DEMOCRACY, CIVIL LITIGATION, AND THE NATURE OF NON-REPRESENTATIVE INSTITUTIONS

Matthew A. Shapiro[†]

With democratic governance under threat in the United States and abroad, legal scholars have endeavored to defend the institutions considered integral to a well-functioning democracy. According to an increasing number of civil procedure scholars, civil litigation should be included among those institutions, with many contending that litigation performs several important "democratic" functions.

This Article draws on political theory to explicate and evaluate this emerging democratic defense of civil litigation, as well as to situate the defense in the broader context of democratic argumentation about non-representative institutions in legal theory. Democracy is just as complex as any other normative concept, and that complexity pervades the democratic defense of civil litigation. Not only do civil procedure scholars identify several distinct democratic functions that litigation ostensibly serves, establishing several distinct potential connections between the institution and democracy; they also rely (often implicitly) on several distinct conceptions of the ideal to draw those connections. More specifically, when the democratic defense runs up against litigation's many incontrovertibly non-majoritarian features, proponents tend to resort to what political theorists have described as less political conceptions of democracy—that is, conceptions that see democracy less as

† Associate Professor of Law, Rutgers Law School. For helpful comments and conversations, I thank Emad Atiq, Charles Barzun, Rachel Bayefsky, Zach Clopton, Dan Epps, Dan Farbman, Brenner Fissell, Maggie Gardner, Andrew Hammond, Valerie Hans, Debbie Hellman, Helen Hershkoff, Alexi Lahav, David Noll, Luke Norris, Danya Reda, Larry Solum, Norm Spaulding, Jed Stiglitz, Emily Stolzenberg, Gregg Strauss, Chas Tyler, Diego Zambrano, and Adam Zimmerman, as well as participants in the Seventh Annual Civil Procedure Workshop, the 2022 Junior Faculty Federal Courts Workshop, the Obligations X Conference, the "Courts and Politics" panel at the 2023 Manchester Centre for Political Theory (MANCEPT) Workshops, and faculty workshops at Boston College, Cornell, Texas A&M, and the University of Virginia. I am also grateful to Alana Cohen, Deana Giles, Sam Grossman, Zachary Hunt, Liza Park, Sahil Patel, and their fellow editors of the *Cornell Law Review* for helpful editorial work.

a procedure for negotiating persistent disagreements between competing segments of society through ongoing contestation over political power and more as a set of social activities further removed from the exercise of political power or even a set of substantive moral ends to be imposed via that power once and for all.

This Article argues that such depoliticization of democracy has considerable drawbacks in the civil justice context. In recent decades, the institution of civil litigation has come under assault from both the right and the left. Yet the less political conceptions of democracy underwriting significant facets of the democratic defense are unlikely to vindicate litigation against those attacks. For, in order to assimilate litigation to other, representative institutions, the democratic defense must subsume disparate, often-competing values under the single heading of "democracy." Such conflation not only elides the many inevitable tradeoffs between those values, but also distracts us from what's distinctive and most valuable about litigation—what functions litigation can perform but other political institutions can't. And without a clear sense of litigation's unique role in our political system, defenders of litigation will struggle to parry calls for civil justice "reform," which on a wide range of policy issues—from arbitration to aggregate litigation to private enforcement—often posit a set of alternative institutions that supposedly serve the same purposes as litigation, only better.

In its tendency to depoliticize democracy, the democratic defense of civil litigation reflects similar trends in recent legal theory. This Article shows how scholars of both private and public law increasingly invoke democracy to justify the work of non-representative institutions such as courts and administrative agencies but rely on less political conceptions of the ideal to do so. Such depoliticization risks obscuring the institutions' most distinctive normative contributions, as well as the inevitable conflicts between those contributions and other fundamental values, including a democratic commitment to popular sovereignty. Absent consensus about how to resolve such conflicts, the best we may be able to do is to render non-representative institutions such as litigation more accountable to other, representative institutions that are better situated to negotiate persistent disagreements about fundamental values. Democratic defenses of litigation and other non-representative institutions, by contrast, attempt to account for those institutions' non-majoritarian qualities at the steep price of taking much of the disagreement—and thus much of the politics—out of democracy.

INTRODUCTION

Democracy is widely thought to be imperiled in many developed countries, not least the United States.[1] In the face of this threat, legal scholars have endeavored to defend the institutions considered integral to a well-functioning democracy. The list of essential democratic institutions turns out to be rather expansive, including not only elections and legislatures, but also various non-representative institutions such as administrative agencies[2] and even courts exercising the power of constitutional judicial review.[3]

According to an increasing number of civil procedure scholars, civil litigation should also be added to the list, with many contending that litigation performs several important "democratic" functions. In a particularly extensive version of this argument, Alexandra Lahav has pronounced civil litigation "critical to American democracy" and "vital . . . to [its] successful

---

1 *See generally, e.g.*, TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); DAVID RUNCIMAN, HOW DEMOCRACY ENDS (2018).

2 *See infra* Section IV.C.

3 *See infra* Section IV.B.

functioning."[4] Declaring that "litigation has a significant democratic value,"[5] she identifies several "core functions of litigation in [a] democracy"[6] and develops an account of litigation as "a process through which individuals, groups, organizations, and corporations promote and protect democratic values."[7] And she warns that "[l]itigation as a democratic institution is under attack in a variety of ways, largely through procedural changes limiting people's ability to sue without adequate justification."[8] Judith Resnik has likewise lauded "adjudication as a touchstone of thriving democracy"[9] and "open courts" as "an important facet of a functioning democracy."[10] More specifically, she argues that the "public processes of courts contribute to the functioning of democracies and give meaning to democratic precepts that locate sovereignty in the people, constrain government actors, and insist on the equality of treatment under law."[11] Not only should we appreciate "the utility of courts to contemporary democracy,"[12] Resnik insists, but "adjudication can itself be a kind of democratic practice."[13] In the same vein, Stephen Burbank and Stephen Subrin have contended that "[c]ivil litigation and democracy should be, and they can be, mutually reinforcing,"[14] while decrying recent Supreme Court decisions that limit litigation as "attacks on American

---

4 ALEXANDRA LAHAV, IN PRAISE OF LITIGATION, at vii (2017); *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1660 (2016).

5 LAHAV, *supra* note 4, at 1.

6 *Id.* at 112.

7 *Id.* at 142.

8 *Id.* at 143.

9 Judith Resnik, *Courts: In and Out of Sight, Site, and Cite—The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 795 (2008) [hereinafter Resnik, *Courts*].

10 *Id.* at 809; *see also* Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 61 (2011) [hereinafter Resnik, *Bentham*]; Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism—The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 937 (2012) [hereinafter Resnik, *Entitlements*].

11 Resnik, *Courts*, *supra* note 9, at 803; *see also* Resnik, *Bentham*, *supra* note 10, at 4, 52.

12 Resnik, *Bentham*, *supra* note 10, at 6.

13 *Id.* at 53; *see also* Andrew Hammond, *The Democratic Turn in Procedural Scholarship*, 42 REV. LITIG. 267 (2023) (tracing a "democratic thread" in Resnik's scholarship).

14 Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 414 (2011); *see also id.* at 401.

democracy."[15] Still other civil procedure scholars have sounded similar themes.[16]

These various lines of argument, which together constitute an emerging *democratic defense* of civil litigation, are, at least in one respect, unexceptional. Given that our political system as a whole aspires to be in some sense "democratic," it's natural to suppose that each of its component institutions should also answer to democracy, with each appearing to derive enhanced legitimacy from its affiliation with that value. Little wonder, then, that many civil procedure scholars feel an imperative to show how litigation, too, instantiates or promotes democracy.

And yet, notwithstanding its intuitive rhetorical appeal, the democratic defense of civil litigation is, in other respects, far from straightforward. "[T]here is," after all, "no gainsaying that the association between courts and democracy is contested."[17] Indeed, in public law, one of the most familiar and abiding criticisms of constitutional judicial review—the so-called countermajoritarian difficulty—presumes that courts are fundamentally *un*democratic institutions.[18] One thus might wonder how civil litigation, the process by which civil cases progress through courts,[19] could possibly have "significant democratic

---

15 *Id.* at 405; *see also* Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 296 (2021) (anathematizing many of the developments condemned by Burbank and Subrin as a form of "anti-democratic procedure").

16 *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right* in Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 527 (2022); Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 5 (2023); David Marcus, *Finding the Civil Trial's Democratic Future After Its Demise*, 15 NEV. L.J. 1523, 1525 (2015). Further attesting to the strength of the association between civil litigation and democracy, even critics of contemporary litigation feel compelled to condemn it as an "undemocratic" departure from more traditional modes of dispute resolution. *See generally, e.g.*, MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

17 Norman W. Spaulding, *Facades of Justice*, 110 MICH. L. REV. 1067, 1072 (2012) (book review); *see also id.* at 1075.

18 I consider the connection between the democratic defense of civil litigation and the countermajoritarian difficulty in Part IV. *See infra* Section IV.B. The democratic defense focuses on *federal* civil litigation, and so does this Article. Of course, in many states, judges are elected, arguably rendering the countermajoritarian difficulty less acute at that level. *Cf.* David Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2065 (2009) (considering how judicial elections might function "as engines of popular constitutionalism").

19 Civil litigation thus includes neither administrative adjudication nor private forms of dispute resolution such as arbitration.

value"[20] or "be a kind of democratic practice."[21] Equally striking is the democratic defense's apparent scope: although many of its proponents seem to take as their paradigm public law litigation raising significant public policy questions,[22] they don't limit their arguments to that category of cases, but rather ascribe democratic benefits to litigation writ large, including more prosaic, private law cases.[23] The democratic defense credits the gamut of civil litigation with a set of virtues that is more typically associated with other, representative governmental institutions.

In this Article, I argue that proponents of the democratic defense avoid such complications only by employing shifting conceptions of democracy, with significant costs for our understanding of civil litigation. Democracy is just as complex as any other normative concept,[24] and that complexity pervades the democratic defense of civil litigation. Not only do civil procedure scholars identify several distinct democratic functions that litigation ostensibly serves, establishing several distinct potential connections between the institution and democracy; they also rely (often implicitly) on several distinct conceptions of the ideal to draw those connections. More specifically, when the democratic defense runs up against civil litigation's many incontrovertibly non-majoritarian features, proponents tend to resort to what political theorists have described as less *political* conceptions of democracy—that is, conceptions that see democracy less as a procedure for negotiating persistent disagreements between competing segments of society through ongoing contestation over political power and more as a set of social activities further removed from the exercise of political power or even a set of substantive moral ends to be imposed via that power once and for all.

This depoliticization of democracy, whatever its merits in the abstract, has considerable drawbacks in the civil justice context. In recent decades, the institution of civil litigation has been attacked from both the right and the left. Conservative political interests have long decried litigation as "inefficient," "abusive," and bad for business and advocated civil justice

---

20 LAHAV, *supra* note 4, at 1.

21 Resnik, *Bentham*, *supra* note 10, at 53.

22 *See, e.g.*, Marcus, *supra* note 16, at 1525.

23 *See, e.g.*, Lahav, *supra* note 4, at 1659.

24 Indeed, the philosopher W.B. Gallie famously cited democracy as one of his main examples of an "essentially contested concept." *See* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 186 (1956).

"reform,"[25] instigating a seemingly inexorable "retrenchment" of the civil justice system.[26] Meanwhile, especially in public law, left-leaning scholars have increasingly soured on courts, and law more generally, as potential instruments of progressive social change, as evidenced most recently by progressives' renewed criticisms of constitutional judicial review and calls for Supreme Court reform.[27] The less political conceptions of democracy underwriting significant facets of the democratic defense are unlikely to vindicate litigation against these attempts

---

25 *See generally, e.g.*, THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012).

26 STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); SARAH L. STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015). This retrenchment can be seen in the near-complete "disappearance" of the civil trial, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012); *see generally, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943 (2004), and the severe "diminish[ment]" of what few trials remain, Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018), as well as in the ever more "restrictive" nature of pretrial procedure, A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010), and the burgeoning of private arbitration, *see generally, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015). For other prominent critiques of many of these trends, see generally Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011); and Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

27 *See infra* note 381. Such criticisms reflect longstanding skepticism on the left that legal institutions and procedures can be trusted to promote progressive causes rather than preserve the status quo and entrench the powerful, skepticism that has classically been associated with the Critical Legal Studies movement, *see generally, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988), and certain strands of Critical Race Theory, *see generally, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). Some progressive scholars, though, are more sanguine about the possibilities of courts and law. For a recent attempt to defend the essential (if ancillary) role of litigation and legal strategy in progressive social movements, see generally SCOTT L. CUMMINGS, LAWYERS AND MOVEMENTS: LEGAL MOBILIZATION IN TRANSFORMATIVE TIMES (2022).

to curb the institution, attempts the defense's proponents evidently hope to resist. For, in order to assimilate litigation to other, representative institutions, the democratic defense must subsume disparate, often-competing values—including popular self-government, equality, dignity, distributive justice, and the rule of law—under the single heading of "democracy." Such conflation not only elides the many inevitable tradeoffs between those values, but also distracts us from what's distinctive and most valuable about litigation—what functions litigation can perform but other political institutions can't. And without a clear sense of litigation's unique role in our political system, defenders of the institution will struggle to parry calls for civil justice "reform," which on a wide range of policy issues often posit a set of alternative institutions that supposedly serve the same purposes as litigation, only better. A defense of civil litigation should focus on the institution's most characteristic features, whereas appeals to democracy in the civil justice context tend to occlude them.

In celebrating a robust civil justice system as a specifically *democratic* feature of contemporary liberal democracies, proponents of the democratic defense tap into a rich vein of rhetoric regarding American legal institutions and culture. Democracy was, for instance, one of the values scholars invoked to defend the Warren Court's legacy against subsequent rollbacks.[28] Proponents of the democratic defense of civil litigation can be understood to be elaborating such arguments and extending them to all of civil procedure, as opposed to just the decisional and remedial outputs of adjudication. But while proponents sometimes speak of civil litigation generically as a democratic institution, they in fact advert to multiple, distinct democratic functions that litigation might perform. This Article identifies several such functions and distinguishes them along two main dimensions: (1) whether the function renders civil litigation *constitutive of* democracy, such that a lawsuit itself forms part of the democratic process, or *instrumental to* democracy, yielding democratic benefits beyond the immediate lawsuit, and (2) whether the function treats litigants as *active* participants in the democratic process or *passive* recipients of, or conduits for, democratic goods. The democratic defense turns out on closer inspection to be multifaceted, asserting not just one

---

[28] *See, e.g.*, Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 15–16, 38–39 (1979). On the influence that the legacy of the Warren Court has exerted on progressive legal thought, see generally LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

connection between civil litigation and democracy, but rather a cluster of distinct, if related, connections.

This Article's typology of civil litigation's potentially democratic features also makes clear that no single conception of democracy unites all the claims made by proponents of the democratic defense. Instead, I map the defense onto several different conceptions that are prominent in contemporary political theory. Those conceptions can be either more or less *political*. As used in the political theory literature, the term "political" is best understood as denoting a conception of democracy characterized by two features: (1) it views democracy as a procedure for making collective decisions about the exercise of political power—the coercive power held by the state—as opposed to extending the ideal to other kinds of social activities, and (2) it accepts ongoing disagreement about, and contestation over, basic questions of rights and justice as an ineliminable feature of modern politics, as opposed to presuming or demanding universal adherence to specific answers to such questions. A political conception of democracy thus contemplates that the members of the political community will collectively contest the exercise of political power on a continuing basis, with today's winners potentially becoming tomorrow's losers, rather than ordaining a set of thicker substantive ideals to which political institutions must conform in order to qualify as "democratic."[29]

---

29 For similar accounts of what it means for a conception of democracy (or any other normative concept) to be "political," see generally, for example, STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000); BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS (1993); CHARLES LARMORE, WHAT IS POLITICAL PHILOSOPHY? (2020); and JEREMY WALDRON, LAW AND DISAGREEMENT (1999). *See also* EDWARD HALL, VALUE, CONFLICT, AND ORDER: BERLIN, HAMPSHIRE, WILLIAMS, AND THE REALIST REVIVAL IN POLITICAL THEORY 170 (2020) (tracing a "realist" approach in twentieth-century British political theory that "suggests that the central questions of politics should concern responding to and managing conflict and disagreement"); *infra* note 153 and accompanying text. For a recent account of democracy that is "political" in spirit, see generally JAN-WERNER MÜLLER, DEMOCRACY RULES (2021). For a recent critique of a putatively democratic "ideology of democratism" that actually substitutes elite preferences for the popular will, see generally EMILY B. FINLEY, THE IDEOLOGY OF DEMOCRATISM (2022). Other ostensibly political accounts of democracy, while also emphasizing the fact of disagreement, seem to define "political" somewhat differently, as involving a particular critical stance toward the status quo. *See generally, e.g.*, LORNA FINLAYSON, THE POLITICAL IS POLITICAL: CONFORMITY AND THE ILLUSION OF DISSENT IN CONTEMPORARY POLITICAL PHILOSOPHY (2015).

The more political conceptions of democracy that I emphasize in this Article also have affinities with the "thin" conceptions of constitutional democracy espoused by many comparative constitutional law scholars. *See, e.g.*, ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY (2021); GINSBURG & HUQ, *supra* note 1; MARK TUSHNET & BOJAN BUGARIC, POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM 12–32

The most political conception in this sense defines democracy simply as popular self-government, and some of the contentions made by proponents of the democratic defense of civil litigation—particularly the claim that litigation allows individuals to participate in governmental decisionmaking—resonate with that conception. Those aspects of the democratic defense have the most purchase with regard to public law litigation that arguably performs a "representation-reinforcement" function, providing a political forum to groups that have been excluded from the representative branches of government.[30] The problem, however, is that most civil litigation serves no such role, while even public law litigation can't plausibly be said to permit the people to govern themselves *collectively*, but rather (at most) permits individuals or groups to exert a modicum of political power piecemeal. Perhaps sensing the poor fit between popular-sovereignty-based conceptions of democracy and civil litigation, proponents tend to buttress the democratic defense with appeals to other conceptions of democracy that turn out to be less political, including deliberative democracy and discourse theory, social or relational equality, and economic democracy and other conceptions requiring a significant degree of material equality.[31] While these alternative visions all remain in some sense "democratic," they all to varying degrees encompass activities beyond collective decisionmaking about political power or impose significant substantive preconditions on its exercise, even in the face of persistent disagreement about the legitimacy of those very preconditions. They presume, in other words, the kind of agreement that proves so elusive in contemporary liberal democracies. So, inasmuch as civil procedure scholars espouse any of these thicker conceptions of democracy, they tend to depoliticize the democratic defense of civil litigation.

It turns out, moreover, that proponents of the democratic defense must indeed frequently choose among the various

---

(2021); Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268 (Tom Ginsburg & Aziz Huq eds., 2016). *But see generally* ROSALIND DIXON & RICHARD HOLDEN, FROM FREE TO FAIR MARKETS: LIBERALISM AFTER COVID-19 (2022) (appearing to go beyond a thin conception of democracy and to insist on certain "fair" economic arrangements for a political system to qualify as democratic); Rosalind Dixon, *Fair Market Constitutionalism: From Neo-Liberal to Democratic Liberal Economic Governance*, 43 OXFORD J. LEGAL STUD. 221 (2023) (enumerating various requirements for market arrangements to qualify as "fair").

30 *See infra* notes 95–96 and accompanying text.

31 *See infra* Part II.

conceptions of democracy, which don't always cohere; a single feature of civil litigation can simultaneously be more democratic according to one conception and less democratic according to another. And when the conceptions conflict—in particular, when one, more political conception condemns an aspect of litigation that another, less political conception countenances—proponents of the democratic defense tend to embrace the less political one. That tendency, this Article shows, manifests itself through several *depoliticizing moves*, such as associating litigation with other, representative institutions and recasting other, more substantive values as "democratic" imperatives. But whatever the precise mechanism, the democratic defense's depoliticization of democracy has important ramifications for debates about civil justice "reform" and the legitimacy of judicial processes. Adjudicating those debates requires a clear accounting of the different values at stake, yet insofar as proponents set significant substantive limits on policy outcomes in the name of "democracy," they end up importing other values into the democratic defense. That, in turn, tends to obscure tradeoffs between the competing moral imperatives that the civil just system is commonly thought to answer to. It's more difficult to appreciate potential conflicts between democracy and, say, the rule of law when the latter ideal is treated as an aspect of the former. A successful defense of civil litigation should also vindicate the distinctive role played by the institution in a liberal-democratic political system, lest critics contend that the need for litigation is obviated by other institutions that perform the same functions more efficiently—as they've done on issues ranging from arbitration to aggregate litigation to the "private enforcement" of governmental regulatory policy. But just as the democratic defense flattens the normative landscape, so it flattens the institutional landscape, focusing on a set of features possessed equally, and perhaps to an even greater degree, by other institutions. We may be able to better defend litigation by disaggregating the values we care about in the civil justice context and highlighting those that are instantiated paradigmatically, if not uniquely, in courts, rather than attempting to present litigation as a paragon of a single, trans-institutional ideal, whether democracy or otherwise.

The democratic defense of civil litigation, with its less political understandings of democracy, is no aberration, but rather reflects similar trends in recent legal theory. By juxtaposing the democratic defense with those parallel lines of argument, we can better appreciate part of the impetus to justify litigation in democratic terms, as well as the need to balance democracy

with other, competing values in the civil justice context. Across a wide range of doctrinal areas, legal scholars have advocated various substantive policy positions in the name of "democracy" while prescinding from the significant disagreement surrounding those positions. They have done so, I suggest, in an effort to legitimize institutions with a significant *technocratic* element—that is, institutions tasked with attending to a particular subset of reasons or values rather than reflecting the popular will. From self-styled "democratic" defenses of private law adjudication that turn out to rest on distinct values such as social equality;[32] to ongoing attempts to either demonstrate or refute the compatibility of constitutional judicial review with democracy;[33] to defenses of the administrative state that invoke democracy but proceed to cash out the concept less in terms of popular contestation and more in terms of fixed values such as reason-giving, social equality, and neo-republican freedom[34]—in all these various contexts, the concept of democracy often stands in for a set of substantive normative commitments that are supposed to condition the exercise of political power, rather than signifying a decisionmaking procedure for negotiating conflicts about those very commitments. Such attempts to fit courts and administrative agencies into the democratic mold obscure those institutions' most distinctive normative contributions, as well as the inevitable conflicts between those contributions and other fundamental values, including a democratic commitment to popular sovereignty. Absent consensus about how to resolve such conflicts, the best we may be able to do is to subject non-representative institutions such as litigation to other, representative institutions that are better situated to negotiate persistent disagreements about fundamental values. Democratic defenses of litigation and other non-representative institutions, by contrast, attempt to account for those institutions' non-majoritarian qualities at the steep price of taking much of the disagreement—and thus much of the politics—out of democracy.

This Article draws on political theory to explicate and evaluate the democratic defense of civil litigation, as well as to situate the defense in the broader context of democratic argumentation about non-representative institutions in legal theory. Part I catalogs and classifies the various democratic

---

32 *See infra* Section IV.A.

33 *See infra* Section IV.B.

34 *See infra* Section IV.C.

functions that the defense's proponents attribute to litigation, while Part II identifies several distinct conceptions of democracy underlying those claims. With those typologies in hand, Part III reveals the defense's tendency to emphasize less political conceptions of democracy and notes some of the drawbacks of such an approach for civil justice. Part IV then connects the democratic defense of civil litigation to similar recent democratic accounts of non-representative, technocratic institutions in both private and public law and suggests some potential ways to balance technocracy and democracy in civil procedure.

I
The Democratic Defense of Civil Litigation

The democratic defense of civil litigation consists of a general normative claim about a particular institution. My primary aim in this Part is to analyze the normative claim—that litigation is, among its other virtues, *democratic*—but before doing so, I want to say a few words about how the defense's proponents seem to understand the institution they're defending.

The democratic defense seeks to vindicate "the quotidian activities of ordinary litigation."[35] Those activities unfold in trial courts rather than appellate courts, and they involve trial courts primarily in their adjudicatory capacity—the processes by which courts resolve, or at least "manage,"[36] the discrete disputes that parties bring before them—rather than their lawmaking capacity (though the fact that courts often promulgate and develop legal norms through adjudication ends up figuring as an important premise in some of the democratic defense's constituent arguments).

