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NORMATIVE CONTROVERSIES UNDERLYING  
CONTEMPORARY DEBATES ABOUT CIVIL JUSTICE  
REFORM: A WAY OF TALKING ABOUT BUREAUCRACY  
AND THE FUTURE OF THE FEDERAL COURTS

ROBERT G. VAUGHN\*

INTRODUCTION

Federal judges survive as the only romantic figures in the three branches of government. Executive officials appear entangled in administrative bureaucracies and rarely emerge other than as functionaries. Service in Congress seems less a personal enterprise as the cost of elections, the structure of committees, the demands of constituents, the esoteric rules, and the proliferation of staff turn the legislator into a manager and a fundraiser. Judges, however, control their courtrooms and personally resolve issues of national importance. They stand against popular prejudice, redress wrongs, and thunder against mendacity and greed. Even the criticism of judges condemns their idiosyncrasies and their ability to implement personal visions of the law.

Given this perception, the links between courts and bureaucracy may seem strange, even jarring. Yet, in this article, I assert that the discussion of the future of the federal courts requires an examination of theories about executive bureaucracies. The romantic vision of federal judges captures one, but increasingly not the most, salient aspect of the federal judiciary. The recent literature regarding the judiciary chronicles the decline of this romantic perception and reflects unease, if not concern, about the future. Indeed, the fear of bureaucratic justice lies beneath much of the debate about civil justice reform. For example, participants in the debate about civil justice reform have repeatedly written about bureaucracy in examining the federal courts and their future.<sup>1</sup> Com-

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1. Discussions of bureaucracy have occupied a significant amount of the literature addressing civil justice reform and the future of the federal courts. Several books and articles use conceptions of bureaucracy as a central point of discussion. See DAVID NACHMIAS & DAVID H. ROSENBLOOM, *BUREAUCRATIC GOVERNMENT USA* 141, 141 (1980) (asserting that "while the judicial system has always been bureaucratic in terms of structure, it is now operating in an increasingly bureaucratic fashion as well"); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 66-67 (1981) (illustrating the

transformation of judges into administrators and rejecting the current judicial reform movement's emphasis on bureaucratic efficiency); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 878-90, 927-28 (1983) (discussing and rejecting the theory of bureaucratization of the federal court system but offering alternative dispute resolution (ADR) as a remedy to the growth in judges' case-loads); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1442-43, 1462 (1983) [hereinafter Fiss, *Bureaucratization*] (delineating, through analysis of particular scholarship, the bureaucratization of the judiciary as an inevitable process for which potential problems can be minimized); Wolf V. Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 L. & SOC'Y REV. 759, 759-60 (1977) (detailing the growing bureaucratization of courts and in turn rejecting that bureaucratization as a strategy for dealing with court growth); Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 264-65 (1980) (warning that the growth in the use of magistrates and administrative law judges is infecting the federal judiciary with a "carcinogenic" bureaucracy); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 777-81 (1981) (warning that the increase in the number of federal judges, law clerks, and staff attorneys, as well as the decrease in full court opinions may transform federal courts into bureaucracies); Gilbert S. Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469 (1983) (recognizing federal judges as administrators); Bernard S. Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 667 (1983) (arguing that inter- and intra-governmental relations are fostering bureaucracy in the judiciary and offering solutions including the restructuring of the functioning of legislative bodies and the courts, and simplifying court procedures); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REFORM 623, 624-25, 646 (1988) (discussing scholarly criticism alleging bureaucratization of the United States Courts of Appeals and why such criticism has resulted in little change in judicial behavior); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 654 (1980) (detailing the increased workload of the federal courts and suggesting management techniques and methods to "halt the dilution of judicial responsibility"); Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 251 (1981) (arguing that "[b]ureaucratization is reflected in the elaboration of the Court's institutional organization, particularly its hierarchical aspect"); Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478, 1478-79, 1485 (1983) [hereinafter Wald, *Bureaucracy & Courts*] (agreeing with Owen Fiss's general approach, but parting with Fiss on a specific solution); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 766-69 (1983) [hereinafter Wald, *Black-Robed Bureaucracy*] (refuting the idea that federal appeals courts are becoming a bureaucracy but recognizing that some institutional limitations need to be implemented in order to retain judges' abilities for personalized decision making).

Other articles use conceptions of bureaucracy as criteria for the examination of specific aspects of the federal courts. See Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 943-51 (1995) [hereinafter Baker, *Intramural Reforms*] (describing the expansion in the number of federal judicial support personnel and relating the concern that dependence on appellate staff has bureaucratized the judicial process); Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321, 1357-58 (1994) [hereinafter Baker, *Proposed Reforms*] (comparing the present bureaucracy of appellate judging with the role of an appellate judge 20 years ago); Philip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. CHI. L. REV. 628, 636-37 (1983) (commenting on the bureaucracy of the Supreme Court); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823 (1985) (arguing that "Continental civil procedure," such as is found in Germany, "avoids the most troublesome aspects" of U.S. civil procedure by taking the judicial process out of partisan hands, and "assigning judges rather than lawyers to investigate the facts"); Otto R. Skopil, Jr., *Long Range Planning in the Federal Judiciary: Some Observations on a Work in Progress*, 14 MISS. C. L. REV. 199, 204-05 (1994) (emphasizing that the federal courts, in a structural administrative governance sense, are not a hierarchical bureaucracy and as such "centralized plan formulation and implementation" in a corpo-

monly, a particular aspect of the proposals regarding trial or appellate practice is identified and then characterized as either engendering or reducing bureaucracy in the courts. In this exercise, the courts may be compared to the public bureaucracies of executive administrative agencies.<sup>2</sup>

This approach risks using language about bureaucracy as a rhetorical device expressing approval or disapproval of the practice at issue. Analysis turns on definition. The selection and application of the definition usually controls the result. Therefore, commentators can see the same practice as a confirmation of bureaucracy as well as its rejection.<sup>3</sup>

rate manner is difficult); Robert S. Thompson, *Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer's Wobble, or the Death of Error*, 59 S. CAL. L. REV. 423, 440-41 (1986) (noting how hierarchical control in the name of efficiency sometimes results in information not being "processed" by the "checks of adversarial process"); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1147 (1994) (arguing that "growth [in caseload] is compromising the effectiveness of the federal function").

2. See, e.g., NACHMIAS & ROSENBLUM, *supra* note 1, at 170-71 (asserting that judges are increasingly functioning as public bureaucrats by taking on administrative roles when their orders involve reforms to public institutions); Clark, *supra* note 1, at 68-89 (noting that the administrative trend in the judiciary may make it more closely resemble the executive branch of government); Kurland & Hutchinson, *supra* note 1, at 636-37 (discussing the likelihood that, as with Cabinet officers in the executive branch, judicial opinions are written by judicial staff rather than by judges alone); Vining, *supra* note 1, at 252-55 (arguing that if judicial opinions were to become the product of clerks, rather than judges, such opinions would be treated with the same disregard lawyers have for administrative opinions). *But see*, e.g., RICHARD J. RICHARDSON & KENNETH N. VINES, *THE POLITICS OF FEDERAL COURTS* 167-69 (1970) (finding that federal courts are not bureaucratic; they are instead political); Edwards, *supra* note 1, at 882-85 (distinguishing the judiciary from public service bureaucracies and noting that though judges may delegate responsibilities, few are likely to delegate decision making to their staffs).

3. The inconsistency of analysis arising from varying definitions of bureaucracy exists in much of the literature addressing the growing bureaucratization of the federal judiciary in specific contexts such as judicial clerks, compare Rubin, *supra* note 1, at 652 (arguing that the expanded duties of law clerks creates a risk of institutional judging), with Edwards, *supra* note 1, at 885-89 (asserting that growth of judicial support staffs will not lead to judges delegating decision-making authority to those staffs); central appellate staff, compare Richman & Reynolds, *supra* note 1, at 627-29, 636-38 (noting that over-reliance on staff attorneys endangers the judicial function), with Wald, *Black-Robed Bureaucracy*, *supra* note 1, at 778-80, and Wald, *Bureaucracy & Courts*, *supra* note 1, at 1485 (noting the benefits to a judge of having a central appellate staff); the number of judges, compare Wilkinson, *supra* note 1, at 1164, 1172 (asserting that an increase in the number of judges leads to more bureaucracy, thus arguing for limits on the expansion of the federal judiciary), with Richman & Reynolds, *supra* note 1, at 625 (describing literature viewing the increase in judges as an alternative to more administrative and bureaucratic approaches to justice); magistrate judges, compare Higginbotham, *supra* note 1, at 266-67 (condemning the growth in the number of magistrate judges and other judicial officers as establishing a bureaucracy not subject to the protections given to Article III judges), with Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 92-105 (1995) (proposing greater use of magistrate judges in pretrial to return accountability to the trial process); the institutions of judicial administration (including the Judicial Conference, the Federal Judicial Center, and the Administrative Office of the United States), compare Clark, *supra* note 1, at 76-77 (stating that judicial institutions, such as the Judicial Conference of the United States and the Federal Judicial Center, further the process of "[b]ureaucratic coordination" in the operation of the federal courts), with RICHARDSON & VINES, *supra* note 2, at 167-69 (arguing that the Judicial Conference and similar institutions do not stifle judicial autonomy); and curtailing oral argument, compare McCree, *supra* note 1, at 790-91 (emphasizing the risk of curtailing oral argument to the personalized judicial role),

Indeed, activities of the court viewed as worthy of protection from bureaucracy may be seen by others as the court's incorporation into the bureaucracy. Of course, the choice of a definition can offer powerful insights that help to frame the discussion. For example, Owen Fiss's proposal that bureaucracy poses the danger of a lack of accountability and responsibility identifies a central fear of bureaucracy at odds with the perception of the judge as a personal decision maker.<sup>4</sup> The articulation of that fear has influenced subsequent discussion.<sup>5</sup> Even the most thorough definitions, rigorously applied, however, can fail to clarify the discussion. For example, David Nachmias's and David Rosenbloom's application of Max Weber's definition of bureaucracy permits as much dispute as it resolves.<sup>6</sup>

Commentators recognize that the discussion of procedural and structural reforms implicates political and ideological considerations. These considerations are perhaps easier to perceive on issues such as the scope of federal jurisdiction<sup>7</sup> but they have been identified regarding

with Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 28-29 (1986) (asserting that the court must employ oral argument much less than it does now and that its construction must change if it is to be a useful tool at all).

4. Fiss, *Bureaucratization*, *supra* note 1, at 1443. Fiss expresses doubts about Max Weber's definition of bureaucracy, which emphasizes rules governing conduct, and prefers the approach of Hannah Arendt, which focuses on the impact on moral character of those within a bureaucracy through the fragmentation of human experience and the loss of a sense of individual responsibility. *See id.* at 1450-56.

5. *See, e.g.*, Edwards, *supra* note 1, at 880 ("agree[ing] with Fiss that bureaucracy in the sense of 'Rule by Rules' is unlikely to overtake the federal judiciary"); Merritt, *supra* note 1, at 1469-72 & n.5 (reiterating Fiss's views but countering some of them, arguing that "[t]he advent of the staff attorney, the summary affirmance, and oral dispositions from the bench seem justified, if used within reasonable limits"); Wald, *Bureaucracy & Courts*, *supra* note 1, at 1479-83 (concurring with Fiss that organizational reform of the judiciary is needed but rejecting his remedies as "too much toward the quaintly anachronistic notion that judicial responsibility requires freeing judges from worrying about how others act so that they can worry about doing everything themselves").

6. These authors base their analysis on Weber's description of bureaucracy and apply this definition to the federal courts. NACHMIAS & ROSENBLUM, *supra* note 1, at 148-62. Their book is notable for the rigor with which they apply Weber's definition and the range of aspects of the judiciary considered in this application. As noted above, different results might be reached by authors who choose other definitions of bureaucracy. *See supra* note 3 (noting different definitions of bureaucracy in judicial institutions). In addition, different results could follow the application of Weber's definition depending upon the aspects of the definition emphasized and the description of the circumstances to which it is applied.

