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Distinguishing Formal from Institutional Democracy

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DISTINGUISHING FORMAL FROM INSTITUTIONAL DEMOCRACY

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In response to the conservative entrenchment of federal courts, some liberal law professors have been revising theoretical arguments that had once put the judicial branch at the center of democratic representation.[1] In particular, these scholars desire a return to popular politics that places voters, lawmakers, and deliberation at the center, instead of lawyers, judges, and "rights."[2] They critique the courtroom for being less representative than other governing institutions and for being unable—both intellectually and institutionally—to handle the vast set of problems associated with government.[3] Elected officials are inherently more representative, they argue, not just because they are directly elected but because they have more involvement with a wider array of political interests, they have the opportunity to engage in more extensive debate about weighty issues, and they have the institutional capacity and financial resources to respond to complex problems.[4]

This backlash against judicial activism has been building for some time among left-leaning legal academics and has a number of roots, some stretching far beyond the current state of federal court conservatism. By the 1970s, legal theorists under the umbrella of "Critical Legal Studies" (CLS) had begun to question the potential transformative role of law,[5] as did civil rights scholars who became disillusioned by

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1. *E.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

2. *See, e.g.*, KRAMER, *supra* note 1, at 247-48 (arguing that the Supreme Court is an agent of the American public and therefore it is not the ultimate authority on the Constitution).

3. *See, e.g.*, SUNSTEIN, *supra* note 1, at 259-60 (concluding that democratic goals are promoted when courts defer to the judgment of legislators).

4. *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 1-6 (1999) (emphasizing the positive features of representative assemblies); Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343, 1355-57 (2005) (noting the arguments in favor of deferring to congressional decisionmaking).

5. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1534-37 (1991).

the tendency of public interest lawyers to represent their own interests as opposed to their clients' interests.[6] Labor law scholars added that federal courts created a particularly individualistic orientation to rights, leading judges to ignore broader class dynamics and inequality in favor of only skin-deep classifications that denied disadvantaged groups more substantive reform.[7] Law and society scholars questioned both the emptiness of legal "rights" and the structural inequalities that seemed to permeate courtrooms.[8] Political scientists, who had long been skeptical both of court capacity and its representative nature, further dismissed the potential of courts as independent actors.[9] Perhaps most notably, Gerald Rosenberg took on the most famous shrine to liberal judicial activism, *Brown v. Board of Education*,[10] providing evidence that the Supreme Court was merely a "hollow hope" as the famous decision had almost no impact on the ground.[11]

There is little wrong with a more cautious view of the possibilities and potential pitfalls of legal activism. Few will miss the bombastic bravado of lawyers and law professors who truly believed that they alone determined the winners and losers in political struggles (and for those who do miss them, they are as loud and strident as ever on cable news talk shows). In this Essay, however, I want to offer a few further considerations about democracy and electoral politics that ought to be considered before we move wholeheartedly with the new conventional wisdom. Largely, I want to focus on some of the reasons why the alternative to courts—electoral populism—is quite arguably

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6. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512-15 (1976) (describing the futility of attempts to accomplish school desegregation solely through the court system).

7. *See* Alan David Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1114-18 (1978) (discussing the difficult burden of proof placed on victims of employment discrimination and its adverse impact on systemic reform); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 159-61 (1982) (noting the high burden of proof placed on plaintiffs and its negative effect on social change).

8. *See, e.g.*, STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 203-04 (1974) (describing the "myth of rights" and its relationship to politics and power); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 149-50 (1974) (concluding that the legal system is more advantageous to those with wealth and power and proposing methods to reorganize the profession).

9. *E.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 293-98 (1977).

10. 347 U.S. 483 (1954).

11. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70-71 (1991). See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 450-55 (2004) and RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 149-53 (2004), for similar arguments discussing the effect of court activism.

equally problematic.[12] There has been a tendency among those who criticize court activism to provide a positive yet entirely undeveloped notion of American democracy radiating in an uncomplicated manner from the other institutions of government. Political scientists such as Rosenberg, and more recently Ran Hirschl, are compelling in their attacks on courtroom activism; but they are less so in their calls for activists to devote greater attention to elected lawmakers as they give little in the way of specifics as to whether the alternative forms of mobilization will have success.[13] Similarly, legal scholars such as Larry Kramer and Mark Tushnet rarely argue beyond the idea that people should "vote"; certainly, they do not develop what "We the People" substantively means nor critically engage literatures on legislative behavior and its consequences.[14]

In ignoring the behavior of elected branches, these arguments end up creating too much of a dichotomy between courts and popular politics that ignores both the inter-webs between the two and the complicated ways in which representation is promoted within each. Recent studies looking at courts within the broader context of American politics have found that the various institutions are deeply linked in the policymaking process.[15] Both branches need each other to ac-

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12. *Cf.* Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 409-10 (2000) (arguing that taking the Constitution away from the courts is not enough to achieve popular constitutionalism); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 845-51 (2002) (demonstrating the value of extrajudicial constitutional interpretation in the debate over the proper balance of power between the branches of government).

13. *See* ROSENBERG, *supra* note 11, at 342-43 (describing the limitations preventing the courts from producing social reform but failing to point out alternative methods of reform); HIRSCHL, *supra* note 11, at 151-53 (same).

14. KRAMER, *supra* note 1, at 233-41; TUSHNET, *supra* note 1, at 70.

15. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 4-7 (1998); ROBERT A. KAGAN, ADVERSARIAL LEGALISM 34-35 (2001) (exploring how the political culture has effected policymaking and policy implementation by lawyers and courts); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS 253 (2003) (finding that decisions made by Congress are dependent upon the predicted impact of judicial involvement); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE 3-6 (2004) (contending that Roosevelt and his administration were influential in increasing the commitment of federal courts to racial equality); R. SHEP MELNICK, BETWEEN THE LINES 265-66 (1994) (discussing the development of relationships between various policy committees and the courts); Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483, 483 (2003) (describing the historical and institutional relationships between elected officials and courts and the legal community's influence on civil rights enforcement); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 521-22 (2002) (discussing the political influence in the judiciary and its impact throughout history); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 35-37 (1993) (arguing that

complish their goals. Most pertinent is that elected officials rely on courts in a myriad of ways to conduct public policy and they frequently authorize legal activism to handle matters precisely because they are incapable of doing it themselves. If, then, courts are also failing to produce change, then perhaps this failure reflects a much broader phenomenon in American democracy: that our entire system of government, the American state as conceived, has great difficulty handling any problems in need of more than incremental change.[16]

Moreover, the argument that we need to move away from court activism has tended to interpret democracy in a manner that is formalistic rather than institutional. Formally, lawmakers are elected by voters and must face consistent re-elections; as such, they are more directly democratic than judges who are given life-time appointments by these lawmakers. But although democracy is at its essence the representation of a public's voice, it can be carried about in a plethora of ways, depending on which elements of the public we wish to hear, protect, and serve. Understood institutionally, democratic representation is a far more complex process that is produced by an environment where individuals act according to an assortment of rules and structures. In this context, both the elected branches and the courts come to be seen as merely *differently* democratic, offering different types of opportunities that often fluctuate wildly with historical context. Someone who is elected is not by definition more representative than someone who is appointed. For example, although legislators are directly elected, internal congressional rules make it far more difficult for many ordinary Americans to have their voice heard in the legislative body than in a court of law. In fact, one of the most common ways legislators represent their voters is by increasing voters' ability to gain access to the courts. Courts are hardly pure representatives of democracy, but as long as there are rules determining access—whether to the courtroom, to a lawyer, or to the opposing party's evidence—there is no reason why they cannot be as or more representative than the elected branches. The form that democracy takes in all of our branches of government, then, must be carefully examined and defended, and not assumed or defined only in a crude formalistic manner that argues votes and elections necessarily lead to democracy

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historically, legislators have invited Justices of the Supreme Court to assist in making policy decisions).

