The Contradictions of Mainstream Constitutional Theory

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For the last four decades, some form of "process" theory has dominated conventional constitutional theory, on the bench and in the academy. The organizing, usually implicit, background assumption is that the exercise of governmental power—whether by legislatures or courts—is to be tested for normative legitimacy against a set of procedures. Writing as critics of the basic framework of process theory, Professors Kimberlé Crenshaw and Gary Peller discuss the contributions and constraints of a proceduralist constitutional law discourse. In light of direct democracy initiatives claiming the power of legislation, and a substantively conservative judiciary defining the "law," Professors Crenshaw and Peller suggest focusing on new ways that claims of the disempowered are articulated in constitutional doctrine.

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INTRODUCTION

This is an essay in honor of the late Professor Julian Eule. We take as our point of departure his work on the appropriate judicial scrutiny of direct democracy initiatives. Particularly given the recent strategies of right-wing activists to use ballot measures to reverse the meager legislative victories that the targets of their hostility have managed to win, it is important how progressives articulate and develop ways of understanding these phenomena that challenge their surface appeal as exemplars of popular self-determination.

In our view, Professor Eule's scholarship on direct democracy demonstrates the progressive possibilities of the process-oriented approach to constitutional law. He articulated a powerful case for careful review of voter initiatives and referenda despite their apparently unquestionable "democratic" pedigree when viewed within the terms of other constitutional theories that base their justifications for judicial review on the limited democratic character of the "legislature." In a skillful weave of "republican" concerns about the dangers of majoritarian factionalism together with "democratic" aspirations for popular sovereignty, he has effectively impugned the tendency to identify the quality of democratic self-determination with the quantity of votes aggregated in televised election night rituals. At a historical moment when progressive political movements are in retreat, Eule's idea of analogizing judicial review of direct democracy initiatives to the deliberative check on short-sighted popular passions—supposedly underlying the American system of checks and balances on legislation—is an important counter to the intuition that popular initiatives are the most democratic means to choose social policies. And, at a doctrinal level, the suggestion that restrictive Supreme Court interpretations of minority rights need not bind a court reviewing popular initiatives may, ironically, provide a practical, argumentative guide for courts and lawyers running out of ways to contain conservative Supreme Court precedent. In short, Eule showed that, in the hands of a skilled practitioner, a proceduralist analytic can rise to the challenge of defending hard-fought legal victories from being overturned by direct popular action.

At the same time, we believe that Eule's challenge to the presumptive constitutionality of initiatives also reveals the limits of proceduralist

2. See id. at 1522–26.
approaches in comprehending the actual relations of social power existing beyond the theoretical models of democratic theory. As we see it, process-oriented approaches to constitutional law are analytically flawed and ideologically conservative. The common analytic flaw is a formalist solution to the issue of how to identify the sites of social power. The ideological tilt is more loosely manifest in the construction of a discourse that drains our dreams of democratic empowerment and human liberation of their vitality and immediacy, and translates them into a legitimating apologia for the mainstream ways our social life is organized.

The cultural link between the analytic and the ideological is loosely captured in the late twentieth-century idea of being “processed into obscurity,” of having movements of resistance and transformation within mainstream “enlightened” institutions inevitably met with the appointment of a committee to study any issue raised, or the referral of the workplace fight from the shop floor to the grievance procedures of the collective bargaining agreement. Reason meets passion with a perfectly sensible resolution according to the institutionalized procedures for resolving questions of that kind. We are, in general, against these ways of disciplining through diffusion and the bureaucratization of popular attempts at political agitation. We believe that the problem with right-wing initiatives like California’s Proposition 209, banning race and gender affirmative action, or Colorado’s Amendment 2, prohibiting legislative protection against discrimination according to sexual orientation, is not that they reflect passionate, shortsighted, or irrational mob action that deliberation should diffuse and discipline. Rather, the cultural and political dynamics reflected in the open hostility of these initiatives against Blacks, Asians, Latinos, Indians, and sexual minorities are not accounted for in structural, formal designations of the dangers of popular initiative and the virtues of the deliberative method.

In our view, only an empty formalism can prevent mainstream theories of judicial review from recognizing the inconsistencies between talk of “democracy” and “self-determination” on the one hand, and on the other hand the everyday experience most of us have in most of the hours of our lives. Similarly, limited ideas about what democracy might mean do
not do justice to the history of struggle, passion, solidarity, betrayal, and fear that characterize liberatory drives to achieve democratic self-determination in workplaces, neighborhoods, schools, streets, and other places of social interaction. Mainstream constitutional theories—whether of the liberal or republican variety—pretend that a meaningful form of democracy exists as the backdrop to the occasional and exceptional intervention of law as symbolized by judicial review. We do not think that constitutional discourse should be constructed to represent as democratically chosen the terms and conditions of social life that actually embody the disempowerment of people.

While there is no analytical barrier preventing an application of process theory to constitutional law from constituting a radical critique of the undemocratic character of our everyday social lives, there are historically explicable reasons why process theory has never developed this radical potential. In Part I, we summarize Eule's work on direct democracy and situate it within the process theory analytic. In Part II, we discuss how process theory's status as the centrist constitutional theory of our time depends on the suppression of the analytic contradictions underlying the process approach. We develop these contradictions by considering the development of the equal protection doctrine and the Supreme Court's resolution of challenges to several direct democracy initiatives. In Part III, we consider the strategic and ideological consequences of the process rhetoric. We conclude that, despite the best liberal intentions of scholars like Eule, proceduralist ideology, even at its best, is a conservative and apologetic way to think and talk about the social world.

I. THE PROCEDURALIST GENRE OF CONTEMPORARY CONSTITUTIONAL THEORY

A. Eule's Argument for Increased Judicial Scrutiny of Popular Initiatives

In Judicial Review of Direct Democracy, Eule carefully and meticulously makes the case that judicial review should be less restrained, i.e., more activist, when confronting popular initiative as compared to legislative action. Against the superficial appeal of the notion that the direct democracy process is presumptively more legitimate because it represents more clearly the will of the people themselves than the imperfect leg-

4. See Eule, supra note 1, 1558-60.
islative representation of popular will, Eule contends that the legislative process contains important safeguards against factionalism that are lacking in the process of popular initiative.  

In arguing for stricter judicial scrutiny of popular initiatives, Eule first asserts that the low voter turnout and the lessened voter comprehension of ballot measures call for skepticism as to whether the election results even measure majority will. He also contends that the binary, yes/no structure of measuring voter preferences intrinsic to the ballot-measure form falsely rigidify the political choices available. Ultimately, however, even if the plebiscite were a better way to measure majority will than legislative results, he argues that the Constitution should be read to favor legislation.

In Eule’s view, legislation is preferable to ballot initiatives precisely because it incorporates protections against majoritarian factionalism absent from popular initiative. The legislative process of deliberation and the checks and balances of the constitutionally prescribed separation of powers work to filter raw majority preferences. These processes are lacking in the ballot initiative process unless, as Eule advocates, courts in a judicial review capacity compensate for the lack of filtering by a greater level of scrutiny than that applied to legislation. Eule argues that understanding the problem of judicial review as the counter-majoritarian difficulty fails to take account of all the ways that the constitutional structure filters majoritarianism even without judicial review. Once those filters are properly accounted for, the case for increased scrutiny of ballot measures becomes clear: Through heightened judicial scrutiny, the judiciary would provide a filtering of majority preferences akin to legislative deliberation and the checks and balances incorporated in the process of legislative enactment.

The content of the increased scrutiny, according to Eule, should be an even greater vigilance in protecting the interests of disempowered minorities; for example, he suggests that the Washington v. Davis requirement that a discriminatory purpose or motive be shown to make out a claim of illegal racial discrimination under the Equal Protection Clause should be relaxed when popular initiatives are under review. The difficulty of evaluating voter motivation, and the need for more careful scrutiny, combine to suggest lowering the barrier to judicial intervention.