7. Politics can be conceived, for example, both in terms of general values in conflict within the political system and in terms of the advantages and disadvantages that jurisdictional rules impose on different groups. As such, court commentators themselves conceive of politics in a number of ways. *See, e.g.*, MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 4-6, 17-19 (1991) (exploring how representational and counter-majoritarian principles have influenced federal jurisdiction); RUSSELL R. WHEELER & CYNTHIA HARRISON, *FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM* 22 (1989) (noting that in creating the federal court system, questions surrounding the organization and structure of federal courts were not mere technical questions, but at a deeper level passionate political conflicts); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-18

practice and procedure as well.<sup>8</sup> At heart, the discussion consists more of values than of techniques. Therefore, this portion of the literature rejects an approach to the debate that sees it as deciding how the federal courts can be more efficient—an approach that identifies reform as a technical matter divorced from normative considerations. This portion of the literature recognizes the normative content of reform proposals but often seeks to connect such content with specific values, such as judicial independence or individual rights.<sup>9</sup> These values are classically associated with images of the federal courts.<sup>10</sup> However, these proposals fail to identify a broader range of competing values.

Unfortunately, definitions of bureaucracy have also failed systematically to identify these normative considerations or to provide the basis for organizing and analyzing the welter of proposals and accompanying arguments. I believe, however, that the way one talks about bureaucracy can contribute significantly to the discussion regarding the future of the federal courts by identifying suppressed normative considerations, by explaining inconsistencies in argumentation as clashes between competing visions of judicial legitimacy, and by demonstrating that civil justice reform touches the deepest value conflicts in modern American public law.

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(1986) (emphasizing that rising caseloads reflect a growth in the availability of redress under law, not an explosion of litigation); Arthur D. Hellman, *Courting Disaster*, 39 STAN. L. REV. 297, 311 (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985), and noting the ideological foundations of judicial reform proposals); Mark Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 CONN. L. REV. 621, 637–40 (1990) (highlighting that the branches of government are affected by different interest groups and that conflicts about jurisdiction represent views on the character of the courts and the role of government, explaining why these differences prevent a consensus regarding the scope of federal jurisdiction in the political branches or in the courts, and noting that changes in federal jurisdiction are sometimes motivated not by caseloads but by a desire to change the way in which cases are decided); Wald, *Black-Robed Bureaucracy*, *supra* note 1, at 771 (noting that the influx of cases “reflects more legal protections, benefits, and access for those groups that previously only encountered the law as a weapon aimed against them”).

8. See, e.g., Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992) (arguing that the procedural court reforms proposed by the Council on Competitiveness implement a blatantly political agenda); Matthew R. Kipp & Paul B. Lewis, *Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act*, 28 U. MICH. J.L. REFORM 305, 311–16 (1995) (noting Lockean views underlying traditional federal procedure); Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a “Better Way:” Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 847–50 (discussing the various values and perspectives at issue in procedural reform); Tushnet, *supra* note 7, at 628, 630 (indicating how “the perceived need to do something about the outcomes of the cases the courts are handling” is a reflection of “the politics of jurisdictional revision”).

9. See, e.g., discussion and sources cited *supra* note 7 (noting the different influences and implications of procedural and structural reform on the federal court jurisdiction).

10. See, e.g., THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”); THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing life tenure of federal judges as a means of ensuring judicial independence to “guard the [C]onstitution and the rights of individuals”).

I propose to demonstrate that an examination of a way in which legal scholars have analyzed the structure of arguments about bureaucratic practices in executive administration can advance the debate about the future of the federal courts. To be successful in this regard, a language about bureaucracy<sup>11</sup> must permit an observer to identify the underlying values contained in the discussion, to place disparate practices and proposals within that framework, and to recognize how arguments supporting a particular proposition may be inconsistent with one another, as well as to predict the relationships between proposals and the values they support. To do this, I use the work of two administrative law scholars, Thomas Sargentich and Gerald Frug. Despite important differences between them, two of their articles provide comprehensive views of bureaucracy that go beyond argument over definition. Because of this comprehensiveness, they offer a more descriptive and analytical language that I believe illuminates the discussion about the future of the federal courts.

Thomas Sargentich's article, *The Reform of the American Administrative Process: The Contemporary Debate*,<sup>12</sup> focuses on broad theories about the "legitimacy and character of administrative decision making."<sup>13</sup> In so structuring the debate, Sargentich organizes proposals for reform of the administrative process in an informative and analytically powerful way. He identifies three ideals of the administrative process: the "Rule of Law Ideal," the "Public Purposes Ideal," and the "Democratic Process Ideal."<sup>14</sup> These ideals contain a core embodiment of how the administrative process should operate.<sup>15</sup> Because these ideals are not fully implemented in the reality of administrative practice, each contains an alternative expression reflecting the limitations that reality places on implementation of the corresponding core embodiment.<sup>16</sup> Each alternative expression also reflects the theoretical weaknesses of its respective core embodiment.<sup>17</sup> The core embodiment of the Rule of Law Ideal is formalism and its alternative expression is proceduralism. The core embodiment of the Public Purposes Ideal is instrumentalism and its alternative expression is the market. The core embodiment of the Democratic Proc-

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11. To avoid repetition of and grammatical difficulties with the phrase, "a way of talking about bureaucracy," I occasionally use the phrase, "a language about bureaucracy," as an alternative. In doing so I do not contend that the articles that I will examine create a "language," nor do I use the term in a figurative sense that they create something analogous to a language.

12. Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 [hereinafter Sargentich, *American Administrative Process*].

13. *Id.* at 394.

14. *Id.* at 392-93. Sargentich discusses the methodology of decision making in each of these ideals in Thomas O. Sargentich, *The Future of Administrative Law*, 104 HARV. L. REV. 769, 771 (1991) [hereinafter Sargentich, *Future of Administrative Law*] (reviewing CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990)).

15. See Sargentich, *American Administrative Process*, *supra* note 12, at 393.

16. See *id.* at 393-94.

17. See *id.* at 394-95.

ess Ideal is participation and its alternative expression is oversight.<sup>18</sup> These ideals reflect general philosophical and ideological positions regarding the role of government and administration.

Gerald Frug's article, *The Ideology of Bureaucracy in American Law*,<sup>19</sup> presents four stories or models that "justify bureaucracy."<sup>20</sup> These stories seek to reassure us that bureaucracies, with their potential for domination, are under control. Regardless, Frug argues that each is incapable of providing a basis for the control of bureaucracy.<sup>21</sup> His discussion unabashedly opposes bureaucratic organization, viewing it as inconsistent with democratic life.<sup>22</sup> These stories he calls the "Formalist Model," the "Expertise Model," the "Judicial Review Model," and the "Market/Pluralist Model."<sup>23</sup> Although considerable correlation exists between Sargentich's ideals and these models, there are important differences between Sargentich and Frug.<sup>24</sup> For example, unlike Sargentich's reliance on classical political theory, Frug relies on critical legal studies. He asserts that each model is doomed to failure because each relies on the impossible task of separating subjectivity and objectivity, the communal and the shared, from the personal and the unique.<sup>25</sup>

In Part I, I use the analytical structures of these two articles to organize the arguments and proposals regarding civil justice reform and to examine and critique their normative foundations. In so doing, I do not rigidly follow either article, although the format of the presentation relies on Sargentich's ideals. I do not contend that this undertaking incorporates the subtlety and nuance of either work, but I do believe that it captures the broad structures of analysis upon which I rely. With each of these articles, I draw analogies between the corresponding comprehensive formulations of a language about bureaucracy and the literature of judicial reform. These comprehensive formulations provide a systematic way of thinking and talking and they influence perspective and perception. I contend that Part I shows that this way of talking about bureaucracy helps to identify the values underlying the discussion regarding civil justice reform and permits organization of civil justice reform arguments and proposals around those values.

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18. See *id.* at 395.

19. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) [hereinafter Frug, *Ideology of Bureaucracy*].

20. *Id.* at 1279; see *id.* at 1277-86 (using the areas of corporate and administrative law to conduct his analysis).

21. See *id.* at 1277-78 (asserting that the stories are based on a single story which serves as a "mechanism of deception").

22. See *id.* 1377-88 (using experiences in the Federal Circuit to examine arguments about specialized courts and arguing that in the quest for freedom it is necessary to undermine the status quo faith in bureaucratic organization as a protector of freedom).

23. *Id.* at 1282-84 (identifying the source and development of each story).

24. See *infra* notes 317-20 and accompanying text.

25. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1286-88.



In Part II, I explore some of the implications of the application of these discourses about bureaucracy to the evaluation of civil justice reform. I do this first by making some more specific observations about the analytical approaches employed in the two articles. This exploration also uses specific examples to indicate how this conception of bureaucracy empowers a new assessment of arguments in the literature of civil justice reform. For example, I show how the cluster of arguments supporting alternative dispute resolution (ADR) contains arguments incompatible with one another because they arise from differing visions of the judiciary. In this context, I also develop Sargentich's conclusion that some arguments relating the alternative expression of one ideal with the core embodiment of another can seem consistent until analyzed in light of the underlying visions of each ideal.<sup>26</sup>

I also describe how the application of a language about bureaucracy can enrich concepts important to the discussion of judicial reform. For example, I address judicial independence and individual rights, two such concepts that often appear in discussions of the future of the federal courts. The language of bureaucracy discloses the varied and conflicting meanings of these deceptively inclusive terms. Because the meanings of these terms are altered with each normative vision of the judiciary, they can neither organize nor illuminate the tensions between these visions that underlie specific proposals.

The way in which Sargentich and Frug each talk about bureaucracy also suggests an analytical methodology. For example, their discussions render less useful dichotomous categories that encourage the balancing of values. Because the debate regarding civil justice reform rests on conflicting visions of the judiciary, balancing cannot accommodate these incommensurable normative positions. Sargentich and Frug approach their tasks from different intellectual perspectives. These differences emphasize the similarity of many of their insights and they offer some clues to fruitful ways of evaluating issues of civil justice reform.

Despite the widespread use of language about bureaucracy in the literature of judicial reform, it may still seem odd to rely on views of executive administration in examining the future of the federal courts. After all, unlike administrative agencies, courts form a separate and independent branch of government, and an extensive body of constitutional law and practice defines judicial power. Unlike administrative agencies, courts are reactive. They generally lack substantive rulemaking power and act only through adjudication. The setting and tenor of judicial and administrative adjudication differ considerably. The constitutional status of judges, the formality of the trial, the norms and traditions of trial, and appellate practice distinguish judicial from administrative adjudication.

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26. See Sargentich, *American Administrative Process*, *supra* note 12, at 439-40.

Like agencies, however, the courts are lawmaking institutions that must deal with burgeoning caseloads as they decide issues of national significance. Courts face the challenges confronting executive administrative agencies: addressing increasing workloads, and issues of competence, rewards, and accountability. Perhaps most importantly, like administrative officials, federal judges and judicial officers are not elected. Like administrative officials, these judges and judicial officers wield the power and authority of government. With executive bureaucracies, each of Sargentich's ideals of administrative law answers the central question, "On what general normative principles may the use of often substantial public power by unelected agency officials in our political system be justified and, at least for the system as a whole, legitimated?"<sup>27</sup> According to Frug, the purpose of the stories of control is intended to ally our fear of this same bureaucratic power.<sup>28</sup> In her rereading of the traditional story of the development of the federal courts in light of new versions of the story, Judith Resnik states a like theme: "The terrorizing fear of too much power."<sup>29</sup> The ways in which Sargentich and Frug talk about bureaucracy address this dilemma central to both administrative agencies and to the courts.<sup>30</sup> Debates about the legitimacy of unelected administrative officials are relevant, with proper modifications, to the courts which share this fundamental dilemma. Finally, to be useful, not every premise of these conceptions of executive administration need apply to the courts. However, the major aspects of them do illuminate normative conflicts underlying debates about civil justice reform.

### I. A WAY OF TALKING ABOUT BUREAUCRACY

In this Part, I demonstrate how comprehensive examination of executive administration structures the discussion of the future of the federal courts. First, I set out in the most general way the types of criticisms and reforms that populate this discussion. The presentation is general and cursory because the character of the issues raised is explored in detail

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27. *Id.* at 393.

28. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1284-85 (discussing the assurances that the models seek to provide in order to counter perennial concerns that bureaucratic organizations can dominate those outside of the organization and destroy the freedom of self-expression of those within the organization).

29. Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1035 (1994) [hereinafter Resnik, *Rereading the Federal Courts*] (discussing the traditional story of the federal courts and its limited ability to completely address the question of too much power in any one of the three branches); see WHEELER & HARRISON, *supra* note 7, at 2-4 (describing the historical concern that courts can be tyrannical and noting that several provisions concerning judicial procedure were included in the Bill of Rights to address the problem).

30. Like the heads of administrative agencies and departments, federal trial and appellate judges are appointed by the President and confirmed by the Senate. See U.S. CONST. art. II, § 2, cl. 2. Unlike these administrative heads, judges enjoy tenure for life. See *id.* art. I, § 1. Although the staffs are smaller in size, like administrative heads, judges supervise and rely on the efforts of a number of personnel who are not subject to confirmation. See Baker, *Intramural Reforms*, *supra* note 1, at 943-51.

later in this Part. My intention is to give the reader some general background before beginning a more detailed examination. Next, using Sargentich's ideals of administrative law as the format, I examine Sargentich's and Frug's discussions of bureaucracy. Their views create a way of talking about bureaucracy that I apply to civil justice reform, both to organize the debate and to examine and critique its normative foundations. This application is aided by the large body of literature addressing civil justice reform and its corresponding implications for the future of the federal courts.

### A. *The Federal Courts in Transition*

The character and number of issues regarding federal procedure and the federal courts show that we are in the midst of a comprehensive reexamination of the role and legitimacy of the federal courts. Nearly every major aspect of the judicial process and procedure is now a topic for discussion. For purposes of presentation rather than analysis, I introduce these issues as ones related to the growing caseload of the federal courts, to the appellate courts, to the pretrial process, to access to the courts, to jury reform, to alternative dispute resolution, to judicial selection and discipline, and to the relationships between the President, Congress, and judiciary. Some sense of the scope of the discussion about the future of the federal courts provides a basis for applying language about bureaucracy.

The growing caseloads of trial and appellate courts have in turn generated a number of proposals, each of which raises a variety of issues regarding the practicality and wisdom of the specific proposals.<sup>31</sup> These proposals also involve a discussion of the future of the federal judiciary. In a series of articles, Thomas Baker describes and evaluates proposals that respond to this caseload in the appellate courts.<sup>32</sup> He divides the re-

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31. See Baker, *Intramural Reforms*, *supra* note 1, at 940; see also *supra* note 1 and accompanying text.

32. See Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863, 863-65 (1994) [hereinafter Baker, *Past Extramural Reforms*] (discussing the historical methods Congress has used to assist the federal courts faced with increasing caseloads); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 913-14 (1994) [hereinafter Baker, *Imagining Futures*] (discussing the structural proposals to reform the intermediate appellate courts); Baker, *Intramural Reforms*, *supra* note 1, at 913-14 (examining the various "procedural shortcuts" historically employed by the United States Courts of Appeals); Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 919 (1990) (discussing the then pending, but not adopted, proposal to divide the United States Court of Appeals for the Ninth Circuit into two circuits); Baker, *Proposed Reforms*, *supra* note 1, at 1321-32 (examining proposed "procedural shortcuts" currently in limited use in the United States Courts of Appeals); Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 45 CASE W. RES. L. REV. 705, 707-15 (1995) [hereinafter Baker, *Future of Judicial Federalism*] (discussing the possible future of state and federal courts and the future opportunities for cooperation and judicial federalism).

sponses into the intramural, steps that courts can take to more efficiently dispose of cases,<sup>33</sup> and the extramural, steps that require changes from outside the judiciary.<sup>34</sup> Included in the intramural are case management and case tracking,<sup>35</sup> increased use of settlement and other alternative techniques of case resolution,<sup>36</sup> more efficient use of support personnel,<sup>37</sup> limitations on oral argument and on briefs,<sup>38</sup> different procedures for different types of appeals,<sup>39</sup> and resolution of appeals without a published opinion.<sup>40</sup> Extramural responses include increases in the number of federal judges and other judicial personnel,<sup>41</sup> reducing or altering federal

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33. See Baker, *Intramural Reforms*, *supra* note 1, at 913; Baker, *Proposed Reforms*, *supra* note 1, at 1321-22.

34. See Baker, *Past Extramural Reforms*, *supra* note 32, at 864 (noting the requirement of congressional action for this type of reform).

35. See Baker, *Intramural Reforms*, *supra* note 1, at 940-43 (discussing the variety of management plans which include tracking and monitoring of cases); see also Baker, *Proposed Reforms*, *supra* note 1, at 1330-31 (identifying the "hallmark" of case management to be the monitoring of appeals through each stage and the increased importance of the screening process). These plans and proposals have elicited comment. See, e.g., Hon. Stephen Breyer, *The Donahue Lecture Series: "Administering Justice in the First Circuit,"* 24 SUFFOLK U. L. REV. 29, 42-44 (1990) (discussing the current system of tracking appeals in the First Circuit and the limited possibilities for increased efficiency within such a system).

36. See Baker, *Intramural Reforms*, *supra* note 1, at 941-42 (discussing the primary goal of some case management plans to be settlement and the difficulties in measuring the effectiveness of such programs).

37. Cf. *id.* at 943-51 (discussing the increased importance of both administrative and decisional personnel in response to an oppressive caseload).

38. See *id.* at 915-25 (discussing the reduced availability of oral argument and the increased importance of written briefs); Baker, *Proposed Reforms*, *supra* note 1, at 1337 (discussing the "re-evaluation of the deemphasis of oral argument"). Other comments on the subject have been made. See, e.g., McCree, *supra* note 1, at 790 (questioning the value of the efficiency gained by reducing the number of appeals decided without oral argument); see also Martineau, *supra* note 3, at 33 (reviewing the history and various positions with regard to oral argument and concluding that unless changes are made to the current oral argument process it "will continue to be little more than a waste of time").

39. See Baker, *Intramural Reforms*, *supra* note 1, at 940-43 (discussing experimentation in response to increasing caseloads); cf. Baker, *Proposed Reforms*, *supra* note 1, at 1330 (noting that "differentiated case management has been the most common response" to the growth of appellate dockets). The case management reforms have also been addressed by others. See, e.g., Breyer, *supra* note 35, at 47 (discussing the identification of related cases for assignment and increasing settlement and screening techniques); John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 859-62 (discussing in great detail the adoption and continued use of appeal "screening" to manage workload).

40. See Baker, *Intramural Reforms*, *supra* note 1, at 930-39 (discussing issues of quality and efficiency that are involved in deciding whether a decision should be published); Baker, *Proposed Reforms*, *supra* note 1, at 1329-30 (discussing the possibilities of using a preliminary opinion, subject to review by the parties before a final opinion is published, as more efficient than the current practice). These reforms have been discussed in detail by other authors. See Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 FLA. L. REV. 205, 218-23 (1985) (discussing the use of abbreviated unpublished decisions, advocating an explanation of every decision made by a court of appeals and favoring citation to unpublished decisions where appropriate); cf. William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 573-74 (1981) (evaluating the publication plans of the then 11 courts of appeals and proposing a model publication plan).

jurisdiction,<sup>42</sup> limiting appeals,<sup>43</sup> and restructuring the trial and appellate courts.<sup>44</sup> This listing only suggests the variety of responses under these general rubrics and the complexity of the arguments that can be marshaled for and against them.

Connected to, but also separate from, the issues raised by these responses are issues related to reduced access to the courts. These areas are related because several proposals for reducing the caseload burdens on the courts would limit access to the courts; however, proposals in this area reflect a different agenda.<sup>45</sup> For example, these suggestions include the imposition of user fees;<sup>46</sup> settlement rules that would shift costs if parties refusing settlement offers did not receive more favorable results at trial; fee shifting provisions, such as variations of the English, loser pays rules;<sup>47</sup> and penalties for frivolous litigation and appeals.<sup>48</sup>

Proposals from a variety of perspectives address the pretrial process. Prominent among these are reform of the discovery process, use of alternative dispute resolution, and increased judicial involvement in encouraging settlement.<sup>49</sup> Discussion of the pretrial process includes broader issues, such as the implications of managerial judging<sup>50</sup> and alterations of the adversary process.<sup>51</sup>

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41. See Baker, *Past Extramural Reforms*, *supra* note 32, at 877-88 (arguing that caseload demands should be addressed by increasing the number of appellate judges only as a "last resort").

42. See *id.* at 865-71.

43. See Baker, *Imagining Futures*, *supra* note 32, at 919-23.

44. See *id.* at 924-69 (discussing restructuring of courts through redrawing circuit boundaries, establishing additional tiers of appellate courts, creating specialized national subject matter courts, creating a centrally organized court of appeals, and drawing jumbo circuits); Baker, *Past Extramural Reforms*, *supra* note 32, at 870-911 (discussing methods of court restructuring including increasing the use of ADR, dividing courts of appeals, establishing specialized courts of appeals, and improving the quality of federal legislation); see also J. Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L. REV. 455, 457 (1995).

45. See, e.g., Hensler, *supra* note 8, at 245 (discussing the Council on Competitiveness's proposal to limit access to federal trial courts); cf. Baker, *Imagining Futures*, *supra* note 32, at 919 (creating discretionary appellate jurisdiction); Breyer, *supra* note 35, at 34-37 (discussing the 1990 Federal Courts Study Committee report that suggested limiting the right to appeal).

46. See Alschuler, *supra* note 7, at 1812 n.11 (discussing user fees as a method to manage the caseload); cf. Rowe, *supra* note 8, at 896-98 (discussing a more limited use of user fees).

47. Breyer, *supra* note 35, at 45-47 (arguing that strong smaller claims would benefit from loser pay rules and discussing the advantages of tailoring fee shifting provisions).

48. Cf. Hensler, *supra* note 8, at 247-48 (discussing incentives for encouraging meritorious litigation); Rowe, *supra* note 8, at 871 (discussing the incentives to reduce litigation, particularly regarding costs and attorney fees).

49. See John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 DUQ. L. REV. 245, 247-52 (1996) (discussing experimentation with ADR by local district courts); Rowe, *supra* note 8, at 898-902 (discussing the advantages and disadvantages of alternative dispute resolution). See generally Hensler, *supra* note 8 (canvassing proposals regarding discovery abuse, case management, and ADR).

50. See *infra* notes 166-70 and accompanying text.

51. See *infra* notes 252-74 and accompanying text.

Reform of the civil jury also appears in a variety of contexts. Some proposals seek to improve the decision-making ability of the jury;<sup>52</sup> other proposals seek to alter the role of the jury by greater use of court appointed experts, expert panels, and expert courts.<sup>53</sup> Attention has also focused on the use of peremptory challenges in the selection of juries.<sup>54</sup>

Finally, relationships between the judiciary and other branches of government appear in the literature.<sup>55</sup> Most of the discussion has addressed the role of Congress in procedural rulemaking and the implications of the Civil Justice Reform Act of 1990.<sup>56</sup> Also of interest have been

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52. See, e.g., Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 474-92 (1996) (arguing that simplifying jury instructions, increasing judge-jury interactions, allowing judicial summary of and commentary on the evidence, eliminating many complex evidentiary rules, and reducing the role of the directed verdict and of the judgment not withstanding the verdict would be constitutional and consistent with historical practices in the United States and in England; and returning the jury to a more activist role); *Development in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1411-21, 1459, 1503-13 (1997) [hereinafter *The Civil Jury*] (presenting and commenting on various proposals for strengthening the jury system).

53. See Smith, *supra* note 52, at 458-70 (asserting that juries could be selected based on level of education and previous trial experience and that specialized or expert juries could be used); *The Civil Jury*, *supra* note 52, at 1459, 1491-92 (noting proposals for specialized juries and summarizing criticisms of the jury system in complex cases). *But see*, e.g., Hellman, *supra* note 7, at 308-10 (discussing Posner's arguments against specialized courts). See generally Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 1-5 (1989) (using experiences in the Federal Circuit to examine arguments about specialized courts); A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627 (1995) (discussing the use of expert surrogates for Article III judges).

54. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809-12 (1997) (arguing that the peremptory challenge is "meaningless" and "undemocratic" and thus is inconsistent with the current representational functions of the jury); *The Civil Jury*, *supra* note 52, at 1460-63 (summarizing the debate about the peremptory challenge); cf. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 2-9 (1990) (discussing the inherent unconstitutionality of an all-white jury in race-sensitive cases).

55. See, e.g., RUSSELL R. WHEELER & GORDON BERMANT, FED. JUDICIAL CTR., FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE (1994) (discussing the current governance structures and procedures of the federal courts and outlining proposed reforms and arguments favoring the reforms that Congress may choose to adopt); Baker, *Future of Judicial Federalism*, *supra* note 32, at 807 (discussing the relationship of the judiciary and the other branches, noting specifically with respect to judicial and congressional relations that, "I must confess that I am not hopeful [for improved relations]"); Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 AM. U. L. REV. 1537, 1541-42, 1550-53 (1995) (discussing examples of positive, contributory exchanges between the judiciary and Congress from the mid-1980s to mid-1990s); see also Louis Fisher, *Judicial Independence and the Line-Item Veto*, JUDGES' J., Winter 1997, at 19, 53 (arguing that the line-item veto may be constitutionally infirm because of its threat to judicial independence).

56. 28 U.S.C. §§ 471-482 (1994); see, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 382 (1992) [hereinafter Mullenix, *Counter-Reformation*] (discussing the many ways in which the Act infringes on judicial rulemaking, in fact producing an environment which "authorizes unconstitutional rulemaking"); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1283-88 (1993) [hereinafter Mullenix, *Separation of Powers*] (arguing that the Act violates the separation of powers doctrine); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and*

changes in impeachment procedures<sup>57</sup> and the implications of the line-item veto.<sup>58</sup>

The literature suggests a lack of consensus regarding fundamental issues of both procedure and structure.<sup>59</sup> The literature evidences a federal judiciary in transition, a judiciary whose future may differ significantly from its past.<sup>60</sup> Conceptions of bureaucracy provide one way of organizing and critiquing the issues entailed in this discussion of the federal courts.

### B. *The Rule of Law Ideal*

According to Sargentich, the Rule of Law Ideal rests on state contract theories that require the consent of the governed.<sup>61</sup> This vision seeks to ensure that individuals are permitted to make their own choices free from the interference of the state.<sup>62</sup> Public law divides the realm of government from that of private action.<sup>63</sup> Because of reliance on this distinc-

*Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1520–23 (1995) (suggesting how the Act has led to greater use of magistrates); see, e.g., Maull, *supra* note 49, at 245–47 (discussing the variations of alternative dispute resolution programs spawned by the Civil Justice Reform Act's call for implementation of ADR in general).

57. See John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judiciary Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 221–50 (1994) (discussing weaknesses in statutory disciplinary procedures); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1125–33 (1985) (discussing the relationship between the Act and the impeachment power); Herman Schwartz, *The War Against Judicial Independence*, L.A. TIMES, May 11, 1997, at M2 (noting threats of impeachment against federal judges for the content of their opinions). See generally RUSSELL R. WHEELER & A. LEO LEVIN, FED. JUDICIAL CTR., JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES (1979) (describing methods of judicial discipline and removal); Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 851, 870 (1995) (expressing concern about Senate impeachment procedures).

58. See generally Robert C. Byrd, *The Control of the Purse and the Line-Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 331–32 (1998) (calling on the judiciary to strike down the Line-Item Veto Act). This article does not specifically address the implications of the recent Supreme Court decision which struck down the line-item veto as a violation of the Presentment Clause. U.S. CONST. art. I, § 7, cl. 2; see *Clinton v. City of New York*, 118 S. Ct. 2091, 2095 (1998). Some of the concerns expressed by Senator Byrd and other opponents of the line-item veto have been alleviated by the Court's decision in *Clinton*. However, as the Court struck down only the specific method utilized in the implementation of the line-item veto before them, the critique is still relevant to future constructions of the line-item veto that will undoubtedly be deployed. See *Clinton*, 118 S. Ct. at 2108.

59. See Charles W. Nihan, *A Study in Contrasts: The Ability of the Federal Judiciary to Change Its Adjudicative and Administrative Structures*, 44 AM. U. L. REV. 1693, 1695 (1995) (concluding that the “judiciary is unlikely to reach a consensus on either judgeship limitations or jurisdictional changes, which many believe are necessary to cope with the judicial workload projected for the next twenty-five years”); Tushnet, *supra* note 7, at 628–30 (suggesting that the different interest groups affecting Congress and the courts are likely to make consensus difficult both within and among the branches).

60. See *supra* notes 31–59 and accompanying text.

61. See Sargentich, *American Administrative Process*, *supra* note 12, at 397–98.

62. See *id.*

63. See *id.* at 398.

tion between public and private spheres, the core embodiment of the Rule of Law Ideal is formalism—the idea that all exercises of public power must be guided by legal rules.<sup>64</sup> Although the conception of these legal rules may vary, formalism rests its faith on these rules to separate legal from political decision making.<sup>65</sup>

Frug likewise describes the formalist model of bureaucratic control as attempting to place all judgments regarding values, ends, and desires outside of the bureaucracy.<sup>66</sup> The bureaucracy then objectively carries out the subjective choices made by others.<sup>67</sup> The bureaucracy applies rules derived from outside itself, and these rules are such that their application mechanically determines the outcome in specific instances.<sup>68</sup> To Frug, this line between the objective and subjective cannot be drawn.<sup>69</sup> His critique of the nondelegation doctrine leads him to conclude that no principled way exists to determine how much discretion regarding subjective choices may be given by the legislature to administrative agencies.<sup>70</sup>

For Sargentich, discretion exercised by administrative agencies also limits formalism.<sup>71</sup> Like Frug, he believes that the nondelegation doctrine seems unlikely to restrict this discretion in any important way.<sup>72</sup> Sargentich articulates a number of reasons for the existence of such discretion including the “indeterminate and sweeping . . . scope”<sup>73</sup> of much legislation. Many practical and political considerations act to assure this indeterminacy.<sup>74</sup> Of particular interest is his conclusion that “statutory norms designed to criticize existing institutions—for instance, antidiscrimina-

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64. See *id.* at 398–99. The concept of legal norms can “include principles in Ronald Dworkin’s sense or rules in H.L.A. Hart’s sense.” *Id.* at 398. The crucial element is that they are “relatively autonomous from the sphere of frankly political decisions.” *Id.* at 398–99.

65. See *id.* at 399.

66. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1298–99.

67. See *id.*

68. See *id.*

69. Cf. *id.* at 1300–03. Under this framework, some subjectivity must be introduced into the bureaucracy because administrative agencies have always exercised at least some discretion. See *id.* at 1301. In fact, such discretion “has always seemed indispensable.” *Id.* The task of deciding what discretion is permissible requires the separation of the objective and the subjective. See *id.* at 1301–03.

70. See *id.* at 1300–05. The nondelegation doctrine is the attempt “to distinguish the kind of discretion agencies can exercise from the kind that must be exercised only by the legislature.” *Id.* at 1301. The failure of the doctrine to do so in any meaningful way illustrates the melding of the subjective and the objective. See *id.* at 1304–05.

71. See Sargentich, *American Administrative Process*, *supra* note 12, at 402–03 (discussing formalist limitations on the Rule of Law Ideal).

72. See *id.* at 400–02.

73. *Id.* at 402.

74. See *id.* at 403. These considerations include: lack of time, staff, and resources to develop more precise agency limitations; the independent value of agency discretion through “experimentation, flexibility and change without recourse to statutory amendment”; and the political expediency of general language permitting compromise and focusing controversy on the administrative agency rather than Congress. *Id.* Sargentich puts it frankly when he notes that by scripting vague and indeterminate legislation, Congress creates the framework in which the focus of controversy shines on the administrative agency rather than on Congress. See *id.* at 403–04.



tion norms . . . —may require . . . general and open-ended principles.”<sup>75</sup> This observation is of particular interest because a substantial number of federal statutes applied by the courts are of this character.<sup>76</sup>

Because of the limitations on formalism, the Rule of Law Ideal turns to proceduralism.<sup>77</sup> Proceduralism protects the individual from abuse of governmental power by requiring that government officials follow certain procedures before acting.<sup>78</sup> Proceduralism, however, does not ultimately restrict substantive discretion because it permits officials to act on the basis of vague, unarticulated powers that permit a number of substantive choices.<sup>79</sup> The principal methodology of the Rule of Law Ideal is legal reasoning—a methodology that manifests the importance of restrictions on the exercise of power by the application of legal rules.<sup>80</sup> Likewise, Frug notes that some commentators argue that courts could validly avoid the difficulties of substantive review by turning to procedure.<sup>81</sup> In his discussion of a judicial review model, Frug argues that attention to bureaucratic procedure, rather than substantive decisions, fails to escape the contradictions that plague substantive review.<sup>82</sup>

### 1. Formalism

The applicability of this vision of the administrative process to courts is suggested by Sargentich. According to him, the line between legal reasoning and political judgment seems easier to draw with the courts than with administrative agencies.<sup>83</sup> He recognizes, however, that in administrative law, the Rule of Law Ideal requires that courts reviewing administrative agencies follow the dictates of the legislature.<sup>84</sup> The inconsistency in the delegation doctrine is that courts are to be “restricted decisionmakers”<sup>85</sup> applying the norms set out in the legislation; yet the nondelegation doctrine may well require them to strike down the legisla-

75. *Id.* at 404. Statutes that seek to change existing institutions and practices require broad principles because, “[i]f the critical norms were highly specific and thus strictly confined in their reference or implications, their force as catalysts of social change inevitably would be blunted.” *Id.*

76. *See infra* notes 99–100 and accompanying text. Sargentich recognizes that formalism can deal with a few open-ended norms but not a statutory scheme where the majority of norms are of this character. *See Sargentich, American Administrative Process, supra* note 12, at 402–04. Clearly, the administrative process contains many of these open-ended norms. Arguably, the tasks of the federal courts now require them to confront a substantial number of similarly open-ended norms.

77. *See Sargentich, American Administrative Process, supra* note 12, at 404–05.

78. *See id.* at 405.

79. *See id.* at 406–07.

80. *See Sargentich, Future of Administrative Law, supra* note 14, at 773–74.

81. *See Frug, Ideology of Bureaucracy, supra* note 19, at 1343–44.

82. *See id.* at 1344. “This retreat to procedure . . . adopts the same mixed formalist-expertise structure that rendered substantive judicial review incoherent.” *Id.*

83. *See Sargentich, American Administrative Process, supra* note 12, at 399.

84. *See id.* at 400–01.

85. *Id.* at 401.

tion that contains the norms they are to apply.<sup>86</sup> As Sargentich notes, this "constitutionally-based nullification of legislative enactments in the administrative context presents the same conundra for courts that are raised so often in discussions of judicial review."<sup>87</sup>

In his discussion of the judicial review model, Frug recognizes the application of his analysis to the courts.<sup>88</sup> In conducting judicial review, the courts can adopt either a formalist or expertise model of its role, emphasizing either the breadth of or the limits on judicial discretion.<sup>89</sup> The courts can also combine the two models.<sup>90</sup> Skillfully used, this mixing of models in defining the judicial role permits the courts to choose views of its role that either doubly restrain or doubly authorize judicial intervention.<sup>91</sup> Likewise, the courts can use formalist or expertise models of the bureaucracy, emphasizing bureaucratic discretion or the limits placed upon it.<sup>92</sup> The combination of these perceptions of the role of the courts and of the bureaucracy generates sets of inconsistent arguments counseling for and against judicial intervention.<sup>93</sup> Frug's description of the formalist and expertise models of the role of the courts in control of bureaucracy fits nicely with the literature of civil justice reform discussed in this Part of the article.

Some judicial systems still rely upon the language of formalism to define and to defend the judicial role.<sup>94</sup> Civil law systems, particularly in Latin America, reflect the dominance of the civil code.<sup>95</sup> Law consists of a set of norms that can be mechanically applied; this mechanical application supporting a perception of a limited role for the judge.<sup>96</sup> This language of formalism remains attractive because the notions of democratic legitimacy upon which the Rule of Law Ideal rests makes the decisions of unelected judges vulnerable.