16. *See generally* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE (1982) (studying the process of American state building and its connection to the government's responses to social and economic change); *see also* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA 149-59 (1984) (arguing that the American political system can only induce desegregation policy changes incrementally).

and representation.[17] Before abandoning court activism, we first need to ask what type of democracy and representation we want. For those groups who find the elected branches less available or entirely unavailable, courts, for various institutional reasons, may well provide a powerful alternative.

I. COMPLICATING DEMOCRACY: SCRUTINY OF ELECTED OFFICIALS' BEHAVIOR

Most scholars (and judges) who critique judicial activism in the United States rely on an assumption usually implicit and never fully developed: that the elected branches will provide representation if people mobilize for it. As suggested above, the argument is largely formalistic—people can vote for legislators, they cannot vote for federal judges, and hence legislators more directly represent the will of the people. Elected officials are not perfect, this logic goes, but they are accountable if targeted by sustained appeals from an activist population, and since they do not behave any worse than judges in making determinations about democracy, America is better off privileging their position in legislative and political debates.[18] This is a powerful and dominant logic that has swayed majorities of the Supreme Court on numerous occasions to defer to decisions made by elected officials and parties when they are deemed representative.[19] The logic is also consistent with the circumstances in which the Court and many legal scholars perceive it to be legitimate for judges to interfere in the democratic process.[20] The Court interferes in democratic politics when it perceives that a class of people is unfairly "locked out" of the political process, particularly when classes are deemed by the Court to be "discrete and insular" and thus not only denied the right to vote, but also separated from the rest of society because of prejudice and the likelihood that their interests will not be represented by those who do vote.[21]

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17. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 927-35 (1994) (arguing that a federalist political system is a formality but not a reality).

18. TUSHNET, *supra* note 1, at 65-66; Kramer, *supra* note 4, at 1356-57.

19. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 581-86 (2000) (defending decisionmaking rights of political parties and rejecting states' limitations on them where the asserted state interests were not compelling); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997) (upholding the decision of the Minnesota legislature regarding election regulations where the state demonstrated a sufficient interest).

20. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289 (1982).

21. *Id.* at 1296; JOHN HART ELY, DEMOCRACY AND DISTRUST 135-36 (1980); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50

But the formalist arguments create problems for judges and legal scholars when they involve situations where groups are denied representation through less formal practices.[22] In fact, democratic theorists have long argued that any form of substantive representation, whether for groups traditionally viewed as disadvantaged or even for national majorities, is far more complicated. Voting is only one aspect and often not the most conclusive mode of defining democracy. Scholars have made extensive arguments about the ways in which power is embedded in spheres of society, leading not just to the law's entrenchment and reproduction of existing hierarchies (as CLS scholars might suggest), but also influencing the preferences of those being represented.[23] More pervasive in the literature are arguments coming from various "new institutional" scholars that emphasize the importance that rules and institutions play in denying both majorities and minorities of being accurately or fairly represented by the political process. As E.E. Schattschneider has famously written, "[p]olitics deals with the domination and subordination of conflicts."[24] Institutional scholars have shown that not all votes count, that not all voters are represented, and that elected officials will often act in ways that prohibit democracy from flourishing, all the while doing so in accordance with their democratic missions.[25] Party scholars have shown that when candidates try to get elected, institutional dynamics lead them to act in a manner that confuses many voters, ignores others, and provides meaningful representation to very few.[26] Congressional scholars, however, have provided the most detailed accounts of this phenomenon, showing how the elected incentives of legislators drive members to

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STAN. L. REV. 643, 643 (1998). The Court most notably suggested this line of argument in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), leading to decades of jurisprudence that has inconsistently attempted to define the contours of discreteness and insularity. *E.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442-47 (1985).

22. Today, judges and scholars are more willing to actively interfere in cases involving the rights of non-American detainees, a group that has no formal representation from voters. But even for American minority groups, many argue that representation may be formalistic, but hardly substantive. *See, e.g.*, LANI GUINIER, THE TYRANNY OF THE MAJORITY (1995) (proposing that a procedural re-organization of the electoral system might lend more legitimacy to the representation of voting minorities). For a discussion of whether African Americans have been represented in national electoral politics since 1965, see generally ELY, *supra* note 21; PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA (1999).