5. See id. at 1548–50.
6. See id. at 1513–17.
7. See id. at 1517.
8. See id. at 1522–26.
B. The Proceduralist Constitutional Tradition

As we use the term, "process-oriented" approaches to constitutional law describe a discourse that first achieved dominance in the post-World War II period and continues to define conventional constitutional debate in the academy and on the bench. The shared characteristics of these theories are their focus on the institutional conflict presented by the power of judicial review of legislation recognized in *Marbury v. Madison*,\(^\text{11}\) and their assumption that the proper scope of judicial review could be neutrally identified by evaluating, independent of the substance of any law, the respective institutional competence and converse structural limitations of courts and legislatures. Process theory in constitutional law reflects the idea—shared in the more general legal process jurisprudence—that legal justice consists of the correlation of dispute resolution procedures with the kinds of conflicts to which they are best suited, for example, administrative agencies are good for resolving some kinds of social issues, state governmental processes are best for other issues, democratic voting prevails for still other issues, and so forth. In the constitutional arena, the attention is on the relative suitability of courts and legislatures for different kinds of issues. Focusing on the counter-majoritarian difficulty with judicial review, the inability of the judiciary forcibly to enforce its judgments, and the array of institutional options available to the judiciary, Alexander Bickel emphasized judicial options of deciding and avoiding decisions—the "passive virtues."\(^\text{12}\) Herbert Wechsler identified the particular institutional competence of judicial review with the procedure of ruling based on "neutral principles," and decried the Court's decisions in cases like *Brown v. Board of Education*\(^\text{13}\) given that controversial value judgments were involved.\(^\text{14}\) John Hart Ely developed a blueprint for judicial activism that would be "representation-reinforcing" and attempted thereby to sidestep the charge of being counter-majoritarian.\(^\text{15}\) In our lexicon, they all are process theorists because they concentrate on developing constitutional

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\(^{11}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{12}\) The phrase "counter-majoritarian difficulty" was first used by Alexander Bickel. See A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

\(^{13}\) 349 U.S. 294 (1955).


\(^{15}\) JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
theories concerned with the interrelation between the judiciary and the legislature rather than the content of just laws.

At this general level, Eule should be recognizable as a proceduralist: His background assumption is that the different characteristics of various lawmaking institutions themselves suggest the appropriate level of judicial review, wholly apart from the substance of the laws enacted; in Eule's description, it is the different characteristics of the process of popular initiatives that should trigger a more interventionist judicial review, regardless of and prior to consideration of their content. Like Bickel and Wechsler, Eule focuses on the structural procedures of popular initiative as compared to legislation to identify the appropriate level of judicial review. And like Ely, Eule articulates a scheme that seeks to infer, from the very structure of majoritarianism, reasons not to defer automatically to institutions that are democratic only in form.

C. The Realist Predicate to the Rise of Proceduralism

As a matter of intellectual genealogy, the focus on process that we have briefly described can be traced to the legal realist critique of the "formalist" constitutionalism of the "liberty of contract" era. Process theory, in constitutional discourse and in American law more generally, arose in the vacuum created by the legal realist demonstration that "law is politics."

In terms of constitutional doctrine, the realist argument was posed against the turn of the century libertarian constitutional theory of cases like *Lochner v. New York.* In *Lochner,* the Court struck down ameliorative labor legislation fixing maximum hours that bakery employees could work on the ground that such laws abridged the freedom of the bakery owner and the employee to choose the terms of their relations free from governmental coercion. As we see it, the liberty of contract approach was the last period of American constitutional history in which the Constitution was interpreted with explicit reference to a substantive theory of justice and human freedom, an approach more or less recognizable as a form of legal libertarianism.

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17. 198 U.S. 45, 64 (1905) (striking down maximum hour legislation as violating right freely to contract as implicit in the constitutional language of due process).

18. It is true that the liberty of contract approach can itself be described as proceduralist: Protection of the private sphere insured that social relations were legitimate to the extent that
Reflecting an ideology centrally organized around a sharp dichotomy between the public and the private, the *Lochner* result could be seen as neutral, determinate, and apolitical to the extent the judiciary was simply protecting a private sphere of freedom from governmental regulation. Much of the legal realist work was taken up in debunking the core libertarian assumption that, without legislative regulation, the economic marketplace could be truly private and free from governmental regulation. While the libertarian thinkers of the *Lochner* era assumed that the common-law rules of contract, property, and tort provided a set of neutral background rules that merely facilitated individual transactions in the marketplace, the realists showed that each doctrinal rule could be seen as a policy decision made by judges, a policy decision between, say, the competing claims of freedom and security.  

Nothing in the idea of voluntariness or a free marketplace, for example, dictated how to define fraud; the choice between a caveat emptor privilege (expanding the freedom of sellers) and a full-disclosure duty (expanding the security of buyers) depended on a policy judgment that itself had distributive consequences. Accordingly, the common-law rules as to what constitutes fraud, coercion, competence, a compensable tortious injury, an actionable nuisance, and the like were not simply neutral ground rules of the marketplace, but served to establish a particular series of regulations, particular sets of policy decisions, none of which could be neutrally deduced from the concept of free will or a private sphere, and each of which could be seen to benefit some and burden others. A broad disclosure duty benefits the gullible, the ignorant, and the buyers; a narrow disclosure rule benefits the skeptical, the sophisticated,

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they were the result of a process of individual choice. By describing the approach as embodying a substantive conception of social justice, we mean to focus attention on the manner in which, in the *Lochner* era approach, the Court saw itself protecting a sphere of social relations (the private) from encroachment by the government (the public) because of deep-seated principles of justice and freedom rather than any idea that the procedures of legislation were not functionally suited to regulating such relations. Conversely, it is not that process thinkers do not believe in the suitability of “private ordering” for some types of social issues. See HART & SACKS, supra note 3, at 207-365. Instead, the rationale for allocating particular decisions to private actors is, in proceduralist discourse, the functional superiority of the “private ordering” process for regulating those domains, not the idea that justice and human freedom require it.


the seller. Recognizing a tort of sexual harassment would benefit women at the expense of harassers; failing to protect such an interest creates a privilege on the part of harassers to injure without having to pay compensation. In each doctrinal area, some rule must be chosen, and the choice will have distributive consequences in constructing the relative power and wealth of market actors.

The realists uncovered how the common-law baseline, which grounded the libertarian defense of private market ordering from the intrusion of public policy decisions, was itself constituted through policy decisions. Their critique revealed that the so-called private choice exercised in a putatively free sphere was necessarily already regulated by public power. The common-law construction of the baseline reflects the manner in which so-called private choice is necessarily already regulated by public power. Accordingly, to permit legislatures rather than common-law judges to set those necessarily regulative baselines would not introduce regulation, but instead substitute one set of policy decisions for another. Conversely, realists also argued that even when the legislature had not explicitly regulated in a particular area, the marks of public power nevertheless could be found. Legislative inaction also effectuated a policy decision.

These abstract elements of the realist critique were captured in two Supreme Court opinions that exemplify the victory of realist over libertarian analytics. Shelley v. Kramer,\(^21\) finding state action in the common-law enforcement of privately chosen contractual terms, embodies the realist point that the power of private parties to contract depends on public enforcement by the state, whether through legislative or common-law rules giving effect to their contractually chosen terms.\(^22\) Reading Shelley broadly, there can be no true private sphere separate from social power because all so-called private action occurs in the bargaining context of public rules and ultimately depends upon the willingness of public authorities to give them effect. In Miller v. Schoene,\(^23\) the Court rejected a just compensation claim for losses occasioned by legislative requirements that cedar trees in close proximity to apple trees be destroyed to prevent harm to the apple trees caused by spores transported from cedar to apple trees.\(^24\) The Court reasoned that a policy judgment as to the relative importance of cedar and apple trees would be embodied even in the absence of such legislation.\(^25\)

\(^{21}\) 334 U.S. 1 (1948).
\(^{22}\) See id.
\(^{23}\) 276 U.S. 272 (1928).
\(^{24}\) See id. at 280–81.
\(^{25}\) See id. at 279–80.
Had the legislature not acted, the relations between cedar and apple owners would be regulated in the form of a privilege on the part of the cedar tree owner to cause harm to the apple tree owner without having to pay compensation. Either legislative action or legislative inaction would benefit one side and hurt the other; there was no neutral basis to choose between the alternatives in order to require compensation in one scenario and not the other—and no baseline from which to identify a prior, prepolitical right to private property that would be violated if no compensation is provided for the losses caused by legislative regulation.