Even as proponents of the democratic defense focus on the intricacies of civil litigation, however, they don't take all aspects of the contemporary civil justice system as given; rather, their vision is a moderately idealized one in which litigation's basic contours remain fixed but the myriad procedural rules and policies governing the institution are more malleable. The defense is thus best understood as a claim that an adversarial litigation system resembling the U.S. federal[37] civil justice

35 Resnik, *Entitlements*, *supra* note 10, at 937.

36 *See generally* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

37 The defense's proponents tend not to focus on state civil justice systems, which frequently fail to conform to the traditional adversarial model. *See generally* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 Colum. L. Rev. 1183 (2022).

system has significant democratic *potential*, which particular rules and policies can help to either realize or frustrate. It's this realistic idealism, taking the basic architecture of federal civil litigation as it is but specific rules as they might be,[38] that gives the democratic defense its critical bite against recent "restrictive" developments in civil procedure.[39]

The democratic defense should also be distinguished from several other strains of democratic argument concerning courts. First, to call civil litigation "democratic" is to make a claim about the institution's absolute value, not its value relative to that of other institutions. Although the democratic defense may have implications for comparative institutional analysis, proponents acknowledge that litigation isn't necessarily democratic in the exact same ways as, say, a legislature, nor do they deny that litigation may well be less democratic than other institutions in certain respects.[40] They insist only that civil litigation has significant democratic value, whatever democratic pedigrees other institutions might profess.

Second, whereas the democratic defense maintains that certain features of civil litigation realize or promote democracy, scholars sometimes also advocate making courts and the civil justice system "more democratic," meaning more accessible to ordinary individuals or more responsive to popular sentiment.[41] The fact that civil litigation performs important democratic functions may well be a compelling reason to increase access to, or the responsiveness of, courts, but such a prescription doesn't follow ineluctably from the democratic defense's normative claims about the procedures of litigation, which are my focus in this Article.

---

38 *Cf.* JEAN-JACQUES ROUSSEAU, *On the Social Contract*, *in* THE BASIC POLITICAL WRITINGS 139, 141 (Donald A. Cress trans., Hackett Publishing Co. 1987) (1762) ("Taking men as they are and laws as they might be.").

39 *See supra* note 26 and accompanying text.

40 *See, e.g.*, LAHAV, *supra* note 4, at x–xi. *But cf.* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1755–77 (2021) (arguing that many state legislatures are *less* democratic, on a majoritarian understanding of democracy, than state courts).

41 *See, e.g.*, Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 430 (1977). Norman Spaulding has traced this line of democratic argument throughout the history of the American legal profession. *See, e.g.*, Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2251 (2017); Norman W. Spaulding, *The Luxury of Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983, 985 (2004); Norman W. Spaulding, *The Practice of Law as a Useful Art: Toward an Alternative Theory of Professionalism*, 40 FORDHAM URB. L.J. 433, 456 (2012).

Third, to insist, as the democratic defense does, that civil litigation can contribute to democracy is by no means to deny that litigation can also *undermine* democratic governance. One need only consider the various lawsuits that sought to overturn the results of the 2020 U.S. presidential election in order to appreciate litigation's antidemocratic potential.[42] More subtly, some scholars argue that certain kinds of legal claims can invite courts to unjustifiably impugn political institutions and processes, thus contributing to "democratic disaffection" among the populace.[43] And fundamentally unfair procedures in some kinds of litigation (especially in state courts) can so alienate ordinary individuals that they come to lose faith in all public institutions.[44] Although litigation won't always have these antidemocratic effects, they do underscore the need to qualify any justification of the institution in terms of democracy so as to account for its democratic costs as well as benefits. But neither is it Pollyannish to appreciate those benefits, as proponents of the democratic defense seek to do.

So, then, what do proponents of the democratic defense mean, exactly, when they describe civil litigation as a "democratic" institution? It's difficult to reduce the defense to a single proposition, for proponents associate myriad aspects of litigation with democracy, often in the same breath. Consider Judith Resnik's assertion that "adjudication is itself a democratic process, which reconfigures power by obliging disputants and judges to treat each other as equals, to provide information to each other, and to offer public justifications for decisions based on the interaction of fact and norm."[45] In a single sentence, Resnik enumerates (at least) three putatively democratic functions performed by litigation, none of which is obviously entailed by any of the others. Nor is Resnik an outlier in this respect; the democratic defense turns out to consist of several disparate, if related, claims made on behalf of litigation.

In the rest of this Part, I seek to disaggregate the democratic defense into its component arguments. More specifically,

---

42 *Cf.* Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 2–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4321943 [https://perma.cc/8VU8-GB33] (describing how lawyers contributed to "democratic backsliding" through their participation in the 2020 "Stop the Steal" campaign).

43 *See* Brian Christopher Jones, *The Legal Contribution to Democratic Disaffection*, 75 ARK. L. REV. 813 (2023).

44 *See* Spaulding, *supra* note 15, at 278–81. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

45 Resnik, *Entitlements*, *supra* note 10, at 938; *see also id.* at 947.

I categorize the various functions of civil litigation that proponents deem "democratic" according to two distinctions. One distinction is between those functions that render litigation *constitutive of* democracy, such that a lawsuit itself forms part of the democratic process, and those that render litigation *instrumental to* democracy, yielding democratic benefits beyond the immediate lawsuit, in other institutions or society at large. Another distinction is between those litigation functions that conceive of litigants as *active* participants in the democratic process and those that treat litigants more as *passive* recipients of or conduits for democratic goods. Although proponents of the democratic defense tend not to draw these distinctions,[46] it's worth appreciating how their various claims differ from one another, even while sailing under the single flag of "democracy."

The resulting typology that I develop in this Part comprises four categories of ostensibly democratic litigation functions, which can be represented in the following matrix:

	Active	Passive
Constitutive	Participation Deliberation Governmental accountability	Recognition Mutual accountability Social equality
Instrumental	Representation reinforcement Agenda setting Countervailing power	Transparency Information production

The following Sections elaborate each of these four categories in turn.

A. Constitutive-Active Functions

When proponents of the democratic defense extol civil litigation as a "democratic" institution, they often depict litigation itself as a site of democratic activity in which the parties are directly engaged. Such an account conceives of litigation as *constitutive* of democracy, with litigation forming part of the larger

46 *See, e.g.*, LAHAV, *supra* note 4, at 1. *But cf.* Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and* Google Spain*)*, *in* OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY 177, 181 (Burkhard Hess & Ana Koprivica eds., 2019) [hereinafter Resnik, *Functions of Publicity*] (acknowledging in passing that "[d]ifferent rules [about the 'openness' of court proceedings] are justified on the basis of the same basic principles of fairness, deliberative integrity, and democracy").

democratic political process, and parties as *active* participants in that process.[47] Proponents, however, identify several distinct putatively democratic activities in which litigation might afford individuals an opportunity to participate.

First, proponents of the democratic defense often contend that civil litigation permits popular *participation in governmental decisionmaking*. That claim is most obviously true with respect to civil juries, which share governmental decisionmaking authority with judges. As a form of "direct participation in adjudication," jury service allows ordinary citizens to deliberate about and contribute to decisions regarding the exercise of governmental power;[48] hence civil procedure scholars' tendency to liken jury service to voting[49] and to celebrate it as a way of "perform[ing] self-government."[50] The democratic, participatory benefits of civil juries are perhaps greatest in public law "cases determining the limits of governmental power over people," where "the jury's decision is a direct exercise in self-government by the people themselves," but even in ordinary private law cases, jurors still "are participating in social ordering"[51] inasmuch as they lend "community input for the decisions applying" the "legal norms" that govern us all.[52] And beyond governmental decisionmaking, jurors can engage in other, less robust political activities as well, including "checking" the power of

---

47 Alongside their claims about civil litigation, some proponents of the democratic defense also contend that procedure generally is constitutive of democracy, inasmuch as "[p]rocedural rights enable self-governance by creating pathways for participation that form the institutional infrastructure through which democratic decisions are made and effectuated. In this sense, procedure provides the architectonic building blocks of democratic practice." Hershkoff & Loffredo, *supra* note 16, at 528. Such generic statements seem to refer more to the procedures governing representative institutions than to the procedures of civil litigation.

48 Lahav, *supra* note 4, at 1695; *see also* LAHAV, *supra* note 4, at 98. *See generally* Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79 (2003); Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029 (2014). For more skeptical takes on the democratic credentials of juries, see Melissa Schwartzberg, *Democracy, Judgment, and Juries*, *in* MAJORITY DECISIONS: PRINCIPLES AND PRACTICES 196 (Stéphanie Novak & Jon Elster eds., 2014); and Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331 (2012).

49 *See, e.g.*, Burbank & Subrin, *supra* note 14, at 402.

50 Lahav, *supra* note 4, at 1691.

51 LAHAV, *supra* note 4, at 98.

52 Burbank & Subrin, *supra* note 14, at 401. For an empirical analysis of the extent to which jury damages awards reflect the community's moral judgments, see Valerie P. Hans, *What's It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935 (2014).

governmental officials (namely, judges) and educating themselves about the workings of government.[53]

Given the "disappearance" of the civil jury trial,[54] however, a democratic defense of civil litigation predicated solely, or even primarily, on jury service would verge on obsolete.[55] Proponents of the defense accordingly seek to extend their claims about litigation's participatory potential to the parties themselves. According to Alexandra Lahav, for instance, if the core meaning of democracy is "self-government and participation on the part of the governed,"[56] then the core democratic feature of civil litigation is that it "offers the opportunity to present reasoned arguments and proofs before an official adjudicator—a judge or jury—and in the process, a chance to debate the values at stake in the lawsuit."[57] Lahav deems such activity "a form of direct participation in government," and thus democratic, because it "has the potential to change the rules that govern behavior going forward."[58] "Litigation," in other words, "serves the democratic value of participation by enabling individuals to engage directly in the process of lawmaking and law enforcement."[59] Lahav insists, moreover, that not only public law cases, but "[e]very type of lawsuit involves participation in government," for every lawsuit "has the potential to set legal rules that will govern others"[60] and can "have broad social impact beyond the individual litigants participating."[61] Similarly focusing on litigation's capacity to generate decisions about the law's content, Judith Resnik contends that

> courts can express another of democracy's promises—that rules can change because of popular input. The public

---

53 *See* LAHAV, *supra* note 4, at 102–04; Lahav, *supra* note 4, at 1691, 1693–94; *see also* Burbank & Subrin, *supra* note 14, at 402. Some empirical evidence also suggests that (certain kinds of) civil juries can have democratic benefits beyond civil litigation, including increasing jurors' subsequent civic engagement. *See, e.g.*, Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Jury*, 11 J. EMP. LEGAL STUD. 697 (2014).

54 *See* sources cited *supra* note 26.

55 *But see generally* Richard Lorren Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79 (2022) (offering an impassioned, if idealistic, plea for the renewal of civil jury trials).

56 LAHAV, *supra* note 4, at 6; *see also infra* notes 163–164 and accompanying text.

57 LAHAV, *supra* note 4, at 6.

58 *Id.*

59 *Id.* at 84.

60 *Id.*

61 *Id.* at 86.

> and the immediate participants see that law varies by contexts, decision-makers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through democratic iterations, norms are reconfigured.[62]

Like Lahav, Resnik conceives of the act of presenting arguments to a governmental decisionmaker regarding the articulation and application of legal norms as a democratic activity in which the parties to a lawsuit can participate.[63]

According to proponents of the democratic defense, civil litigation allows parties to participate in governmental decisionmaking regarding not only the law's content, but also its enforcement. Many scholars contend that civil litigation frequently functions as a form of "private enforcement," whereby private parties, rather than public officials, enforce governmental regulatory policy through individual lawsuits.[64] Advocates of the private enforcement model have suggested that civil litigation can, on their account, permit a kind of "democratic" participation in law enforcement,[65] and proponents of the democratic defense have readily embraced that notion, arguing that "[l]itigation allows individuals to play a direct role in enforcing laws by bringing lawsuits."[66] On this view, a plaintiff, in deciding to file a lawsuit (or at least to sue for certain statutory violations)

---

62 Resnik, *Courts*, *supra* note 9, at 808.

63 Such claims can be understood as putting a democratic spin on Lon Fuller's famous participatory account of adjudication. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364, 366 (1978). For other procedural theories that emphasize the importance of participation but, like Fuller's, associate it with values other than democracy, see RONALD DWORKIN, A MATTER OF PRINCIPLE 72 (1985); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 532–35; and Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189 (2004).

64 *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

65 *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–66 (2013). On one of the most sophisticated accounts of private enforcement, Congress institutes private enforcement regimes so as to prevent the executive from undermining its policy choices and, in doing so, contemplates that private litigants may adopt aggressive litigation strategies that go beyond the regulatory regime's purposes. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 16–18, 227–32 (2010); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529 (2018). This account conceives of private enforcement as a democratically *authorized* practice, whereas the arguments I'm considering in this Section present private enforcement, like all civil litigation, as a democratic activity in its own right.

66 LAHAV, *supra* note 4, at 8; Lahav, *supra* note 4, at 1690–91. At other points, though, Lahav seems to imply a more attenuated form of popular participation in

and thereby initiate the law-enforcement process, participates in a democratic activity because her initial decision concerns the exercise of governmental power and is unmediated by any governmental official.[67] Especially given our legal system's relative preference for enforcing regulatory policy through private lawsuits rather than administrative actions, proponents of the democratic defense regard such popular participation in law enforcement as an important facet of American democracy.[68]

Second, offering a somewhat different gloss on the foregoing participatory account of civil litigation's democratic value, proponents of the democratic defense sometimes argue that litigation realizes a specifically *deliberative* version of democracy by giving parties opportunities to *deliberate about matters of public concern*. Lahav, for instance, pronounces the "process" by which litigants "produce reasoned arguments" not just a kind of political participation, but a "form of democratic deliberation."[69] As with proponents' claims about participation more generally, such claims about deliberation hold most strongly for juries, as "jurors will reach their decision not only by reflecting on their own experience but by deliberating with others and coming to a consensus," an activity Lahav deems "the essence of participation in a deliberative democracy."[70] But Lahav once again declines to limit her account to juries, contending that the entirety of "litigation is one means of challenging the present legal order that has the added benefit of producing and testing proofs and arguments and promoting public deliberation."[71]

---

law enforcement, whereby private parties merely exhort governmental officials to remedy legal violations. *See, e.g.*, LAHAV, *supra* note 4, at 32.

67 *See* LAHAV, *supra* note 4, at 38.

68 Synthesizing many of these strands, Luke Norris has recently elaborated a "participatory democracy" account of private enforcement, which he grounds in the thought of John Dewey and other twentieth-century Progressives. *See* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1508–16 (2022).

69 LAHAV, *supra* note 4, at 110; Lahav, *supra* note 4, at 1677. For antecedents of these claims about deliberation, see, for example, Fiss, *supra* note 28, at 13, 45–46; and David Luban, *Settlements and the Erosion of the Public Realm*, 93 GEO. L.J. 2619, 2648–58 (1995). Both Fiss and Luban argued that settlements (and particularly secret settlements) undermine litigation's deliberative functions. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Luban, *supra*. *But see generally* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995) (arguing that settlement can have various "democratic" benefits).

70 LAHAV, *supra* note 4, at 100.

71 *Id.* at 64.

Now, such arguments actually suggest two different relationships between civil litigation and deliberation, and while proponents of the democratic defense seem to endorse both, it's important to distinguish them. For one, proponents often praise "the capacity of litigation to . . . produce . . . reasoned dialogue,"[72] presenting litigation itself as a *site* of, or *forum* for, deliberation.[73] For another, proponents sometimes argue that individual lawsuits can spur deliberation about matters of public concern in *other* institutions beyond litigation or even in society at large.[74] Whereas the latter argument instrumentalizes litigation, the former, like proponents' claims about "participation," treats litigation as constitutive of democracy. Presenting litigation as a site of deliberation also assigns parties an active role in democracy, albeit somewhat more passive than their role as "participants in self-government." In particular, we'll see that proponents of the democratic defense tend to understand deliberation as the exchange of reasons divorced from any *popular* decisionmaking authority about the exercise of political power.[75] I nonetheless include deliberative accounts of litigation's democratic potential in the constitutive-active category insofar as parties themselves are understood to participate in whatever deliberation occurs during litigation.

Third, another potentially democratic litigation function identified by proponents of the democratic defense is somewhat more passive than either participation in governmental decisionmaking or deliberation about matters of public concern, though it still treats parties as genuine participants in, rather than mere beneficiaries of, the democratic process. While proponents use different language to describe this activity, it can be understood to consist in *holding the government accountable*.[76] There are several different ways in which litigation might be thought to allow parties (and other members of the public) to hold the government accountable. One way is by empowering parties to demand that the government, through its courts, acknowledge and respond to wrongs they have suffered, whether perpetrated by public officials or by their fellow citizens. As Lahav puts it, "litigation is a vehicle

---

72 Lahav, *supra* note 4, at 1681.

73 *See* LAHAV, *supra* note 4, at ix.

74 *See, e.g.*, Lahav, *supra* note 4, at 1678–80.

75 *See, e.g.*, LAHAV, *supra* note 4, at 94; Resnik, *Functions of Publicity*, *supra* note 46, at 251; *see also infra* Section III.A.

76 *See, e.g.*, Marcus, *supra* note 16, at 1523, 1552–53.

for participation in government and an example of democracy in action" because it "require[s] a branch of government—the courts—to hear people's complaints."[77] By presenting one's legal claims to a court, the idea seems to be, one not only seeks to hold the wrongdoer responsible,[78] but also enforces a kind of accountability on the part of the government for responding to its citizens' grievances.

Litigation might also realize another form of governmental accountability insofar as it allows parties and members of the general public to observe and monitor courts as they exercise governmental power. According to Stephen Burbank and Stephen Subrin, for instance, "[p]ublic trials ensure that each of us has the opportunity to see that the laws our representatives have chosen to replace the state of nature are more than empty promises (or threats)—that the community can and will enforce them."[79] Resnik has developed the most elaborate version of this claim, extending it to the entirety of the litigation process rather than just the civil trial. "Litigating and voting," she contends, "are both personal rights and structural necessities, and both are forms of political participation that help to anchor the stability of democratic states."[80] The kind of democratic participation she associates with litigation, however, reduces neither to participating in governmental decisionmaking nor to deliberating about matters of public concern. Rather, drawing on the work of the utilitarian philosopher Jeremy Bentham,[81] Resnik constructs a "political theory about the role that the audience plays in juridical proceedings."[82] The key democratic feature of litigation, on this account, is its *publicity*—the openness of the litigation process not only to the parties, but also to other members of the political community. Resnik thus lauds "democratic rights of access to open and public courts" and contends that "democracies ought to care about public adjudicatory processes."[83] Such publicity, she argues, achieves a peculiarly democratic form of governmental accountability, one grounded in "democratic values about the political importance

77 LAHAV, *supra* note 4, at 6; *see also* Resnik, *Courts*, *supra* note 9, at 790.

78 *See infra* Section I.C.

79 Burbank & Subrin, *supra* note 14, at 401.

80 Resnik, *Entitlements*, *supra* note 10, at 986.

81 *See* Resnik, *Bentham*, *supra* note 10, at 54–57; *see also* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities*, 92 N.C. L. REV. 605, 615–18; Resnik, *Functions of Publicity*, *supra* note 46, at 191–94.

82 Resnik, *Courts*, *supra* note 9, at 810.

83 *Id.* at 774.

of transparent and accountable decision-making by governing powers."[84] More specifically, "all of us have entitlements in democracies to watch power operate and to receive explanations for the decisions entailed."[85] Members of the public who observe court proceedings accordingly form "a necessary *part* of the practice of adjudication, anchored in democratic political norms that the state cannot impose its authority through unseen and unaccountable acts," while courts, "like legislatures, are a place in which *democratic practices* occur in real time."[86] Holding the government publicly accountable in this way has several further benefits, which Resnik also deems democratic. For one, "[w]hen cases proceed in public, courts institutionalize democracy's claim to impose constraints on state power."[87] Public accountability can also facilitate democratic deliberation, as "[o]pen court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power."[88] But for Resnik, the fundamental democratic activity in which civil litigation allows members of the public to participate is "oversight" of governmental institutions—courts—as they exercise political power.[89]

As presented by Resnik, that oversight function renders civil litigation constitutive of democracy and parties and members of the public active participants in the democratic process. She pronounces the public form of governmental accountability realized through litigation "an end in itself"[90] and includes "open access" among the "constitutive elements" of courts.[91] And notwithstanding its passive connotations, her notion of "oversight" can at least potentially involve citizens in more active aspects of democratic governance. In particular, Resnik insists that the presence of public observers at court proceedings can "generate a desirable form of communication between citizen and the state";[92] help to "contribut[e] to what twentieth-century theorists termed the 'public sphere[,]' . . . disseminating authoritative information that shape[s] popular opinion of governments'

---

84 *Id.* at 781.

85 Resnik, *Functions of Publicity*, *supra* note 46, at 209; *see also id.* at 252.

86 *Id.* at 209.

87 Resnik, *Courts*, *supra* note 9, at 807.

88 *Id.* at 804; *see also* Resnik, *Functions of Publicity*, *supra* note 46, at 248.

89 Resnik, *Functions of Publicity*, *supra* note 46, at 252.

90 Resnik, *Courts*, *supra* note 9, at 785.

91 Resnik, *Entitlements*, *supra* note 10, at 938.

92 Resnik, *Courts*, *supra* note 9, at 784.

output";[93] and even "offer the opportunity for popular input to produce changes in legal rights."[94] In seeking to hold the government accountable, the participants in civil litigation—parties to lawsuits and members of the public alike—discharge a distinct democratic function, one that, as Resnik sees it, also serves as a predicate for some of the other democratic activities in which proponents of the democratic defense believe litigation allows parties to participate.

B. Instrumental-Active Functions

Whereas all the foregoing arguments present civil litigation itself as a site of democratic activity, proponents of the democratic defense just as often instrumentalize litigation, treating it as a means to democratic ends realized in other institutions or by the political system as a whole. The parties to a lawsuit, however, can on such accounts still play an active role in promoting democratic goals and thus can remain active participants in the democratic process—even if their participation is somewhat less direct than when litigation is conceptualized as intrinsically democratic.

Perhaps the most familiar example of this kind of *instrumental-active* account of civil litigation's democratic role is the view that litigation, at least in certain public law cases, performs a *representation-reinforcement* function. For instance, David Marcus, invoking John Hart Ely's representation-reinforcement theory of constitutional judicial review,[95] defends structural-reform litigation as democratic insofar as it "addresses shortcomings in representative government" by providing a forum for members of marginalized groups who can't get a fair hearing in majoritarian institutions.[96] On this account, while the various activities of civil litigation may not themselves be democratic, as the constitutive-active claims analyzed in the previous Section would have it, litigation nonetheless serves as an essential adjunct of democracy, compensating for deficiencies in representative institutions that tend to systematically exclude certain groups and interests. Litigation can help to make the political

---

93 Resnik, *Entitlements*, *supra* note 10, at 923 (footnote omitted).

94 *Id.* at 938; *see also id.* at 997.

95 *See* Marcus, *supra* note 16, at 1550–52. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

96 Marcus, *supra* note 16, at 1546. For a philosophical elaboration of this familiar type of argument, see generally Robert C. Hughes, *Judicial Democracy*, 51 LOY. U. CHI. L.J. 19 (2019).

system more democratic over all, even if it doesn't qualify as a democratic institution in its own right. The parties who bring structural-reform lawsuits, moreover, still play an active role in the democratic process, albeit by exposing and correcting failures in that process rather than by participating directly in democratic governance.

To be sure, one can put a constitutive spin on representation-reinforcement accounts of civil litigation, such that litigation itself becomes a democratic activity—but only at the price of dissociating democracy from popular self-government. Consider Corey Brettschneider and David McNamee's contention that, when the government violates its citizens' "fundamental rights," it loses its claim to democratic legitimacy, and litigation brought to remedy the violation becomes (at least provisionally) the true democratic process, with the plaintiff assuming the "mantle of democratic sovereignty."[97] To make that argument, they must espouse a conception of democracy according to which "the mantle of democratic sovereignty requires that a state pursue the public good, obey the rule of law, and respect its citizens' fundamental democratic rights," so that "[w]hen a state's actions fail to meet these conditions, it does not act as a democratic sovereign."[98] Such a conception entails the striking conclusion that a truly democratic government is conceptually incapable of violating its citizens' "fundamental rights"; even a popularly responsive government loses its democratic legitimacy, becoming (again, at least provisionally) *un*democratic, when it commits a rights violation. As we'll see, this understanding of democracy is highly depoliticized, imposing significant substantive preconditions for institutions to qualify as "democratic."[99] But the point for now is that most representation-reinforcement accounts present civil litigation as supporting, rather than supplanting, the institutions in which democratic sovereignty normally resides.

Although representation-reinforcement accounts of civil litigation's democratic role tend to focus on structural-reform and other public law litigation, proponents of the democratic defense identify several other ways in which litigation generally can help to serve democracy outside the courts. For one,

---

97 Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. 1229, 1237 (2015).