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86. *See id.* at 401-02.

87. *Id.* at 401 (footnote omitted).

88. *See Frug, Ideology of Bureaucracy, supra* note 19, at 1334-38.

89. *See id.* at 1337-38.

90. *Cf. id.* at 1340 (noting that "Justice Frankfurter . . . defined and circumscribed the court's role by understanding it in joint formalist-expertise terms. He envisioned the courts as organizations that could successfully combine the features of apparently antithetical model [sic] of bureaucratic legitimacy").

91. *See id.*

92. *See id.* at 1340-42.

93. *See id.* at 1342-43.

94. *See, e.g., Robert G. Vaughn, Proposals for Judicial Reform in Chile*, 16 *FORDHAM INT'L L.J.* 577, 579-90 (1992/1993) [hereinafter Vaughn, *Judicial Reform*] (describing the Chilean judiciary's history of emphasizing formal norms and its mechanical application).

95. *See, e.g., id.* at 581. *See generally* Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 *AM. U. J. INT'L L. & POL'Y* 1295, 1310-23 (1995) (discussing the difference in conception of judicial function prevailing in common law countries as opposed to civil law countries).

96. *See Farer, supra* note 96, at 1312-13 (discussing the creation of bureaucratic career patterns that make judges less likely to strike down government action than those judges who do not see themselves as bureaucrats).

The legal realists in the United States critiqued formalism as a defense of the exercise of public power by unelected officials.<sup>97</sup> To the realists, legal norms established in precedent, in legislation, or in the Constitution were less important in determining outcomes than an examination of the behavior of the judges themselves.<sup>98</sup> The norms limiting courts were interpreted and applied by the courts, who had rather broad discretion to establish the content and application of these legal norms.

Constitutional interpretation repeatedly demonstrates that the courts enjoy relatively broad policy-making powers. Although this power can be justified on several grounds related to the character of judicial power, the separation of powers, and the protection of individual rights, these justifications less easily apply to common law decisions or to statutes—the interpretation of which now forms the bulk of activity of the federal courts.<sup>99</sup> After the realists, precedent seems a malleable concept that imposes limits only on the margins. As do administrative agencies, courts confront statutes of “indeterminate and sweeping . . . scope.”<sup>100</sup>

In these circumstances the options for reformers are few. One could attempt to redefine judicial power around more formal limits, an option embraced by many conservatives. Attacks on the antimajoritarian character of the courts have been combined with attempts to restrict constitutional interpretation by relying upon “original intent,”<sup>101</sup> to develop rules of statutory construction that deny judges the use of legislative history, thereby forcing courts to apply only the words of the statute<sup>102</sup> and to ad-

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97. The formalist perspective may more properly capture the popular view of the courts. For example, even that astute observer and prolific author, Isaac Asimov, saw a future where decisions would be made by computers analyzing precedent, a development that he believed would guarantee fair results and eliminate the advantages conferred on litigants with greater resources. Isaac Asimov, *The Next 70 Years for Law and Lawyers*, 71 A.B.A. J. 56, 58 (1985).

98. Cf. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 251–91 (expanded ed. 1988) (discussing the impact of legal realism and process jurisprudence on the judicial role). *But cf.* Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1632–33 (1988) (stating the critique forwarded by legal realists, yet recognizing a broad mix of determinacy and indeterminacy in adjudication, and as such, recognizing that at some level not all judicial decisions are controlled by norms).

99. See Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 285–290 (1982) (discussing the dominance of statutory interpretation in cases before the Supreme Court).

100. Sargentich, *American Administrative Process*, *supra* note 12, at 402; see *supra* notes 71–76 and accompanying text.

101. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* 143–60 (1990) (arguing that original understanding is the only method of constitutional interpretation that upholds the American ideal); Robert H. Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829 (1986) (proposing a vision of original intent that judges should employ “that focuses on each specific provision of the Constitution rather than upon values stated at a high level of abstraction” when engaging in constitutional interpretation).

102. See, e.g., Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 373–74 (discussing different schools of thought regarding the use of legislative history). Some Supreme Court Justices advocate abandoning the use of legislative history or dra-

vocate judicially created standards that are clear and easily applied.<sup>103</sup> The success of this enterprise seems considerably in doubt. Ironically, these attempts to restrict judicial discretion appear rather to increase it. For example, "original intent" is as indeterminate as the techniques it replaces.<sup>104</sup> The rejection of legislative history, at least as to social legislation, increases, rather than limits, judicial discretion and enfeebles the legislature.<sup>105</sup>

Two important civil procedure decisions reflect this attempt to reassert formal limits on the courts. Justice Scalia used *Burnham v. Superior Court*<sup>106</sup> to articulate a standard of due process that, at least regarding long standing procedures of current applicability, limits the substantive discretion of judges.<sup>107</sup> Scalia's desire to restrict the subjective assessments of individual judges regarding what is fair and just drives his analysis.<sup>108</sup> Likewise, he emphasizes the antimajoritarian character of the courts as well as the need for certainty of standards.<sup>109</sup> In *Finley v. United*

matically reducing its relevance through the application of interpretative techniques that rely on the language of statutory provisions. See, e.g., *Public Citizen v. Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy J., concurring) ("Where the language of a statute is clear in its application, the normal rule is that we are bound by it."); *United States v. Stuart*, 489 U.S. 353, 373 (1989) (Scalia J., concurring) ("We conduct[] no separate inquiry into the intent or expectations of the signatories [of a particular treaty] beyond those expressed in the text . . .").

103. See, e.g., *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 160-64 (1989) (Scalia J., dissenting) (arguing that "'a practical approach' to [the interpretation of] FOIA consists of following the clear provisions of its text, and adhering to the rules we have enunciated regarding interpretation of the unclear ones"). See generally Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (exploring the dichotomy between the general rule of law and personal discretion in creation of law by the courts).

104. See James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 283-90 (1991). Boyle lists six arguments against original intent, noting that it is (1) "simply false as both a practical and philosophical matter" that the intention of the original author must control the subsequent meaning of the text; (2) the Framers had a view of interpretation that rejects original intent as the appropriate method of interpretation; (3) records show that the intentions of the Framers "are often contradictory, indeterminate, or both"; (4) in those areas where their intent is clear, such as support of slavery or belief in the inferiority of women, that intent is "morally outrageous"; (5) "the theory of original intent is inconsistent with most of the Supreme Court's jurisprudence, with the vast majority of scholarly writing, with the opinions of most constitutional historians, and probably with the views of most Americans"; and (6) adoption of original intent would involve "an impossible transition" from current interpretative practices and standards. *Id.* at 283-84. Boyle notes that Bork, in *The Tempting of America*, "shift[s] his ground somewhat," moving to the concept of original understanding which is the "understanding of the Constitution's contemporary audience, rather than the intent of its original authors," *id.*; see *id.* at 284-90 (discussing the concept and problems of original understanding). Boyle finds original understanding to be subject to the same defects as original intent. See *id.* at 287-90.

105. Cf. Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1, 1-6 (1996) (examining the impact of plain meaning interpretation on the application of the British race and sex discrimination statutes and the resulting increase in judicial discretion).

106. 495 U.S. 604 (1990).

107. See *Burnham*, 495 U.S. at 622-23.

108. See *id.*

109. See *id.* at 625-27.

*States*,<sup>110</sup> he emphasized that most federal court jurisdiction must be conferred by Congress and that courts may not independently expand that jurisdiction.<sup>111</sup> Again, this effort regarding the power of the court over its jurisdiction fits with the enterprise of restricting judicial discretion.

## 2. Proceduralism

Sargentich's analysis would predict, in an administrative context, that the theoretical and practical limitations on formalism would lead to proceduralism. In this view, procedure protects the individual against the application of the power of the state.<sup>112</sup> Indeed, the courts rely on procedure to ensure fairness to a greater extent than the administrative process. In fact, articulation of uniform procedure seems to have been the traditional response to the challenges of legal realism to formalism. Judith Resnik suggests that the drafting of the Federal Rules of Civil Procedure was partly a response to the influence of the legal realists.<sup>113</sup> The certainty of substantive norms, then lost, was replaced with the uniformity and predictability of procedural rules. Of course, she is right to emphasize the variety of influences on the rules and the fictional nature of any intent of the advisory committee,<sup>114</sup> but her recognition of uniform procedure as a reaction to legal realism seems consistent with G. Edward White's description of consensus thought, which he dates somewhat later.<sup>115</sup> Consensus thought also responded to the realists. Part of the response was an emphasis on legal process and the importance of reasoned decision making rather than fiat.<sup>116</sup> This emphasis on process and on reasoned decision making highlighted the importance of the rationale for judicial opinions. In this sense, an obligation to expose a judge's reasoning, including the policy choices contributing to it, to rational analysis, changed precedent from a substantive to a procedural protection. Consensus thought, however, undermined its own agenda. Its emphasis on a rational solution that all educated persons would arrive at so ignored conflicting perspectives and irrational behavior that it cast doubt on the conception of rationality supporting consensus thought. The substantive agenda of consensus thought contained a central paradox that undermined it—the

110. 490 U.S. 545 (1989).

111. See *Finley*, 490 U.S. at 547-48.

112. See Sargentich, *American Administrative Process*, *supra* note 12, at 405.

113. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-03 (1986) [hereinafter Resnik, *Failing Faith*].

114. *Id.* (noting the impact of progressives and New Dealers, and the self interest of attorney-members who had cases in federal courts in more than one state). A sense of the intellectual climate in which the rules were developed can be gleaned from a retrospective evaluation of them. See generally Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988*, 137 U. PA. L. REV. 1873 (1989) (assessing the debate concerning local, state, and federal rules of procedure).

115. See generally G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1985) (dating consensus thought from 1945 through 1970).

116. See *id.* at 141.

assumption that every problem has a consensual rational solution that educated persons will arrive at, ignoring conflicting perspectives and irrational behavior, ironically casting in doubt the possibility of consensus thought. The procedural responses to the limitations of formalism remain, and concern about their viability forms an important part of the discussion regarding civil justice reform.

Among the reforms undertaken by appellate courts, the most controversial ones reduce or eliminate oral argument and limit the publication of opinions.<sup>117</sup> Other appellate court practices include differential tracking of appeals, the increasing use of court staff to process and evaluate opinions, and practices where panels of judges review proposed opinions individually without a formal conference regarding them.<sup>118</sup> Many of the criticisms of these practices have repeated the theme that they reduce the procedures restraining judges and thereby jeopardize the fair and adequate consideration of individual claims.<sup>119</sup> For example, if unpublished opinions are not precedent and the process leading to such opinions differs significantly from traditional appellate procedures, critics fear that judges will be encouraged to rely on the advice of others, to give the decisions inadequate consideration, and to indulge biases which would otherwise be constrained by the need to live with the precedent created.<sup>120</sup> These practices have generated considerable academic criticism, generally without effect.<sup>121</sup> The acceptance of these practices shows that the pressures on the courts have led to changes that call into doubt many traditional procedural justice values of civil adjudication.

Perhaps of greater significance to proceduralism as a restraint has been the loss of uniformity in the Federal Rules of Civil Procedure. Commentators identify as causes of this loss expansive interpretations of Rule 83,<sup>122</sup> which permits local rules not inconsistent with the general rules of civil procedure;<sup>123</sup> the 1992 amendments to the federal discovery

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117. See, e.g., Ginsburg, *supra* note 40, at 205–06 (discussing the obligations of appellate judges); Martineau, *supra* note 3, at 1–5 (discussing the reform measures that appellate courts have recently taken); Oakley, *supra* note 39, at 859–62 (discussing the measures used by the Ninth Circuit for handling the increased case load); Richman & Reynolds, *supra* note 1, at 623–25 (discussing the validity of arguments that consider the streamlined process that is being used by the circuit courts as a threat to the efficacy of the legal process). Federal appellate courts began by denying oral argument in a small percentage of cases that presented no real issue for decision. Today, the majority of federal appellate cases are decided without oral argument. See Martineau, *supra* note 3, at 20.

118. See Hellman, *supra* note 7, at 299–300; Reynolds & Richman, *supra* note 1, at 623–24.

119. See, e.g., Reynolds & Richman, *supra* note 1, at 634 (discussing some of these critiques).

120. See *id.* at 633. They also note that these practices will fail to provide public accountability for trial court errors. See *id.* at 635.