As an analytic and ideological matter, the realist demonstration of the incoherence of the laissez-faire image of a free economic marketplace delegitimated the liberty of contract constitutional interpretation by identifying the market as publicly constituted by a series of policy decisions embodied, in the absence of legislation, in the constitutive common-law rules. Accordingly, if policy was at issue, the realists argued, it was illegitimate—and antidemocratic—for the Court to strike down the democratic policy decisions reflected in legislation.

The realist slogan that "law is politics" reflects not only the realist debunking of the pretensions to objectivity and determinacy in judging, but also this particular analytic deconstruction of libertarianism as a substantive theory of social justice, legal neutrality, and constitutional interpretation. The legal process school of American jurisprudence should be understood in the historical context of the crisis of legal legitimacy that realism both reflected and engendered. The realists effectively debunked the analytic rationale for reading the Constitution (and the common law) through a libertarian framework. The problem was that, if all such legal decisions were really political at base, there seemed to be no particularly legal way of resolving them, and thus no basis for legitimate judicial action at all.

The dramatic rise of proceduralism in twentieth-century legal thought should be understood in the context of this particular intellectual quagmire. Against more radical alternative conclusions—that law is necessarily politics by other means, and thus the designation as "law" must be understood to be an ideological sham to make appear as necessary and objective social policies that were in fact contingent and political—proceduralists attempt to resurrect a law/politics distinction by drawing a new demarcation between process and substance: Substantive decisions are necessarily policy, as the realists demonstrated, but decisions about procedure, about whether a particular decision was reached according to appropriate decisions, are susceptible to a legal analysis. Given the emphasis on the match
between a particular kind of question and procedures for its resolution, process theories are characterized by a focus on the "competence" of various institutions to decide various kinds of issues. And thus, at the constitutional level, process theory suggests a focus on the particular competence of the legislature and the judiciary to decide particular kinds of social issues.

D. The Early Politics of Proceduralism

At its inception, process theory seemed unproblematically progressive. Process theory legitimized the notion of an activist judiciary expanding and transforming the common law according to formerly verboten considerations of social policy by framing such lawmaking as interstitial. In this view, the judiciary was a deputy legislature, inevitably making law according to a loosely defined "reasoned elaboration" of preexisting principles and policies. The acknowledgment of the inevitable place of policy in legal decision making was connected with the rise of an "activist" common-law judiciary reforming tort and contract by developing the law of products liability and promissory estoppel, for example. Judicial activism of this sort was deemed legitimate under democratic principles because the legislature could always reverse the common-law decisions of the judiciary if it went too far afield. Simultaneously, the proceduralist premise that the legitimacy of all institutions rested ultimately on democratic will sustained the repudiation of the *Lochner* Court's conservative activism.

Yet the ability of process theory to both legitimize new deal activism and to sustain the realist assault on *Lochner*, all under the rubric of fidelity to the democratic process, was linked to its impotence when confronting constitutional challenges to legislation. As a consequence, when the legislation under consideration was politically progressive, then deference to the legislature suggested by the counter-majoritarian difficulty produced liberal results, i.e., progressive legislation was upheld. But when the legislation under consideration effected censorship and racial segregation, process theory's call for judicial restraint in the absence of so-called neutral principles worked to render such policies immune to legal challenge.

The problem of course was that the democratic character of legislatures tended to be uncritically presumed. Discourse about the counter-majoritarian difficulty and the passive virtues presumed that judicial review need be carefully limited because it was an exception to the general commitment to democratic self-governance. This commitment to the exis-

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26. HART & SACKS, supra note 3, at 165–68.
tence of democratic self-governance was critical: Not only was the legitimacy of all American legal institutions premised on it, but it also constituted a core idea that distinguished the United States from the European dictatorships that the allies opposed in the War.

For example, in Dennis v. United States, Justice Frankfurter wrote a classic process-oriented concurring opinion upholding the convictions of Communists on the ground that their politically subversive speech constituted a sufficient threat to national security so as not to be protected under the First Amendment. He wrote separately, however, to put his conclusion in terms of institutional competence. While the majority simply applied the clear and present danger test and deferred to the lower courts' “factual” conclusions regarding the imminence of the danger posed by the worldwide communist conspiracy, Frankfurter focused on the respective institutional characteristics of the legislature and the judiciary to conclude that the issues presented by the case were better suited to legislative resolution. Given the uncontroversial premise that the legislature must have the power to protect constitutional government from armed overthrow, it required no great leap of logic to reason that whether a worldwide communist conspiracy really posed a serious threat—and then whether subversive communist speech could lead imminently to that threat—were questions of factual investigation and evaluative judgment. But the investigation and evaluation of a worldwide political, military, and ideological situation with respect to threats of Communism were precisely the types of determinations that the legislature and not the judiciary was competent to make. The judiciary, itself unable to make findings as to such global issues, must defer to legislative determinations of the risk that subversive groups posed to the government, and thus, according to Justice Frankfurter, the First Amendment did not prevent Congress from “finding” an imminent threat of communist subversion warranting the prohibition of communist/revolutionary speech.

Similarly, in his famous Neutral Principles lectures, Herbert Weschler agonized over the legitimacy of the Brown decision. Although he harbored no sympathy for segregation, Weschler simply could not identify any neutral principle that would distinguish between the rights of black schoolchildren to associate and the rights of white school children not to. Because he thought that democratic legislatures must be deferred to unless

28 See id. at 517, 524–25 (Frankfurter, J., concurring).
29. See id. at 539–40.
30. See supra note 14.
some neutral principle demanded otherwise, Weschler concluded that the judiciary was institutionally incompetent to overrule legislative policy regarding racial segregation. Of course, Weschler's premise that segregation presented competing associational rights between black and white school children is by any measure an amazingly myopic view of a policy that was grossly asymmetrical both in its origins and purposes. Weschler's rendering of segregation was Plessy-like in its denial of the meaning, context, and function of segregation. Of course Weschler was personally aware of the distinctively asymmetrical nature of segregation, yet this knowledge could not translate into a legitimate basis for judicial intervention. The extent, nature, and degree of segregation was a substantive matter that the judiciary, lacking democratic legitimacy, was ill-equipped to assess.

Neither Weschler nor Frankfurter considered in any way the possibility that the legislature that banned subversive agitation in Dennis or that disenfranchised blacks in Brown was not democratic but rather the result of a grossly undemocratic set of social arrangements. The combination of Weschler's inability to rationalize Brown and Frankfurter's judicious sanctioning of red-baiting in Dennis might have been expected to make process-oriented constitutional theory unattractive to progressive-minded theorists. However, it very quickly turned out that the very proceduralism that seemed to suggest no judicially-enforced constitutional limitation to censorship or apartheid could be, ingeniously, turned around to ban censorship and apartheid. As we suggest below, Eule's work is properly understood as part of this progressive version of process constitutional theory in which the approach becomes identified with the Warren Court's activism in civil rights, free speech, and the protection of the rights of criminal defendants.

E. The Progressive Reform of Process Theory in Constitutional Law

When the legislation under consideration was politically progressive, the deference to the legislature suggested by the counter-majoritarian difficulty, the passive virtues, and the need to rule through neutral principles, produced liberal results, i.e., progressive legislation was upheld. But when the legislation under consideration effected censorship and racial segregation, process theory's call for judicial restraint left such policies immune from legal challenge, and thus process theory played a conservative political role. The transformation of process-orientation from Frankfurter and Wechsler to Ely and Eule can be traced by the manner in which the democratic character of the legislature is identified in each approach. Rather than simply presume the democratic character of the
legislature, the Warren Court can be seen to have carved out a set of topics for critical judicial review gleaned from the premises of the counter-majoritarian difficulty itself. This interpretation is both a result of Ely’s grafting a coherent, worked-out theory onto Warren Court decisions, and, we think, simultaneously descriptive of the mind set of liberal judges themselves from the late fifties and through the seventies. Eule takes the refinement of the process analytic one step further by more critically examining the particular democratic character of representative institutions as compared to direct democracy alternatives, and by providing a way to read the processes of legislation as reinforcing core democratic commitments.