98 *Id.* at 1235; *see id.* at 1237–39, 1258–62.

99 *See infra* Part II. And indeed, Brettschneider develops a substantively demanding conception of democracy elsewhere. *See* COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 26–27 (2007).

litigation can perform an *agenda-setting* function, calling the attention of legislatures and other policymaking institutions to issues they would otherwise neglect.[100] According to Lahav, for instance, litigation can act as a "catalyst" for policymaking in other institutional venues,[101] as well as "spur social change, through judicial opinions that revise the law and by inspiring and sustaining social movements."[102] That is because "[i]nstitutions such as the legislature, administrative agencies, executive branch officials, and community activists are more likely to take action following a lawsuit and sometimes will not act without that catalyst."[103] More specifically, judicial decisions can "g[i]ve activists a powerful language for asserting their rights and inspiration that ground[s] their hopes in the legitimacy of law,"[104] while they can use the litigation process to construct "narratives" that can, in turn, shape "the democratic conversation" about issues of public concern.[105] And at least in cases with "high political salience," litigation can serve as "a vehicle for political mobilization."[106] The parties to lawsuits, on these various accounts, can leverage litigation to more effectively participate in political processes unfolding in other institutions, thereby helping to make those processes more democratic, even if litigation itself doesn't provide an opportunity to participate in democracy.[107]

---

100 For classic accounts in the political science literature of the importance of agenda-setting to democratic policymaking, see generally ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 113 (1989); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984); and E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1975).

101 LAHAV, *supra* note 4, at 41.

102 *Id.* at 8. This assumes that the resulting legal decisions are "jurisgenerative" rather than "jurispathic." *See generally* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

103 LAHAV, *supra* note 4, at 41.

104 *Id.* at 44.

105 *Id.* at 65–67.

106 Marcus, *supra* note 16, at 1546; *see id.* at 1553–54.

107 On these agenda-setting accounts, litigation might perform a function similar to that of the historical practice of petitioning legislatures, which members of marginalized social groups used to put issues on the legislative agenda. For a recent historical account of petitioning as a form of "procedural" democracy, see DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790–1870, at 43 (2021). For analogous accounts focusing specifically on tort litigation, see, for example, Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 350–61 (2021); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011); and Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929 (2015).

Proponents of the democratic defense posit another instrumental relationship between civil litigation and democracy when they contend that litigation allows members of marginalized social groups to exercise *countervailing power* against more powerful individuals and entities and to thereby combat political and economic inequality. Owen Fiss first suggested that litigation, particularly structural-reform litigation, might constitute a form of "countervailing power," which he defined as "the establishment of power centers equal in strength and equal in resources to the dominant social actors," such as corporations and governmental agencies.[108] Proponents of the democratic defense have built on Fiss's observation and identified various ways in which weaker parties can use litigation to offset disparities in political and economic power, a function they deem democratic.[109] According to Resnik, for example, "[t]he particular structural obligations of trial level courts have advantages for producing, redistributing, and curbing power in a fashion that is generative in democracies."[110] Conferring rights of court access, she insists, thus has "redistributive entailments" that can, in turn, promote socioeconomic equality.[111] And given that she associates democracy with "welfarist . . . resource distribution" and includes courts among "welfarist rights,"[112] any reconfigurations of power effected through litigation are, on her account, necessarily democratic. Helen Hershkoff and Stephen Loffredo have likewise argued that procedural rights can "promote democracy" inasmuch as they "counter power imbalances that threaten democratic values."[113] Other scholars have made similar claims about specific procedural devices, particularly class actions.[114] All such arguments conceive of litigation as

---

108 Fiss, *supra* note 28, at 44.

109 In a series of articles, Norris has argued that many of the framers of the Federal Rules of Civil Procedure were motivated by a vision of civil litigation as a form of countervailing power and that recent procedural developments, particularly widespread consumer and employment arbitration, have severely undermined that function. *See* Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. Rev. 462 (2017) [hereinafter Norris, *Labor*]; Luke Norris, *Neoliberal Civil Procedure*, 12 UC Irvine L. Rev. 471 (2022) [hereinafter Norris, *Neoliberal*]; Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. Rev. 249 (2018) [hereinafter Norris, *Parity*].

110 Resnik, *Entitlements*, *supra* note 10, at 938.

111 *Id.* at 946; *see id.* at 989.

112 Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* The Future of Economic and Social Rights 259, 259–60 (Katharine G. Young ed., 2019) [hereinafter Resnik, *Social Rights*].

113 Hershkoff & Loffredo, *supra* note 16, at 536; *see also id.* at 547.

114 *See, e.g.*, Lahav, *supra* note 4, at 121–22.

an instrument for achieving the (ostensibly) democratic goals of reducing power disparities and promoting socioeconomic equality, goals that litigants, in bringing and prosecuting lawsuits, actively help to realize.

C. Constitutive-Passive Functions

Rather than presenting parties to lawsuits as active participants in democracy, other elements of the democratic defense conceive of them as passive recipients of or conduits for democratic goods. Such claims, as with those that assign litigants a more active role, can treat civil litigation as either constitutive of democracy, with any democratic benefits inhering in the litigation process itself, or instrumental to that value, with litigation yielding goods that contribute to democratic governance in other institutional fora.

The *constitutive-passive* version of the democratic defense generally holds that civil litigation plays an essential role in giving institutional expression to individuals' formal standing as equal members of a democratic polity. As Resnik puts it, litigation is "a government-sponsored occasion to impose, albeit fleetingly, the dignity reflected in the status held by a juridical person, competent to sue or be sued, able to prompt an answer from and entitled to be treated on a par with one's adversary—whether that be an individual, a corporation, or the government itself."[115] Hershkoff and Loffredo attribute similar significance to litigation when they argue that "[p]rocedure also has intrinsic value for each individual member of the polity who holds a right to participate, because it confers dignity upon the right holder, instantiates that member's equal status under law, and accords respect separate and apart from the end result of exercising the procedural right."[116] But such claims actually reflect several distinct ideas about the relationship between litigation and democratic citizenship.

First, proponents of the democratic defense sometimes contend that litigation affords individuals official *recognition* of their formal legal status as rights bearers, as well as of the rights themselves when they're violated. Hershkoff and Loffredo, for example, claim that "rights of democratic procedure . . . accord the respect and dignity that any theory of self-governance worth having needs to acknowledge and protect," an intrinsic benefit "that is separate from any immediate or anticipated

---

115 Resnik, *Entitlements*, *supra* note 10, at 992.

116 Hershkoff & Loffredo, *supra* note 16, at 529; *see also id.* at 548–51.

payoff that might result from the exercise of the right."[117] Or as Lahav puts it, "[l]itigation provides participants with an official form of governmental recognition," for "[e]ven if a party loses his case, . . . he can assert his claim and require both a government official and the person who has wronged him to respond"[118]—a kind of formal acknowledgment of his status as a rights bearer.[119] Although Lahav occasionally associates such recognition with the rule of law and its attendant ideal of "equal treatment under law,"[120] she more often grounds it in democracy. She argues, for instance, that "civil rights litigation . . . allows individuals who are otherwise shut out of the democratic process to access a governmental official (the judge) who must listen to their claim,"[121] and she pronounces that official recognition democratic, given that "the root of democracy is respect for persons as participants in the polity."[122] Similarly, Resnik contends that, with the egalitarian extension of substantive legal rights to historically marginalized groups,[123] our society has increasingly come to embody "[t]he idea of courts as sources of the recognition of all persons as equal rights-holders and as ready resources for the array of humanity."[124] That idea, she insists, renders courts "democratic venues," inasmuch as they're "obliged to treat all persons with respect and require[] state agents—judges—to do so as well."[125]

Second, whereas the foregoing claims emphasize the government's recognition of its citizens' formal legal status, other aspects of the democratic defense suggest that litigation can instantiate a similar kind of recognition between citizens, in the form of *mutual accountability* or *answerability*. Lahav, for instance, emphasizes "[t]he fact that litigation permits individuals or institutions to call others to account for their conduct."[126] By "[r]equiring that alleged wrongdoers publicly defend themselves and answer for their conduct" and offering the prospect of "holding them accountable (financially and otherwise)," she

---

117 *Id.* at 550.

118 Lahav, *supra* note 4, at 1667–68.

119 *See id.* at 1667–69; *see also* LAHAV, *supra* note 4, at 113.

120 *See, e.g.*, LAHAV, *supra* note 4, at 114.

121 Lahav, *supra* note 4, at 1659; *see id.* at 1670–77.

122 *Id.* at 1676.

123 *See* Resnik, *Entitlements*, *supra* note 10, at 928–31.

124 Resnik, *Entitlements*, *supra* note 10, at 940; *see also* Resnik, *Social Rights*, *supra* note 112, at 266.

125 Resnik, *Functions of Publicity*, *supra* note 46, at 208; *see also* Resnik, *Social Rights*, *supra* note 112, at 284.

126 Lahav, *supra* note 4, at 1690.

contends, litigation ensures that we are all potentially accountable to one another and thus all relate to one another as equals.[127] Resnik likewise describes "adjudication" as "a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue—in public—about alleged misbehavior and wrongdoing."[128] In that way, she explains, "[l]itigation forces dialogue upon the unwilling (including the government), and momentarily alters configurations of authority."[129] Such "egalitarian exchanges of mutual recognition," Resnik concludes, "make adjudication a democratic practice."[130] According to this line of argument, while individuals may have to take the initial step of filing a lawsuit, they reap the democratic benefit of recognition—whether of the government or their fellow citizens—without much further ado, simply in virtue of the formal structure of the litigation process.

Third, proponents of the democratic defense sometimes cast the recognition and mutual accountability realized through civil litigation at a higher level of generality, as embodying a form of *social equality*. As Lahav puts it: "By allowing all individuals—regardless of their social standing—access to court to state their claims, litigation promotes equal concern and respect for all and makes sure that the law is applied equally to all."[131] Although Lahav occasionally characterizes such social equality as a "prerequisite" or "foundation" for litigation's other democratic functions,[132] she makes clear that she views litigation as helping to *constitute* relations of social equality and thus democracy. Litigation, in particular, helps to guarantee one's status as an equal member of the political community, inasmuch as the capacity to file a lawsuit amounts to a "right to have rights"—"the ability to appear before a government official and argue that one is entitled to recognition as a potential holder of rights."[133] That right is so foundational to one's standing in society that "a person excluded from the court system is *politically* degraded."[134] Litigation, for Lahav,

---

127 LAHAV, *supra* note 4, at 8; *see also id.* at 32.

128 Resnik, *Courts*, *supra* note 9, at 806.

129 *Id.*; *see also* Resnik, *Bentham*, *supra* note 10, at 62; Resnik, *Functions of Publicity*, *supra* note 46, at 208.

130 Resnik, *Social Rights*, *supra* note 112, at 284.

131 LAHAV, *supra* note 4, at 7.

132 *Id.* at 112–13.

133 *Id.* at 113. Though at other times, Lahav casts equality in more instrumental terms. *See, e.g.*, *id.* at 117–18.

134 *Id.* at 113 (emphasis added).

thus secures equality, but a distinctively democratic form of equality—"equality as part of democracy."[135] She accordingly includes the achievement of social equality among the "core functions of litigation in democracy"[136] and insists that "the courts need to be a special sphere where equal justice can be realized so that democracy can flourish."[137] Employing similar egalitarian rhetoric, Resnik maintains that "[c]ourts can be great levelers"[138] and celebrates how "[s]ocial movements succeeded in many countries in transforming adjudication into a democratic practice to which all persons—regardless of gender, race, class, and nationality—have access to open and public courts in which independent and impartial judges are required to treat disputants with dignity and respect."[139] Social equality, understood in this way as a distinctively democratic good, inheres in the litigation process and accrues to the participants in that process irrespective of their particular actions. As with recognition and mutual accountability, it is a democratic good that parties to lawsuits need not actively seek but that litigation instead automatically bestows, simply because of the kind of institution it is.[140]

D. Instrumental-Passive Functions

A final category of claims made by proponents of the democratic defense conceives of civil litigation as *instrumental* to the production of various goods that facilitate democratic governance in other institutions, while presenting parties as *passive* conduits for those goods, with the goods being incidental byproducts of lawsuits rather than anything parties actively bring about.

The most commonly cited such good is *transparency*, understood as the production or revelation of information pertinent

---

135 *Id.* at 113 n.2.

136 *Id.* at 112.

137 *Id.* at 117; *cf.* FREDERICK WILMOT-SMITH, EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD 34–41 (2019) (arguing that liberal-democratic commitments to "equal rights" and "equal concern" demand that all citizens have relatively equal abilities to vindicate their rights).

138 Resnik, *Courts*, *supra* note 9, at 807.

139 Resnik, *Entitlements*, *supra* note 10, at 920–21.

140 I have argued elsewhere that these claims about recognition and mutual accountability sound in the value of dignity. *See generally* Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501 (2020). Lahav also occasionally employs dignitarian language. *See, e.g.*, Lahav, *supra* note 4, at 1667–68. I argue below that this refashioning of dignity as a democratic value represents a depoliticizing move. *See infra* notes 294–298 and accompanying text.

to policymaking.[141] Lahav thus contends that, with its powerful mechanisms for civil discovery, "[l]itigation promotes transparency by forcing information out into the open that would otherwise remain hidden."[142] That information-production function, she further insists, is democratic, since "[t]o adequately self-govern and to enforce the law, people must have access to information that will help them make decisions."[143] "At least some measure of transparency," in other words, "is . . . necessary . . . for the successful functioning of democratic society."[144] The democratic activities to which the information produced through litigation contributes, however, occur not within litigation itself, but rather in other governmental institutions, particularly legislatures and administrative agencies. More specifically, litigation can highlight social problems that legislatures would otherwise ignore;[145] it "allows citizens to police government and produces information that helps spur reforms";[146] and even "[t]he threat of litigation can . . . lead to the production of important information for future litigation and for policy making."[147] Lahav and other scholars have also noted "the importance of the role civil discovery plays in regulatory decision-making by forcing information into the open,"[148] while Resnik has emphasized the contribution information produced through litigation can make to public policy debates.[149]

Through all these various mechanisms, the information produced by litigation can support democratic governance in other institutions, if not within litigation itself. And while parties to lawsuits help to uncover that information through their discovery requests, they do not thereby participate in

---

141 The other most frequently cited good is law development, which I consider in the context of proponents' criticisms of arbitration. *See infra* Section III.A.

142 LAHAV, *supra* note 4, at 8; *see also* Lahav, *supra* note 4, at 1683; Resnik, *Courts*, *supra* note 9, at 804.

143 LAHAV, *supra* note 4, at 8; *see also id.* at 57, 82.

144 Lahav, *supra* note 4, at 1683. On the connection between democracy and the information produced by courts, see generally Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67 (2013).

145 *See* LAHAV, *supra* note 4, at 57–58; Lahav, *supra* note 4, at 1684.

146 Lahav, *supra* note 4, at 1684; *see also* LAHAV, *supra* note 4, at 9, 58.

147 Lahav, *supra* note 4, at 1685.

148 *Id.* at 1689. On the relationship between civil discovery and regulation by administrative agencies, see generally Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020).

149 *See, e.g.*. Resnik, *Courts*, *supra* note 9, at 804; Resnik, *Social Rights*, *supra* note 112, at 284.

democracy, but rather perform more mundane activities that fortuitously yield democratic benefits.

II
Defining "Democracy" in the Democratic Defense of Civil Litigation

Given the myriad "democratic" functions that proponents associate with civil litigation, the democratic defense might seem more like a family of discrete arguments than a single, unitary thesis.[150] The defense is more coherent than that, but the various claims made on behalf of litigation by the defense's proponents do in fact presuppose multiple conceptions of democracy.[151] In this Part, I map the democratic defense onto some of the more prominent conceptions that have been elaborated in the contemporary political theory literature.

The disparate conceptions of democracy presumed by proponents of the democratic defense can be arrayed along a spectrum spanning more and less *political* understandings of the ideal. Based on how the term is generally used in the contemporary political theory literature, a "political" conception of democracy is best understood as having two main features: (1) it views democracy as a procedure for making collective decisions about the exercise of political power, as opposed to extending the ideal to other kinds of social activities,[152] and (2) it accepts ongoing disagreement about and contestation over basic questions of rights and justice as an ineliminable fact of modern politics, as opposed to presuming or demanding universal adherence to specific answers to such questions.[153]

---

150 *Cf.* Ludwig Wittgenstein, Philosophical Investigations §§ 65–71 (G.E.M. Anscombe trans., 4th ed. 1998) (arguing that some concepts apply to their predicates by virtue of a "family resemblance" rather than a set of necessary or sufficient conditions).

151 Rather than relying on different *conceptions* of democracy, the various claims of the democratic defense might instead be understood to be focusing on different *elements* of a single, but multifaceted, concept of democracy. Either way, though, the defense turns out to understand democracy in several distinct ways, each of which is more or less political in the sense I go on to elaborate in this Part, thus rendering the defense equally prone to the kinds of value conflicts I explore in Parts III and IV.

152 *Cf.* Eitan Hersh, Politics Is for Power: How to Move Beyond Political Hobbyism, Take Action, and Make Real Change 1–14 (2020).

153 *See supra* note 29 and accompanying text. There are, of course, myriad other uses of the term "political" in political theory. In classical political theory, for example, "the political" often denotes the pursuit of a community's common good or even human beings' more general sociability. *See* Melissa Lane, *Ancient Political Philosophy*, Stan. Encyclopedia Phil. (Mar. 22, 2023), https://plato.stanford.

A less political conception, conversely, focuses on activities further removed from collective decisionmaking about the exercise of political power (say, a conception that regards "Tweeting" as a democratic activity inasmuch as it involves popular discussion of matters of public concern),[154] or it treats democracy as embodying an immutable substantive moral vision for the organization of society, one that entails significant preconditions for the legitimate exercise of political power, irrespective of popular disagreement about the desirability of those preconditions (say, a conception that regards economic equality or contractual freedom as a requirement of "true democracy"). To be sure, the substance/procedure distinction is just as porous in democratic theory[155] as it is in law,[156] and any conception of democracy—however purportedly procedural—entails numerous substantive commitments, including a definition of "the people" who rule, a list of subjects fit for determination by representative decisionmaking processes, and a set of criteria for identifying expressions of the "popular will."[157] Indeed, an openness to ongoing contestation may itself be best understood as resting on a substantive moral commitment to political equality.[158] But we can nevertheless distinguish between those conceptions of democracy that leave more decisions about the exercise of political power up for popular debate and those that take more decisions off the table.[159]

---

edu/entries/ancient-political/ [https://perma.cc/N963-DHM6]. I don't mean to reject such uses. But if one of the main facts of contemporary social life is that people fundamentally disagree about basic matters of rights and justice, then one of the main tasks of contemporary politics is to manage isagree insofar as it bears on the exercise of political power, and my (admittedly stipulative) use of the term "political" is intended to distinguish conceptions of democracy that emphasize that task.

154 Theories of "cultural democracy" also tend to be less political in this respect. *See, e.g.*, Jonathan Gingerich, *Is Spotify Bad for Democracy? Artificial Intelligence, Cultural Democracy, and Law*, 24 YALE J.L. & TECH. 227 (2022).

155 *See, e.g.*, Corey Brettschneider, *The Value Theory of Democracy*, 5 POL., PHIL. & ECON. 259, 261 (2006).

156 *See, e.g.*, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010).

157 *See, e.g.*, Amy Gutmann, *Democracy*, *in* 2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 521 (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 2nd ed. 2012).

158 *See, e.g.*, MÜLLER, *supra* note 29.

159 The distinction I draw between more and less political conceptions of democracy seems to be close to the inverse of Jeremy Kessler and David Pozen's distinction between "politicized" and "depoliticized" legal theories. On their account, depoliticized legal theories "seek to negotiate highly politicized legal conflicts through the introduction of decisionmaking frameworks that abstract away

Simply to draw that distinction, of course, is by no means to defend more political conceptions of democracy as normatively superior to less political ones (or vice versa). On the contrary, although I'll spend much of the remainder of this Article arguing that less political conceptions of democracy have significant drawbacks in civil procedure (and potentially other areas of the law, too),[160] I suspect many readers will reject the more political conceptions, which, as we'll see, strip democracy of many of its associations with other basic values such as equality and justice, in favor of the less political ones, which define democracy at least partly in terms of those other values. One can have that normative preference, though, while recognizing the analytical importance of distinguishing among conceptions of democracy based on the number and kinds of preconditions they impose on the exercise of political power. One can even acknowledge some of the costs of setting such preconditions even if one ultimately concludes that those costs are outweighed by the benefits of developing a conception of democracy that gives fuller expression to other important normative commitments.

This Part proceeds from more to less political conceptions of democracy, showing how each one undergirds different facets of the democratic defense of civil litigation. As we'll see, those tenets of the democratic defense that conceive of civil litigation as constitutive of democracy and assign individuals a more active role resonate with the more political conceptions, whereas the constitutive claims that treat individuals as passive beneficiaries of moral values resonate with the less political conceptions. Between those two poles lie contentions that posit an instrumental relationship between litigation and democracy, which can potentially accommodate a degree of popular contestation, but at the cost of demoting litigation to an

---

from the central values in contention." Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1822, 1826 (2016). What I call "political" conceptions of democracy seem to be "depoliticized" in that sense, since such conceptions understand democracy as a legitimate procedure for reaching collective decisions notwithstanding "contention" over "central values," as opposed to using "democracy" as a more comprehensive label for those values. Indeed, Kessler and Pozen disparage an emphasis on popular sovereignty—arguably the core of a political understanding of democracy, on my account—as a kind of "demotic formalism." *Id.* at 1822. Whatever the merits of their analytical framework in the contexts in which they deploy it, it strikes me as less felicitous when applied specifically to the concept of democracy, given the need, at the end of the day, for some procedure to determine how to proceed collectively in the face of disagreement about "central values."

160 *See infra* Parts III and IV.

adjunct of democracy, as opposed to presenting the institution as a full-fledged democratic activity in its own right.

Before turning to the various conceptions of democracy underlying the democratic defense of civil litigation, I should note two prominent conceptions that the defense's proponents appear *not* to invoke. For one, proponents eschew Robert Dahl's influential "pluralist" theory of democracy, which defines democracy as a competition among various "interest groups" in society for influence over policymaking.[161] Nor do proponents espouse "minimalist" accounts of democracy as the popular selection of governing elites.[162] Both pluralism and minimalism can be understood to reduce democracy to a process for aggregating preferences—interest groups' preferences for policy in the case of pluralism and individuals' preferences for governing elites in the case of minimalism. As such, both are a poor fit for civil litigation, which isn't structured to aggregate preferences. Both are also among the thinnest, most political conceptions and thus drain the democratic ideal of much of its normative allure, failing to provide the kind of compelling moral vision in which proponents seek to ground their defense of civil litigation.

Proponents of the democratic defense can instead be understood to be appealing, more or less implicitly, to several other prominent conceptions of democracy, which vary in terms of both their emphasis on collective self-governance and their tolerance of disagreement about matters of basic rights and justice—that is, in terms of how "political" they are in the sense I've described. The most political conception invoked by the defense's proponents simply defines democracy as *popular sovereignty*, the idea that the people of a polity should collectively rule themselves.[163] At least rhetorically, this ideal seems to constitute the core of the democratic defense. Lahav, for instance, repeatedly asserts that "[t]he process of litigation promotes democracy by permitting participants to perform acts that are expressions of self-government."[164] And because such

---

161 *See* DAHL, *supra* note 100; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 59–85 (1956).

162 For one of the original minimalist theories of democracy, see generally JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942). For more recent versions, see generally, for example, ADAM PRZEWORSKI, DEMOCRACY AND THE LIMITS OF SELF GOVERNMENT (2010); and IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2006).

163 For prominent intellectual histories of the concept of popular sovereignty, see generally RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016); and MARGARET CANOVAN, THE PEOPLE (2005).

164 Lahav, *supra* note 4, at 1659; *see also, e.g.*, LAHAV, *supra* note 4, at 6.

a conception equates democracy with collective self-governance without explicitly imposing any substantive preconditions on the exercise of political power, it's political by definition. The concept of popular sovereignty can, moreover, at least theoretically support some of the instrumental claims of the democratic defense, such as the idea that litigation produces information that informs policy debates in other political institutions;[165] as with any instrumental claim, the question then becomes whether and to what extent such information actually facilitates popular self-governance in those other venues. Some of the defense's more peripheral constitutive claims might also be best understood in terms of popular sovereignty. Consider, for example, Resnik's argument that the publicity of litigation allows citizens to hold the government accountable by monitoring courts as they exercise public power,[166] which she grounds in Bentham's utilitarian defense of publicity as a check against governmental abuses of power.[167] While such accountability may well serve the distinctively liberal end of limited government, it also constitutes a form of popular control over governmental institutions, and thus instantiates (however weakly) popular sovereignty. But appeals to popular sovereignty are cast at too high a level of generality to sustain the democratic defense's other, more ambitious constitutive claims about civil litigation, given that the institution doesn't even purport to provide a mechanism of collective self-governance. Proponents of the democratic defense accordingly resort to conceptions that seek to specify more concretely the activities in which democracy supposedly consists, activities that more plausibly correspond to the various procedures of civil litigation.