121. See *id.* One alternative to an unpublished opinion is a summary per curiam. However, an unpublished opinion articulating the grounds for the decision might be more helpful than a summary per curiam opinion.

122. FED. R. CIV. P. 83.

123. See Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 807–08 (1995) (discussing Rule 83); cf. Peter G. McCabe, *Renewal of the Rulemaking Process*, 44 AM. U. L. REV. 1655, 1687–91 (1995) (discussing local rules).

rules that allow individual districts to opt out of portions of the amendments;<sup>124</sup> and the Civil Justice Reform Act of 1990,<sup>125</sup> which creates rule committees on the district level and encourages experimentation and the development of rules related to local conditions.<sup>126</sup> Because of the importance of uniformity in procedure as a response to the weaknesses of formalism, the demise of uniformity portends the courts' greater vulnerability to criticisms based on the Rule of Law Ideal. Certainly, fair procedures need not be rigidly uniform, but the lack of commitment to the ideal of uniformity highlights the discretion of specific courts and suggests indeterminacy of procedural as well as substantive standards.

The changes in appellate procedure arguably exacerbate the effects of the loss of uniformity in procedure. To the extent that appellate procedures reduce significant review of lower courts' application of a variety of procedures, the variation appears more likely to reduce the potential protection of procedure in individual cases. Stephen Yeazell identifies a larger effect of the Federal Rules of Civil Procedure—the transfer of power from appellate to trial courts.<sup>127</sup> In his view, this transfer of power is the unintended result of the creation of extensive pretrial procedures.<sup>128</sup> The final judgment rule insulates most of these pretrial procedures from appellate scrutiny, thereby reducing the control of appellate courts.<sup>129</sup> Against this background, trial court experimentation becomes more problematic because most of that experimentation occurs at the pretrial level and is unlikely to be subject to significant appellate review.

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124. FED. R. CIV. P. 26 (amended Dec. 1, 1992); see McCabe, *supra* note 123, at 1689–90 (discussing the 1992 amendments to Rule 26); Tobias, *supra* note 123, at 812 (discussing amendments to Rule 26).

125. 28 U.S.C. §§ 471–482 (1994).

126. See Baker, *Future of Judicial Federalism*, *supra* note 32, at 779–81 (discussing implications of decentralized rulemaking and congressional activity in rulemaking spawned by the Civil Justice Reform Act); Maull, *supra* note 49, at 245–47 (demonstrating, through an analysis of the diversity of ADR procedures and their contribution to forum shopping, the negative impact of the Civil Justice Reform Act on uniformity); McCabe, *supra* note 123, at 1689–91 (discussing the Civil Justice Reform Act as a threat to uniformity); Mullenix, *Separation of Powers*, *supra* note 56, at 1287 (“More significantly, the [Civil Justice Reform Act] will contribute to the increased balkanization of federal civil procedure and transform the reigning procedural aesthetic of simplicity and uniformity into one of increasing complexity and variation.”); Carl Tobias, *Improving the 1988 and 1989 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1619–27 (1994) (discussing the causes of lack of uniformity); Cheryl L. Haas, Note, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 N.Y.U. L. REV. 135, 151–55 (1995) (noting conflict between local rules and federal rules and discussing dangers of decentralization of rulemaking following congressional involvement); cf. Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1473–83 (1994) (asserting that the Act does not compel nor authorize adoption of local deviations inconsistent with the federal rules and does not violate the separation of powers).

127. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 631 (discussing the consequences of “redesigning the process of litigation”).

128. See *id.* at 631–40, 648.

129. See *id.* at 646–47.

Although the Rule of Law Ideal is central to a defense of judicial and administrative discretion, the federal courts cannot rely on its core embodiment in the theory of legal formalism. Modern reforms also threaten to undermine reliance on the alternative expression of procedural regularity and fairness. The assumptions regarding the value of procedure underlying criticisms of modifications in trial and appellate practices mirror those supporting proceduralism in the administrative process—that procedures guarantee fair results by encouraging thorough and thoughtful consideration of substantive decisions. The responses to these criticisms also reflect those given to attempts to formalize more of administrative procedure—that the burdens imposed are not worth the price of the additional procedure. Given recent developments, the viability of proceduralism itself in the federal courts is now in question.

### C. *The Public Purposes Ideal*

According to Sargentich, the Public Purposes Ideal stresses the role of administrative agencies in accomplishing important public goals.<sup>130</sup> The ideal draws on the importance attached to the affirmative tasks of government in policy making under governing statutes. Therefore, the core embodiment is instrumentalism, “by which is meant the familiar notion that the significant worth of a policy inheres in its success as an instrument of the public good.”<sup>131</sup> Instrumentalism focuses on carrying out the public purposes of an agency’s enabling legislation, or choosing between alternatives based on agency judgments regarding the public good—as in cost-benefit analysis.<sup>132</sup> The Public Purposes Ideal relies upon official expertise as its principal methodology.<sup>133</sup> This methodology manifests the ideal’s reliance on technical and rational judgments to achieve the public good.

By focusing on rational analysis, instrumentalism leads to ever-expanding analytical schemes that inescapably tend to become vague and devoid of substantive content.<sup>134</sup> Indeed, such an approach can eventually become the guise for political manipulation.<sup>135</sup> Sargentich expresses several doubts about the efficacy of cost-benefit analysis as a basis for administrative policy making. A principal normative objection is that utilitarian ethics tend to discount the power of “plural conceptions of values [as] having distinct and independent claims of moral force.”<sup>136</sup> The

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130. See Sargentich, *American Administrative Process*, *supra* note 12, at 410.

131. *Id.* at 411.

132. See *id.* at 411–12. Reliance on the enacting legislation of an agency and cost-benefit analysis constitute the two principal instrumentalist approaches. See *id.*

133. See Sargentich, *Future of Administrative Law*, *supra* note 14, at 774.

134. See Sargentich, *American Administrative Process*, *supra* note 12, at 415–16.

135. See *id.* at 416.

136. *Id.* at 418. In addition, cost-benefit analysis assumes a limited set of preconceived aims that cannot be derived by cost-benefit analysis. The difficulty of establishing a common denominator for costs and benefits and the difficulty of quantifying benefits also render determinations resting on cost-benefit analysis suspect.



weaknesses of instrumentalism and the limitations placed upon it by the reality of the administrative process lead to an alternative expression of the vision of the Public Purposes Ideal; namely, protecting the market.<sup>137</sup> The reliance on the market accepts private decision making as the principal determinant of the public good. Subjective preferences in the market decide the public values to be pursued.<sup>138</sup> This alternative expression forecloses a significant role for the administrative process except to the extent that the agencies intervene in response to imperfections in the market. Issues of administrative choice become matters of economic rationality, foreclosing other normative viewpoints.<sup>139</sup> A variety of rationales for administrative intervention, however, suggest that such intervention may be the usual rather than the exceptional event.<sup>140</sup>

Frug describes the expertise model as celebrating the discretion of those within the bureaucracy.<sup>141</sup> The bureaucracy becomes a social system in which leadership is crucial. The bureaucracy works for the public to achieve common goals. Its internal structure must remain flexible and responsive.<sup>142</sup> Constituents of a bureaucracy no longer set the policies of the organization, but become consumers of those policies.<sup>143</sup> Under the expertise model, the bureaucracy enjoys immense discretion and therefore immense power.

The immense power of the bureaucracy under the expertise model is circumscribed by its expertise and professionalism and by the requirement of impersonal judgment.<sup>144</sup> The model, however, is unable to draw the line between arbitrary and proper discretion. It is unable to draw the line between the necessary subjectivity of the members of the bureaucracy and the objective constraints upon it.<sup>145</sup> Nor is the model able to draw the same line between expertise and bias.<sup>146</sup> Subjective and objective elements are so related that it is not possible to separate them. Frug

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137. *See id.* at 419–25.

138. *See id.* at 419–20.

139. *Cf. id.* at 420 (discussing how the market imperfections allow for “room for intervention by the administrative process”).

140. *See id.* at 423. According to Sargentich, these include: monopoly power that forecloses competition, natural monopolies involving economies of scale, inadequate consumer information, externalities, unfair windfall profits, and “the perceived need to eliminate ‘excessive’ competition or to moderate distributional inequities that may result from a sudden or severe scarcity of a valued good.” *Id.*

141. *See Frug, Ideology of Bureaucracy, supra* note 19, at 1318.

142. *See id.* at 1318–19.

143. *See id.* at 1320.

144. *See id.* at 1321–22 (arguing that these objective restraints must somehow be separated from the subjective characteristics of bureaucratic decision making).

145. *See id.* at 1324–26 (explaining that it is not possible to decide which discretion is necessary and which is arbitrary, just as it is not possible to decide which restraints are excessive and which are proper).

146. *See id.* at 1326–27 (explaining that expertise can be another way of describing bias—a viewpoint or perspective based on background and experience).

sees the call for super-experts as a response to the impossibility of the separation—an attempt which, due to its very nature, is also doomed.<sup>147</sup>

Given the contradictions inherent in the expertise model, defenders of bureaucracy rely upon a third model, the market/pluralist model. Because the discussion here is structured around Sargentich's ideals of administrative law, this summary focuses on the market aspects of the market/pluralist model—a model which Frug applies principally to private, not public, bureaucracies.<sup>148</sup> Still, his discussion relates the market model to the formalist one—some “predetermined, formally realizable constituent goal,”<sup>149</sup> such as the desire to maximize stock value, is assumed, and the corporation objectively acts to fulfill this goal.<sup>150</sup>

### 1. Instrumentalism

Perceptions that the federal courts play an important, affirmative role in American society reflect the Public Purposes Ideal. Owen Fiss's passionate defense of the courts' responsibility to articulate and to implement constitutional values illustrates such an affirmative role.<sup>151</sup> The separation of powers and the nature of judicial power require action for the public good.<sup>152</sup> The role of the courts in our government uniquely obligates them to protect the individual against the institutions of power—both public and private.<sup>153</sup> This obligation extends beyond interpretation of the Constitution to the construction and application of statutes as well.

Conservative and liberal ideologies can support a substantial affirmative role for the courts. For example, important strains of public choice literature assert that the courts must be active in limiting the self-interest of other branches of government, for self-interest distorts public

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147. See *id.* at 1327–31 (explaining that the super-expert fails to resolve the conflict because of the simultaneous need for the expert to be independent and to acquire information and expertise about the bureaucracy).

148. See *id.* at 1355–62.

149. *Id.* at 1360.

150. See *id.*

151. See Fiss, *Bureaucratization*, *supra* note 1, at 1461 (describing adjudication as a constant exercise of collective power to assure that social life conforms to public values); Owen M. Fiss, *The Supreme Court 1978, Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11–18 (1979) [hereinafter Fiss, *Forms of Justice*] (noting that courts implement public values not contained in specific prohibitions—for example, equal protection); *cf.* WHITE, *supra* note 98, at 252 (describing how appellate judicial expertise has been defined in different ways during this century—the appellate judge has variously been described as an “oracle, social engineer, hunch player,” or a “craftsman in . . . ‘reasoned elaboration,’”—and how each of these views has been used at some time or another to justify the exercise of judicial power).

152. See Fiss, *Forms of Justice*, *supra* note 151, at 5–9 (explaining that under modern conceptions, courts act in response to legislative failure).

153. See, e.g., *id.* at 5 (“Structural reform is . . . distinguished by the effort to give meaning to constitutional values in the operation of large-scale organizations.”); *id.* at 8 (responding to the special incentives causing bureaucracies to insulate themselves from public scrutiny); *id.* at 42–43 (rejecting an individualism that leaves the individual at the mercy of large concentrations of power).

policy.<sup>154</sup> The courts should require other branches to follow institutional rules designed to control self-interest, such as the rules addressing the internal operation of the legislature.<sup>155</sup> Some commentators argue that the courts should actively ensure that legislative action satisfies the public interest.<sup>156</sup> Not surprisingly, adherents to the Rule of Law Ideal are unlikely to accept such a broad formulation of the judicial role.