Simply stated, the original process-oriented notion, exemplified by Frankfurter and Wechsler, demanded deference to the legislature in light of its democratic character. Because, as the realists showed, substantive legal issues invariably depended for their resolution on political judgments not capable of neutral, legal resolution, the judiciary was competent to decide such issues only interstitially when the legislature has not acted, and must defer when the legislature has addressed a specific policy question. From the limitation of the judiciary to decide only according to apolitical considerations, one could infer the competence of the legislature to decide according to democratic procedures—the appropriate means of resolving social issues not capable of resolution according to neutral principles. Yet no inquiry was ever made as to whether this inference was in fact supportable. Early proceduralists based their deference on a simple finding that the issue presented for judicial review should be resolved according to democratic procedures, not whether the procedures in place were in fact democratic.

The turn made by the Warren Court, as interpreted by Ely, was to conclude that, if the basis for deference to the legislature is its democratic character, such deference is inappropriate when the legislature calls its own democratic character into question (by burdening free speech or voting rights), or when it legislates about the interests of groups that majoritarian democracy is poorly structured to consider, such as the interests of discrete and insular minorities. The very reason for restraint in general justified activist and critical review in these exceptional, categorical areas. Thus, virtually the entire corpus of Warren Court liberalism could be recast and legitimated as rulings designed to ensure rather than limit democratic self-determination. The judiciary could rule in its specific area of institutional competence—the review of processes of decision making rather than the

31. For a further discussion of this interpretation, see ELY, supra note 15.
substance of policy judgments—and simultaneously comply with the notion that substantive policy issues should be decided by democratic means. This was an ingenious solution to the tendency of process theory uncritically to defer to legislation, whatever its content. It also seems to explain the predominance of Warren Court activism specifically in the areas of criminal procedure, voting, free speech, and the protection of minority interests, and the corresponding failure of the Court to read the Constitution to provide substantive requirements.  

II. THE CONTRADICTIONS OF THE PROCEDURALIST ANALYTIC

We believe that the liberal reform of process theory helped make it easier to conceive and reach some important doctrinal developments in constitutional law—the judicial regulation of electoral districting to prevent racial exclusion, for example, or the Warren Court’s protection of free speech rights, or the banning of overt discrimination against African Americans and other racial minorities. In short, we honor the contributions that this way of talking about social justice has made to improve the status of many disempowered groups. But we also think that it is important to understand that process discourse constitutes an ideology about the social world. The notion that discourse about procedural rather than substantive issues is somehow particularly legal is false; the rational appeal of the process approach depends on suppressing the very realist analytics that impugned the neutrality of substantive libertarianism as a way to interpret the Constitution.

In general, the problem of process theory revealed by its historical development is simple: There is no way to make procedural determinations separate from the very substantive decisions that a focus on procedures is designed to avoid. To put this another way, process theory cannot escape from the baseline problem that the realists exposed in the

32. The progressive Ely/Warren Court spin has defined the mainstream of process theory for some two decades. To be sure, there has simultaneously existed a conservative counterinterpretation of the proceduralist turn: Robert Bork, for example, utilized a process-oriented analytic frame to argue for narrowed judicial review in constitutional law. See ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971). In the sixties, Paul Bator took the same tack in the delineation of a narrow scope of federal court jurisdiction. See Paul Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 456–57 (1963). Conservative process theory, however, has remained something of a countertext to the mainstream liberal consensus.

liberty of contract approach. Just as judges applying a liberty of contract
approach had to identify free contractual choice to defer to the private
marketplace, so process-oriented judges must identify legitimate democratic
self-determination before deferring to electoral marketplaces. And just as
the liberty of contract approach represented the economic marketplace as
private by suppressing the manner in which the baseline rules constructed
the power relations of the market, so constitutional process theorists
purport to protect an unregulated democratic marketplace by suppressing
the manner in which baseline rules construct the power relations of the
political marketplace. The more formalist the process identification of
democracy, the more the process approach satisfies the limitations on
judicial discretion at the cost of the convincingness of its conclusions; the
more functionalist the process inquiry, the more process theorists must
make decisions about the very controversial substantive decisions that only
the democratic process is supposed to resolve.

This problem of process theory is easiest to see in the contrast
between the Frankfurter/Wechsler approach and the Ely/Eule approach. In
the early process approach, Frankfurter and Wechsler analyzed the kind
of question presented and compared it to the particular institutional
competence of the judiciary. Once they identified that policy or value
judgments were necessary to the resolution of a particular issue, they
automatically concluded that the judiciary must defer because, given its
lack of democratic legitimacy, the issue was beyond its competence. The
circularity of this approach seems obvious in historical retrospect: The
judiciary's lack of democratic legitimacy at the base of the need for
restraint was only relevant when compared with the democratic legitimacy
of the legislature. If the legislature itself was undemocratic, however, there
was no predicate for the judiciary to defer to the legislature. The
Frankfurter/Wechsler style of process theory never faced this possibility; it
was avoided by simply presuming that the legislature was democratic.

The Frankfurter/Wechsler deference to the legislature is the formalist
pole of the continuum of ways to identify democracy. Rather than asking
anything about the quality of life, power relations, or even the legal rules
governing the electoral market, Frankfurter and Wechsler apparently
identified democracy with whatever an institution formally designated as
a "legislature" produced. Their approach to the identification of the
democratic character of the legislature was akin to a formalist definition
of contractual consent: One could identify consent wholly from for-
mal, external signs (like the signature on the contract), or, as the realists
showed, one could do a functional, empirical analysis that evaluated the
meaningfulness of choices made in the actual context of the economic
transaction. Similarly, one could identify democracy formally (through the
identification of specific acts made by "duly constituted legislative
representatives") or one could identify democracy functionally (through a
substantive evaluation of the actual conditions of decision making). Given
that nothing within the theory itself dictated the formalist or functionalist
approach, it is rather amazing that Frankfurter proposed to defer to the
democratic character of a legislature that was engaged in censoring
dissent views, and that Wechsler argued the superiority of a democratic
process that excluded African Americans. A deep suppression of social
reality was required for these supposedly leading intellectuals to engage in
such formalist nonsense.

The Ely/Eule brand of process theory partly responds to the formalism
of the Frankfurter/Wechsler approach by establishing prerequisites to the
conclusion that the legislature is democratic and therefore worthy of defer-
ence. This refined version of process theory recognizes the illegitimacy of
simply presuming the democratic character of the legislature in defining
the appropriate scope of judicial review. Instead, the Ely/Eule tradition
adds critical bite to the process approach by giving content to the concept
of democracy. They associate democracy with free speech rights, rights
relating to fair elections, and the like; they also identify the structural
shortcomings of the majoritarian electoral process in properly considering
the interests of minorities and thus require searching judicial scrutiny of
laws burdening discrete and insular minorities.

There is no doubt that this liberal refinement of process theory is a
vast improvement in requiring at least some critical analysis of whether the
legislature is in fact democratic and therefore worthy of deference. The
problem is that, as soon as the possibility of critically reviewing the legisla-
ture's democratic character is opened up, it is difficult to contain. First, the
selection of free speech and fair electoral processes are not self-evident as
the only ways that democracy could be defined. The selection of some set
of characteristics as opposed to others (an election process not dependent
on funding from the wealthy would hardly seem to constitute a radical way
to define democracy) that could have been chosen represents a controver-
sial policy judgment at the heart of the approach whose legitimacy is sup-
posed to rest on the ability to limit "law" to uncontroversial judgments
about procedures. Second, even if there were consensus that these charac-
teristics, and no others, are the signifiers of a democratic process, there is
still the problem of determining when such rights have been burdened.
As we see it, the very same contradictions that the realists identified in the liberty of contract approach to constitutional law also characterize process theory. Like the freezing of the common-law rules of property, contract, and tort as a prepolitical, natural baseline, process theory assumes that status quo social reality forms a neutral baseline from which to evaluate if democracy exists. Similarly, like the fallacious distinction between legislative action and inaction in the *Lochner* era, the process approach can only contain its critical inquiry by limiting it to the review of legislative action and assuming that legislative inaction leaves the political marketplace unregulated.