23. JOHN GAVENTA, POWER AND POWERLESSNESS 11-13 (1980).

24. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 66 (1960).

25. *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (examining the voting process from an economic perspective and its relationships with party politics in democracies).

26. *See id.* at 292-93 (describing the motives of elected officials).

pass legislation that is full of grandeur and symbolism, yet devoid of details and full of collective irresponsibility.[27] Members of Congress tend not to prioritize technical issues of legislation because they are not elected on such technicalities; nor are they interested much in the enforcement of policy. They respond to emergencies that are alerted to them by organized interests who find flaws in the enforcement of the policy—they do not "patrol" and make sure enforcement power is working.[28] The passage of symbolic legislation allows legislators to make broad appeals to an only half-interested national public while providing loopholes to electorally important interests that pay close attention to legislation and often resist the public policy.[29] Recognizing the costs of not responding to "concentrated" interests—groups that have a direct financial stake in the legislation—members have created a variety of ways in which they appease public matters with symbolic efforts, all the while protecting those who pay attention and (often) are most powerful.[30] Congress may very well have the power to make policy change; more typically, however, their legislative behavior creates mandates filled with loopholes and hollow enforcement policies so that those who do pay attention (i.e., lobbyists) will be happy.[31]

This does not mean that powerful interests never lose, but that there are long-term institutional reasons for why they win with great frequency. "Public interests"—i.e., those that benefit large numbers of people such as clean air or civil rights—are consistently hampered by collective action problems.[32] Because gains in civil rights will benefit all members of the relevant group regardless of whether they participate, people have an incentive to "free ride" and not donate money or time to the organization if they can benefit without paying any costs.[33] Moreover, many societal problems such as clean air and

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27. *See, e.g.*, GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 226-28 (6th ed. 2004) (explaining that congressmen want to please voters and satisfy policy demands, but they avoid responsibility for any negative consequences of policy decisions); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-57 (1974) (providing a discussion of "credit claiming," where congressmen pass legislation for particular individuals or groups to appeal to voters).

28. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 167-69 (1984).

29. MAYHEW, *supra* note 27, at 60-61, 127-31.

30. *Id.* at 127-36.

31. *Id.*

32. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 13-16 (1971); *see also* JANE J. MANSBRIDGE, WHY WE LOST THE ERA 6-7 (1986) (describing difficulties inherent in promoting legislation designed for public benefit).

33. MANSBRIDGE, *supra* note 32, at 119-20.

civil rights are relatively diffuse. People can get by day to day without it. In contrast, "concentrated" business interests have much more direct financial incentives to spend money on legislative battles, often millions, if not billions of dollars are on the line with decisions made over tax and trade laws.[34] When one's livelihood is on the line, people will prioritize and fight with all of their resources if their economic survival is threatened by potential legislation. It is for this reason that one way in which public interests try to gain power in legislative battles is to align their issues with a concentrated interest. Hence, President Clinton attempted to make public health care reform economically advantageous to HMOs, and civil rights groups emphasized the financial benefits provided to trial lawyers through their ability to receive attorneys' fees or damage awards, as the Civil Rights Act of 1991 provided.[35] These strategies bring powerful interests into the legislative battle on the side of public interests to equalize the power dynamic.

For this short Essay, my point is not to be exhaustive on this account, but to merely suggest that when we think of democracy institutionally, it necessitates an examination of internal dynamics that provide strong variations in representative outcomes. We need to spend more time examining exactly what it means for democracy to be representative and compare the opportunities and capacities of different branches of government.