The increasing obligation of the courts to hear "public law" litigation encourages a conception of the judicial role consistent with the Public Purposes Ideal. Abram Chayes early recognized the implications to the federal courts of laws requiring them to articulate as well as to vindicate a variety of public policies.<sup>157</sup> Other commentators have likewise perceived the relationship between public law litigation and bureaucratic pressures on the federal courts.<sup>158</sup>

As it does in its application to the administrative process, the Public Purposes Ideal celebrates the discretion and policy-making role of the courts. The selection of the right people to become federal judges and the creation of a flexible setting in which they may function is important. Indeed, many objections to proposals to increase the number of federal judges or to restructure the appellate courts express concerns with a resulting decline in the prestige of the federal bench and the quality of persons who will serve as judges.<sup>159</sup> Unlike the Rule of Law Ideal, the Public

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154. See Richard A. Epstein, *The Independence of Judges: The Uses and Limitation of Public Choice Theory*, 1990 BYU L. REV. 827, 843-53 (discussing the ways in which courts fit and do not fit the model as agents of interest groups); William C. Mitchell & Randy T. Simmons, *Public Choice and the Judiciary: Introductory Notes*, 1990 BYU L. REV. 729, 737-38 (pointing out that courts, much like bureaucracies are not elected); Linda A. Schwartzstein, *Bureaucracy Unbounded: The Lack of Effective Constraints in the Judicial Process*, 35 ST. LOUIS U. L.J. 597, 597-98 (1991) (criticizing courts for removing democratic restraints for overseeing public bureaucracies).

155. See Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 1006-11 (1988) (discussing Farber and Frickey's proposal for judicial enforcement of legislative rules).

156. See, e.g., *id.* at 1007 (addressing proposal for substantive judicial review of economic legislation).

157. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

158. See, e.g., Clark, *supra* note 1, at 66 (asserting that the rise of public law litigation is one of the forces turning federal judges into administrators); Fiss, *Forms of Justice*, *supra* note 151, at 11-14 (examining the role judicial independence must play in the judicial function); Heydebrand, *supra* note 1, at 773 (noting that an important element in understanding the courts is the increasing role of the federal government in the economy); Kipp & Lewis, *supra* note 8, at 323-24 (discussing the role of public law disputes in transforming courts to an activist model); Rowe, *supra* note 8, at 833 (arguing that to some degree the increase in litigation is due to the expanded reach of substantive law).

159. See, e.g., Baker, *Past Extramural Reforms*, *supra* note 32, at 884 (discussing Judge Kaufman's view that the quality of judges may be adversely affected by an increase in the number of judges); Edwards, *supra* note 1, at 918-19 (expressing concern that an increase in the number of judges will lower the prestige of the judiciary); McCree, *supra* note 1, at 782-84 (expressing concern that an increase in the number of federal judges not only lowers the status of the position, but also creates administrative problems); Hon. Jon O. Newman, *Determining the Size of the Federal Judiciary Requires More Than a Mission Statement*, 27 CONN. L. REV. 865, 868 (1995) (expressing

Purposes Ideal perceives the antimajoritarian character of the federal courts not as a vulnerability, but as a significant advantage. The insulation of judges from interest group politics ensures that they can rationally pursue sound public policy. These positions reflect the importance of expertise and professionalism emphasized in the Public Purposes Ideal. They also reflect its emphasis on reasoned decision making.

Instrumentalism, the core embodiment of the Public Purposes Ideal, requires an official to ascertain the public good in order to pursue it instrumentally.<sup>160</sup> Because the courts cannot look to a single statutory scheme commissioning them, they can rely even less than administrative agencies on enabling legislation to define the public good to be pursued through their expertise. The Constitution as an enabling document is simultaneously terse and broad, and could support a variety of conceptions of the public good to be pursued by the courts. Public law legislation provides somewhat more, but usually incomplete, guidance as to the public good to be pursued by the courts in litigation invoking such legislation. The legitimacy of courts, like agencies, in applying public law statutes rests on the success in realizing the purposes of the law. Unlike agencies, courts make these decisions episodically not with one, but rather with numerous similarly broad statutory mandates. As with agencies, the most likely substitute for such statements is some variant of cost-benefit analysis.

In this context, cost-benefit analysis, as an application of instrumentalism, is closely tied to the development of the managerial role of federal judges, particularly federal trial judges. A brief examination of that role provides the necessary predicate to an examination of the role of cost-benefit analysis. As illustrated below, this focus on managerial expertise shifts the view of judicial expertise from being a means to the end of realizing the public good to being an end in itself. Managerial judging can undermine the ideal of public purposes that justifies the courts as instrumentalist decision makers.

Many commentators see the growing caseload as *the* problem confronting the federal courts.<sup>161</sup> *The Long Range Plan for the Federal*

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concern over the possibility that an increase in the number of judges will lead to an increase in bureaucracy and a reduction in the quality of the judiciary). An increase in the number of judges is likely to increase the cost and decrease the availability of benefits, such as sabbaticals, that have been seen as important to the professional development of federal judges. Cf. IRA P. ROBBINS, FED. JUDICIAL CTR., JUDICIAL SABBATICALS 21-57 (1987) (discussing the benefits of judicial sabbaticals to judges and the federal courts).

160. See Sargentich, *American Administrative Process*, *supra* note 12, at 411.

161. See, e.g., Breyer, *supra* note 35, at 37 (discussing the effects of the increased caseload on a judge's available time); Clark, *supra* note 1, at 149-50 (examining how the growth in caseload is one factor which has driven bureaucratization); *id.* at 73 (stating that "in large measure the history of judicial administration is the story of a fight against delay"); Edwards, *supra* note 1, at 896 (asserting that a rising workload creates a risk of quality in courts of appeals); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3

*Courts*<sup>162</sup> paints a bleak picture regarding the future growth of that caseload and its impact on the functioning of the federal courts.<sup>163</sup> From this perspective, managerial judging is principally, if not exclusively, a response to a burgeoning caseload. The relationship between the managerial role of federal judges and increasing caseloads, however, appears more complex—with each driving and reinforcing the other. The complexity of this relationship becomes important because so many reform proposals, particularly ones regarding the scope of federal jurisdiction, seem driven only by the desire to reduce caseloads—an approach to federal jurisdiction that Martin Redish refers to as the astrological sign approach.<sup>164</sup>

Many commentators recognize that public law litigation has not only increased caseloads but also expanded the role of the federal courts.<sup>165</sup> Many proposals to limit federal jurisdiction, although not justified on policy grounds, presume a role for the federal courts different from that contained in the Public Purposes Ideal. These proposals support limitations on federal jurisdiction or the restriction of public law litigation primarily as a way of reducing caseloads. Likewise, the focus on management finds justification in the Public Purposes Ideal. Moreover, more efficient management allows the courts, like an overburdened agency, to direct resources to those activities in which the greatest public good can be obtained.

In her prescient work regarding managerial judging, Judith Resnik recognizes the relationship between that approach and an expanded affirmative role for the courts.<sup>166</sup> She also predicts, however, how that approach could actually limit the judicial role.<sup>167</sup> Managerial judging, although initially connected to policy goals of the courts, has developed a focus on efficiency that has disconnected it, and the cost-benefit analysis it employs, from the values that justify broad judicial discretion. This development is predicted by Sargentich's analysis.<sup>168</sup>

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(1996) (implying that too few judges and too large a caseload has created a system geared toward settlement).

162. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter JUDICIAL CONFERENCE, LONG RANGE PLAN].

163. *Id.* at 9-16.

164. See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1787 (1992) (stating that an equally rational result to altering jurisdiction to achieve docket reduction "would have been achieved by elimination of all cases brought by those born under the signs of Pisces, Leo, and Virgo"); *id.* at 1831 (stating that the common problem of current jurisdictional structure is that limitations have "no rationale other than the simple fact that they limit docket size").

165. See sources cited *supra* note 158.

166. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377-80 (1982) [hereinafter Resnik, *Managerial Judges*].

167. See *id.*

168. See Sargentich, *American Administrative Process*, *supra* note 12, at 417 (examining how the cost-benefit analysis easily becomes separated from any normative moorings as it seeks to en-

This disconnection follows a subtle but important shift in the conception of judicial expertise contained within managerial judging. Under instrumentalism, expertise relates to determinations of the public good. In this context, cost-benefit analysis would be used to decide substantive policies or standards for the public good. At an operational level, cost-benefit analysis would be used to help set the priorities of the courts. There is much to suggest that managerial judging now fails to relate to instrumentalism in these ways. Judicial discretion now relates to an expertise in management, and as such, a matter of bureaucratic, not professional, expertise. This change in the concept of expertise risks converting managerial judging into an end itself. Sargentich describes this same risk in administration: cost-benefit analysis becomes a tool, rather than a rule of decision.<sup>169</sup>

Managerial judging relates to the Public Purposes Ideal in the sense that it grants trial judges immense discretion combined with a belief in managerial expertise. Discussions of the future of the federal courts now incorporate the image of the judge as a manager of litigation.<sup>170</sup> It is not uncommon for federal judges to recommend the most extensive use of the case management powers now incorporated into the federal rules.<sup>171</sup> This view of active management combined with a recognition of inherent powers in procedural matters portends an expansion of managerial judging.

Linda Mullenix argues that the Civil Justice Reform Act strengthens these portents by resting procedure on judicial expertise with its distinc-

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compass more and more factors). This separation permits cost-benefit analysis to be pursued for its own ends. Moreover, because cost-benefit analysis presumes a limited range of preconceived ends not generated by the analysis, it can be pursued as an end in itself against these preconceptions.

169. See *id.* at 418–19. Because the preconceived ends of the courts contained in both formalism and instrumentalism can be pursued through cost-benefit analysis, it is not surprising that application of managerial expertise in the service of efficiency becomes self-directed. Dispute resolution, according to established rules as well as the broader ends of instrumentalism, can be accomplished more efficiently by a judiciary composed of capable managers.

170. See, e.g., Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994), and stating that “case management has become integral to the operation of the appellate courts”); Kipp & Lewis, *supra* note 8, at 307 (stating that the Civil Justice Reform Act “represented a formal recognition that the more traditional, passive role of the judge—a role that was a primary value in the Anglo-American system of justice—was no longer viable under present-day conditions”); Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 513 (1995) (arguing that automatic disclosure rules and new discovery rules require managerial judges because judges must necessarily be involved in the process); C.J. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 8 (stating that district judges must now see their roles as managers and “experience some of the strong hand of management themselves. The future may require even more dramatic changes.”).

171. Cf. Charles R. Richey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar*, 157 F.R.D. 69, 75–85 (1994) [hereinafter Richey, *Rule 16 Revised*]; *id.* at 84–85 (citing examples of judicial use of case management); Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit and Bar*, 139 F.R.D. 525, 527 (1992) [hereinafter Richey, *Rule 16 Revisited*] (discussing various case management techniques).

tive counter-majoritarian approbation.<sup>172</sup> The decentralization of rule-making power will only exacerbate the willingness of judges to define procedure in terms of docket control.<sup>173</sup> Decentralization delegates rule-making power to the level most concerned with docket reduction; decentralized procedure may reflect the values of docket control rather than other values now contained in more centralized rules. Managerial judging will overshadow other perspectives and cost-benefit analysis can overwhelm other values including less easily quantitative concepts of justice. The application of cost-benefit analysis to access to the courts favors the commodification of justice, subsuming other values in this analysis.<sup>174</sup> Ironically, in this way managerial judging can undermine the vision of the judiciary supported by the Public Purposes Ideal, again, a development predicted by Sargentich's analysis.

Although many commentators express reservations about managerial judging, John Langbein strongly argues for the aggressive case management contained within the inquisitorial model of German civil procedure.<sup>175</sup> Langbein's article exemplifies the efficiency arguments that can be marshaled for managerial judging.<sup>176</sup> More importantly, it demonstrates how managerial judging can lead to significant alterations in the character of the courts. He notes that the discretion inherent in the German inquisitorial system, like most European civil law systems, requires a variety of protections including merit selection, a separate professional cadre of judicial officials, close supervision of new judges by other judges in a judicial hierarchy, and improved systems for the discipline of judges.<sup>177</sup> This aspect of his article makes the close connection between

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172. See Mullenix, *Counter-Reformation*, *supra* note 56, at 439 ("Federal procedural rulemaking has for the past 50 years been counter-majoritarian and predicated on a model of expertise."); Mullenix, *Separation of Powers*, *supra* note 56, at 1336 (discussing Judge Weinstein's policy arguments on procedural rulemaking); see also Kipp & Lewis, *supra* note 8, at 307 (noting that the Civil Justice Reform Act adopts Judge Learned Hand's view that judges are active case managers); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 803 (1995) (emphasizing the "positive value," as "sanctified" by the Civil Justice Reform Act, of greater rulemaking authority by local federal courts).