To clarify this idea, consider the example of free speech rights. Assuming that the existence of free speech, for example, is a noncontroversial precondition to democratic governance, the issue becomes how to identify whether people are in fact free to speak out on public issues. One way to identify whether free speech rights exist is to have the judiciary scan the social universe and determine whether people actually, functionally, have the ability to express themselves meaningfully on political issues affecting the polity. At the other extreme, one could simply presume that sufficient free speech exists so long as the government has not affirmatively burdened such rights. The first approach might be termed functional, realist, and de facto. The second should be recognizable as a formal, prerealist, and de jure model. Nothing within the terms of process theory dictates which approach to utilize. Either approach is problematic for process theorists.

To the extent that process theorists simply presume the existence of free speech rights unless the legislature has acted to burden them, they respect the limitations on the institutional competence of the judiciary (not to make controversial value judgments), but fail to demonstrate the basis for deference to the legislature—the same formalist problem of the Frankfurter/Wechsler approach. On the other hand, a functional, realist inquiry into the real-world enjoyment of free speech rights provides a more convincing basis for the ultimate conclusion that free speech rights exist, but at the cost of judicial legitimacy because such an approach would require making controversial value judgments about the distribution of power in society. For example, does the formal right to speak out in a public park make fair, in any meaningful sense, the wildly different relative power that the wealthy and the poor have to influence fellow citizens about political issues? Does the social construction of hierarchies and boundaries of gender, race, sexuality, and class first need reform before fair democratic decision making takes place? Is so, who will run the deprogramming cen-
Contradictions of Mainstream Constitutional Theory

One extreme protects judicial legitimacy by limiting the inquiry to a formalist evaluation; the other approach promises a real world evaluation with no legitimacy for the judiciary to be conducting the inquiry. And there is no way out of this quandary. It simply reflects the fact that the realist critique was not transcended, but only suppressed, in the process approach.

This tension between the poles of formal and functional ways to evaluate democracy define the characteristic doctrinal dilemmas of process theory. For example, the choices between de jure and de facto ways to identify when the interests of minorities have been burdened—triggering the stricter review under process theory—has marked the development of equal protection doctrine over the last several decades. The de jure approach is reflected in cases like Washington v. Davis, which limits constitutional review of racial discrimination to cases in which the legislature intended to burden minorities. The approach assumes that, if the legislature has not intended to burden minorities, they have not been burdened in a constitutionally meaningful sense. But just as the Schoene Court understood that the failure to regulate cedar tree owners would in effect establish a regulation burdening apple tree owners, so the de jure approach can be seen to be prerealist because it fails to recognize that legislative inaction—say the failure to protect minorities—establishes a legal privilege to harm minorities without having to pay compensation. From a sophisticated, realist perspective, there is no way analytically to distinguish legislative action from inaction without falsely assuming that the status quo is prepolitical and accordingly a neutral baseline. When process theorists honor the state action doctrine and accordingly limit constitutional review to affirmative governmental acts, they implicitly assume that minorities are not burdened in the status quo or, in the First Amendment context, that free speech rights are not burdened, just as Lochner-era judges assumed that the private sphere was free from regulation so long as the legislature had not acted. Taking Schoene and Shelley seriously means recognizing the mistake of assuming that a realm is free from regulation in the absence of explicit legislation.

As we noted above, just as the ideas of voluntariness and free will never dictated the particular fraud and duress rules of the late nineteenth

34. For a more in depth analysis of the conflict between de jure and de facto equal protection doctrine, see Kimberlé Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988).
century, nothing in the idea of democracy, free speech, or the protection of minorities demands that process theory be conducted in a formalist rather than functionalist manner. In fact, a de facto approach has, on limited occasion, been pursued. The Warren Court followed a de facto approach in many of the school desegregation cases—requiring affirmative governmental steps to be taken to achieve integration rather than simply requiring that the government stop acting nonneutraly with respect to race, even though, from a de jure perspective, the legislature did not act to produce the segregation it was ordered to remedy. Similarly, some free speech, religion, voting, and travel cases also demonstrate that a functionalist, de facto approach is possible. But those cases appear today exceptional and countertextual. In fact, as a historical matter, the process approach has always been heavily tilted toward the formal approach. This bias, while analytically indefensible, is historically explicable in terms of the approach’s main preoccupation with the post-Lochner legitimacy of judicial decision making. The problem with the functional, de facto approach is that it obviously requires the kinds of controversial judgments that the judiciary is unable to render under the institutional competence terms of process orientation; the problem with the de facto approach is that it avoids such value judgments by assuming without justification the normative status of the status quo, whatever the status quo might be. And the

37. See, e.g., Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (ruling that after plaintiffs show segregative policies affecting part of a school district, the burden shifts to defendants to demonstrate that the entire district was not affected); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (confering upon courts broad equitable power to remedy school segregation, including shifting the burden to school authorities to demonstrate that a school's racial composition is not the result of discrimination); Green v. County School Bd., 391 U.S. 430 (1968) (striking down a freedom of choice desegregation plan, the Court held that once a school district had official segregative policies, simply ceasing those policies was held insufficient to remedy constitutional violations).

38. See, e.g., Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (requiring a privately owned shopping mall to provide access to protesters because the private owner exercises power that is similar to that of the government); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that a common-law defamation remedy constitutes state action subject to First Amendment review).

39. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the denial of unemployment compensation to a Saturday Sabbath observer burdened her free exercise of religion because as a functional matter, her economic needs for unemployment compensation forced her to comply with government requirements).


41. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (refusing to allow states to deny welfare benefits to new residents because such denial would interfere with their right to interstate travel).
ultimate circularity of the process approach consists of the fact that a meaningful inquiry into whether to defer to the legislature because of its democratic character requires the kinds of controversial value judgments that only the legislature itself is competent to make under the terms of process theory. Ironically, this state of affairs is kept from view in contemporary versions of process theory by adopting as its own the vision of state action that the realists so thoroughly debunked in its deconstruction of the liberty of contract approach to constitutional law.

Of course, it is true that taking \textit{Shelley} and \textit{Schoene} and the rest of the realist analytic seriously would mean abandoning the state action doctrine as a limitation on the reach of constitutional restrictions, a doctrinal turn that would have dramatic and far-reaching consequences. But the state action doctrine has no intellectual, rational justification once the libertarian assumptions of the \textit{Lochner} era have been rejected. If the realist analytics are right—and as far as we know, they have never been challenged as analytically unsound—there is no reason to assume that the only significant form of collective power that could burden free speech rights or minority interests is affirmative legislative action—rather than, say, the legally protected privileges of private parties to restrict the actual, empirical freedom of individuals.

Despite its intellectual incoherence, however, no process theorist has \textit{ever} proposed abandoning the state action limitation on judicial review. Ely, Eule, and the rest all construct their theories with the state action doctrine as an assumed part of the theoretical landscape. Understanding that the retention of the state action doctrine provides a useful window into explaining why, despite the analytic possibility of process theory being conducted in a functional, de facto manner, there is a recognizable tilt in process theory to the formalist pole of possible approaches.

