanation. As John Hart Ely put it, "It turns out, you see, that whether it's a property interest is a function of whether you're entitled to it, which means the Court has to decide whether you're entitled to it before it can decide whether you get a hearing on the question whether you're entitled to it."[21]

One whose sad lot it is to read the Supreme Court's constitutional opinions is soon inured to illogic and immunized to surprise, but my first reaction on reading *Roth* in 1972 was nonetheless close to disbelief. It was as if Holmes had never lived and the legal realist movement had not taken place. Justice Stewart had not been known for jurisprudential sophistication, but even he, one would have thought, understood that disputes could not sensibly be resolved by trying to extract meaning from a word as one might extract ore from the earth. What was really happening, however, I later realized, was not that the Court was seeking to resolve the dispute by discovering the "true meaning" of "property" or "liberty," but that it was seeking to avoid having to resolve the dispute. The Court, of course, had not the slightest warrant for being involved in the first place; no intellectually respectable argument could be made that the Constitution disallowed the gov-

21. ELY, DEMOCRACY AND DISTRUST 19 (1980).

ernmental policy choice involved—the offer of a one-year contract of employment with no commitment as to further employment even though that made the offer less attractive. That fact, however, had not stopped the Court from intervening in *Goldberg,* and the Court in *Roth* was apparently unwilling to overrule *Goldberg.*

And that is the story, in brief, of how the meaning of "property"—and later, "liberty"—became an issue in constitutional law. It is a preposterous issue, the result of circular reasoning applied to an imaginary distinction. Professor Terrell, however, apparently troubled not at all by the illogic that gave rise to the issue, sees it as a fit one for deep philosophical analysis. Having previously developed a methodology for discovering the true meaning of "property,"[22] he now applies it to "liberty."

Professor Terrell believes that his elaborate definition of "liberty" is useful in understanding and evaluating *Roth* and the Supreme Court's later "procedural due process" decisions. Those decisions can be much more easily understood, however, as the product of a continuing struggle between those justices who would retain the "procedural due process" technique as an additional means of exercising unguided judicial review and those who would abandon it. In *Arnett v. Kennedy,*[23] Justice Rehnquist, the leader of the latter group, attempted to resolve the conflict between *Goldberg* and *Roth* by effectively rejecting *Goldberg.* A person denied a benefit by government does not, under *Roth,* have a constitutional right to "due process" (a prior hearing or whatever) unless he can show, in effect, a "property" right. But whether or not one has a "property" right must be determined, Rehnquist reasoned, not be looking to the due process clause—that would be circular—but by looking to the applicable law. In essence, then, a claimant is entitled under the Constitution only to whatever procedures he is entitled to under the law; the Constitution adds nothing, which is clearly correct as a matter of constitutional interpretation but inconsistent with *Goldberg.* Only Chief Justice Burger and Justice Stewart joined Justice Rehnquist's opinion in *Arnett,* however; three other justices concurred only in the result on other grounds. In *Bishop v. Wood,*[24] it appeared that Justice Rehnquist's reasoning was

22. Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis,* 70 GEO. L. J. 861 (1982).

23. 416 U.S. 134 (1974).

24. 426 U.S. 341 (1976).

adopted by a bare majority of the Court, but later decisions showed that the matter was far from settled, and just the past term, in *Cleveland Bd. of Educ. v. Loudermill*,[25] the *Arnett* analysis was explicitly rejected with only Justice Rehnquist dissenting.

C. *"Liberty" as a Limit on Substantive Due Process"*

The *Goldberg* "procedural due process" cover for substantive due process (pure policy-making, "reasonableness") review was not confined to cases in which government had denied someone a benefit such as a job or a license, but was also applied where government action had affirmatively inflicted an injury. Without getting into the merits, if any, of the benefit-harm distinction, suffice it to say that cases seen as of the latter type are said to involve not a "property" but a "liberty" right or interest—which is how "liberty," too, became in need of definition or "description" in constitutional law.

The leading and most controversial decision supposedly turning on the meaning of "liberty" is *Paul v. Davis*.[26] Local police officials circulated a flyer to local merchants naming plaintiff as an "active shoplifter" on the basis of shoplifting charges that had been filed against him. The charges were later dismissed, however (which, given the impediments to criminal convictions created by the Supreme Court in recent years, indicates nothing about guilt), and plaintiff, of course, sued the police chief in federal court claiming a violation of his federal constitutional right to "procedural due process." The plain fact of the matter is that nothing in the Constitution prohibits the state from doing—or permitting the police chief to do—what it did. Plaintiff may have been injured, but it happens, whether we like it or not, that the Constitution does not prohibit—or at least was not intended to prohibit—every government action that causes someone an injury. One of the things it does not prohibit is a state policy of identifying to shopkeepers persons believed to be thieves, even though, of course, in this as in everything else the state may make a mistake. But the whole point of substantive due process is to remedy what Supreme Court justices see as the Constitution's deficiencies, to supply restraints on representative government that the justices consider necessary but that

25. ___ U.S. ___, 105 S. Ct. 1487 (1985).
26. 424 U.S. 693 (1976).

the framers and ratifiers neglected to include.