As we've seen, one such activity emphasized by proponents of the democratic defense is popular *participation* in governmental decisionmaking.[168] Such participation can be understood as a corollary of popular sovereignty, and it represents a political conception of democracy, at least insofar as broad participation is a precondition for legitimately resolving disagreements

165 *See supra* Section I.D.

166 *See* Resnik, *Courts*, *supra* note 9, at 805; *supra* notes 80–94 and accompanying text; *see also* David Luban, *The Principle of Publicity*, *in* THE THEORY OF INSTITUTIONAL DESIGN 154, 157 (Robert E. Goodin ed., 1996).

167 *See, e.g.*, JEREMY BENTHAM, SECURITIES AGAINST MISRULE AND OTHER CONSTITUTIONAL WRITINGS FOR TRIPOLI AND GREECE 30 (T.P. Schofield ed., 1990); *see also* Gerald J. Postema, *The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law*, *in* BENTHAM'S THEORY OF LAW AND PUBLIC OPINION 40 (Z. Xiabo & M. Quinn eds., 2014).

168 *See supra* Section I.A.

about matters of rights and justice.[169] Participatory theories of democracy, however, have fairly limited application to civil litigation. In particular, while civil juries may well exercise a degree of governmental decisionmaking authority, parties to lawsuits generally can, at most, attempt to *influence* governmental decisionmakers, by presenting arguments to judges. That opportunity for influence may be significant for members of marginalized groups who seek to change social policy but lack access to other policymaking fora, as emphasized by representation-reinforcement accounts of structural-reform litigation.[170] In most civil cases, by contrast, the judge merely determines the rights and obligations of the parties, rendering the form of political "participation" available in most litigation rather attenuated.

Participation in governmental decisionmaking is one of the more robust activities a conception of democracy might choose to emphasize.[171] For that reason, it's unlikely to sustain a general democratic defense of civil litigation, which rarely presents ordinary individuals meaningful opportunities to participate in significant policy decisions. Conceptions of democracy that emphasize other activities arguably fit the full range of civil cases somewhat better, but only by untethering democracy from core notions of popular sovereignty and popular control over the exercise of political power. Perhaps the most commonly cited activity besides participation is *deliberation* about matters of public concern, and the contemporary political theory literature abounds with different theories of *deliberative democracy*. According to liberal theories of deliberative democracy, a political decision is democratic only if it's preceded by the exchange of mutually acceptable reasons among citizens, conceived of as free and equal members of the political community.[172]

---

169 *Cf.* Jeremy Waldron, *Participation: The Right of Rights*, 98 PROC. ARISTOTELIAN SOC'Y 307 (1998) (developing such a political account of participatory rights).

170 *See supra* notes 95–96 and accompanying text.

171 For a recent attempt to take the demands of a commitment to equal popular participation in governmental decisionmaking seriously, see generally HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY (2020).

172 *See generally, e.g.*, AMY GUTMANN & DENNIS F. THOMPSON, DEMOCRACY AND DISAGREEMENT (1996) [hereinafter GUTMANN & THOMPSON, DISAGREEMENT]; AMY GUTMANN & DENNIS F. THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004) [hereinafter GUTMANN & THOMPSON, DELIBERATIVE DEMOCRACY]; Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit eds., 1989); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 95 (Seyla Benhabib ed., 1996).

Lahav explicitly invokes such accounts of deliberative democracy, and unsurprisingly so.[173] After all, liberal champions of deliberative democracy have themselves assimilated public deliberation to the reasoning of courts, following John Rawls, for instance, in pronouncing the Supreme Court an "exemplar of public reason."[174] But the association of deliberation with judicial reasoning actually suggests that liberal theories of deliberative democracy may prove less political than other conceptions of democracy implicated by the democratic defense of civil litigation.

Liberal theories of deliberative democracy tend to be less political in at least two respects. First, such theories restrict the kinds of reasons that are admissible in public deliberation, thus removing certain arguments and topics from the realm of popular contestation. Many such theories, in particular, espouse some version of Rawlsian "public reason," which requires that policy decisions concerning "constitutional essentials and matters of basic justice" be justifiable in terms of values and according to standards of reasoning that all citizens can reasonably be expected to endorse.[175] To be sure, as Seyla Benhabib explains, "public reason in Rawls's theory is best viewed not as a *process of reasoning* among citizens, but more as a regulative principle, imposing certain standards upon how individuals, institutions, and agencies *ought to reason about public matters*," where those standards "are set by a *political conception of liberalism*."[176] But many liberal theories of deliberative democracy that do contemplate an actual deliberative process incorporate similar standards, and insofar as they do, they limit the set of policies that can be adopted by popular majorities. Such theories thus appear to demand a greater degree of consensus than is attainable in modern, pluralistic societies[177] and are, in that respect, less political than alternative conceptions of democracy that focus on activities other than deliberation. This depoliticization, moreover, is likely to be only more pronounced in the context of civil litigation, given the

---

173 *See, e.g.*, LAHAV, *supra* note 4, at ix, 84 n.1; Lahav, *supra* note 4, at 1661–62.

174 JOHN RAWLS, POLITICAL LIBERALISM 231–40 (paperback ed. 1996); *see, e.g.*, GUTMANN & THOMPSON, DISAGREEMENT, *supra* note 172, at 45; LAHAV, *supra* note 4, at 110 n.51.

175 RAWLS, *supra* note 174, at 227–29.

176 SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 108 (2002).

177 *See* Thomas Christiano, *Must Democracy Be Reasonable?*, 39 CANADIAN J. PHIL. 1 (2009).

even more constrained form of argumentation permitted in judicial proceedings.[178]

Second, according to liberal theories of deliberative democracy, deliberation can yield legitimate decisions only if the participants can regard one another as "free and equal" members of the political community, a requirement that turns out to entail significant substantive preconditions for the deliberative process. Those preconditions can amount to a comprehensive theory of social justice[179] or, more modestly, a bundle of basic rights, including socioeconomic rights,[180] but either way, the preconditions themselves aren't subject to deliberation, irrespective of any popular disagreement about their legitimacy. Although it's possible to develop more political accounts of deliberative democracy that leave more policies up for debate,[181] such politicization is achieved partly by relaxing deliberation's rational restrictions and substantive preconditions so as to permit greater popular contestation. That means jettisoning some of the features that distinguish deliberation from other, less regulated political activities, and thus blurring the distinction between deliberative and participatory conceptions of democracy.

Other, ostensibly competing conceptions of deliberative democracy invoked by proponents of the democratic defense prove to be even more substantively demanding, and thus even less political, than liberal conceptions. Resnik, for example, draws on Jürgen Habermas's "discourse theory" to argue that one of the main functions of courts is "[t]he shaping of democratic rule of law through discourse," which she suggests is also "the central burden of Habermas's" theory.[182] The centerpiece of that

---

178 *Cf.* Spaulding, *supra* note 17, at 1074 ("Dialogue and deliberation may be compelled in adjudication, but this occurs in a space carefully structured to privilege elite experts and those who can afford immediate access to them.").

179 For example, Rawlsian public reason is premised on a more general liberal theory of justice, which grants "special priority" to certain "basic rights, liberties, and opportunities" and mandates a significant degree of economic equality. *See* RAWLS, *supra* note 174, at 223–24. Rawls subsequently confirmed that this theory precludes welfare-state capitalism and requires either a "property-owning democracy" or democratic socialism. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 137–40 (Erin Kelly ed., 2001).

180 *See, e.g.*, Ron Levy, *Rights and Deliberative Systems*, 18 J. DELIBERATIVE DEMOCRACY 27 (2022).

181 *See generally, e.g.*, CRISTINA LAFONT, DEMOCRACY WITHOUT SHORTCUTS: A PARTICIPATORY CONCEPTION OF DELIBERATIVE DEMOCRACY (2020).

182 Resnik, *Bentham*, *supra* note 10, at 35 n.170; *cf.* Luban, *supra* note 69, at 2633–40, 2658–59 (developing a "public-life conception" of governmental legitimacy and adjudication, which draws on Habermas and Hannah Arendt).

theory is Habermas's "democratic principle of legitimacy," according to which "only those statutes may claim legitimacy that can meet the assent of all citizens in a discursive process of legislation that in turn has been legally constituted";[183] citizens, moreover, must have arrived at the views they articulate in that "discursive process" through a "free and inclusive" process of public "opinion and will-formation."[184] According to Resnik, litigation can contribute to the formation of public opinion by helping to constitute a "public" that observes and critiques what courts purport to do in its name.[185] But if litigation serves that role, it does so only insofar as it satisfies Habermas's strict substantive preconditions for public will-formation.[186] Applying Habermasian discourse theory to civil litigation thus only replicates the theory's widely noted depoliticizing propensities, including its relative disregard for pluralism and disagreement in diverse societies[187] and its acceptance of only a certain range of substantive outcomes as "legitimate."[188]

Whereas the foregoing conceptions of democracy present deliberation as an activity in which citizens might engage, other claims of the democratic defense of civil litigation can be understood to implicate conceptions that conceive of democracy as a mechanism for *representing* various viewpoints in governmental deliberative processes, regardless whether the individuals who hold those viewpoints actually participate in decisions concerning the exercise of political power.[189] The defense's

---

183 JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 110 (William Rehg trans., 1996).

184 *See* JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION 103 (C. Cronin trans., 2008).

185 *See* Resnik, *Bentham*, *supra* note 10, at 34–38; Resnik, *Courts*, *supra* note 9, at 804–06; Resnik, *Entitlements*, *supra* note 10, at 923 & n.13.

186 *See generally, e.g.*, Stefan Späth, *Social Entitlements in Habermas's Discourse Theory of Law: Welfare State Regulations as Legitimizing Institutions*, 35 RATIO JURIS 273 (2022).

187 *See* DAVID ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 184–205 (2008).

188 As Habermas himself acknowledges. *See* HABERMAS, *supra* note 183, at 304. For an argument that Habermas's theory of popular sovereignty "discount[s] the role of collective citizen agency in the justification of the modern constitutional state," see George Duke, *Habermas, Popular Sovereignty, and the Legitimacy of Law*, LAW & CRITIQUE (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4562670.

189 Sometimes, proponents invoke the concept of representation more loosely to refer to more general imperatives such as increased access to courts for the members of historically marginalized groups. *See, e.g.*, Judith Resnik, *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 LAW & ETHICS HUM. RTS. 1 (2021).

proponents, to be clear, don't rely on formal notions of representation, which are relevant to aggregate litigation[190] but don't provide a general justification for civil litigation writ large. They instead allude to theories of "descriptive" or "substantive" representation, as when they argue that litigation can perform a "representation-reinforcing" function or serve as a policymaking "catalyst" by surfacing viewpoints or interests that would otherwise remain submerged in political discourse.[191] Such claims resonate with recent accounts in democratic theory of "discursive representation,"[192] "representation as advocacy,"[193] and "informal political representation."[194] When applied to civil litigation, these forms of virtual representation still actively involve litigants in the democratic process, as the parties to a lawsuit articulate the viewpoints they're representing. But beyond giving voice to certain viewpoints, the parties, on such accounts, have little say over collective decisions about the exercise of political power, rendering the claims of the democratic defense that presuppose virtual notions of representation less political than those that invoke participatory or even deliberative theories of democracy.[195]

The aspects of the democratic defense I've considered so far all rest on conceptions of democracy that emphasize various activities in which citizens might participate rather than particular substantive outcomes the political process should achieve. Those conceptions accordingly tend to be more political, at least in theory. Insofar as they end up proving less

---

190 *See generally, e.g.*, Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743 (2017).

191 *See supra* Section I.B. For the classic distinction between "formalistic" representation and more "virtual" theories of representation, see generally HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

192 *See generally* John S. Dryzek & Simon Niemeyer, *Discursive Representation*, 102 AM. POL. SCI. REV. 481 (2008).

193 *See generally* Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758 (2000).

194 *See generally* Wendy Salkin, *The Conscription of Informal Political Representatives*, 29 J. POL. PHIL. 429 (2021); Wendy Salkin, *Speaking for Others from the Bench*, 29 LEGAL THEORY 151 (2023). For more on these and related developments in democratic theory, see generally Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387 (2008).

195 For a purportedly "democratic" theory of adjudicative lawmaking that seems to rely on a similarly loose notion of "interest representation," see CHRISTOPHER J. PETERS, A MATTER OF DISPUTE: MORALITY, DEMOCRACY, AND LAW 155–69 (2011). *See also* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572 (2005) (developing a theory of judicial review based on the idea of "argumentative representation").

political in practice, especially when applied to the specific institution of civil litigation, that's either because they focus on activities that are further removed from the exercise of political power or because they impose significant substantive preconditions for any activity to qualify as truly "democratic." The defense's constitutive-passive claims,[196] by contrast, invoke conceptions of democracy that are less political for a different reason: they incorporate values that other conceptions treat as preconditions *for* democracy into the concept *of* democracy itself, such that institutions and policies that fail to instantiate those values are necessarily "undemocratic."

The value that proponents of the democratic defense most often treat as an aspect of democracy is *equality*, and particularly *social* or *relational* equality—the ideal of a society whose members relate to one another as equals. Social-egalitarian theories, though, remain theories of democracy insofar as they focus on the value that's thought to justify democratic political arrangements in the first place.[197] Indeed, many democratic theorists contend that democracy best expresses citizens' equal status, by giving everyone an equal say in political decisions.[198] Social-egalitarian theories regard democratic political institutions as necessary for treating everyone as equals, but not sufficient. According to Elizabeth Anderson's prominent account of social equality, for instance, citizens can participate in democratic political institutions as true equals only if they enjoy a certain minimum level of material wellbeing and aren't subject to unjust social hierarchies.[199] Other theories similarly insist that citizens can relate to one another as *political* equals, as democracy promises, only if they can also relate to one another as *social* equals.[200] On such theories, the democratic ideal is also

196 *See supra* Section I.C.

197 *Cf.* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15–19 (1996) (defending bills of rights as "democratic" on such grounds).

198 *See generally, e.g.*, THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS (2008); JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY (2019); Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFF. 287 (2014); Daniel Viehoff, *Democratic Equality and Political Authority*, 42 PHIL. & PUB. AFF. 337 (2014). For a recent account of precisely what kind of political equality a commitment to Social equality requires, see generally Sean Ingham, *Representative Democracy and Social Equality*, 116 AM. POL. SCI. REV. 689 (2022).

199 *See generally* Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999).

200 *See generally, e.g.*, David Miller, *Equality and Justice*, 10 RATIO 222 (1997); Samuel Scheffler, *Choice, Circumstances, and the Value of Equality*, 4 POL., PHIL. &

a distinctively egalitarian ideal, one whose realization requires not just governing institutions in which individuals can participate, but also broader societal conditions that guarantee everyone's equal social standing.[201]

Because theories of social equality shift democracy's focus from the various activities of self-governance to social relations and their supporting conditions, they may fit the institution of civil litigation better than other conceptions of democracy, but they achieve that greater coherence at the price of limiting the domain of legitimate popular disagreement and thus significantly depoliticizing the democratic ideal. Proponents of the democratic defense, we've seen, not only explicitly appeal to social equality, but also invoke notions such as recognition and mutual accountability, which can also be understood as incidents of citizens' equal social status.[202] Lahav, for example, maintains that "the existence of a right to enforce rights is the backdrop of all social interactions," given that the "knowledge that we can rely on our ability to enforce the law if necessary allows us to engage in many exchanges and relationships, and to feel secure in our interactions with others in society," and she grounds the importance of being able to relate to others in these ways in "a deeper ideal that characterizes modern democracy: the ideal of status equality."[203] Resnik likewise attributes expanded access to the civil justice system over the course of much of the twentieth century to the efforts of "democratic *egalitarian* social movements."[204] I agree (and have argued elsewhere)[205] that civil litigation does indeed help to constitute these kinds of egalitarian social relations, by putting litigants on a formal par with one another. But just as that formal promise requires a greater degree of substantive equality to be rendered meaningful, so the ideal of social equality turns out to demand significant material equality. Indeed, some political theorists have suggested that social equality may well require material conditions similar to those required by egalitarian

---

ECON. 5 (2005); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003) [hereinafter Scheffler, *Egalitarianism*].

201 *Cf.* Scheffler, *Egalitarianism*, *supra* note 200, at 22 (describing relational equality as both a "social ideal" and a "political ideal").

202 *See supra* Section I.C.

203 LAHAV, *supra* note 4, at 4, 140 (emphasis added).

204 Resnik, *Functions of Publicity*, *supra* note 46, at 189.

205 *See generally* Shapiro, *supra* note 140.

theories that focus on distributive justice.[206] At the very least, a political theory founded on citizens' equal social standing must enshrine not just equal political rights, but also certain liberal civil rights guaranteeing individual autonomy and even rights to some kind of economic minimum.[207] Those rights, moreover, must be entrenched against encroachment by popular majorities and thus insulated from popular contestation. In appealing to social equality to justify basic features of civil litigation, then, proponents of the democratic defense implicitly condition litigation's legitimacy on certain background social and political arrangements that are themselves not subject to popular debate.

Finally, rather than treat economic equality as an entailment of other, more fundamental values such as social equality, another set of conceptions of democracy implicated by the democratic defense deem economic equality a democratic goal in its own right. There is, of course, an important *practical* connection between economic equality and democracy, as a robust political science literature demonstrates how extreme economic inequality (often excoriated as "oligarchy" or "plutocracy") tends to enable elite capture of political institutions and the suppression of popular preferences in the political process.[208] But when proponents of the democratic defense argue that civil litigation can help to promote economic equality by enabling members of weaker social groups to exercise "countervailing power,"[209] or when they criticize recent procedural developments as embodying an anti-democratic

206 *See generally* Gideon Elford, *Survey Article: Relational Equality and Distribution*, 25 J. Pol. Phil. 80 (2017); Christian Schemmel, *Why Relational Egalitarians Should Care About Distributions*, 37 Soc. Theory & Prac. 365 (2011).

207 *See generally, e.g.*, Christiano, *supra* note 198, at 231–59; Thomas Christiano, *Democracy as Equality*, *in* Democracy 31 (David Estlund ed., 2002); Laura Valentini, *Justice, Disagreement and Democracy*, 43 Brit. J. Pol. Sci. 177 (2013). As a historical matter, many nineteenth-century liberal reformers argued that equality requires equal *civil* rights, including rights to access the courts, but not equal *political* rights to participate in representative institutions. *See* William Selinger & Gregory Conti, *The Lost History of* Political *Liberalism*, 46 Hist. Eur. Ideas 341, 351 n.76 (2020).

208 *See generally, e.g.*, Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age (2008); Martin Gilens, Affluence & Influence: Economic Inequality and Political Power in America (2012).

209 *See supra* Section I.B.

"neoliberal" ethos,[210] they make a *normative* claim about the relationship between economic equality and democracy.[211]

Recent developments in both political and legal theory support this move to incorporate economic equality into the concept of democracy, but those theoretical trends also highlight how such a move depoliticizes democracy, as egalitarian economic relations come to be seen less as a subject of popular contestation and more as a "democratic" imperative. Political theorists have argued that political institutions and procedures qualify as democratic only insofar as they realize egalitarian power relations in society at large[212] and that "neoliberal" or economically libertarian policies are undemocratic per se.[213] In legal theory, meanwhile, scholars working under the banner of "law and political economy" have sought to blend democracy with economic egalitarianism.[214] Adherents profess that their "basic commitment is to democracy," by which they mean that "law's creation of economic order should be accountable to those who live in that order, and the ultimate standard of accountability is the democratic will of the people, expressed in procedures that accord equal weight to all members in structuring our shared life."[215] But they insist that democracy requires much more than just fair elections, popular participation, or even deliberation.[216] More specifically, even

---

210 *See, e.g.*, David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2510–17 (2021); Norris, *Neoliberal*, *supra* note 109; *cf.* Cummings, *supra* note 42 (manuscript at 6) (attributing lawyers' participation in "democratic backsliding" to various socioeconomic features of the American legal profession, including "the reorientation of legal education around neoliberal market values").

211 Economic democracy also appears to be the conception of democracy favored by many scholars who study state civil courts. *See, e.g.*, Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359, 362 (2022).

212 *See generally, e.g.*, Steven Klein, *Democracy Requires Organized Collective Power*, 30 J. POL. PHIL. 26 (2021).

213 *See generally, e.g.*, WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTI-DEMOCRATIC POLITICS IN THE WEST (2019); WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015).

214 *See generally* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

215 *Id.* at 1827.

216 *See, e.g.*, Samuel Bagg, *How Should We Think About Democracy?*, LPE BLOG (June 5, 2019), https://lpeproject.org/blog/how-should-we-think-about-democracy/ [https://perma.cc/KK78-JFGQ]; Samuel Bagg, *Two Fallacies of Democratic Design*, LPE BLOG (July 13, 2023), https://lpeproject.org/blog/two-fallacies-of-democratic-design/ [https://perma.cc/N7ZP-A7VH].

as they endorse majoritarianism, criticize "the antimajoritarian features of the American constitutional scheme,"[217] and concede that putting one's faith in democratic processes is "risky,"[218] they espouse "a vision of democracy as a process of building collective power" and "'countervailing power.'"[219] They make clear, moreover, that this purportedly democratic "vision" entails a robustly egalitarian political program. For example, they insist that one "criteri[on that] define[s] a properly democratic political economy" is that "the substance of economic life must support democratic self-rule by ensuring substantial equality, freedom from abjection and dependence, a workplace experience of dignity and self-assertion rather than vulnerability and humiliation, and the capacity to build power through institutions such as unions."[220] The ultimate goal, in short, is a "more deeply democratic and progressive political economy"—democracy and economic progressivism apparently being two sides of the same coin.[221] Consistent with that assumption, adherents approvingly cite in the name of "democracy" a highly detailed and avowedly "progressive" policy agenda[222] and even advocate constitutional amendments that would enshrine various substantive economic policies against majoritarian decisionmaking.[223]

---

217 Britton-Purdy et al., *supra* note 214, at 1829.

218 *Id.* at 1794.

219 *Id.* at 1828–29.

220 *Id.* at 1831.

221 *Id.* at 1833; *see also, e.g.*, Kate Andrias, *The Hard Questions About Constitutional Political Economy*, Balkinization (Apr. 25, 2022), https://balkin.blogspot.com/2022/04/the-hard-questions-about-constitutional.html [https://perma.cc/9JBR-T9AE] (advocating "a more democratic and egalitarian political economy"); Kate Andrias, *New Democracy: Finding Hope in the Past and Heavy Lifting for the Future*, Notice & Comment (July 21, 2022), https://www.yalejreg.com/nc/symposium-novak-new-democracy-03/ [https://perma.cc/BUB2-PAAU] [hereinafter Andrias, *New Democracy*] (asserting that "a more equal distribution of resources, material security and dignity, and social control of capitalism are part and parcel of the democratic project"); *cf.* Kate Andrias, *Labor and Democracy*, *in* Oxford Handbook of the Law of Work (Guy Davidov, Brian Langille & Gillian Lester eds., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575059 (linking "the goals of workplace democracy, economic democracy, and political democracy").

222 *See* Britton-Purdy et al., *supra* note 214, at 1833–35; *see also, e.g.*, Jedediah Britton-Purdy, *The Republican Party Is Succeeding Because We Are Not a True Democracy*, N.Y. Times (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/opinion/us-democracy-constitution.html [https://perma.cc/KF5P-6WSY].

223 *See* Amy Kapczynski, Aziz Rana & Robert L. Tsai, *New Year, New Amendments*, LPE Blog (Jan. 10, 2022), https://lpeproject.org/blog/new-year-new-amendments/ [https://perma.cc/G44W-Q4HA].

To be sure, many law-and-political-economy scholars share the traditional progressive skepticism of courts.[224] Proponents of the democratic defense can thus be understood as bucking that longstanding consensus and inviting a reconsideration of civil litigation's egalitarian potential. But insofar as proponents couch that invitation in terms of "democracy," they follow many contemporary political and legal theorists in regarding democracy as a particular substantive moral vision to be imposed rather than a process for continually (re)negotiating disagreements about the meaning of equality and other values, and they thereby introduce a less political conception of the ideal into the democratic defense of civil litigation.