The legal scholarship that promotes a return to populism, however, has not, to date, done very much of this. Take, for example, the critique that Larry Kramer makes of judicial review—updating Herbert Wechsler's argument that courts need not protect state interests because Congress does so automatically through its over-representation of small states in the Senate, through the committee system, and so forth.[36] Kramer argues that courts should stay out of congressional decisionmaking because Congress is more democratic and more representative of state interests.[37] Formalistically, this is correct. Substantively, this is problematic for a number of reasons that at least need to be explored in detail. Take just one example as to why: campaign spending by congressional candidates. Extensive fundraising and

34. JAMES Q. WILSON, POLITICAL ORGANIZATIONS 36-39 (1973).

35. *See* THEDA SKOCPOL, BOOMERANG: HEALTH CARE REFORM AND THE TURN AGAINST GOVERNMENT 45 (1997) (describing Bill Clinton's plan for health care reform during the 1992 campaign); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 443-44 (2003) (noting how some percentage of a damage award needs to go to plaintiffs' attorneys to induce them to pursue cases beyond their own interests).

36. KRAMER, *supra* note 1, at 85-86.

37. *Id.* at 233-48.

spending is widely considered to be essential for winning elections.[38] It is also widely assumed, though admittedly contested in the political science literature, that winning candidates are influenced by those who donate money.[39] Yet in recent years, for both the House of Representatives and the Senate, an increasing number of members are receiving a majority of their campaign contributions from outside of their state.[40] In the Senate, this is most dramatic, as in 2000, more than a third of the members received a majority of their funding from out of state.[41] If this is the case, then the formal requirements of representation face a challenge from institutional requirements. To get elected, members must appeal to their voters; to appeal to their voters, they must appeal to financial donors. In the end, the individuals that members are representing is at least a topic that requires considerable attention. Future work on court versus electoral forms of politics ought to take this complexity more seriously and attempt institutional analysis in areas where courts fail to more aggressively promote rights and policy.

II. UNDERSTANDING COURTS AND DEMOCRACY AS INSTITUTIONS

Once we understand all institutions as having both constraints and opportunities for political action, we need to attempt to examine courts in the same manner that legislative scholars study Congress—as a place of rules and incentives that can be used by political actors in pursuit of their goals. As with Congress, actors who use courts to promote political policies will find that certain types of policy promotion will have greater success than others. It is not simply that judges carry ideological and common-law baggage that determines outcomes and opportunities; the rules and structure of the courtroom provide their own opportunities and constraints. Marc Galanter's classic article on "repeat players" and "one-shotters" provides a model of this in legal scholarship that can be further developed in relation to broader questions about opportunities for plaintiffs and political activists in the courtroom.[42] Just as concentrated interest groups are able to receive particularized benefits to promote both short- and long-term goals in the legislature, wealthy repeat players dominate courtrooms both by promoting long-term rules that make it more difficult and costly for a

38. JACOBSON, *supra* note 27, at 42-45; Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 1001-05 (2002).

39. *E.g.*, JACOBSON, *supra* note 27, at 225-26; Frymer & Yoon, *supra* note 38, at 984.

40. Frymer & Yoon, *supra* note 38, at 1006-08.

41. *Id.* at 1007.

42. Galanter, *supra* note 8, at 97-114.

one-time plaintiff to stay in court to win a decision, even when the plaintiff has the "law" on their side.[43] Repeat players are willing to settle individual cases, satisfying the one-shotter with a financial payment, but also maintaining long-term interests of keeping potentially bad precedents off the public and legal record.[44] Repeat players also pay far more attention to procedural changes in the courts, making sure that rules regarding pleading requirements, evidence, discovery, and summary judgment are to their advantage.[45] By making it difficult, for instance, for a one-shotter plaintiff to obtain evidence of the guilt of a repeat player, the plaintiff is more likely not to pursue the case or take a settlement that allows them to go away without suffering too great an emotional and financial loss.[46]

Many of the opportunities provided in courtrooms directly intersect with the way legislators behave.[47] Because legislators have far greater success passing statutes that provide particularized benefits as opposed to public goods, Congress often attempts to promote the public good precisely by luring the support of lawyers—a concentrated interest—with a particularized benefit.[48] One example of this process in action has been Congress continually providing civil procedural reforms to lawyers. Courtrooms in the latter part of the twentieth century have expanded opportunities for disadvantaged plaintiffs by benefiting from rule changes that were authorized (or at least authorized by the absence of a veto) by Congress.[49] The Rules Enabling Act, passed by Congress (in 1938) with the strong backing of the American Bar Association (ABA), provided judges substantial influence over the content of the federal rules of civil procedure. The Act provided that a set of judicial committees led by the Judicial Conference, and made up of judges, lawyers, and elite law professors, would devise the procedure for all federal courts to follow in the litigation process, from initial pleading to trial decisions and appeals.[50] The procedural changes made it easier for potential plaintiffs to enter the courtroom, have a hearing with lawyers who will make legal arguments, and subsequently have opportunities for appeal if they are inadequately served. Document exchange, deposition, and