Were the state action limitation to be abandoned, the judicial review role would not be restricted to review of legislation, popular initiative, or other affirmative lawmaking. Rather, given the judiciary's role within the terms of process theory to ensure the democratic legitimacy of lawmaking, the judiciary would be required to evaluate the entire social field to determine if the extent conditions were consistent with democratic self-determination, before any affirmative lawmaking at all. It would have to resolve questions such as whether democracy is consistent with the maldistribution of wealth in American society; whether a free marketplace of ideas could exist given the ways that ownership of effective means of communication is established; whether the reality of the election process exclusion of all but the wealthiest is consistent with democracy; whether
the widespread sexual objectification of women prevents their meaningful participation in the political process; or whether the lack of health care prevents large groups of people from meaningful participation. In other words, the very controversial issues that can be resolved through democratic legislation would have to be resolved by the judiciary itself before any deference to the legislature would be in order. The ultimate quandary is that, under the terms of process theory, the judiciary lacks the institutional competence to decide the issues necessary for it to determine whether to defer to the legislature. Process theorists suppress this contradiction by tilting their analysis to the formalist pole—by acting as if the issues necessary to evaluate the democratic character of American society happened all to be resolvable within the terms of neutral principles and other ways to define the limits on judicial decision making. In short, the otherwise inexplicable embrace of the state action doctrine and other intellectually discredited elements of the old *Lochner* approach responds to the process commitment to keep judicial decision making within the terms set forth in process theory, regardless of its failure meaningfully to evaluate democratic processes.

Along these lines, Justice White is intellectually correct when he states in his *Washington v. Davis* opinion that pursuing a de facto approach to identifying racial discrimination would lead to a slippery slope with no stopping point: "[The de facto approach] would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." White assumes that simply reciting these consequences is enough to impugn a de facto approach. He does not consider, however, the possibility that failure to pursue such enquiries may render formal and empty the judicial protection of minorities, or of free speech rights. In the end, then, the Ely/Eule approach is simply a dressed-up version of the Frankfurter/Wechsler model. Ultimately, both approaches base deference to a purportedly democratic process on the limits on judicial inquiry rather than a meaningful evaluation of the process itself.

### III. PROCESS THEORY DISINTEGRATING: THE SUPREME COURT’S REVIEW OF POPULAR INITIATIVES

We believe that the analysis we have set forward above points in a direction that amplifies and extends Eule’s demand for close scrutiny of

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Contradictions of Mainstream Constitutional Theory

direct democracy. Yet as we have emphasized above, the cost of this extension might well entail the relinquishment of one of process theory's most basic promises: to provide a jurisprudential method free of substantive evaluation or, more directly, politics. The ground of this argument is found in connecting the realist dimensions of Shelley and Schoene on the one hand, and Reitman v. Mulkey43 and Romer v. Evans44 on the other.

Just as Shelley and Schoene exemplify the subversive consequences of a realist approach to the liberty of contract ideology, to our minds, Reitman and Romer likewise exemplify the analytic circularity of the process approach to constitutional law that we described above. In both Reitman and Romer, the Supreme Court reviewed popular initiatives (actually state constitutional amendments enacted through popular referenda) that purported to withdraw antidiscrimination protection.

In Reitman, the Court struck down a constitutional amendment preventing the enactment in California of fair housing laws banning racial discrimination.45 Clearly, as the Court noted, there was as an initial matter no constitutional duty to adopt such antidiscrimination provisions.46 One would suppose, consequently, that there would be no constitutional prohibition against the repeal of such legislation after it had been adopted. In its ruling, however, the Court held that the repeal of the fair housing laws worked to encourage private housing discrimination, and thus violated the Equal Protection Clause. In a similar ruling, the Romer Court struck down a state constitutional amendment adopted through popular referendum that would have forbidden granting "special rights" against discrimination on the basis of sexual orientation.47 While there was no constitutional duty to protect gays and lesbians against discrimination in the first instance, the Court held that it violated the Constitution to single out homosexuals and refuse to protect them against discrimination.48

As we see it, Reitman and Romer are analogous to Shelley and Schoene in that they demonstrate the inability analytically to fix a neutral baseline from which to evaluate an illegitimate democratic process in the same ways that Shelley and Schoene demonstrated the lack of a neutral economic baseline from which to identify the intervention of economic regulation.49

43. 387 U.S. 369 (1967).
44. 517 U.S. 620 (1996).
45. See Reitman, 387 U.S. at 380.
46. See id. at 374–75.
47. See Romer, 517 U.S. at 635.
48. See id. at 630–31, 634–35.
49. For a discussion of these baseline issues as they arise in Reitman, see Kenneth L. Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. REV. 1 (1988). For a discussion of these
example, in Reitman, the Court in one sense merely applied the general equal protection rule that the government may not assist private parties in discriminating against minorities. The ruling, however, immediately raises a problem with the limits of its logic. It is true that the Court based its ruling in part on an analysis of the specific political climate of California at the time, concluding that, as a real-world empirical matter, the "ultimate impact" of the repeal would be to encourage and embolden racial discrimination by private parties.

But Reitman opens up possibilities even more far reaching than the adoption of a functionalist rather than formal review. If, as the Court reasoned, the effect of the repeal would be to encourage discrimination, there is no reason to condemn a state's failure to pass antidiscrimination legislation in the first instance if the actual impact of such a failure would be to encourage discrimination. In other words, just as the realists showed that the government's failure to act—say to protect apple trees from cedar trees, or to recognize a tort against sexual harassment—has an effect on the distribution of social power in the economic marketplace, so the government's failure to act in the political marketplace can be seen to effect a particular distribution of power. To the extent the government fails to act to protect minorities from discrimination, it privileges discriminators at the expense of victims of discrimination; to the extent that the government fails to act to require media outlets to permit nonpaying public speech, it privileges such parties to restrict the free speech opportunities of nonowners. Either way, public power is necessarily at stake and manifest in the creation of rights against harm or privileges to harm. Once the repeal of antidiscrimination legislation is recognized as nonneutral governmental action, there is no reason to treat the failure of the government to act at all as neutral, as somehow respecting a baseline of rights, duties, and privileges that is free from public power. In short, the government can no more avoid responsibility for the distribution of power in the political marketplace than it can in the economic marketplace.

baseline issues as they arise in Romer, see Louis Michael Seidman, Romer's Radicalism: The Unexpected Revival of Warren Court Activism, 1996 SUP. CT. REV. 67.
50. Reitman, 387 U.S. at 376.
51. See id. at 376, 380.
52. For this reason, whatever the merits of hate speech or antipornography legislation, we think that it is incoherent to say that such legislation violates free speech rights. To the extent that hate speech and pornography constitute harms to the ability of minorities or women to exercise their own free speech rights, it is a zero sum situation: Refusing to ban hate speech and pornography does not respecting an unregulated free speech market; rather, it creates legally protected privileges for such speakers to harm others. There is simply no neutral baseline possible;
The Reitman Court's implicit treatment of the existence of fair housing measures as the baseline from which to evaluate the neutrality of government action is made even more explicit in Romer. The defenders of the Romer referendum—which would have banned any laws forbidding discrimination on the basis of sexual orientation—argued that by banning antidiscrimination protection for sexual minorities, they were just returning to a neutral baseline in which no “special rights” would be granted to sexual minorities over and above other citizens.\(^5\) In effect, all that the referendum accomplished, according to its defenders, was to put sexual minorities on the same plane as others, hardly a denial of equal protection unless the Constitution required antidiscrimination protection, a premise seemingly foreclosed by the decision in Bowers v. Hardwick.\(^4\) But in striking down the referendum as violative of equal protection, the Court contended that sexual minorities were being singled out for a denial of antidiscrimination protection that other citizens could obtain.\(^5\) In other words, rather than define a baseline of no antidiscrimination protection, with limited exceptions for specified groups, the Court treated the baseline as consisting of general protection against discrimination. Accordingly, the singling out of homosexuals for exclusion from that general baseline constituted an irrational denial of a benefit based on animus toward sexual minorities.

IV. PROCESS THEORY DISINTEGRATING: THE SUPREME COURT’S REVIEW OF POPULAR INITIATIVES

Just as Shelley and Schoene exemplify the subversive consequences of a realist approach to the liberty of contract ideology, so, to our minds, Reitman and Romer exemplify the analytic circularity of the process approach to constitutional law that we described above. In both Reitman and Romer, the Supreme Court reviewed popular initiatives (actually state constitutional amendments enacted through popular referenda) that purported to withdraw antidiscrimination protection.

In Reitman, the Court struck down a constitutional amendment preventing the enactment in California of fair housing laws banning racial

\(^5\) See Romer, 517 U.S. at 626.