III
Depoliticized Democracy in the Democratic Defense of Civil Litigation

The democratic defense turns out to comprise several distinct democratic functions that civil litigation is reputed to perform, and those functions turn out to reflect several distinct conceptions of democracy. The conceptions of democracy implicated by the democratic defense, moreover, vary in terms of how political they are—how much they focus on the collective exercise of political power and how much they tolerate ongoing disagreement about fundamental rights and values.

In this Part, I argue that the less political elements of the democratic defense often end up overshadowing the more political ones. That's for at least two reasons: first, the more political elements most plausibly apply to public law litigation, yet the democratic defense purports to justify civil litigation writ large; and second, the different democratic functions and their underlying conceptions of democracy can conflict with one another.[225] To comprehend all civil cases and to navigate such conflicts, proponents tend to emphasize the less political functions and conceptions. More specifically, Section III.A identifies several *depoliticizing moves* made by proponents of the democratic defense—systematic patterns of argument whereby a

---

224 *See, e.g.*, Matthew Dimick, *On Courts, Exchanges, and Rights*, LPE Blog (July 22, 2021), https://lpeproject.org/blog/on-courts-exchanges-and-rights/ [https://perma.cc/3LNK-P24S]; *see also supra* note 27 and accompanying text.

225 *Cf.* Lahav, *supra* note 4, at 148 (acknowledging, in passing, that the various "democratic values" she ascribes to litigation "sometimes conflict" and thus "require trad[e-]off[s]").

seemingly political claim about civil litigation gets cashed out in less political terms. Section III.B then suggests that these forms of depoliticization can hinder efforts to understand and defend litigation as an institution by obscuring litigation's most distinctive features and therefore misapprehending the nature of the threats posed by the various recent attempts to curb (or, in some cases, weaponize) courts and litigants.

A. Depoliticizing Moves

One reason the democratic defense ends up having to resort to less political conceptions of democracy is that the more political ones fit only a relatively narrow slice of civil litigation. As some of the defense's proponents concede, appeals to "democracy" most intuitively apply to public law cases, and particularly structural-reform or "impact" litigation, rather than ordinary private law disputes.[226] That's because, as David Marcus has explained, the former cases more frequently involve "issues of high political or policy salience" and thus can more credibly claim to allow the parties to participate in democratic self-government.[227] This picture of public law litigation echoes Owen Fiss's celebration of "[a]djudication" as "the social process by which judges give meaning to our public values" and "[s]tructural reform" litigation in particular as the highest adjudicatory calling inasmuch as the "public values" it implicates derive from the Constitution.[228] Although litigation may not provide a forum for *collective* self-governance even in public law cases, proponents of the democratic defense can still plausibly portray such cases as affording parties an opportunity to participate in decisions about the exercise of political power and to contest prior political settlements—features that resonate with the defense's more political elements.

The more political conceptions of democracy invoked by the democratic defense have much less purchase, by contrast, when it comes to private law litigation, where it's often hard to understand the parties to be contesting competing values.[229] And yet, proponents extend the defense to encompass the full

---

226 *See, e.g.*, LAHAV, *supra* note 4, at 84, 123 n.20; Lahav, *supra* note 4, at 1659.

227 Marcus, *supra* note 16, at 1529.

228 Fiss, *supra* note 28, at 2.

229 I consider democratic accounts of private law adjudication more extensively in the next Part. *See infra* Section IV.A.

breadth of the civil docket, including private law cases.[230] "Every type of lawsuit," Lahav declares in a typical passage, "involves participation in self-government."[231] To support such general claims, however, proponents must emphasize features of litigation that are further removed from decisions about the exercise of political power and posit certain substantive values (and, indeed, particular conceptions of those values) as fixed ends to be pursued rather than subjects to be debated. They must, in other words, depoliticize their democratic defense.

Proponents face a similar depoliticizing imperative when different elements of the democratic defense end up conflicting with one another, which will occur whenever parties seek to deploy litigation in ways that threaten other values that proponents also deem "democratic." Just as popular majorities can enact legislation that undermines, say, social equality, so litigants can use the opportunities for participation in governmental decisionmaking and deliberation about matters of public concern afforded by litigation to assert rights claims that are in tension with that value. One response would be to concede that such uses of litigation are "democratic" but to nevertheless condemn them in light of other, competing values—as unjust or illiberal, say. But that kind of response is often unavailable to proponents of the democratic defense, who, we've seen, subsume many of those competing values within the concept of democracy itself.[232] Proponents must therefore choose which elements of their defense of litigation—the more process-based ones or the more substantive ones—to privilege. When presented with that choice, proponents typically take the more substantive, less political route.

To be clear, I'm not suggesting that such depoliticization is deliberate or conscious.[233] On the contrary, proponents

---

230 *See, e.g.*, Lahav, *supra* note 4, at 1659 n.7. Resnik, for her part, draws no sharp distinction between public law and private law cases in her many articles defending litigation in terms of democracy.

231 LAHAV, *supra* note 4, at 84; *cf.* Fiss, *supra* note 28, at 29 (acknowledging that "[c]onstitutional adjudication is the most vivid manifestation of [courts'] function" of "giv[ing] meaning to our public values" but insisting that "it also seems true of most civil and criminal cases").

232 *See supra* Part II.

233 For suggestive empirical evidence that individuals tend to subtly "rationalize their perceptions of democracy" so as to condemn substantive policies with which they disagree as "undemocratic" and condone substantive policies with which they agree as "democratic," see Suthan Krishnarajan, *Rationalizing Democracy: The Perceptual Bias and (Un)Democratic Behavior*, 117 AM. POL. SCI. REV. 474, 475 (2023).

themselves sometimes attempt to put a political spin on the democratic defense. Resnik, for instance, seems to deny (albeit offhandedly) that her appeals to democracy entail any specific substantive normative commitments.[234] Lahav even more explicitly casts her version of the democratic defense in political terms: she insists that "litigation is a way of continually resolving conflicts arising from the deep divisions that inevitably arise in a heterogeneous society and avoiding one side or the other resorting to violence," while recognizing that such resolutions are always provisional and that "conflict persists."[235] She argues that litigation "provides a public forum in which discussions of competing values—in the particular factual context giving rise to the conflict—may proceed with input from all interested parties"[236] and that "individual and collective lawsuits can and should be understood as controversies of the highest social import that should be brought to public attention and debated."[237] And she grounds all these claims in the twentieth-century Legal Process School, which sought to side-step intractable conflicts about substantive values by developing legitimate procedures for resolving disputes.[238] Other arguments adjacent to the democratic defense similarly describe litigation as a forum for negotiating disagreements about fundamental values. For example, Norman Spaulding cites "value pluralism" as a reason to make the civil justice system more "democratic," meaning more open to popular participation.[239] "[B]ecause we disagree [about morality]," Spaulding contends, "we need fora in which to determine (situationally and provisionally) which values are sufficiently constitutive to enjoy the force of law," a role he thinks litigation can perform.[240]

All these claims about litigation are political in the sense in which I've been using the term in this Article, in that they all contemplate ongoing contestation over the exercise of political power, rather than presenting litigation as a means of realizing

---

234 *See, e.g.*, Resnik, *Entitlements*, *supra* note 10, at 997.

235 LAHAV, *supra* note 4, at vii–ix.

236 *Id.* at 3, 29; *see also id.* at 5, 101; *cf.* Resnik, *Functions of Publicity*, *supra* note 46, at 210 (asserting that "court-based processes are one venue for debate" about "law and norms—substantive and procedural").

237 LAHAV, *supra* note 4, at 29.

238 *See id.* at vii–ix, 5 n.7; *cf.* Ernest A. Young, Erie *as a Way of Life*, 52 AKRON L. REV. 193, 208–12 (2018) (connecting the *Erie* doctrine to the Legal Process School).

239 *See* Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1389, 1395 (2008).

240 *Id.* at 1392.

particular moral values. But if proponents are going to defend a broad range of litigation and champion a broad range of values as "democratic," they'll have to fall back on conceptions of democracy that deemphasize ongoing contestation over the exercise of political power—that are less political. And that is indeed what proponents do, effecting the shift through several *depoliticizing moves*.

One move is to transfer the site of contestation by *associating* civil litigation with other, representative institutions, so that litigation continues to derive democratic legitimacy from those other institutions even as its connection to the exercise of political power becomes more attenuated. For example, while insisting that "open *courts* express the democratic promises that rules can change because of popular input," Resnik makes clear that those "promises" ultimately depend on representative institutions, noting how "[t]hrough democratic iterations—the backs and forths of courts, *legislatures*, and the public—norms can be reconfigured."[241] And notwithstanding her claims presenting litigation as a *site* of deliberation, she often subtly shifts to casting it as a *precondition* for deliberation in other institutions.[242] Lahav, meanwhile, purports to prescind from a comparative institutional analysis of the relative democratic credentials of litigation vis-à-vis those of other institutions,[243] but she ends up implicitly trading on those other institutions' more obvious democratic legitimacy. Consider again her claims about litigation's information-production function.[244] Because the revelation of information is not inherently democratic, she must link that function to other institutions more closely connected to collective decisions about the exercise of political power, such as legislatures and administrative agencies.[245] Lahav draws similar institutional connections in the course of her claims about deliberation. The legal challenges to New York City's "stop and frisk" police tactic, for example, "gave New Yorkers a structure and a language for debating and deliberating together about neighborhood crime and the way police treat minority men" and "spurred political participation outside the courtroom."[246] And while the *Brown*

---

241 Resnik, *Bentham*, *supra* note 10, at 61 (emphases added); *see also, e.g.*, Resnik, *Social Rights*, *supra* note 112, at 284.

242 *See, e.g.*, Resnik, *Functions of Publicity*, *supra* note 46, at 252.

243 *See* LAHAV, *supra* note 4, at x–xi, 16 n.26; Lahav, *supra* note 4, at 1662–63.

244 *See supra* Section I.D.

245 *See, e.g.*, LAHAV, *supra* note 4, at 47; Lahav, *supra* note 4, at 1689.

246 LAHAV, *supra* note 4, at 92–93.

decision may not have ended racial segregation on its own, it stands, in her view, as an example of how "litigation function[s] as a form of political activity that, in combination with direct action, brought about real change."[247] Litigation is thus transformed from an independent political activity into "a way to spur social and institutional change, in combination with other methods of regulation such as agency oversight, public lawsuits, legislative action, and community activism."[248] Indeed, on this account, "[o]ne need not always win [one's] case to obtain a victory for the principle at stake, and although the result is indirect, this too is a meaningful form of participation in self-government."[249] The upshot of these kinds of arguments is that litigation is an "expression of self-government" not taken on its own, but only in conjunction with other institutions that can more plausibly boast a role in collective decisionmaking about the exercise of political power.

Another depoliticizing move involves ostensibly staying within a more political conception of democracy but *diluting* the conception's requirements so as to better accommodate civil litigation's non-representative features. For example, while acknowledging that aggregate litigation doesn't permit as robust a form of participation as is available in individual lawsuits, Lahav insists that "the individual hearing is not the only democratically valuable form of participation in litigation" and urges that we "adopt a broader understanding of what it means to participate in litigation and to develop alternative forms of participation that are consistent with democratic values."[250] But the "alternative forms of participation" she identifies are less political, having little to do with collective decisions about the exercise of political power. Declaring that "[t]he important form of participation that must be preserved . . . is reasoned dialogue," Lahav expands that category to include rather mundane activities: "in a class action where there is a trial, individuals can participate as witnesses, as observers, or simply by following it in the media, participating in broader social discussion of the case, or taking on an activist role by using the trial to draw attention to their point of view."[251] She similarly maintains that

---

247 *Id.* at 45. This account of *Brown* contradicts the conventional wisdom among political scientists about the decision's impact. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 6 (1991).

248 LAHAV, *supra* note 4, at 54.

249 *Id.* at 90.

250 *Id.* at 91–92.

251 *Id.* at 92.

"bellwether trials" in aggregate litigation afford other parties "a kind of vicarious participation in the process of revealing what happened and why"[252] and that "public hearings" allow affected individuals to tell their "stories" and thus to help to construct narratives.[253] Time and again, the promise of participation in governmental decisionmaking[254] turns out to be redeemed by less direct forms of engagement.

Some of the claims of the democratic defense simultaneously gesture toward both of these first two depoliticizing moves. Consider Helen Hershkoff and Luke Norris's argument that litigation is one of the "political resources that can be deployed . . . in democratic contestation."[255] Although they never define the concept of "democratic contestation" precisely, they do purport to ground it in scholarship analyzing how certain social movements have enlisted litigation as part of a broader political strategy.[256] Invoking that literature suggests the first depoliticizing move, portraying litigation as a means of influencing collective decisionmaking in other, representative political institutions. But even that move can plausibly account for only the kind of public law litigation highlighted by representation-reinforcement versions of the democratic defense.[257] To defend more typical forms of litigation as well, Hershkoff and Norris must construe the concept of "democratic contestation" to include any activity that involves "access[ing] the state and mak[ing] claims in the forum of their choice that determine[s] the meaning and application of legal norms."[258] This gloss exemplifies the second depoliticizing move, as the idea of "contestation" is diluted to encompass not just recognizably political activities, but even bringing an ordinary lawsuit.[259] A combination of depoliticizing moves is sometimes required to

---

252 *Id.* at 93.

253 *Id.*

254 *See supra* notes 48–68 and accompanying text.

255 Hershkoff & Norris, *supra* note 16, at 46.

256 *See id.* at 46–47. For a recent account of the importance to social movements of the kind of "demand-making" that might occur in "impact" litigation, see generally Katrina Forrester, *Feminist Demands and the Problem of Housework*, 116 AM. POL. SCI. REV. 1278 (2022). And for a recent argument that social movements are essential to democracy, see generally DEVA R. WOODLY, RECKONING: BLACK LIVES MATTER AND THE DEMOCRATIC NECESSITY OF SOCIAL MOVEMENTS (2021).

257 *See supra* notes 95–96 and accompanying text.

258 Hershkoff & Norris, *supra* note 16, at 47.

259 This reading is confirmed by Hershkoff and Norris's criticism of the arbitration of ordinary legal claims for preventing "political contestation." *Id.* at 48.

give the democratic defense the justificatory breadth its proponents seek.

In a third depoliticizing move, proponents of the democratic defense sometimes subtly *shift* from a more political conception of democracy to a less political, more substantive one. A common slippage is from conceptions that emphasize collective self-rule to those that emphasize social equality and recognition of citizens' equal status as rights-bearers. Resnik, for instance, at one point denies that "democracy [is] defined only through popular sovereignty principles expressed by electoral processes" and instead adopts "a democratic political framework striving to ensure egalitarian rights and attentive to risks of minority subjugation."[260] She similarly concedes that she's eschewing majoritarian accounts of democracy in favor of those that impose significant substantive limits on the exercise of political power in the name of equality and individual rights.[261] Consistent with these shifts, Resnik presents egalitarian access to the civil justice system as inherently democratic, since "courts need to have all sectors of the social order use them in order to protect their own legitimacy in democratic politics."[262] Lahav similarly privileges social-egalitarian conceptions of democracy even in her accounts of public law "impact" litigation. In her description of litigation by homeless individuals challenging a municipal anti-loitering ordinance, for example, what begins as a tale of "participation in self-government" turns out to be "a story of members of one of the least powerful groups in society—the homeless—bringing a municipal government to account in the courts,"[263] an act of accountability that sounds in the more substantive accounts of democracy grounded in social equality.[264] To be sure, some of her language suggests a representation-reinforcement account of the litigation,[265] but she puts a social-egalitarian spin on Ely's theory, casting courts as "a refuge of *equal treatment* for those otherwise denied political rights."[266]

Proponents of the democratic defense make analogous transpositions to other depoliticized conceptions of democracy

---

260 Resnik, *Bentham*, *supra* note 10, at 54.

261 *See, e.g.*, Resnik, *Entitlements*, *supra* note 10, at 937.

262 Resnik, *Functions of Publicity*, *supra* note 46, at 247.

263 LAHAV, *supra* note 4, at 86.

264 *See supra* Section I.C.

265 *See* LAHAV, *supra* note 4, at 86.

266 *Id.* at 113 (emphasis added).

as well. For example, jettisoning a conception of participation as decisionmaking for a conception of deliberation as mere reason-giving, Lahav contends that "[c]ommunity observers, sample trials, and public hearings" all constitute forms of democratic "participation" because "they [all] require the presentation of proofs and arguments and in so doing promote the use of reason in public life."[267] Indeed, particularly striking for a chapter titled "Participation in Self-Government," Lahav *condemns* a proposal to incorporate voting into mass-tort settlements[268] on the ground that, "[a]lthough voting is a form of participation, introducing this form of decision-making is *corrosive* to the democratic value of litigation because it stifles reasoned deliberation and the presentation of proofs and arguments."[269] Resnik similarly shifts from participatory to redistributive conceptions of democracy, noting how "courts operating under democratic precepts [of broad participation] offer the potential to redistribute resources and power from government to individual, from one side of a case to another, and from disputants and decision-makers to the audience."[270]

Proponents of the democratic defense sometimes execute this shift from more to less political conceptions of democracy by incorporating certain social or institutional preconditions thought to promote democracy into the definition of democracy itself, so that the failure to fully satisfy those preconditions doesn't just undermine democracy but renders the offending institutions "undemocratic." Hershkoff and Norris, for instance, condemn recent procedural developments as a form of "oligarchy—that is, economic power translating into political power and undermining democracy."[271] On one reading, the "oligarchy" charge simply echoes the extensive political science literature demonstrating extreme economic inequality to preclude political equality and thus democracy,[272] which is compatible with treating a degree of economic equality as a precondition for even a more political conception of democracy as participation in self-government. At other times, however, Hershkoff and Norris's preferred conception of democracy seems not just to contemplate the avoidance of extreme economic inequality as a precondition for

267 *Id.* at 94.

268 *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010).

269 LAHAV, *supra* note 4, at 94 (emphasis added); *see also id.* at 94–95, 98.

270 Resnik, *Entitlements*, *supra* note 10, at 997.

271 Hershkoff & Norris, *supra* note 16, at 7; *see also id.* at 8.

272 *See supra* note 208 and accompanying text.

democracy, but to regard the pursuit of economic equality or distributive justice as a "democratic" goal in its own right. In that vein, they criticize efforts to restrict plaintiffs' access to litigation for "stunting democratic compacts" (by which they appear to mean statutes), particularly those regulatory laws that are "designed either to cabin excessive corporate power or to diminish inequality and level out power imbalances by providing anti-discrimination, workplace, and consumer protection guarantees to members of the public,"[273] and they advocate "jurisdictional design" that would enable "otherwise diffuse, uncoordinated, and underresourced parties" to "exercise countervailing power against" more powerful parties.[274] A more political conception of democracy might treat at least some of these policies as mandated by other values or perhaps even conducive to democratic governance, but in any case as legitimate subjects of popular contestation, whereas Hershkoff and Norris appear to suggest that a polity that fails to enact such policies is, to that extent, undemocratic.

Finally, rather than vacillating between different conceptions of democracy, a fourth depoliticizing move involves *recasting* distinct values as "democratic," so that they form part of the ideal. One of the values most frequently appropriated by proponents of the democratic defense is legality or the rule of law.[275] Consider Lahav's critique of arbitration, which is officially levelled in the name of "democracy" but ends up focusing on rule-of-law concerns, such as the facts that "the public is denied the public statement on the law th[e] dispute might have yielded," that "[s]ometimes arbitration allows those regulated to control how rules are enforced and even to change the rules," that "[a]rbitrators' decisions need not follow the law," and that "fewer wrongdoers are held to account."[276] "When people cannot sue to enforce their rights," she laments, "the rule of law is eroded."[277] Resnik similarly asserts that arbitration "has profound implications for the *democratic* character of courts"[278] only to make clear that her main concern is with the practice's lack of transparency about how disputes are resolved

---

273 Hershkoff & Norris, *supra* note 16, at 50.

274 *Id.* at 53; *see also supra* Section I.B.

275 *See, e.g.*, LAHAV, *supra* note 4, at 6 n.9; Lahav, *supra* note 4, at 1660.

276 LAHAV, *supra* note 4, at 25–27.

277 *Id.* at 127; *see also, e.g.*, *id.* at 55; *cf.* Hershkoff & Norris, *supra* note 16, at 51 (criticizing corporate "abuse" of certain jurisdictional doctrines as "anti-democratic" partly because it involves "insulating corporate wrongdoers from liability").

278 Resnik, *Social Rights*, *supra* note 112, at 280 (emphasis added).

and parties are treated.[279] More generally, she associates the traditional "openness" of courts with democracy but expounds her justification for transparency in terms of the rule of law,[280] noting, in particular, "the risk of the exercise of power without any sense of a need to account for that authority."[281] And the "twentieth-century aspirations . . . [to] provide 'equal justice under law'" become on her account "democratic orders."[282] Lahav also treats democracy and the rule of law more or less interchangeably in her criticisms of qualified immunity[283] and restrictions on prisoner litigation, the latter of which she deprecates as "antithetical to the rule of law" and inconsistent with "a democratic society which values the rule of law."[284] Indeed, for Lahav, "[t]he ability to participate in maintaining the rule of law by bringing suit is part of the foundation of civil society" and a form of "participation in self-government."[285]

The tendency of proponents of the democratic defense to conflate democracy with the rule of law is understandable. For one thing, one aspect of the rule of law is the requirement of "[e]qual treatment before the law,"[286] which strongly resonates with the social-egalitarian ideal that many political theorists take to justify democracy in the first place.[287] For another, just as there are more and less substantive conceptions of democracy,[288] so there are more[289] and less[290] substantive conceptions of the rule of law, and some of the more substantive

---

279 *See, e.g.*, *id.* at 285; *cf.* LAHAV, *supra* note 4, at 58 (arguing that litigation is beneficial because it generates "information about the law itself," allowing people to order their affairs).

280 *See* Resnik, *Functions of Publicity*, *supra* note 46, at 245.

281 *Id.* at 251.

282 *See* Resnik, *Social Rights*, *supra* note 112, at 267.

283 *See* LAHAV, *supra* note 4, at 81–82.

284 *Id.* at 125–26.

285 *Id.* at 87.

286 *See id.* at 112.

287 *See supra* notes 198–201 and accompanying text. It's this resonance that allows Hershkoff and Norris, for example, to condemn "unequal access" to litigation—a violation of the rule of law—as a threat to "*political* equality" and thus democracy. Hershkoff & Norris, *supra* note 16, at 45–46 (emphasis added); *cf.* Cummings, *supra* note 42 (manuscript at 5) (presenting "declining resources for access to justice" as not just a threat to the rule of law, but *ipso facto* a contributing cause of "democratic backsliding").

288 *See supra* Part II.

289 *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 66–67 (2011); PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 6 (2016).

290 *See, e.g.*, JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 210–11 (1979).

conceptions treat democracy and legality as two facets of the same ideal.[291] The rule of law also, as a practical matter, "supplies . . . the infrastructure of democracy," inasmuch as law constitutes the processes by which expressions of the popular will are translated into governmental action.[292] And some scholars have suggested that the rule of law can help to protect democracy against the excesses of populism.[293] But however intuitive such associations between democracy and the rule of law might seem, the point for purposes of this Article is that they tend to depoliticize the democratic defense by positing a fixed set of values potentially realized by litigation but not subject to popular contestation.

Another value that proponents often incorporate into the democratic defense is dignity.[294] Hershkoff and Loffredo, for instance, advocate "procedures that are informed by and take account of democratic values—values that often are identified as equality, dignity, and respect"—thus subsuming such "intrinsic process values" within the concept of democracy.[295] According to Lahav, "[t]he process of litigation acknowledges that people who are harmed are entitled to receive direct recognition from the person who caused them harm and from the court, and to be made whole in some way," and "[i]n so doing, litigation affirms the values of autonomy and human dignity."[296] And Resnik contends that "courts serve themselves as a site of democratic valorization of individual dignity."[297] Indeed, on her account, dignity stands along with equality and popular sovereignty in a triad of values falling under the umbrella concept of democracy, the implication being that all three values are intertwined.[298] But treating dignity (or equality or legality) as an aspect of democracy in this way posits a rather demanding

---

291 *See, e.g.*, GERALD J. POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW 111–12 (2022); Jean Hampton, *Democracy and the Rule of Law*, *in* 36 NOMOS: THE RULE OF LAW 13, 13 (1994).

292 POSTEMA, *supra* note 291, at 17; *see id.* at 211.

293 *See* Bojan Bugaric, *Can Law Protect Democracy? Legal Institutions as "Speed Bumps*,*"* 11 HAGUE J. ON RULE L. 447, 447–48 (2019).