43. *Id.* at 100-01.
44. *Id.* at 101-02.
45. *Id.* at 122, 124 n.75.
46. *Id.* at 101-02.
47. The portion of this Essay discussing civil procedure reform draws from Frymer, *supra* note 15, at 486-87.
48. *Id.*
49. *Id.*
50. *Id.* at 486-87 (citation omitted).

interrogatories became available to federal civil litigants as a matter of course, enabling plaintiffs greater ease in finding out damaging evidence against defendants. Litigants could avail themselves of all these remedies under a relatively broad definition of the scope of "discovery" which permits a plaintiff to look at any information relevant to the "subject matter" of the dispute. Even "fishing expeditions" were allowed in order to determine legal disputes with the maximum factual information. In 1946, discovery rules were made even more expansive for plaintiffs by allowing the admission of evidence even if it is "not admissible at trial," as long as it appeared "reasonably calculated to lead to the discovery of admissible evidence."[51] These changes struck the balance in favor of those who petitioned for redress of grievances and shifted the burden onto those accused to come into court and make a case. Class action and joinder rules made it economically feasible to go to court despite the prospect of only small financial gain for the individual, while the use of special masters and magistrates enhanced the ability of the district judges to decide large complex cases of national importance.[52] By the 1960s, then, civil rights groups used these rules to gain significant political access and representation.[53]

A second example is the way in which Congress has handled civil rights enforcement in the latter half of the twentieth century. Starting in the 1940s, the government faced increasing pressure from a variety of sources—from civil rights groups to foreign governments and the Pentagon—to pass wide-scale reforms on civil rights.[54] As Congress continually failed to pass effective policy over various interests that were able to block legislation, both executives and legislators promoted court activism by providing lawyers with financial incentives to sue on behalf of sympathetic plaintiffs.[55] Congress has consistently passed statutes with provisions that give lawyers and courts the primary role in enforcement by explicitly authorizing suits by private parties to enforce regulations, allowing greater court oversight of the administrative process, and by providing attorneys' fees and damage awards for potential plaintiffs.[56] In the Civil Rights Acts of 1964, 1972, and 1991, politicians in each case balked at efforts that would make it eas-

51. FED. R. CIV. P. 26(b)(1).

52. Frymer, *supra* note 15, at 487.

53. Bell, *supra* note 6, at 493. And as with any form of representation, it was hardly unproblematic. Derrick Bell has famously argued, for instance, how lawyers representing class actions blurred the interests of their clients with that of their own. *Id.* at 490-91.

54. JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 24-27 (2002).

55. Frymer, *supra* note 15, at 487.

56. MELNICK, *supra* note 15, at 34; Frymer, *supra* note 15, at 483.

ier for victims of discrimination to find remedies in public venues.[57] Instead, enforcement powers were continually provided to private lawyers and Congress gave a variety of particularized benefits to the well organized trial lawyers lobby to give them the incentive to take on civil rights claims—most notable of these have been provisions that award attorneys' fees and (in 1991) tort damages when their clients win civil rights claims.[58] Unable to gather the votes to pass a bill that would promote civil rights as a public interest, Congress continually turned to finding ways to bring powerful concentrated interests—lawyers—into the process by giving them financial incentives to partake in civil rights reform.