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discrimination. Clearly, as the Court noted, there was as an initial matter no constitutional duty to adopt such antidiscrimination provisions. One would suppose, consequently, that there would be no constitutional prohibition against the repeal of such legislation after it had been adopted. In its ruling, however, the Court held that the repeal of the fair housing laws worked to encourage private housing discrimination, and thus violated the Equal Protection Clause. In a similar ruling, the Romer Court struck down a state constitutional amendment adopted through popular referendum that would have forbidden granting “special rights” against discrimination on the basis of sexual orientation. While there was no constitutional duty to protect gays and lesbians against discrimination in the first instance, the Court held that it violated the Constitution to single out homosexuals to refuse to protect them against discrimination.

As we see it, Reitman and Romer are analogous to Shelley and Schoene in that they demonstrate the inability analytically to fix a neutral baseline from which to evaluate an illegitimate democratic process in the same ways that Shelley and Schoene demonstrated the lack of a neutral economic baseline from which to identify the intervention of economic regulation. For example, in Reitman, the Court in one sense merely applied the general equal protection rule that the government may not assist private parties in discriminating against minorities. The ruling, however, immediately raises a problem with the limits of its logic. It is true that the Court based its ruling in part on an analysis of the specific political climate of California at the time, concluding that, as a real-world empirical matter, the “ultimate impact” of the repeal would be to encourage and embolden racial discrimination by private parties. But Reitman opens up possibilities even more far reaching than the adoption of a functionalist rather than formal review. If, as the Court reasoned, the effect of the repeal would be to encourage discrimination, there is no reason to decline to strike down a state’s failure to pass antidiscrimination legislation in the first instance if the actual impact of such a failure would be to encourage discrimination. In other words, just as the realists showed that the government’s failure to act—say to protect apple trees from cedar trees, or to recognize a tort against sexual harassment—has an effect on the distribution of social power in the economic marketplace, so the government’s failure to act in the political marketplace can be seen to effect a particular distribution of power. To the extent the government fails to act to protect minorities from discrimination, it privileges discriminators at the expense of victims of discrimination; to the extent that the government fails to act to require media outlets to permit nonpaying public speech, it privileges such parties
to restrict the free speech opportunities of nonowners. Either way, public power manifest in the creation of rights against harm or privileges to harm is necessarily at stake. Once the repeal of antidiscrimination legislation is recognized as nonneutral governmental action, there is no reason to treat the failure of the government to act at all as neutral, as somehow respecting a baseline of rights, duties, and privileges that is free from public power. In short, the government can no more avoid responsibility for the distribution of power in the marketplace of ideas of the political marketplace than it can in the economic marketplace.56

The Reitman Court's implicit treatment of the existence of fair housing measures as the baseline from which to measure the neutrality of government action is made even more explicit in Romer. The defenders of the Romer referendum—which would have banned any laws forbidding discrimination on the basis of sexual orientation—argued that by banning antidiscrimination protection for sexual minorities, they were just returning to a neutral baseline in which no “special rights” would be granted to sexual minorities over and above other citizens. In effect, all that the referendum accomplished, according to its defenders, was to put sexual minorities on the same plane as others, hardly a denial of equal protection unless the Constitution required antidiscrimination protection, a premise foreclosed by the decision in Bowers.

In striking down the referendum as violative of equal protection, the Court contended that sexual minorities were being singled out for a denial of antidiscrimination protection that other citizens could obtain. In other words, rather than define a baseline of no antidiscrimination protection, with limited exceptions for specified groups, the Court treated the baseline as consisting of general protection against discrimination. Accordingly, the singling out of homosexuals for exclusion from that general baseline constituted an irrational denial of a benefit based on animus toward sexual minorities.

The majority’s construction of a baseline of general protection against discrimination for everyone is based on an outright reversal of the common-law construction. Under the old common law, a private party

56. For this reason, whatever the merits of hate speech or antipornography legislation, we think that it is incoherent to say that such legislation violates free speech rights. To the extent that hate speech and pornography constitute harms to the ability of minorities or women to exercise their own free speech rights, it is a zero sum situation: Refusing to ban hate speech and pornography does not respect an unregulated free speech market; rather, it creates legally protected privileges for such speakers to harm others. There is simply no neutral baseline possible; whichever rules are chosen will empower some and disempower others in the free speech marketplace.
was privileged to discriminate on any ground whatsoever. An owner of
private property could, in general, exclude whomever he wished. An
employer could refuse to hire an individual for whatever reason. Everyone
was free to contract or not to contract on any basis whatsoever. The
limiting principle to this general privilege was the public/private line. In
the limited and exceptional category of public actors, no discrimination
was permitted. In the nineteenth century, this realm consisted entirely of
innkeepers, smiths, common carriers, and public utilities. Without com-
menting on its reversal of this relation between rule and limiting principle,
the Romer majority treats the duty of public actors not to discriminate as if
it were the basic rule governing all actors, and the privilege to discriminate
as the limiting and exceptional principle for the category of truly private
relations. In the majority’s construction of the baseline, everyone is pro-
tected against arbitrary discrimination. Particular groups, like racial or
sexual minorities, need explicit, categorical protection that others do not
need. Interestingly, the majority constructs this baseline by citing the Civil
Rights Cases for the proposition that all individuals are protected under
common-law principles from discrimination, never acknowledging that this
was the exception, not the general rule, under the old common law.

The Romer decision is sophistry, but no more so than any other
manipulation of the baseline from which governmental action is evaluated.
Justice Scalia is right that, given the state’s power to criminalize homosex-
ual conduct upheld in Bowers, it is implausible to contend that there
is a constitutional duty to protect sexual minorities against discrimination.
Moreover, there is no constitutional duty for government to protect indi-
viduals against discrimination on various other bases: “[A]n interviewer
may refuse to offer a job because the applicant is a Republican; because he
is an adulterer; because he went to the wrong prep school . . . ; because he
eats snails . . .” Accordingly, given a baseline of no protection against
discrimination, the Court’s decision looks like special treatment for sexual
minorities. Scalia’s charge is accurate that the majority is simply manipu-
lating the baseline to make it appear that the referendum, rather than the
antidiscrimination laws granting protection to sexual minorities not avail-
able to others, constitutes nonneutral action to be reviewed. There is no

57. See, e.g., Hurley v. Eddingfield, 59 N.E. 1058 (Ind. 1901) (holding that absent a con-
tractual agreement, a doctor is under no duty to treat a patient).
58. For a discussion of this common-law structure, see Hurley v. Irish-American Gay, Les-
59. 109 U.S. 3 (1883).
60. See Romer, 517 U.S. at 627–28.
61. Id. at 652–53 (Scalia, J., dissenting).
conceptual reason to treat the baseline as the majority does, i.e., that everyone who needs protection against irrational discrimination is granted it except that sexual minorities are carved out from those general laws by the referendum. But Scalia is not "right" because there is no reason to accept the old common-law baseline that Scalia proposes either. The designation of neutrality, or special treatment, or affirmative action, all depends on the baseline that one takes as the starting point. It is a more or less ideological decision about how to describe the social and legal world, a decision that is not restrained by any neutral, legal principles.

In these terms, Reitman and Romer look odd only because the baseline usually is defined differently—in terms of the old, discredited liberty of contract notion that any state of affairs existing before legislative action is somehow conceptually and ontologically prior to the exercise of government power. Given the conservative baseline that process-oriented constitutionalism usually employs, these cases look "wrong." But as a conceptual matter, it is possible to do a Reitman or Romer analysis anytime a judge wants. Like Shelley and Schoene, Reitman and Romer demonstrate the utter indeterminacy of constitutional discourse under a proceduralist analytic.

V. EVALUATING PROCESS DISCOURSE IDEOLOGICALLY

Given the indeterminacy of the process "analytic," there is no reason that it cannot be used to further either conservative or liberal results. Romer brings this manipulability right out in the open. Eule's work on popular initiatives is similarly revealing.