294 *See, e.g.*, LAHAV, *supra* note 4, at 7.

295 Hershkoff & Loffredo, *supra* note 16, at 546, 612.

296 LAHAV, *supra* note 4, at 32; *see also id.* at 113.

297 Resnik, *Courts*, *supra* note 9, at 808.

298 *See* Resnik, *Entitlements*, *supra* note 10, at 973; Resnik, *Functions of Publicity*, *supra* note 46, at 208; Resnik, *Social Rights*, *supra* note 112, at 261–62; *cf.* Martin H. Redish & Victor Hiltner, *Adversary Democratic Due Process*, 75 FLA. L. REV. 483, 488 (2023) (advocating "liberal adversary democracy" as a model of procedural due process but defining that putatively democratic ideal substantively,

substantive criterion that an institution must satisfy to qualify as democratic, and because proponents fail to account for the likely significant disagreement about the content of that criterion, their appeals to such values depoliticize the democratic defense of civil litigation.

B. Depoliticized Democracy's Drawbacks

The foregoing depoliticizing moves have some rather obvious rhetorical advantages for the democratic defense of civil litigation. If litigation qualifies as "democratic" simply in virtue of its ramifications for decisionmaking in other institutions, then it can partake of the popular legitimacy of those other institutions even though litigants remain far removed from collective decisions about the exercise of political power. Likewise, if attenuated forms of popular engagement count as "participation in self-government," then litigation can trade on connotations of more consequential political activities to claim a place among the institutional mechanisms of popular sovereignty. And if genuine democracy is taken to require the pursuit of other important values, then litigation's contributions to those values can earn a kind of compound interest, in the form of a concomitant contribution to democracy as well. Appeals to democracy, through the various depoliticizing moves, become a way of yoking litigation to other institutions characteristic of contemporary liberal democracies and harmonizing some of our most fundamental moral commitments.

There are, moreover, compelling normative reasons to favor the more capacious conceptions of democracy evoked by the depoliticizing moves. As emphasized particularly by deliberative and egalitarian conceptions, democracy has significant material and institutional preconditions, including a degree of socioeconomic equality that prevents any particular individual or group from wielding disproportionate political power and robust civic institutions that help to inform, rather than distort, public opinion.[299] The thicker, less political conceptions of democracy recognize civil litigation's contributions to fostering these preconditions as specifically democratic benefits, whereas the thinner, more political conceptions associate the

---

as a way of "safeguarding" the "liberal values" of "individual development, growth, and dignity").

299 *See supra* note 208 and accompanying text. On the importance of expert knowledge-producing institutions for democracy, see generally ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

preconditions with other values and thus risk not only downplaying democracy's demands, but also subjecting the continued viability of democratic institutions themselves to the whims of majoritarian processes.[300] The more political conceptions of democracy also tend to give short shrift to "the problem of persistent minorities," which arises when the members of a demographic minority consistently fail to enact their preferred policies and so don't enjoy a truly equal share of political power, in violation of democracy's most basic premise.[301] To fully respect all citizens' political equality, some democratic theorists contend, the members of minority groups must be afforded access to countermajoritarian policymaking institutions, whose decisions should, in turn, also be recognized as democratic.[302] Finally, the more substantive, less political conceptions of democracy furnish a stronger basis for criticizing the status quo than do the more political conceptions, given the former's thicker normative content.[303] One can, of course, invoke other values besides democracy to condemn current institutional arrangements, but one might also balk at lending otherwise-defective institutions the air of legitimacy that attends the "democratic" label and so might instead seek to incorporate the other values into the definition of democracy itself, such that any institution that offends those values is, to that extent, undemocratic, too.

All that said, and without necessarily rejecting any of the specific claims made by proponents of the democratic defense, I want to suggest that the depoliticizing moves have significant drawbacks for efforts to understand civil litigation as an institution and to defend it against the most thoroughgoing contemporary critiques. For one thing, expanding the concept

---

300 For an account of how popular majorities can subvert democracy itself, and how constitutional courts can prevent such subversion, see Samuel Issacharoff, *The Majoritarian Threat to Democracy: Constitutional Courts and the Democratic Pact*, *in* MAJORITY DECISIONS, *supra* note 48, at 236. *See generally* YASHA MOUNK, THE PEOPLE VERSUS DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT (2018); NADIA URBINATI, ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY (2019).

301 *See generally* Thomas Christiano, *Democratic Equality and the Problem of Persistent Minorities*, 23 PHIL. PAPERS 169 (1994).

302 *See, e.g.*, Arash Abizadeh, *Counter-Majoritarian Democracy: Persistent Minorities, Federalism, and the Power of Numbers*, 115 AM. POL. SCI. REV. 742 (2021); *see also infra* Section IV.B.

303 *Cf.* TUSHNET & BUGARIC, *supra* note 29, at 11 (noting that "thick accounts make it too easy to find fault with actual practices," while "[t]hin accounts . . . may make it too difficult to do so"); JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 29–30 (2016) (observing that the ideal of constitutionalism is often used to justify limited government).

of democracy to encompass other values and activities less connected to popular sovereignty tends to elide tradeoffs between those other values and activities, on the one hand, and democracy, on the other.[304] It's commonly recognized, for example, that democracy and the rule of law can conflict with each other,[305] yet it's more difficult to appreciate those conflicts when the latter value is treated as an aspect of the former, as the subordinate value tends to be overshadowed by the paramount one. Now, to acknowledge such value tradeoffs isn't to justify a reactionary aversion to reform,[306] nor is it to deny that there are better and worse ways to resolve the conflicts. Liberalism, for instance, can be understood as a theory (or, rather, a family of theories) of how to systematically make tradeoffs between many of the values invoked by proponents of the democratic defense.[307] But the choices involved in those tradeoffs

---

304 *Cf.* John Tasioulas, *The Inflation of Concepts*, AEON (Jan. 29, 2021), https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason [https://perma.cc/MYC8-M83L] (identifying similar costs associated with "conceptual overreach" in public discourse about values such as human rights and the rule of law). One might resist my characterization of democracy here and throughout the Article as a full-fledged value that can potentially conflict with other fundamental values such as equality, dignity, and justice. On such a view, democracy is merely a regulative ideal derived from those other values, such that one can't fully specify the requirements of the former or give it normative content without adverting to the latter. Although I can't refute this view here, it strikes me as a poor fit for the democratic defense of civil litigation. For one thing, it would render proponents' pervasive invocations of "democracy" merely rhetorical shorthand for other values, whereas proponents seem to ascribe basic—and even intrinsic—significance to democracy itself. *See supra* Sections I.A, I.C. For another thing, even assuming that democracy is a derivative rather than a fundamental value, it carries certain normative ideals, such as popular sovereignty, in its wake, ideals that are just as likely to conflict with other fundamental values (unless one espouses some kind of—to my mind, implausible—value monism). The thinner, more political conceptions of democracy better reveal those conflicts—whether one conceptualizes them as conflicts between democracy and other values or as conflicts among the fundamental values thought to support a commitment to democratic institutions.

305 *Cf.* Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301, 307–08 (2013) (noting "the tension in a democratic society between promoting law compliance and protecting the right of citizens (rather than elite professional advisers) to decide whether and on what terms to comply with the law"). *See generally* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986).

306 *Cf.* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 7 (1991) (identifying common rhetorical techniques to justify such an aversion).

307 *Cf.* Samuel Issacharoff & J. Colin Bradley, *The Plebiscite in Modern Democracy*, *in* ROUTLEDGE HANDBOOK OF ILLIBERALISM 505 (András Sajó, Renáta Uitz & Stephen Holmes eds., 2021) (presenting liberalism as striking a particular "balance" "between plebiscitary and representational democracy").

should be transparent, whereas the depoliticizing moves analyzed in the previous Section tend to muddy the waters.

The depoliticizing moves also tend to occlude litigation's most characteristic functions and features,[308] which should form the core of any defense of the institution.[309] Indeed, critics on both the right[310] and the left[311] often portray litigation as an inefficient enterprise, implying that it endeavors to serve ends that could be better realized by other institutions. Appeals to democracy, ironically, feed into this narrative by inviting (perhaps unfavorable) comparisons between litigation and other, more obviously democratic institutions. If litigation is supposed to answer to democracy, then why not just make do with legislatures or even administrative agencies, both of which can stake a more credible claim to popular legitimacy?[312] The rejoinder, of course, is that some of the values deemed "democratic" by proponents of the democratic defense are *not* adequately vindicated in other institutions, but rather find their fullest expression in litigation alone. We risk losing sight of those values—whether a kind of relational or interpersonal morality[313] or the rule of law—when we fold them into a more general account of democracy.

Conflating other values with democracy threatens to distort efforts to defend civil litigation on several doctrinal and policy fronts, whereas focusing on litigation's most distinctive normative contributions might help to put the institution on

---

308 *Cf.* POSTEMA, *supra* note 291, at 99–100 ("To identify the rule of law with all the good we demand of a political community, to incorporate all standards of justice and rights into the ideal, obscures the rule of law's distinctive contribution to ordering of a decent society.").

309 *Cf.* Fiss, *supra* note 28, at 38 ("The legitimacy of particular institutions, such as courts, depends not on the consent—implied or otherwise—of the people, but rather on their *competence*, on the special contribution they make to the quality of our social life.").

310 *See supra* note 25 and accompanying text; *see also, e.g.*, Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015); Reda, *supra* note 25.

311 *See infra* Section IV.B.

312 Jonathan Gould identifies an analogous dynamic in debates about constitutional judicial review:

> A central problem for unelected courts exercising strong-form judicial review is the need to legitimate their role in the political process in the face of a tenuous democratic pedigree. One means of doing so is to present themselves as engaged in a mode of reasoning that differs from what goes on in the legislative and executive branches. If courts were to overtly make all-things-considered judgements about justice, economic efficiency, or other public policy considerations, critics could charge that such judgments are better made by elected officials or expert technocrats.

Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2053, 2073 (2022) (book review).

313 *See infra* Section IV.A.

a firmer political footing. Consider the controversy over pervasive, mandatory arbitration in the consumer and employment contexts. Although the current arbitration regime has been criticized on many different grounds, two of the most prominent and potent criticisms are that arbitration insulates powerful parties (particularly large corporations) from legal accountability for their wrongdoing by making it more difficult for individuals to vindicate their rights[314] and that it stifles the development of legal doctrine by relegating legal claims to a form of dispute resolution that needn't resolve disputes according to law.[315] Both criticisms sound in the rule of law, an ideal that has been understood to require broad access to rights-enforcing institutions[316] as well as resolutions of disputes that do justice between the parties according to binding, generally applicable rules—that is, "according to law."[317] With its practically inaccessible procedures[318] and ad hoc judgments, arbitration clearly imperils both rule-of-law imperatives.

And yet, proponents of the democratic defense, through the various depoliticizing moves, end up recasting such threats

---

314 *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 33–34 (2013); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 703 (2018); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3075–76 (2015); Resnik, *Diffusing Disputes*, *supra* note 26, at 2808–09; David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240–42 (2012); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110–14; Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–51 (2005). The primary culprit, according to critics, are class-arbitration bans. *See, e.g.*, Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T v. Concepcion, 88 NOTRE DAME L. REV. 825, 830 (2012); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 720–24 (2012).

315 *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409–13; Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 30 (2004).

316 *See, e.g.*, RAZ, *supra* note 290, at 217; Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 691 (2006). *But see* William Lucy, *Access to Justice and the Rule of Law*, 40 OXFORD J. LEGAL STUD. 377, 377–78, 390 (2020) (questioning the connection between the rule of law and access to justice).

317 *See, e.g.*, John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. LEGAL PHIL. 1, 13 (2018).

318 *See* Resnik, *Diffusing Disputes*, *supra* note 26, at 2879; Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 679 (2020).

to legality as threats to democracy.[319] That transfiguration will leave proponents rather flummoxed whenever popular majorities happen to enact policies that favor arbitration over litigation. More fundamentally, condemning widespread arbitration as "undemocratic" misapprehends the true nature of the threat posed by the practice: the enervation of institutions charged with holding people accountable for violating general rules of interpersonal conduct and with continually adapting those rules to changing circumstances. Those activities may, to be sure, have certain downstream benefits for democracy. When, for instance, even the weakest members of society can readily hold wrongdoers accountable, norms of social equality may well prove more robust, which may, in turn, help to promote political equality.[320] So, too, courts, by enforcing and developing public rules of interpersonal conduct, can help to preserve the primacy of those rules over private decisions, and at least when the rules at issue have a popular provenance, adjudication can to that extent plausibly be understood as vindicating democracy.[321] But such arguably democratic benefits, insofar as they materialize at all, supervene on litigation's most distinctive functions, particularly the assessment of interpersonal conduct for conformity with generally applicable rules—functions that are valuable in their own right, quite apart from any contributions to broader democratic practices. A defense of litigation vis-à-vis arbitration should focus on those unique functions, which arbitration by definition can't perform, rather than presenting litigation as akin to, and thus potentially fungible with, other institutions.

Appeals to democracy are also likely to complicate efforts to resist restrictions on aggregate litigation, including class actions and multidistrict litigation (MDL).[322] Just as widespread

---

319 *See supra* notes 275–293 and accompanying text; *see also, e.g.*, RADIN, *supra* note 314, at 33; David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 501–02 (2014).

320 *See infra* Section IV.A.

321 *Cf.* Noah Zatz, *Democracy Without Law?*, LPE BLOG (Oct. 24, 2022), https://lpeproject.org/blog/democracy-without-law/ [https://perma.cc/3FPT-CFCT] (arguing that democratically enacted laws constrain judicial decisionmaking, thus helping those laws to "stick").

322 In the case of class actions, the restrictions have been both legislative, *see, e.g.*, Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332, 1453, 1711–1715 (2018), and judicial, *see, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). As for MDL, defense-side interests have been advocating amendments to the Federal Rules of Civil Procedure that would significantly curb the discretion of judges hearing cases consolidated under the MDL statute, 28 U.S.C. § 1407 (2018). *See* Memorandum from Hon. Robert M. Dow, Jr., Chair, Advisory Comm. on Civil Rules, to Hon. John D. Bates, Chair, Comm. on Rules

consumer and employment arbitration is most forcefully criticized as an affront to legality, so the most straightforward justification for aggregate litigation appeals to the rule of law—to wit, that aggregation enables the enforcement of legal rights that would otherwise go unenforced and thereby helps to ensure accountability for widespread, diffuse rights violations. This has long been the standard justification for damages class actions, particularly those involving so-called negative-value claims, for which the costs of litigation exceed any potential recovery.[323] And while many MDLs involve mass-tort claims that are financially viable on their own, the device still facilitates rights enforcement by promoting aggregate settlements that relieve plaintiffs of the often-insurmountable burden of proving that they were individually harmed by the defendants' conduct in exchange for "global peace" for the defendants.[324] These effects of aggregation redound to the rule of law, which requires that rights be vindicated in practice and not just recognized in theory, as well as to the constituent ideal of legal equality or equality before the law, given that economically disadvantaged individuals are especially vulnerable to widespread, diffuse rights violations and thus benefit disproportionately from mechanisms designed to redress them.[325]

Once again, however, proponents of the democratic defense recapitulate these familiar arguments in terms of democracy,[326] a rhetorical shift that's as likely to fuel as it is to forestall calls to

---

of Practice & Procedure, Report of the Advisory Committee on Civil Rules 10–17 (May 13, 2022), https://www.uscourts.gov/sites/default/files/civil_rules_report_-_may_2022_0.pdf [https://perma.cc/5CSN-U78B].

323 *See, e.g.*, JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 53 (2015); Sergio Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1074–87 (2012); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22–24 (1996); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535–36 (2016); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1059–60 (2002); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294–95, 312–13 (2014); Resnik, *Fairness in Numbers*, *supra* note 14, at 134; David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002). For the locus classicus of this argument, see Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

324 *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 90–91 (2019).

325 *See* Gilles, *supra* note 323, at 1537–38, 1553–57.

326 *See supra* notes 275–293 and accompanying text.

curtail aggregate litigation. Both class actions[327] and MDLs[328] have been criticized for allowing plaintiff's lawyers to exploit agency costs to secure spurious settlements that yield generous attorney's fees but little benefit for victims. In response to such criticisms, some scholars have proposed reorganizing aggregate litigation on a "public administration" model, with the kinds of procedures characteristic of bureaucratic decisionmaking.[329] That kind of reform might help to address some of the current pathologies of aggregate litigation, but it would also highlight courts' relative lack of political accountability and thus potentially further undermine the legitimacy of their role in resolving complex cases.[330] For if aggregate litigation involves claims amenable to bureaucratic treatment, then why not channel those claims to more accountable bureaucratic institutions?[331] Invoking democracy bolsters this line of argument, calling attention to courts' comparatively *un*democratic pedigree. It also strengthens calls for "democratic" rights of participation within aggregate litigation, which threaten to undermine the collective benefits of aggregation.[332] To be sure, proponents of the democratic defense seem attuned to this risk, going so far as to disparage voting rights for members of class

---

327 *See, e.g.*, COFFEE, JR., *supra* note 323, at 136; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 418 (2000); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991). *But see* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006) ("In reality, there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all. Nor is there any economic reason to fret that entrepreneurial plaintiffs' lawyers are being overcompensated.").

328 *See generally* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019).

329 *See, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 54 (2007); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 403 (2019).

330 This is one of the main grounds on which Martin Redish has criticized class actions. *See* REDISH, *supra* note 16, at 16–17.

331 Indeed, many of the cases once resolved through aggregate litigation are now heard by administrative agencies, a migration that proponents of the democratic defense lament. *See* Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802 (2014).

332 *See, e.g.*, Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3182–83 (2013); *see also* Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 615–16 (2021).

actions in favor of less influential forms of participation.[333] But this puts proponents in the awkward position of, on the one hand, touting the "democratic" benefits of aggregate litigation and, on the other, denying participants any significant form of decisionmaking control over the process. Such paradoxes highlight democracy's ambiguous implications in the context of aggregate litigation.

As with arbitration, the fundamental problem is that defending aggregate litigation in terms of democracy abstracts from litigation's most distinctive functions, rendering it vulnerable to being supplanted by other institutions—in the case of aggregate litigation, "public administration." A more targeted defense, by contrast, would focus on aggregate litigation's role in promoting the rule of law by ensuring a degree of interpersonal accountability for widespread, diffuse rights violations, a function that doesn't reduce to processing claims for compensation and so can't be so easily commandeered by administrative agencies. This isn't to say that we can avoid every tradeoff by invoking alternative values such as the rule of law. Indeed, even as aggregation promotes the rule of law by facilitating rights enforcement, it also undermines the ideal by vesting judges with nearly unfettered discretion.[334] But grounding a defense of aggregate litigation in the rule of law invites measured reforms of the practice while preserving its fundamental attributes,[335] whereas appeals to democracy court lines of critique that contemplate replacing it altogether.

Nor is the democratic defense likely to safeguard the integrity of civil litigation against recent troublesome twists on the private enforcement model. Recall that the defense's proponents laud private enforcement as a form of popular participation in law enforcement.[336] That account, however, proves to be double-edged when the private enforcement model is deployed in ways that threaten other important values. Most controversially, Texas's Senate Bill 8 prohibits most abortions after a fetal heartbeat has been detected and authorizes enforcement

---

333 *See supra* notes 268–269 and accompanying text. On the forms of participation available in contemporary class actions, see Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849–50 (2017).

334 That is especially true of MDLs, where judges' procedural decisions are bound by few rules and rarely subject to appellate review. *See, e.g.*, Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 19–20 (2021).

335 *See, e.g.*, *id.* at 59–62.

336 *See supra* notes 268–269 and accompanying text.

of that prohibition exclusively through lawsuits by private parties rather than actions by public officials.[337] Some critics of the law who otherwise support private enforcement have denounced that procedural arrangement as "anti-democratic."[338] That criticism, however, upends the democratic defense's account of private enforcement, which implies that greater popular participation in law enforcement is inherently democratic, irrespective of the substantive policy ends being pursued.[339]

To avoid this implication, proponents must tailor their account of democracy—using the depoliticizing moves—so as to condone favored private enforcement regimes and condemn disfavored ones such as S.B. 8. Luke Norris, for instance, has recently argued that "popular participation in regulatory enforcement is democratically valuable" not categorically, but only when "it can (1) even out structural power imbalances that threaten to undermine democracy, (2) enable members of the public to bring the expertise of their direct, affected experience to dynamic regulatory contexts, and (3) help to facilitate democratic deliberation over regulatory norms."[340] Although these conditions can apparently be construed so as to preclude S.B. 8 as a "democratically valuable" private enforcement regime, they achieve that exclusion only by emulating the depoliticizing moves employed by proponents of the democratic defense. In particular, a concern with "structural power imbalances" echoes economic conceptions of democracy as fostering "countervailing power,"[341] while voicing one's "affected experience" to decisionmakers and "help[ing] to facilitate democratic deliberation" in other institutions both represent more attenuated forms of political participation. The surprising upshot of all

---

337 TEX. HEALTH & SAFETY CODE ANN. §§ 171.204–171.208 (West 2021); s*ee* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

338 Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1193 (2023). *Compare, e.g.*, *id.* (decrying private enforcement regimes such as S.B. 8 as "anti-democratic"), *with* David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347817 [https://perma.cc/82BY-YEJT] (proposing reforms to the Federal Rules of Civil Procedure that would facilitate private enforcement of governmental regulatory policy).

339 *See supra* notes 65–68 and accompanying text; *cf.* Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1310–16 (2023) (describing what he dubs "private suppression" schemes such as S.B. 8 as a (nefarious) form of "popular constitutionalism").

340 Norris, *supra* note 68, at 1489; *see id.* at 1518, 1522, 1527.

341 Conceptions that Norris himself explicitly embraces. *See, e.g.*, Norris, *Labor*, *supra* note 109; Norris, *Neoliberal*, *supra* note 109; Norris, *Parity*, *supra* note 109.

this conceptual maneuvering is that a democratically enacted statute that directly involves members of the public in law enforcement turns out to be "undemocratic," apparently because it fails to advance certain substantive normative commitments.

A more candid approach would condemn private enforcement regimes such as S.B. 8 not as *un*democratic, but rather as *too* democratic—for involving private parties so extensively in law enforcement as to undermine the rule of law. Beyond the substantive goals they're designed to achieve, the main concern with such regimes is that they put too many decisions about the allocation of legal resources and the use of legal institutions in the hands of private individuals who have no concrete stake in the proceedings and thereby subvert the impartial administration of justice, one of the core requirements of the rule of law.[342] And indeed, critics end up elaborating their "democratic" critiques of S.B. 8 in precisely such terms, noting, among other things, how the statute distorts traditional understandings of private rights of action by dispensing with any required showing of legal injury and stokes a kind of "legal vigilantism" by empowering unaffected third parties to sue violators.[343] This isn't to reject all private enforcement regimes as inconsistent with the rule of law. On the contrary, scholars have traditionally justified private enforcement as a way of *promoting* the rule of law by supplementing (often-deficient) public law enforcement efforts,[344] and proponents of the democratic defense likewise appeal occasionally in their positive accounts of private enforcement to the ideal of legality.[345] But proponents' simultaneous invocation of the ostensibly democratic value of participation in law enforcement obscures the stakes of laws such as S.B. 8, which force us to recognize (if we didn't already) that private enforcement can threaten as well as serve the rule of law.

Across the foregoing doctrinal and policy debates, the democratic defense distorts our understanding of civil litigation by shifting our attention, via the depoliticizing moves, from the

342 *See, e.g.*, Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 553 (2022); Huq, *supra* note 339, at 1321–26.

343 Michaels & Noll, *supra* note 338, at 1228, 1236.

344 For accounts of the relationships between public and private enforcement, see, for example, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 291–99 (2016); and Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 492–511 (2012).

345 *See, e.g.*, LAHAV, *supra* note 4, at 33.

institution's most distinctive functions to ones it (arguably) shares with other institutions; in doing so, the defense enshrines certain values as fixed goals rather than subjects of contestation. The defense potentially has a similar depoliticizing effect on our broader public discourse about civil justice as well. Civil procedure scholars have debunked the common caricature of litigation as a "neutral," apolitical domain, revealing the institution to be both a site and an object of contestation over important values just like any other political institution.[346] In fact, litigation implicates not only the more legalistic values I've emphasized such as interpersonal morality and the rule of law, but also more generic political values such as equality, distributive justice, and, yes, democracy. Yet the democratic defense risks suppressing fundamental disagreements about how litigation should respond to each of these values individually as well as how it should make tradeoffs between them when they inevitably conflict.[347] For, while the defense's invocation of democracy connotes contestation, its various depoliticizing moves treat certain (conceptions of) other values as aspects of democracy and thus beyond contestation. If democracy turns out to comprehend many of the other values we care about, then it becomes more difficult to debate whether and how litigation implicates those values, which come to function as preconditions for or limits on the politics of civil justice rather than subjects of it. A purportedly democratic account of civil litigation ends up making our discourse about the institution less democratic.