In *Paul v. Davis* the Court, again in an opinion by Justice Rehnquist, with Justices Brennan, White, and Marshall dissenting, dismissed plaintiff's claim. Obligated to proceed more or less within the requirements of *Goldberg* and *Roth,* Justice Rehnquist was precluded from simply announcing that the Constitution had no relevance to plaintiff's claim. Instead, he made the remarkable announcement that plaintiff had not been deprived of "liberty" within the meaning of the due process clause of the fourteenth amendment because he had been injured only in his reputation—it was not as if he had been denied, say, the liberty to drive a car—and, therefore, the due process clause simply was not applicable. The result is, of course, a mess—unprincipled, unpredictable, and unjustifiable decision-making—and the Court's later waverings have not improved the situation. But that hardly distinguishes this area from almost any other in constitutional law; it merely illustrates again that the Court is a most ill-suited institution for the making of policy as to nearly all areas of life.

Conclusion

Professor Terrell's paper, unfortunately, does not contribute to clearing up this mess. As already noted, his whole approach is misdirected, based on the mistaken assumption that *Roth's* apparent formalism is to be taken seriously. The problem, however, is not that the Court has been unable to hit upon the real or right or best definition of "liberty." The problem is that the Court is engaging in substantive due process review in these cases and trying to conceal that fact under a "procedural" cover while some of the justices are trying to find a way to limit that review without entirely abandoning it.

Even if defining "liberty" were the problem in the cases Professor Terrell discusses—even if we were to try legal formalism again—his extensive and in-depth analysis of the term would not be of help. That analysis seems to me questionable at almost every step, question begging, circular, arbitrary, and leading to some unbelievable conclusions. For example, by what seems to be sheer *ipse dixit* he announces the seemingly self-contradictory proposition that reducing the number of one's options does not reduce one's liberty (remove one from the "central case" or "focal meaning" of liberty) if a

significant number of options remains.[27] He then applies this "finding" or "observation" to conclude that *Roth* was correctly decided because plaintiff Roth could probably still get plenty of other jobs.[28] I do not think that it is any easier to make the decisions required by Terrell's system than it is simply to decide the cases, and I do not think that the decision of the cases would be in any sense improved.

Unfortunately, time does not permit substantial comment on Professor Butler's at least equally imaginative and surprising paper. But I cannot refrain from commenting that his statement that the seventh amendment was "the most sought-after provision in the Bill of Rights" is surely one of the most startling to be encountered in the literature of constitutional law. In my frequent attempts to point out that the Bill of Rights is neither as expansive nor as useful as enthusiasts of judicial activism seem to believe—agreeing with Professor Butler that it constitutes "a rather meager and lackluster pantheon of basic substantive liberties"—I always point to the seventh amendment as one Bill of Rights guarantee that nearly everyone must agree we would be better off without. Who could possibly think today that there should be a jury trial in every civil dispute involving more than twenty dollars?

One of Justice Frankfurter's strongest policy arguments against Justice Black's incorporation thesis was that it would make the seventh amendment applicable to the states,[29] and even Justice Black felt it wise to concede that incorporation did not necessarily have to go that far.[30] And to learn now that the seventh amendment was the most wanted Bill of Rights provision of all! Be that as it may, I believe it ex-

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27. "[A] choice between two distinct and meaningful alternatives is just as 'central' an example of liberty on my account as a choice among a hundred such options."

28. The *Roth* result "seems to be quite consistent with the definitional element of 'meaningfulness' within liberty," because although the refusal to rehire Roth reduced his "array of options," that array "still contain[ed] enough options to be meaningful."

29. "Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting. . .that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars." Adamson v. California, 322 U.S. 46, 64-65 (1947).

30. "Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish is not necessarily essential to a decision here." *Id.* at 75.

tremely unlikely that the ratifiers of the fourteenth amendment intended to "incorporate" the seventh amendment so as to make it applicable to the states, or for that matter, that they intended to incorporate the just compensation clause of the fifth amendment either. I am not prepared to comment on Professor Butler's historical research in support of his similarly startling idea of a "libertarian jury," but I am skeptical that our very practical-minded Founders could have favored a practice that would amount to a virtual abandonment of the ideal of law.