It is clear that Eule is sensitive to the dynamics of racial power in our society. He may also be right that, in a legislative forum, the "deliberative" environment is less conducive to racial acting out. But the argument is not analytically convincing—in Romer terms, it's just Eule's "deliberative" baseline instead of a baseline starting with popular majoritarian sovereignty. Eule's solution to the problem of racist and homophobic voting majorities is ingenious—when faced with problematic instances of electoral results, one can add a "republican" layer to the definition of democratic process to justify negating the results of popular election. But his arguments also push the indeterminacy of process theories of constitutional law

62. We find the republican notion of "deliberation" as a legitimating characteristic of legislative action itself problematic; it assumes some neutral, acultural mode of rational discourse that we don't think exists. See William N. Eskridge, Jr. & Gary Peller, The New Public Law Movement: Moderation as a Postmodern Cultural Form, 89 MICH. L. REV. 707 (1991).
to a whole new level—in addition to all the ways to argue that the legislature is unrepresentative, Eule offers a layer of ways to argue that, in effect, the voters are not representative either. The analysis can go in just any direction at all.

To the extent that a proceduralist approach is manipulable in these ways, it can be utilized to achieve liberal or conservative results. But while there is nothing analytically conservative about process-oriented constitutional approaches, the fact of the matter is that a functionalist, de facto application of process theory always seems more “activist,” interventionist, and illegitimate. The reason is that, despite its indeterminate analytics, proceduralism has historically played a conservative legal, political, and cultural role.

A de facto deployment of process theory seems illegitimate because, historically, process theory was constructed to relegate the judiciary after the legal realist attack. Accordingly, a starting-point premise is that there is in fact a neutral, apolitical way to resolve matters of substantive conflict. The applications of process theory in Reitman and Romer, like the possibility of a de facto interpretation of equal protection that Justice White found so troubling in Washington v. Davis, reveal that nothing in the premises of process theory can legitimate a restrained judiciary avoiding substantive decision making because the review of process always involves at least an implicit decision on substantive fairness. When process theory is applied in a de jure, restrained fashion, it seems to have solved the problem of legitimating the judiciary by keeping its actions within the realm of neutral questions about procedure; the problem is that such legitimation rests on an indefensible assumption that the status quo distribution of power, wealth, prestige, and privilege is consistent with procedural fairness and therefore need not itself be reviewed. When process theory is applied in a de facto, activist fashion, it avoids the problem of assuming the normative status of existing conditions, but at the cost of judicial legitimacy. Given the historical context within which process theory was constructed—following the realist assault on the law/politics distinction—it should not be surprising that process theory has always been applied with a decidedly conservative tilt.

The problem is much deeper than that, however. Process theory in constitutional law is inseparable from the rise of proceduralism in American culture more generally. Proceduralism is part of a general ideological and cultural turn toward avoidance and suppression of social problems, a subtle way of diffusing energy directed towards true social transformation. Eule offers a useful way to try to get popular initiatives that harm racial
or sexual minorities struck down, but it also strikes us as implausible to think that the social issues reflected in Proposition 209 in California, for example, are explicable in terms of a lack of deliberation.

Proposition 209 reflects a deep resentment of racial liberation, and a deep embrace of an ideology of meritocracy that, like process theory itself, takes as a baseline the existing ways that qualifications for jobs and admittance to educational institutions are constructed. It reflects a de jure view of race discrimination that constructs affirmative action as a special privilege. Changing the ideological lens from a de jure to a de facto perspective would make most “affirmative action” seem simply like a garden-variety remedy for discrimination rather than a special handout. Understanding what’s going on in Proposition 209 means understanding how the white working class has been manipulated to think it has an investment in a social and economic structure that actually is based on the subordination of workers in general and a definition of merit that legitimates the low status of the very people who supported Proposition 209 most vehemently. It means understanding the ways that liberal and progressives have themselves contributed to this backlash by demonizing this group as “rednecks.” It means understanding how constitutional discourse itself—in defining race discrimination according to a de jure model—has helped to construct and confirm an ideological discourse in which the racial redistribution of resources looks like racial favoritism rather than a relatively meager attempt to reverse centuries of subordination. In short, it requires a complex political analysis to get at how popular sovereignty such as that reflected in Proposition 209 might embody antidemocratic assumptions and motivations. Such an analysis would necessarily be controversial on many levels. But what is clear is that the flaws of such acts of popular sovereignty are decidedly not captured by a notion that the initiative failed to include a process of rationalistic deliberation.

Similarly, the proceduralism of the Warren Court reflected an avoidance and suppression of the substantive conflicts underlying many of its great cases. For example, the problem of economic disempowerment of welfare recipients is avoided and suppressed in the Goldberg v. Kelly procedure granting welfare recipients hearings whenever their individual benefits are reduced or eliminated. Poor people need money, jobs, day care, and housing, not meaningless meetings in which they are symbolically “heard” but it can make no difference what they say. Proceduralism has provided a way simply to avoid wrenching issues by appointing a

committee, having a hearing, deliberating—it has, in everyday life, become a particularly insidious way of pretending that subordinated people actually participated in setting the terms of our social life.

CONCLUSION

Process-oriented approaches to constitutional law, exemplified in the work of Professor Julian Eule and other centrist constitutional scholars, are analytically indeterminate. Proceduralism can be applied to achieve either conservative or liberal results. Even when utilized by liberals like Eule, however, proceduralism has a deeply conservative and apologetic cast. The libertarianism of _Lochner_ and other conservative cases of the turn of the century also could be utilized for liberal results in individual cases—within the central analytic of individual liberty, the Court could have concluded that workers exercised no meaningful free will and thus ameliorative labor legislation was permissible. But just as the discourse of libertarianism served to obscure the social power manifest in the purportedly private realm, so process theory obscures the substantive issues implicit in procedural decisions. The distribution of wealth, power, prestige, and privilege in American society presents inescapably political issues. There is no way to avoid them simply through procedural resolution. The notion that the basic terms of our social life are legitimate because they are the result of an appropriate process for deciding such issues—whether the legitimating process is electoral or deliberative—is false.

We think that process theory at the constitutional level is connected to proceduralist discourse in everyday institutional life. There are, very occasionally, deeply democratic moments in our workplaces and schools when people resist the routinization of everyday life and mobilize to transform it. Such popular mobilization is often deeply democratic because it embodies an aspiration for self-determination, for people deciding how things should be right there, in the immediate moment, rather than simply accepting the way things are. The culture of proceduralism meets these very best—and most democratic—moments of our social lives with fear and a will to discipline and defuse. When Norma Rae climbs atop the machinery and leads a wildcat walkout from the shop floor, we are inspired and root for her precisely because we share a deeply held aspiration for true self-determination, for people getting together and struggling to gain control over everyday life. Appointing a committee to analyze the "problem" and deliberate about solutions accordingly just misses the whole point of how an authentic self-determination might be achieved. Understanding
that the choice at some level of life in America at the end of the twentieth century is between wildcat strikes, runaway juries, and popular mobilization on the one hand and reasoned deliberation through committee meetings on the other, we reflexively feel a sense of solidarity with the wildcat strikers and the runaway jurors, with those people who seize power to resist the normalization of subordination. We want to multiply these moments of communal connection and self-determination, not to reject them.

Of course, sometimes we think such moments serve repressive ideologies—runaway juries can acquit Klan members on trial for bombing black churches, and the authentic self-determination of a racist majority can repress African Americans and others. And sometimes appointing a committee to consider an institutional issue really does make sense and does not constitute the suppression of the energy of people working in the institution. But just as the liberatory character of moments of self-determination are not recognized in the proceduralist discourse, so a proceduralist set of rules cannot systemically distinguish authentic and liberatory popular mobilization from acts of social domination. No “legal” discourse can because, in the end, identifying whether democracy exists involves deeply political, ideological, and cultural analyses—just the kind of inquiry that proceduralism systemically forecloses. Ultimately, then, we find ourselves in an awkward relation to liberal process theorists such as Eule or Ely. On particular and discrete issues we often agree, and we often work together. But we also harbor a sense that the procedural discourse is itself an impediment to human liberation because it constructs an ideology that is suspicious of the very moments of passion and group struggle that we find the most hopeful sign that things can dramatically change in American society.