IV
Depoliticized Democracy and Technocracy in Non-representative Institutions

Although the democratic defense of civil litigation draws on several different conceptions of democracy, proponents end up systematically favoring the less political ones, a predilection that encourages the conflation of competing values and

346 *See generally* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 Denv. U. L. Rev. 287, 300–01 (2010); Danya Shocair Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 Fordham L. Rev. 2203, 2203–05 (2017).

347 *Cf.* Spaulding, *supra* note 17, at 1076 (doubting "any interpretive stance that takes at face value the proposition that the imagery and architecture of adjudicative space ha[ve] reflected or can serve any general didactic purpose or normative theory of adjudication—democratic or otherwise—in a society with plural visions of justice").

renders litigation vulnerable to displacement by other, more obviously democratic institutions. Proponents nonetheless hew to their democratic rhetoric apparently because of a perceived imperative to justify litigation's place in our political system specifically in terms of democracy, notwithstanding the institution's awkward fit with core democratic principles of popular sovereignty. To overcome that mismatch, proponents must expand the concept of democracy to encompass other values that litigation more plausibly serves. They thereby treat those other values as beyond popular contestation, presuming a degree of substantive agreement about the meaning and relative importance of the values that remains elusive in pluralistic liberal democracies.[348]

The democratic defense of civil litigation, in this respect, resonates with a larger family of recent legal theories that seek to justify various non-representative institutions as "democratic." More specifically, I argue in this Part that legal scholars have increasingly invoked democracy to legitimate institutions that, like litigation, possess a significant *technocratic* element—institutions that purport to ground their decisions in a particular subset of reasons or values, rather than an all-things-considered normative analysis.[349] Technocratic institutions stand out in a democracy because they profess to derive their legitimacy from adherence to their specialized form of rationality, not the popular will. This creates a need to reconcile the institutions with democratic principles. But precisely because

---

[348] Although I earlier questioned the aptness of Kessler and Pozen's "politicized"/"depoliticized" distinction as applied to the concept of democracy, *see supra* note 159, the dynamic identified in the previous Part does seem to parallel what they call the "adulteration" of depoliticized (in their sense) legal theories, a process in which "[t]he theories . . . become less purely procedural and more obviously charged with politically divisive meanings as newer iterations seek to appease constituencies that insist on the inviolability of various first-order commitments." Kessler & Pozen, *supra* note 159, at 1830.

[349] *Cf.* JOHN GARDNER, *Public Interest and Public Policy in Private Law*, *in* TORTS AND OTHER WRONGS 304, 327 (2019) ("Each [governmental official] ends up doing some things that might be described as 'cost-benefit analysis.' But by and large each has his or her own list of more or less specialized costs and benefits to take into account."). My invocation of technocracy obviously echoes Max Weber's famous account of bureaucratic rationality, *see* MAX WEBER, ECONOMY AND SOCIETY 956–1005 (Guenther Roth & Claus Wittich eds., 1968), but I don't mean to suggest that the functions performed by courts and administrative agencies are *purely* technical and completely devoid of any significant value choices. One can concede that even the most seemingly technical decisions are suffused with moral judgments, *see, e.g.*, K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 99–100 (2018), while recognizing that different institutions prioritize different sets of values in their decisionmaking.

they don't claim to heed the popular will, technocratic institutions can't be readily recast as "democratic" without adverting to other values beyond popular self-government—without, that is, depoliticizing democracy.

This Part contends that less political understandings of democracy underlie avowedly "democratic" accounts of courts and other technocratic institutions in both private and public law. One needn't posit a strict dichotomy between law and politics to recognize courts as at least partly technocratic institutions, in that they employ a specialized form of rationality and, even when appealing to more generic values, refract those values through various considerations regarded as "internal" to the law.[350] And yet, several prominent private law theorists attempt to justify the processes of common law adjudication as "democratic," a line of argument that requires them to invoke thicker conceptions of democracy.[351] Recent accounts of the relationship between democracy and constitutional judicial review—both supportive and critical—likewise construe the democratic ideal to impose significant substantive preconditions on the exercise of political power, such that judicial review is judged at the bar of democracy less for its compatibility with popular sovereignty and more for its capacity to advance particular substantive political goals.[352] And in administrative law, an increasing number of scholars contend not just that the administrative state is democratically authorized by Congress and accountable to the President, but that the kind of technical expertise distinctive of administrative agencies serves democracy by promoting fixed values such as reason giving and republican freedom.[353]

My treatment of each of these areas is necessarily preliminary and far from comprehensive, but I aim at least to note some of the parallels between the democratic defense of civil litigation and recent strains of democratic argumentation in private and public law, as well as to suggest that the invocation of democracy in those other contexts entails similar costs. Those costs include obscuring conflicts between democracy and other important values, missing the distinctive normative contributions made by technocratic institutions, and

---

350 For a recent account of a possible mechanism for this process, see Shyamkrishna Balganesh & Taisu Zhang, *Legal Internalism in Modern Histories of Copyright*, 134 HARV. L. REV. 1066, 1071–72, 1093 (2021) (book review).

351 *See infra* Section IV.A.

352 *See infra* Section IV.B.

353 *See infra* Section IV.C.

obfuscating the need to render those institutions accountable to other, representative institutions that are better situated to make systematic value tradeoffs. The need for such accountability is especially acute when it comes to civil litigation, and I conclude this Part by briefly considering some possible ways to balance technocracy and democracy in civil procedure.

A. Private Law Theory

Recall that the democratic defense of civil litigation purports to justify the litigation process not just in high-profile public law cases, but also in more quotidian private law cases.[354] To achieve that justificatory breadth, however, proponents must resort to the various depoliticizing moves, attenuating the connection between democracy and collective decisions about the exercise of political power and associating other important values with the democratic ideal.[355] Some private law theorists have recently ventured similarly depoliticized democratic accounts of private law adjudication—and with similar drawbacks for our understanding of adjudication's distinctive normative contributions in private law cases.

Echoing some of the contentions of the democratic defense, some private law theorists see democratic value in the procedures of private law litigation.[356] Consider John Goldberg and Benjamin Zipursky's "civil recourse theory" of tort law, whose central claim is that "a person who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her."[357] Although Goldberg and Zipursky appeal to many different values to justify this principle of civil recourse, they repeatedly characterize the right to recourse as a requirement of a specifically "liberal-democratic" polity,[358] comparable to the right to vote.[359] But their explication of the voting analogy only confirms their depoliticized understanding of democracy in the private law context. For the right to recourse, Goldberg and Zipursky explain, resembles the right to vote not because it

---

354 *See supra* notes 22–23 and accompanying text.

355 *See supra* Section III.A.

356 For an account of some of the procedural assumptions made by prominent theories of private law, particularly civil recourse theory, see generally Matthew A. Shapiro, *Civil Wrongs and Civil Procedure*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 87 (Paul B. Miller & John Oberdiek eds., 2020).

357 JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 3 (2020); *see also id.* at 31, 112–13.

358 *See id.* at 112–13, 125, 130, 139–44, 344.

359 *See id.* at 125–27.

affords victims any control over the exercise of political power, but rather because granting them that right respects their status as full, rights-bearing members of society.[360] The principle of civil recourse, on this account, proves "democratic" insofar as it honors citizens' equal social standing, just as elements of the democratic defense celebrate the procedures of civil litigation as an expression of social equality.[361] While this strikes me as a normatively attractive account of the role civil recourse can play in our political system, deeming that function "democratic" (or "liberal-democratic," rather than, say, just "liberal") unmoors democracy from decisionmaking about the collective exercise of political power, thus rendering civil recourse theory's democratic account of private law as depoliticized as its procedural cousin.

Civil recourse theory ends up offering a less political democratic account of private law because the putatively democratic function it ascribes to private law litigation—recognition of individuals' equal status as rights-bearers—conceives of litigation as constitutive of democracy and parties as passive beneficiaries of that value. Although it's possible to understand civil recourse's democratic function in more active terms, that requires shifting democracy's focus even further away from collective decisions about the exercise of political power. Rebecca Stone's recent reconstruction of civil recourse theory illustrates this tradeoff. In circumstances of "normative uncertainty about justice,"[362] Stone contends, "the norms of tort law are . . . properly regarded as only provisional wrongs," such that "the legal system ought to make room for plaintiffs and defendants to negotiate about the appropriate response to a defendant's legal wrongdoing in the light of their own, perhaps superior, conception of what justice between them requires," rather than imposing its own preferred resolution of the dispute.[363] Stone thinks that a system of civil recourse can facilitate this kind of negotiation "by giving potential plaintiffs the authority to decide whether to enforce their rights, thus enabling each to decide whether to seek the remedy that she might be legally entitled to or [to] instead reach some other resolution of her dispute with the defendant that, at least in

360 *See id.* at 143–46.

361 *See supra* notes 131–140 and accompanying text.

362 Rebecca Stone, *The Circumstances of Civil Recourse*, 41 LAW & PHIL. 39, 59 (2022).

363 *Id.* at 60.

her and the defendant's eyes, better realizes justice between them."[364] Stone insists, moreover, that this understanding of the civil recourse power vindicates Goldberg and Zipursky's voting analogy, for just as "[v]oting is a mechanism via which we participate in both the definition of our legal rights and duties and the construction of mechanisms for enforcing those rights and duties," so "we might view [civil recourse] as a mechanism via which litigants can shape the primary rights themselves," rather than being automatically subject to "the community's response to a legal wrong."[365]

As with Goldberg and Zipursky's original version of civil recourse theory, however, Stone's treatment of the voting analogy depends on a less political understanding of democracy. The civil recourse power may well give parties some say over the content of their rights and duties vis-à-vis one another, but in contrast to voting, they are contributing to an essentially private settlement of their bilateral dispute rather than to a public, collective decision about the exercise of political power. Indeed, Stone contrasts the state's role in crafting generally applicable norms to resolve "epistemic normative uncertainty about the true principles of justice" with parties' application of "more local considerations of justice that govern a person's particular relationships with others."[366] Whereas the former activity involves *collectivizing* decisions about the requirements of justice, the latter involves *privatizing* such decisions. The latter can thus be regarded as a "democratic" activity, comparable to voting, only according to a conception of democracy that extends the concept beyond the exercise of political power to the realm of interpersonal relations—to wit, a less political conception.

Other private law theorists emphasize what they regard as the democratic character of judicial lawmaking in private law cases, but in doing so, they presuppose similarly depoliticized conceptions of democracy. The Anglo-American common law tradition has long been celebrated as democratic because of its supposedly "deliberative" quality.[367] In a new, complex version

---

364 *Id.*

365 *Id.*

366 Rebecca Stone, *Private Liability Without Wrongdoing*, 73 U. TORONTO L.J. 53, 67–68 (2023); *see id.* at 70–71, 73–74.

367 *See, e.g.*, Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 7–11 (2003); Matthew Steilen, *The Democratic Common Law*, 10 J. JURIS. 437, 438 (2011). *But see, e.g.*, Eva Steiner, *Challenging (Again) the Undemocratic Form of the Common Law: Codification as a Method of Making the Law Accessible to Citizens*, 31 KING'S L.J. 27 (2020); *see also*

of this argument, Seana Shiffrin extols the "democratic virtues" of the process by which the common law is elaborated.[368] One such virtue of the common law, she contends, is its organic, decentralized development:

> Although any piece of common law jurisprudence is generated by a single judge or a handful of judges at most, through explicit reasoning, practices of precedent, and taking notice of other jurisdictional approaches, common law judges are in conversation with litigants, amici, and other judges over the generations and throughout the states. The issues themselves arise from the grass roots, in a way, as problems occur. Any party who may allege a prima facie cause of action may present arguments, have them heard, and elicit a reasoned response.[369]

Shiffrin here actually identifies several distinct "democratic virtues" of the common law, none of which is particularly political. The "conversation" she describes, for one, seems to amount to little more than a style of reasoning characteristic of judges, which, whatever its other "virtues," bears little relation to popular sovereignty. And while the idea of "grass roots" participation in judicial decisionmaking sounds more political, she ultimately glosses that activity in social-egalitarian terms, stressing how "the common law process embodies a judicial manifestation of the equal importance of each citizen."[370] Indeed, her more general account of "democratic law" (a rich theory that I can't hope to do justice here) is as much an account of social equality as it is one of democracy—propounding a vision of law befitting a "society of equals." Law is "democratic," on that account, insofar as it expresses due respect for everyone's status as equal members of the political community, and that is so when law can be regarded as a jointly authored communication of our shared moral commitments.[371] Shiffrin insists that the common law, at least as much as legislation, serves this "driving purpose of law . . . to give voice to mutual

---

sources cited *supra* note 41 (discussing the nineteenth-century U.S. codification movement).

368 SEANA VALENTINE SHIFFRIN, *Democratic Law and the Erosion of Common Law*, *in* DEMOCRATIC LAW 66, 84 (Hannah Ginsborg ed., 2021).

369 *Id.*; *cf.* Aditi Bagchi, *Private Law and Public Discourse*, 65 ARIZ. L.J. 541, 543 (2023) (arguing that private law litigation involves a form of "public discourse" that can build consensus around principles of justice).

370 SHIFFRIN, *supra* note 368, at 84.

371 *See* SEANA VALENTINE SHIFFRIN, *Democratic Law*, *in* DEMOCRATIC LAW, *supra* note 368, at 17–60.

moral commitments we must make to one another."[372] But notwithstanding the normative merits of that view (and they strike me as considerable), couching it in terms of "democracy" requires adopting a less political understanding of the concept, shifting democracy's focus from the collective nature of the *process* for producing law to the *quality* of the laws produced.[373] That's the same kind of shift that proponents of the democratic defense of civil litigation repeatedly make through the depoliticizing moves.

In contrast to the foregoing attempts to justify private law adjudication at least partly in terms of democracy, a more political understanding of the ideal would focus on subjecting the content of private law rules to ongoing contestation in representative lawmaking institutions. Martijn Hesselink has long advocated such a "democratization" of private law.[374] To be sure, Hesselink seems to be motivated partly by an expectation that representative institutions will be more likely than courts to adopt progressive, egalitarian private law rules, thus evincing an apparently less political commitment to democracy that echoes the kind of "economic democracy" championed by early-twentieth-century European social democrats.[375] But political science has shown that representative processes are at least as likely to yield incremental reforms as they are radical ones,[376] so Hesselink's call for more democracy in private law may prove political in effect even if not in motivation. And unlike the many other private law theorists who invoke democracy, he at least recognizes that private law adjudication isn't inherently democratic, but rather can be rendered democratically legitimate only insofar as it's subject to popular contestation—the hallmark of the more political conceptions of democracy.

By taking a more political approach to private law, we can better appreciate potential tradeoffs between democracy and private law adjudication's most distinctive normative contributions. A broad range of private law theorists deem private law's

---

372 SHIFFRIN, *supra* note 368, at 89.

373 Recent attempts to extend Shffrin's "communicative" theory confirm its depoliticized understanding of democracy. *See, e.g.*, Conor Crummey, *Why Fair Procedures Always Make a Difference*, 83 MOD. L. REV. 1221 (2020).

374 *See, e.g.*, Martijn W. Hesselink, *Democratic Contract Law*, 11 EUR. REV. CONTRACT L. 81 (2015).

375 *See, e.g.*, Helge Dedek, *Private Law Rights as Democratic Participation: Kelsen on Private Law and (Economic) Democracy*, 71 U. TORONTO L.J. 376 (2021).

376 *See* Aditi Bagchi, *The Challenge of Radical Reform in Pluralist Democracies*, 1 EUR. L. OPEN 375 (2022).

fundamental task to be the enforcement of a kind of relational or interpersonal morality—the rights private individuals hold against, and the duties they owe, one another.[377] One can, on this view, understand private law adjudication as a technocratic institution in the sense I've been using the term, in that courts in private law cases pay special heed to relational morality even at the expense of other important values. According to Arie Rosen, democracy threatens to distort this unique focus of private law because representative political institutions are structured in ways that lead them to slight considerations of relational morality in favor of more systemic concerns such as distributive justice.[378] While Rosen is consequently skeptical of calls such as Hesselink's to subject private law to greater democratic accountability,[379] that normative position isn't ineluctable; one could instead conclude that democracy demands that the people, through their elected representatives, be allowed to decide how best to balance relational morality with more systemic considerations, even if they're likely to consistently give one set of values short shrift. The point, in any case, is that, if democratic decisionmaking can indeed compromise the kind of relational morality that's characteristic of private law, then that's a reason to adhere to more political conceptions of democracy, lest we conflate relational morality with democracy and thereby overlook tradeoffs between those values. A more political understanding of democracy thus helps to clarify the significant normative stakes in allocating decisionmaking authority over private law between courts and legislatures.

B. Judicial Review

Constitutional theory has long been preoccupied with the compatibility of judicial review of legislation and democracy—the famous "countermajoritarian difficulty."[380] As that phrase suggests, discussions about the legitimacy of judicial review typically proceed according to a relatively thin, political

---

377 *See generally, e.g.*, ANDREW S. GOLD, THE RIGHT OF REDRESS (2020); GOLDBERG & ZIPURSKY, *supra* note 357; ARTHUR RIPSTEIN, PRIVATE WRONGS (2016); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (rev. ed. 2012).

378 *See* Arie Rosen, *The Role of Democracy in Private Law*, *in* 2 OXFORD STUDIES IN PRIVATE LAW THEORY 211, 232–34 (Paul B. Miller & John Oberdiek eds., 2023).

379 *See id.* at 231–37.

380 The term was coined by Alexander Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2nd ed. 1986). *See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L.J. 153 (2002).

understanding of democracy as self-government by popular majorities, with critics arguing that judicial review offends majority rule[381] and defenders either insisting that it actually accords with majority rule[382] or conceding that it doesn't but contending that it nevertheless promotes other goods such as the protection of individual rights.[383] Rather than retrace the familiar contours of those debates, I want to briefly consider in this Section a set of more recent defenses that attempt to reconcile judicial review with democracy by espousing less political conceptions of the ideal—conceptions that deem either more attenuated forms of political engagement or other important substantive values to be "democratic." A renewed line of critique that condemns judicial review and advocates a progressive constitutionalism in the name of democracy likewise turns out to understand the ideal in less political terms. Both proponents and critics of judicial review, it seems, increasingly condition the practice's democratic (il)legitimacy on its capacity to promote particular substantive values, a criterion

---

381 *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Recent calls for Supreme Court reform have given renewed voice to this line of critique—or at least calls for those reforms that would limit the Court's power to invalidate legislation. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2022) [hereinafter Doerfler & Moyn, *The Ghost of John Hart Ely*]. *But cf.* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 1 (2019) (proposing other reforms that would not necessarily curb the Court's power). More radically, some scholars invoke political conceptions of democracy to question constitutionalism altogether. *See, e.g.*, MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 108 (2022).

382 That might be because Supreme Court decisions end up codifying the achievements of sustained, mass political movements, as on Bruce Ackerman's "dualist" account of democracy, *see generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993), or because the people and their elected representatives support judicial supremacy on constitutional questions, *see generally, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

Of course, a commitment to majority rule less obviously precludes "weak" forms of judicial review that afford legislatures a significant role in recognizing, securing, and interpreting rights through the ordinary legislative process. *See generally, e.g.*, RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS (2008); GREGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER & FRANCISCO J. URBINA, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 2 (2018). For a recent theory of "weak" judicial review that seeks to foster broad popular participation in deliberative processes, see generally ROBERTO GARGARELLA, THE LAW AS A CONVERSATION AMONG EQUALS (2022).

383 *See, e.g.*, Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1699 (2008).

that resonates with elements of the democratic defense of civil litigation.[384]

Before turning to those arguments, I want to note another potential way of reconciling judicial review with democracy, one that adheres to a more political understanding of the ideal. Many constitutional scholars contend that, given various features of the original constitutional design, Congress and the President often fail to reflect the preferences of popular majorities, a democratic deficit only exacerbated by recent Supreme Court decisions.[385] This reality allays the countermajoritarian difficulty and weakens the democratic case for judicial deference to the representative branches, even according to more political conceptions of democracy.[386] Now, even this putatively political line of argument can end up lapsing into a less political understanding of democracy that posits various substantive policy goals as democratic imperatives rather than legitimate subjects of popular contestation.[387] But be that as it may, I focus here on arguments that defend judicial review as consistent with democracy even when the representative branches are in relatively good democratic working order.

One of the main functions of judicial review is to enforce constitutionally enshrined individual rights, and so one way to

---

384 Interestingly, some proponents of the democratic defense acknowledge the potential tension between their arguments about civil litigation and the countermajoritarian difficulty but decline to address it head-on. *See, e.g.*, LAHAV, *supra* note 4, at 9 & n.13; Lahav, *supra* note 4, at 1662.

385 *See, e.g.*, Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022); Michael J. Klarman, *The Supreme Court 2019 Term, Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020).

386 *See* Barry Friedman & Margaret H. Lemos, *Dysfunction, Deference, and Judicial Review*, 29 GEO. MASON L. REV. 2 (2022). Such defects in the representative branches arguably justify more robust judicial review under the first prong of Ely's representation-reinforcement theory. *See* ELY, *supra* note 95. More generally, the further a political system departs from majority rule, the easier it becomes to justify aggressive judicial review even under the most political conceptions of democracy. *See, e.g.*, SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015); Michael C. Dorf, *Constitutional Courts in Defective Democracies*, 62 VA. J. INT'L L. ONLINE 47 (2021); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1 (2019).

387 *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005); Aziz Z. Huq, *The Counter-Democratic Difficulty*, 117 NW. U. L. REV. 1099 (2023); *cf.* Jacob Eisler, *Polarized Countermajoritarianism*, 26 U. PA. J. CONST. L. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4592967 (arguing that recent invocations of "democracy" to justify judicial invalidation of legislation presuppose "substantive moral commitments").

reconcile judicial review and democracy is to deem those rights inherently democratic, such that courts necessarily promote democracy whenever they enforce them, even against popular majorities. This is the reconciliation strategy pursued by many contemporary liberal political theories.[388] Ronald Dworkin, for instance, famously rejected a procedural, majoritarian conception of democracy in favor of a substantive, rights-based conception on the ground that only the latter honors the government's obligation to treat all citizens with "equal concern and respect."[389] Because the violation of individual rights on Dworkin's account isn't just illiberal but undemocratic, judicial enforcement of those rights is consistent with—indeed, required by—democracy.

One can understand recent calls for courts to pursue a more economically progressive constitutional agenda as an attempt to expand the substantive requirements of democracy—and the role of courts in enforcing them—beyond individual rights to encompass economic equality or distributive justice as well. For example, invoking Lani Guinier's idea of "demosprudence,"[390] some scholars advocate a "demosprudence of poverty" whereby judges would adjudicate due process cases so as to be more solicitous of the concerns of "movements for economic justice."[391] As with Dworkin's rights-based theory of judicial review, such accounts of the judicial role regard some substantive policy positions—whether concerning individual rights or economic equality—as more "democratic" than others, irrespective of popular disagreement over those positions, thus reflecting a less political conception of democracy.

Even seemingly political democratic accounts of judicial review can turn out to harbor less political elements. Consider Robert Post and Reva Siegel's theory of "democratic constitutionalism," which seeks to show how social movements on both the left and the right have mobilized in response to Supreme

---

388 *See, e.g.*, Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327 (1990).

389 *See* DWORKIN, *supra* note 197, at 21–35.

390 *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2574 (2014); Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

391 Monica C. Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020); *cf.* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2022) (arguing that judges promote democracy when they align themselves with certain progressive social movements).

Court decisions.[392] Although Post and Siegel clearly sympathize with some of those movements more than others,[393] their account of the relationship between democracy and judicial review remains at least ostensibly political, in that they deem all popular mobilization around judicial review "democratic," regardless of the particular substantive ends a social movement aims to achieve.[394] Democratic constitutionalism instead proves less political for a different reason—namely, it treats even more attenuated forms of popular engagement as a kind of participation in self-government. Post and Siegel offer democratic constitutionalism as a response to "popular constitutionalism," a theory that condemns judicial review as undemocratic and seeks, in the words of one prominent proponent, to "tak[e] the Constitution away from the courts."[395] Popular constitutionalism thus presupposes a political conception of democracy, as it would consign constitutional questions to the realm of ordinary politics and subject them to the will of popular majorities. Given popular constitutionalism's commitment to popular sovereignty, democratic constitutionalism represents, as Jeremy Kessler and David Pozen explain, an "adulteration" of popular constitutionalism, substituting judicial review's potential benefits to democratic deliberation in other fora for

---

392 *See generally* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, Roe *Rage*]. For a similar account that emphasizes the constitutional significance of certain "super-statutes," see generally WILLIAM N. ESKRIDGE & JOHN A. FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010).