Once put in place, these types of benefits are not so easily taken away by elected officials. Instead of pitting a public interest with huge collective action problems against a concentrated interest of private employers, it invests trial lawyers with a stake in promoting the public interest. As Samuel Issacharoff and John Fabian Witt have recently shown, in the 1950s and 1960s, plaintiffs' lawyers dramatically expanded the rate of litigation, becoming far more professional and specialized in their ability to challenge an already mobilized defense bar, allowing one-shotters to overcome the advantages that repeat players have in the courtroom.[59] Obviously this is not without its own problems as trial lawyers have often led the fight against more publicly equitable reforms, and many of the trial lawyers that promote civil rights often do so less in the interest of civil rights plaintiffs than their own agendas.[60] Nor are these legal provisions insurmountable to counterreform as recent reform efforts by the Republican Party and by conservative judges are increasingly making clear. But by keeping trial lawyers motivated to take public interest cases, they have achieved far greater success than those Americans without such high-powered (if self-interested) actors on their side.

III. CONCLUSION: THINKING OF COURTS INSTITUTIONALLY

When thinking of courts institutionally, it is important to recognize that they are not simply creations of congressional acts. There are further institutional features that simply make courts different from the legislative process. An example is physical access to the

57. Frymer, *supra* note 15, at 490.

58. Sharkey, *supra* note 35, at 443-44.

59. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1611 (2004).

60. THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICA 137 (2002); Bell, *supra* note 6, at 490-91.

courtroom and a judge. As mentioned above, access to courts, whether through standing or pleading requirements, varies dependent on both congressional lawmaking and court-based common law. But as Lon Fuller has famously argued, there are also more constant features about the courtroom that provide opportunities not parallel to the legislative process.[61] Adjudication is a process that allows those affected by disputes to have an opportunity to give proofs and reasons that will be decided by an independent arbitrator.[62] While clearly overstated and celebratory, there are important institutional truths that are only amplified when compared with congressional activity. Courts must respond in some way when addressed by potential litigants. In contrast to the legislative and executive branches that have a number of techniques that they can use to avoid responding entirely, courts are much more limited. Compare the power of committee chairs in Congress to schedule hearings for a potential bill with that of a courtroom judge. Committee chairs often have complete authority and if an issue is not of their liking, they can simply refuse to discuss it. Today with Republican control of the House and Senate, groups unwelcome by the majority party can simply be denied access to a hearing. In contrast, even with a similar conservative majority on the Supreme Court, there are far more opportunities for activists to be heard in a courtroom. First, the legal process provides far more entry points to getting issues raised on the table. Strategic use of forum shopping and multiple jurisdictions can provide entry points for activists through a single judge in a single state. As Martha Derthick describes, tobacco litigation exploded by lawyers filing class action lawsuits in front of sympathetic judges in Mississippi and Texas.[63] Procedural rules also allow a potential litigant, assuming they follow the relatively simple pleading requirements, a hearing in the courtroom and opportunities for appeal if they are inadequately served.

This is too short a space to provide a more systematic account of institutional opportunities in the courtroom. And as Galanter and others have well shown, these opportunities will also be problematic.[64] There are certainly downsides to what Robert Kagan calls "adversarial legalism," where courts are expected to play a central role in the development of American public policy.[65] Repeat players win more than

61. Lon L. Fuller, *The Form and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

62. *Id.* at 363.

63. MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 76-79 (2d ed. 2005).

64. Galanter, *supra* note 8, at 98-102.

65. KAGAN, *supra* note 15, at 3-4.

they lose; when they lose, lawyers take far too much share of the profit. But while many scholars use these problems as a premise to downscale the role of lawyers and judges, their arguments for alternatives ring shallow. In the American political system, as well as its economic system, wealthy people will benefit from politics—whether legislative or judicial—most of the time. Once the moral outrage over lawyers making a lot of money dissipates, we can see more realistically a political world of powerful elites in competition in multiple arenas. None of these arenas are much more than hollow hopes, but all of them provide unique opportunities at different political moments.[66] While wholesale attacks on lawyers and courts attract attention from the media[67] and no doubt sell books and get professors' attention, the less exciting argument is probably closer to the truth. Democratic politics are never pure or fair, and when we recognize this, it becomes clear that opportunities and constraints become visible throughout the political-legal system.

66. MICHAEL W. MCCANN, RIGHTS AT WORK 9-12 (1994).

67. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 1-7 (2004).