393 *See, e.g.*, Post & Siegel, Roe *Rage*, *supra* note 392, at 377.

394 More recently, however, Siegel has attempted to defend the Supreme Court's substantive due process decisions as "democracy-promoting," and in doing so, she posits the pursuit of contested substantive values such as "dignity" as a democratic goal. *See* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2021). That move depoliticizes democratic constitutionalism in the same sense as the theories canvassed in the previous paragraph. Indeed, democratic constitutionalism may be inherently depoliticized insofar as the social movements it celebrates seek to *entrench* certain Supreme Court decisions against subsequent popular contestation and revision. For another recent theory of judicial review that similarly emphasizes the role of social movements but also seems to veer in less political directions, see Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335 (2019).

395 MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (capitalization omitted); *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

genuine popular control over constitutional decisionmaking.[396] This can be understood as a depoliticizing move—the dilution of the ideal of participation in self-government to encompass popular responses to the decisions of non-representative institutions. While such popular engagement may be normatively desirable, and while it may even complicate the countermajoritarian difficulty, deeming it "democratic" requires espousing a less political conception of democracy than the ones underlying standard critiques of judicial review.

Whereas the foregoing constitutional theories seek to reconcile judicial review with democracy, other theories invoke democracy to condemn judicial review. In contrast to traditional criticisms of judicial review as undemocratic, however, these more recent critiques oppose judicial review not from a commitment to majoritarianism, but from the traditional progressive skepticism that courts will advance, rather than impede, redistributive goals, thus reflecting a less political conception of democracy.[397] The most prominent recent theory in this vein is Joseph Fishkin and William Forbath's "anti-oligarchy" constitutionalism.[398] Fishkin and Forbath seek to revive a historical tradition of "democracy-as-opportunity" that, they contend, viewed the promotion of a "broad and open middle class" as a constitutional requirement, albeit one that should be enforced primarily by the representative branches rather than the courts.[399] Even as they shift constitutionalism's focus from the Supreme Court to Congress and the President, though, Fishkin and Forbath posit rather far-reaching economic policies as democratic imperatives that the people's elected representatives have a (constitutional) duty to enact, thus understanding democracy in less political terms as a set of substantive ends to be realized through the exercise of political power rather than a process for negotiating disagreements about those ends. Extreme economic inequality can, of course, undermine political equality and thus democracy,[400] and so one can give Fishkin and Forbath's theory a more political gloss whereby democracy demands only that the wealthy be prevented from

396 Kessler & Pozen, *supra* note 159, at 1854–59.

397 *See supra* note 27 and accompanying text.

398 *See generally* JOSEPH FISHKIN & WILLIAM FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022). For an important precursor of their approach to constitutionalism, see ROBIN L. WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

399 *See* FISHKIN & FORBATH, *supra* note 398, at 8–12, 21, 28–31.

400 *See supra* note 208 and accompanying text.

parlaying their disproportionate economic power into disproportionate political power.[401] But the preferred economic program that emerges from their historical account goes well beyond that limited remit to demand extensive redistribution with the aim of reconfiguring socioeconomic relations on more egalitarian terms.[402] And rather than present that laudable goal as an imperative of distributive or social justice, they ground it specifically in democracy, a conceptual move that requires them to embrace a less political conception of the ideal.[403]

Theories such as Fishkin and Forbath's highlight what's at stake for debates about constitutionalism and judicial review in how we understand democracy. If, as they contend, democracy entails significant substantive preconditions, then the compatibility of judicial review and democracy reduces to the instrumental question whether courts are more or less likely than legislatures to secure those preconditions. And that is in fact how debates about the democratic credentials of judicial review now tend to proceed—whether the preconditions are understood to include economic equality, as on Fishkin and Forbath's account, or individual rights.[404] But if we instead understand democracy as a procedure for fairly negotiating fundamental disagreements on an ongoing basis, then most exercises of judicial review are more clearly undemocratic, as the countermajoritarian difficulty has long held, and the question becomes what normative benefits (if any) might outweigh those democratic costs. The most plausible distinctive normative contribution that judicial review might make to our political system involves enforcing individual rights and limits on governmental power—not in the abstract, but specifically according to law. Like civil litigation more generally, judicial review can potentially serve the rule of law. While different political theories will attach different significance to those aspects

401 *See, e.g.*, Gould, *supra* note 312, at 2082–83.

402 *See, e.g.*, William E. Forbath & Joseph Fishkin, *Constitutional Political Economy for a Democracy, Not an Oligarchy*, LPE Blog (Apr. 18, 2022), https://lpeproject.org/blog/constitutional-political-economy-for-a-democracy-not-an-oligarchy/ [https://perma.cc/3LDY-L4N5].

403 *Cf.* Ryan D. Doerfler & Samuel Moyn, *Liberals Need to Change the Rules*, N. Y. Times (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html [https://perma.cc/7ZEG-PQJA] (pronouncing approaches to constitutionalism such as Fishkin and Forbath's "a kind of antipolitics").

404 *See, e.g.*, Doerfler & Moyn, *The Ghost of John Hart Ely*, *supra* note 381, at 785–98.

of legality,[405] there can be little doubt that the rule of law sometimes conflicts with majoritarian decisionmaking. We can better appreciate those conflicts and more candidly confront the resulting value tradeoffs when we adhere to thinner, more political conceptions of democracy rather than conceptions that incorporate the very values with which popular self-government can conflict.

C. Administrative Law

Recall that proponents of the democratic defense emphasize "private enforcement" in their accounts of civil litigation.[406] That's because the United States has a weaker administrative state than many other Western liberal democracies and so must rely more heavily on private lawsuits to implement governmental regulatory policy.[407] Given the centrality of private enforcement to our political system, civil procedure scholars must account for the practice if they are to portray litigation generally as a democratic institution.

Many administrative law scholars have recently responded to a similar imperative to justify the administrative state itself in terms of democracy, invoking more and less political conceptions of the ideal to do so. The most political democratic justifications of the administrative state simply note the bureaucracy's accountability to the representative branches. In particular, just as one can argue that private enforcement is democratically authorized by Congress,[408] so scholars contend that Congress determines how much power to delegate to administrative agencies, while the President supervises agencies' decisions—two forms of democratic accountability that subject the structure and policies of the administrative state to ongoing popular contestation.[409] Such arguments may help to bolster the administrative state's democratic legitimacy, but they stop short of depicting administrative governance itself as a democratic activity. In this Section, I focus on another set of

---

405 *Cf.* Gould, *supra* note 312, at 2094–2100 (identifying tensions in progressive constitutional thought between empowering and constraining government and between facilitating majority rule and protecting minority rights).

406 *See supra* notes 65–68 and accompanying text.

407 *See generally* KAGAN, *supra* note 64.

408 *See* FARHANG, *supra* note 65; Farhang, *supra* note 65.

409 *See, e.g.*, Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 202 (2022); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021).

democracy-based arguments that take this further step, showing how they recast the technical legalistic and policy expertise characteristic of bureaucratic rationality as inherently "democratic" by associating other, more substantive values with the democratic ideal—that is, by depoliticizing democracy.

One value that administrative law scholars often deem "democratic" is reason-giving. Perhaps most prominently, Jerry Mashaw has argued that administrative law promotes "democratic legitimacy" by requiring agencies to give reasons for their decisions.[410] Such "reasoned administration," he contends, makes at least two contributions to democracy, one instrumental and one constitutive. Instrumentally, reason-giving requirements help to ensure that "administrative officials have implemented some plausible effectuation of the goals that Congress embedded in the statutes that have given those officials the authority to act," which, in turn, "reinforce[s] an electoral pedigree for administrative action that is tied" to Congress.[411] This claim understands democracy in relatively political terms, demonstrating how reason-giving can render agencies responsive to the representative branches and thus to ongoing popular contestation over the exercise of political power.[412]

But Mashaw also posits a second, constitutive relationship between reason-giving and democracy that reflects a less political conception of the ideal. "Equally fundamentally," he insists, "reason-giving connects administration to fundamental values in a liberal democracy[,] . . . includ[ing] the avoidance of arbitrary political coercion and the exercise of state power through processes that are both participatory and deliberative."[413] The shift from "democracy" simpliciter to "liberal democracy" signals a shift to a more substantive conception of the ideal, one that deems certain fixed values inherently democratic—for Mashaw, the kind of non-arbitrary and "deliberative" decision-making classically associated with the rule of law. Incorporating

---

410 *See generally* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117 (2007).

411 Jerry L. Mashaw, *Is Administrative Law at War with Itself?*, 29 N.Y.U. ENV'T L.J. 421, 423 (2021).

412 Scholars have identified other instrumental relationships between reason-giving and democracy, showing, for example, how administrative law helps to strengthen popular trust in government, one of democracy's essential preconditions. *See generally* EDWARD H. STIGLITZ, THE REASONING STATE (2022).

413 Mashaw, *supra* note 411, at 423.

rule-of-law values renders Mashaw's democratic account of administrative governance less political because popular contestation can imperil as much as promote those values. Indeed, even as Mashaw touts reasoned administration as a democratically legitimate way of reconciling competing substantive values,[414] he seems to recognize that administrative agencies must be at least partly insulated from political influence in order to safeguard the "deliberative" qualities he prizes in bureaucratic decisionmaking.[415] Other recent attempts to defend the administrative state's democratic legitimacy likewise equivocate between more electoral and more reason-based notions of bureaucratic accountability, ultimately appearing to follow Mashaw in favoring the latter when the two conflict.[416] None of this is to deny the significant normative contributions that the kind of "reasoned administration" celebrated by Mashaw and other scholars can make to our political system. But in couching those contributions in terms of democracy, accounts such as Mashaw's tend to elide tradeoffs between the ideals of legality and popular self-government as well as to suppress disagreements about how to resolve those tradeoffs.

Mashaw's emphasis on avoiding the "arbitrary" exercise of governmental power echoes classical civic-republican accounts of legality's role in ensuring individual freedom, understood as the absence of domination.[417] Several other administrative law scholars have recently invoked that conception of freedom, as well as related values such as social equality, to defend the legitimacy of the administrative state. But in doing so, they have recast those values as preconditions for true democracy, embracing less political conceptions of the ideal. This line of argument is increasingly associated with the so-called "law and political economy" movement, which also resonates with elements of the democratic defense of civil litigation.[418] According

414 *See id.* at 430.

415 *See id.*; *cf.* SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 269 (2021) (observing that the U.S. administrative process permits more popular participation than its European counterparts but also stressing "the value of insulating regulators from day-to-day political imperatives").

416 *See, e.g.*, Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023); Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929 (2017).

417 *See generally, e.g.*, PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

418 *See supra* notes 214–224 and accompanying text.

to the movement's adherents, democracy demands not just political equality, but social and economic equality and equal freedom as well, and administrative agencies are "democratic" insofar as they help to promote those values.[419] Indeed, administrative agencies, on this view, are so integral to realizing those egalitarian values, and those values are so intertwined with democracy, that the fate of democracy comes to rest on the administrative state.[420] Blake Emerson's account of the Progressive-era origins of the modern administrative state exemplifies this dual association of democracy with socioeconomic equality, and socioeconomic equality with administrative governance.[421] The ultimate aim of the Progressives who influenced the development of modern administrative agencies, Emerson contends, was to "provide the material and social requisites for individual freedom on the broadest possible scale."[422] To be sure, they were also committed to popular self-government and thus sought to promote greater "public participation in administrative agencies," but for them, "[p]articipation was a

---

419 *See, e.g.*, Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1 (2023) (appealing to "democratic political representation" to legitimate the administrative state in the face of "social conflict" but espousing a less political "trustee" model of representation); Katharine Jackson, *Democracy, Bureaucracy, and Rights*, LPE BLOG (Apr. 25, 2022), https://lpeproject.org/blog/democracy-bureaucracy-and-rights/ [https://perma.cc/DDA7-W278] (equating democracy with a commitment to "equal liberty," "equal economic liberty," and "social rights"); Katharine Jackson, *What Makes an Administrative Agency "Democratic"?*, LPE BLOG (Nov. 11, 2020), https://lpeproject.org/blog/what-makes-an-administrative-agency-democratic/ [https://perma.cc/3HK5-ZFWB].

420 *See, e.g.*, Andrias, *New Democracy*, *supra* note 221 (linking "the future of democracy" with "the future of the administrative state").

421 For Emerson's reading of the Progressive-era history, see generally BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019). For a similar account, see generally RAHMAN, *supra* note 349. For a democratic defense of administrative governance premised on an even thicker conception of democracy, see generally WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE (2022), which recounts the development of a form of economic democracy in the late-nineteenth and early-twentieth centuries defined by the bureaucratic pursuit of redistributive goals. *See also* Nicholas R. Parillo, *Symposium Introduction: Novak's "New Democracy: The Creation of the Modern American State,"* NOTICE & COMMENT (July 18, 2022), https://www.yalejreg.com/nc/symposium-novak-new-democracy-00/ [https://perma.cc/BZJ9-MSA4] (observing that Novak's conception of democracy "is democracy defined in terms of ends, that is, substantive policies to reach egalitarian distributive outcomes"); Jed Stiglitz, *Democracy and Then Democracy*, NOTICE & COMMENT (July 25, 2022), https://www.yalejreg.com/nc/symposium-novak-new-democracy-05/ [https://perma.cc/8W3J-LQB8] (similar).

422 Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2063 (2018).

means to furnish the legal and material requisites for a democratic society."[423] In this hierarchy of what they regarded as the different elements of democracy, the Progressives analyzed by Emerson seem to have anticipated certain contemporary strands of neo-republican thought, which go beyond republican theories that insist upon even strict political equality[424] to demand a more comprehensive form of equal freedom that also includes a degree of material equality.[425] While that more capacious conception of democracy may make for a more compelling moral vision of a just society, it has drawbacks in the administrative law context, glossing over fundamental disagreements about the meaning and relative importance of the other values subsumed within democracy and obfuscating the potential conflicts between those values and the legal and policy expertise that characterizes bureaucratic reasoning.

A more political understanding of democracy would throw those conflicts into sharper relief. Such an understanding might seek to render administrative agencies more accountable to the representative branches, as many scholars now advocate,[426] but it also might endeavor to subject agencies' decisions *directly* to ongoing contestation by permitting more popular participation in the administrative process. One can understand Daniel Walters's recent "agonistic" theory of administrative law as taking the latter approach.[427] Now, the

---

423 *Id.* at 2072. In other work, Emerson has more directly considered the various conflicts between different conceptions of democracy and other values. *See, e.g.*, Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371 (2022).

424 *See, e.g.*, Rainer Forst, *A Kantian Republican Conception of Justice as Non-Domination*, *in* REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 154 (Andreas Niederberger & Philipp Schink eds., 2013); Christopher McCammon, *Domination—A Rethinking*, 125 ETHICS 1028 (2015).

425 *See* CHRISTIAN SCHEMMEL, JUSTICE AND EGALITARIAN RELATIONS 81–87 (2021); *see also* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 298 (2012) (arguing that a republican theory of freedom requires both political equality and social justice, understood as non-domination in the social sphere). For a more explicit acknowledgment of the sweeping policy implications of the conception of democracy Emerson favors, see Blake Emerson, *The Social Foundations of Presidential Dictatorship and Democracy*, NOTICE & COMMENT (Nov. 11, 2022), https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-14/ [https://perma.cc/B94B-7GJK].

426 *See supra* note 409 and accompanying text.

427 *See* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022); *see also* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763 (2023). Walters's basic distinction between an "agonistic" approach to democracy and democratic theories that require "consensus" is similar, but also somewhat orthogonal, to the distinction I draw between more and less political conceptions of

theory of agonism that Walters invokes, though it starts from a more political understanding of democracy,[428] itself tends to depoliticize the ideal in various ways: treating extant social hierarchies as immutable,[429] positing certain substantive values as "democratic" imperatives beyond debate,[430] and resisting the institutionalization of popular contestation over the exercise of political power.[431] And when push comes to shove, Walters sometimes ends up privileging agonism's less political elements over democracy's core commitment to popular self-government.[432] But his account nonetheless rightly recognizes that a democratic approach to administrative law should take the existence of fundamental disagreements seriously and focus on fostering popular participation in the administrative process as an important way of negotiating those disagreements.[433] While greater participation risks "ossifying" agency

---

democracy. In particular, a consensus theory can still be political in my sense so long as it recognizes that any consensus is merely provisional and thus subject to ongoing contestation, which seems to be true of some of the theories Walters criticizes. What makes a conception of democracy less political on my account is instead its tendency either to focus on activities further removed from the exercise of political power or to insulate certain substantive values from ongoing contestation. And ironically, the theory of agonism that Walter embraces may itself prove less political in precisely those ways, as I go on to suggest.

428 *See, e.g.*, HONIG, *supra* note 29, at 200–11; CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY 1–18 (2013); CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 17-35 (2000); *see also* CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 225 (1989) (describing power in a democracy as "an empty place").

429 *See* Eva Erman, *What Is Wrong with Agonistic Pluralism? Reflections on Conflict in Democratic Theory*, 35 PHIL. & SOC. CRIT. 1039, 1042 (2009).

430 *See, e.g.*, Rafal Mańko, *Judicial Decision Making, Ideology, and the Political*, 33 LAW & CRITIQUE 175 (2022); *cf.* Scott Skinner-Thompson, *Agonistic Privacy and Equitable Democracy*, 131 YALE L.J. F. 454 (2021) (proposing an agonistic account of privacy but making clear that the central "democratic" aim of such an account is the "liberation" of certain "marginalized" groups from "oppression"). *See generally* SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS (2020).

431 *See, e.g.*, Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 67 (1990). Indeed, in its most radical forms, agonistic democracy rejects political institutions altogether. *See* Sheldon S. Wolin, *Fugitive Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 172; SHELDON S. WOLIN, *Norm and Form: The Constitutionalizing of Democracy*, *in* FUGITIVE DEMOCRACY AND OTHER ESSAYS 77 (Nicholas Xenos ed., 2016).

432 *See, e.g.*, Walters, *supra* note 427, at 76.

433 For recent proposals to "democratize" administrative decisionmaking along these lines, see Joshua D. Blank & Leigh Osofsky, *Democraticizing Administrative Law*, 73 DUKE L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4362529; Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1 (2023); and Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021).

decisionmaking and hindering effective government,[434] we'll be better positioned to weigh those democratic costs for administrative governance if we have a clearer sense of administration's distinctive normative contributions, which less political conceptions of democracy tend to occlude.

D. Balancing Democracy and Technocracy in Civil Procedure

Like civil litigation, other non-representative institutions such as private law adjudication, constitutional judicial review, and administrative governance all help to realize important goods—from the enforcement of relational morality and the protection of individual rights to the promotion of the rule of law and the application of reasoned decisionmaking. And like proponents of the democratic defense of civil litigation, many scholars of private and public law are understandably tempted to respond to recent criticisms of each institution as "undemocratic" by arguing that those goods are in fact components of democracy, such that the institutions are rendered democratically legitimate irrespective of their connection to the popular will. But as with the democratic defense of civil litigation, attempts to defend other non-representative institutions in terms of democracy prove problematic. For the disparate values that scholars deem "democratic" can conflict with basic democratic commitments to decisionmaking by popular majorities, while the institutions' most distinctive normative contributions aren't adequately captured by the concept of democracy. We may be able to mount a stronger defense of some of our most important political institutions, while better appreciating their limited role in our political order, if we assess those institutions on their own terms, rather than subjecting them to a normative logic to which they simply weren't designed to conform.

The uneasy relationship that non-representative institutions such as civil litigation bear to democracy reflects a more fundamental tension between the technocratic pursuit of important values and a democratic commitment to popular sovereignty. That tension is especially acute for liberalism, which has historically endorsed both technocratic expertise as a means of achieving effective governance and representative decisionmaking as a means of responding to pluralism.[435] Liberal political theories

---

434 *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

435 *Cf.* Gregory Conti, *How to Read James Fitzjames Stephen: Technocracy and Pluralism in a Misunderstood Victorian*, 115 AM. POL. SCI. REV. 1034, 1035 (2021)

span a spectrum of approaches to reconciling those competing imperatives, with different theories giving more weight to one imperative or the other. At one extreme, some theories seek to insulate many governmental institutions from popular influence so as to preserve the primacy of technocratic governance and the values it aims to realize. At the other extreme, other theories demand that technocratic institutions be subordinated to representative processes so as to maintain those institutions' accountability to the people. In between lies a range of reasonable arrangements that attempt to balance popular sovereignty with other fundamental values. But wherever we prefer to strike that balance, we can't avoid the tradeoff between technocracy and democracy so long as we wish to simultaneously heed the popular will and safeguard more substantive values that can be compromised by majoritarian decisionmaking.

Civil litigation is no more immune to that tradeoff than any other political institution, and one of the most pressing tasks confronting civil procedure scholars is to provide more guidance about how to balance technocracy and democracy in the civil justice context. As I've argued, the democratic defense of litigation distracts us from that task by recasting many of the values that conflict with popular sovereignty as themselves "democratic." A more political understanding of democracy, by contrast, allows us to better appreciate value conflicts and thus to more candidly debate the costs and benefits of different procedural policymaking arrangements. As with liberal political arrangements more generally, a procedural policymaking arrangement can prioritize either technocracy or popular sovereignty. An arrangement that privileges technocracy would resemble the current procedural rulemaking regime, in which procedural policy is set largely by a committee of experts drawn from legal practice, the judiciary, and academia. This approach arguably affords greater solicitude to procedural values, such as those enumerated in Federal Rule of Civil Procedure 1, but at the cost of limiting popular accountability for decisions about which procedural values to prioritize when they inevitably conflict—either with one another or with other, more generic normative commitments.

(identifying a tension in liberal thought between technocracy and pluralism). For a recent account of the tensions between liberal values and democracy in the specific context of administrative governance, see Jeremy K. Kessler, *Illiberalism and Administrative Government*, *in* LAW AND ILLIBERALISM 62 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2022).

On the other hand, an arrangement that privileges (a more political understanding of) democracy would acknowledge the inevitability of fundamental disagreements about important values, including procedural values, and reconceive democracy's more limited, but nonetheless essential, role in the civil justice context to be the development of fair procedures for negotiating those disagreements.[436] That might mean, as a practical matter, reforming the federal civil rulemaking process so as to make it more responsive to popular opinion, contra many scholars' exclusive preference for technical expertise.[437] Or it might even mean having Congress decide more issues of procedural design, in line with criticisms of the Rules Enabling Act process as an excessive delegation of Congress's lawmaking powers.[438] But whatever the exact institutional arrangement, rather than straining to reconceptualize litigation itself as a democratic activity, a political understanding of democracy would focus on democratizing the processes for making civil justice policy. That would encourage more forthright debates about the full range of values implicated by litigation—both the more legalistic ones and the more generic ones—and accommodate continual contestation over the shape of litigation in relation to those values. A thinner, more procedurally focused account of democracy's place in civil justice thus might help to put the politics back into civil procedure.

CONCLUSION

Though a prominent institutional feature of contemporary liberal democracies, civil litigation turns out to bear a complicated relationship to the democratic ideal. Litigation can plausibly be understood to perform not just one democratic function, but several, and to reflect several different conceptions of

---

436 *Cf.* WALDRON, *supra* note 29, at 160–61 (insisting on the need for "procedural principles" of political decisionmaking given persistent disagreement about substantive issues of justice).

437 *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 923–24 (1999); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 849–50 (1993); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801 (1991).

438 *See, e.g.*, Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006). *But see* Briana Lynn Rosenbaum, *The Legislative Role in Procedural Rulemaking Through Incremental Reform*, 97 NEB. L. REV. 762 (2019).

democracy, which tolerate political disagreement to varying degrees. There's a strong imperative to justify litigation in terms of the thicker, less political conceptions, so that it proves no less integral to our democratic system of government than representative institutions. A similar imperative underlies recent attempts to defend private law adjudication, judicial review, and administrative governance in terms of democracy. And yet, notwithstanding the moral appeal of conceptions of democracy that incorporate other important values, we should think twice before resorting to such conceptions in the civil justice context, lest we obscure value tradeoffs, downplay fundamental disagreements, and neglect non-representative institutions' most distinctive normative contributions. For a more compelling account of litigation that more clearly highlights what we risk losing by curbing the institution, we should look to values other than democracy—such as the rule of law—for which representative institutions don't bear primary responsibility. Litigation can still play an essential role in our political system even if it turns out not to be particularly democratic after all.