173. See, e.g., Mullenix, *Counter-Reformation*, *supra* note 56, at 392 (explaining that a key congressional policy decision behind the Civil Justice Reform Act was to "promulgate a national, statutory policy in support of judicial case management more extensive than what the current federal rules require").

174. See Clark, *supra* note 1, at 77 ("The promotion of efficiency in the judiciary cannot be accomplished without cost and sacrifice of other important values.").

175. See Langbein, *supra* note 1, at 824-25.

176. See *id.* at 826-41 (exemplifying, in part, by contrasting the American approach to the German approach). Joseph Weis argues that civil law systems may require more judges because of the more extensive involvement of judges in cases. Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1389 (1992). A substitute for an increase in the number of judges is an increase in the number of subordinate judicial officials.

177. See Langbein, *supra* note 1, at 848-51. However, the possibility of interest group influence exists in a civil law system. See, e.g., Carlo Guarnieri, *Justice and Politics: The Italian Case in a Comparative Perspective*, 4 IND. INT'L. & COMP. L. REV. 241, 252 (1994) (noting the proliferation of connections between the larger political environment and the Italian judiciary); *id.* at 251-53

management responsibilities and the treatment of judges as civil servants,<sup>178</sup> a treatment common in civil law countries.<sup>179</sup> The reality of increased discretion drives the project seeking greater accountability and control. His proposals, like the expertise model in general, would lodge this control in objective professional standards.

Todd Peterson's evaluation of how managerial judging has altered many of the traditional checks on the judiciary also recognizes the importance of accountability and control.<sup>180</sup> Likewise, it ties that control to the development of bureaucratic structures. Peterson argues that managerial judging reduces or eliminates such traditional checks on trial judges as precedent, appellate review, and juries.<sup>181</sup> He proposes using magistrate judges to control the pretrial process, thereby substituting review by federal trial judges for the more traditional checks imposed on trial judges.<sup>182</sup> The limitations imposed on these magistrate judges would be professional in character.<sup>183</sup> Peterson's suggestions as well as Langbein's recommendation for civil service accountability both accept the need for impersonal judgment and seek to reduce the scope within which personal bias can operate.<sup>184</sup>

Given the concerns about the control of discretion and the elimination of bias, the renewed interest in judicial discipline<sup>185</sup> comes as little

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(describing the impact of organized factions within the Italian judiciary); Vaughn, *Judicial Reform*, *supra* note 94, at 582-88 (describing how bureaucratic organization and personnel practices created a conservative state bureaucracy ill-equipped to respond to violations of human rights).

178. See Langbein, *supra* note 1, at 826-41.

179. See, e.g., Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 991-93 (1982) (suggesting that training within a bureaucracy affects outlook and limits contact with real life); David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1846 (1988) (noting that sociological research over the last 40 years shows West German judges to be conservative and authoritarian); Heydebrand, *supra* note 1, at 763 (commenting that such structures risk turning courts into another arm of the state and in civil law countries "judges tend to be bureaucratically oriented and have a comparatively low-paid civil service status").

180. See Peterson, *supra* note 3, at 45-46, 91-92.

181. *Id.* at 45; see also RICHARDSON & VINES, *supra* note 2, at 172 (stating that the potential for extensive pretrial more clearly makes the individual judge the decision maker); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 92 (1985) (discussing reasons "to question the intuitively appealing notion that the threat of reversal induces trial judges to self-correct").

182. See Peterson, *supra* note 3, at 95. See generally R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799 (1993) (asserting that because magistrate judges are directly accountable to trial judges in ways that trial judges are not accountable to appellate courts, magistrate judges may be encouraged to eliminate cases at the pretrial stage as part of a team effort to reduce congestion).

183. Cf. Peterson, *supra* note 3, at 95-100. Peterson's discussion shows that the restraints would be professional in character because they rest on review of the magistrate judge's decisions using the criteria applicable to well conceived and presented decisions of a professional. See *id.*

184. See Langbein, *supra* note 1, at 850-55; Peterson, *supra* note 3, at 95.

185. See WHEELER & LEVIN, *supra* note 57, at v (noting "sustained interest in new forms of judicial discipline and removal has existed in the United States for the last two decades"); see also JAMES R. BROWNING ET AL., FED. JUDICIAL CTR., ILLUSTRATIVE RULES GOVERNING COMPLAINTS



surprise. The literature contains a variety of proposals for improving the discipline of judges, including federal judges.<sup>186</sup> The coincidence of the growth in managerial judging and the renewed interest in judicial discipline hints at an important connection. This coincidence reflects a relationship between the vision of the judiciary contained in the Public Purposes Ideal and the need to limit and control the discretion validated by that vision.

The instrumentalist vision of agency behavior justifies considerable secrecy. Secrecy protects the expertise and discretion of members of the bureaucracy. In part, it insulates rational decision making based on that expertise from political pressures and from the "irrationality" of custom and existing social conventions.<sup>187</sup> In this way, instrumentalism exalts efficiency above the competing interests of openness. The Rule of Law Ideal and the Democratic Process Ideal place much greater value on openness. Publicity provides a method of insuring that decisions fall within the boundaries created by legal standards, and openness is important both to public participation and to political oversight.

In theory, much of the judicial process is open. Traditional views regarding the importance of public trials and the increasing use of cameras in courtrooms permit, if not encourage, public examination of the judicial process.<sup>188</sup> Opinions, briefs, and a variety of discovery documents are part of a public record.<sup>189</sup> Although the deliberative process, particularly for appellate courts, remains closed as do the deliberations of juries (book contracts aside), the judicial process has traditionally been more open than

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OF JUDICIAL MISCONDUCT AND DISABILITY at vii-ix (1986) (describing the citizen complaint mechanism and the goal of reasonable response to citizens who invoke it); Sahl, *supra* note 57, at 194-95 (suggesting courts increasingly have been subjected to public scrutiny); Williams, *supra* note 57, at 906-07 (noting recent charges of "bad behavior" made against members of the federal judiciary).

186. See, e.g., WHEELER & LEVIN, *supra* note 57, at 4-6 (discussing disciplinary proposals and tracing historically the development of mechanisms for discipline); Sahl, *supra* note 57, at 199-200 (stressing need for more openness and public scrutiny of disciplinary procedures); Williams, *supra* note 57, at 899-903 (discussing the need to deal effectively with race and gender bias complaints and the need for procedures with respect to Supreme Court Justices).

187. See Sargentich, *American Administrative Process*, *supra* note 12, at 415.

188. See generally Elizabeth M. Hodgkins, *Throwing Open a Window on the Nation's Courts by Lifting the Ban on Federal Courtroom Television*, 4 KAN. J.L. & PUB. POL'Y 89 (1995) (discussing the progression of television in courtroom from its historical beginnings to the present); Angeli-que M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655 (1997) (discussing whether Court TV is educating the public).

189. For example, the discovery rules assume that discovery information will be public absent direction to the contrary. However, the common law and constitutional rights to discovery material are limited. See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 10-14 (1st Cir. 1986) (concluding that First Amendment and common law rights of public access to judicial proceedings "do[] not extend to documents submitted to a court in connection with discovery proceedings").

many executive bureaucracies, where legislation and litigation have been required in order to obtain access to meetings and to documents.<sup>190</sup>

The impact of managerial judging on openness illustrates the relationship between instrumentalism and secrecy. Managerial judging removes the activity of judges from public view. Commentators emphasize that managerial judging operates in the pretrial process, a process closed to the public and in which little, if any, record is kept.<sup>191</sup> The replacement of a public trial process with a closed pretrial one reduces not only the opportunity for public view, but also the rationale for openness as well. If some of the benefits of managerial judging rely on the involvement of the judge in ways that influence the parties in the course of the litigation, those benefits might be lost if the judge were limited by the restrictions that openness might place on that role. The literature contains proposals for greater openness in the pretrial process, in the selection process, and in the disciplining of judges.<sup>192</sup>

The recent controversy regarding secrecy in litigation also seems tied to the Public Purposes Ideal and stresses that the pretrial process is generally closed to public scrutiny. The advocates of Sunshine in Litigation provisions<sup>193</sup> argue that protective orders, sealing of records, and confidential settlements prevent the public and regulatory agencies from receiving important, perhaps life-saving, health and safety information.<sup>194</sup> They propose provisions that restrict the ability of judges to issue such orders but grant judges the power to review confidentiality provisions in settlements.<sup>195</sup> Arthur Miller's resistance to the application of such proposals in the federal courts rests heavily upon a defense of the discretion

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190. The history of the federal Freedom of Information Act, 5 U.S.C. § 552 (1994), is instructive. See generally *American Bar Association's Symposium on the 25th Anniversary of the Freedom of Information Act*, 9 GOV'T INFO. Q. 223 (1992) (providing a discussion of the history and the operation of the FOIA).

191. See, e.g., Kipp & Lewis, *supra* note 8, at 331-32 (noting literature discussing how Rule 16 takes case management out of public view with no obligation for reasoned written opinions and how this secrecy is accompanied by the lack of procedural safeguards); Resnik, *Managerial Judges*, *supra* note 166, at 425-26 (remarking on one judge's case management decisions as "off the record and beyond the reach of appellate review").

192. Cf. Resnik, *Failing Faith*, *supra* note 113, at 494-98 (outlining tasks and choices that must be undertaken to improve the Federal Rules of Civil Procedure); Resnik, *Managerial Judges*, *supra* note 166, at 380 (noting that managerial judging may be redefining what is fair and rational adjudication); Sahl, *supra* note 57, at 199 (arguing that more open process would better serve judiciary's reputation).

193. See, e.g., S. 374, 104th Cong. (1995) (unenacted federal Sunshine in Litigation bill).

194. See generally SOC'Y OF PROF'L JOURNALISTS, ASS'N OF TRIAL LAWYERS OF AM., *KEEPING SECRETS: JUSTICE ON TRIAL* (1990) (arguing that policy interests, for the most part, should take precedence over privacy rights).

195. See, e.g., FLA. STAT. ANN. § 69.081 (West Supp. 1999) (stating that no court may enter an order which would conceal a public hazard or which would result in public hazard); TEX. R. OF CIV. P. 76(a) (stating that court records may not be sealed if sealing will have an adverse effect upon general public health unless clearly outweighed by substantial specific interest).

of trial judges.<sup>196</sup> This defense repeats the themes of the Public Purposes Ideal including professional restraints, the expertise of judges, and the efficiency of the trial process.

Proposals requiring that trial judges review confidentiality provisions demand separate examination. These proposals involve the court in private settlements in order to vindicate the public interest—powers that fit nicely within the view of the courts under the Public Purposes Ideal. Because managerial judging may often intimately involve courts in the settlement process leading to such agreements, these proposals can be viewed as limitations on judicial power as well as its expansion. In light of the discussion above, however, both conceptions seem linked to the role of the courts contained in the Public Purposes Ideal.

Managerial judging invokes many of the fears of abuse suggested by the Public Purposes Ideal. The failure of cost-benefit analysis to establish the public good to be implemented by the courts leads to techniques of bureaucracy to control the exercise of judicial discretion. Sargentich would predict that the limitations of instrumentalism would lead to the alternative expression of the Public Purposes Ideal—the market.<sup>197</sup> Before examining how proposals for reform incorporate this alternative expression, I turn briefly to Frug's description of responses of the expertise model to the failure to draw the line between appropriate and inappropriate discretion and between expertise and bias.

Frug states that the inability to draw lines between subjectivity and objectivity would lead to attempts to recreate some type of objective limits.<sup>198</sup> In fact, one of his examples, the creation of "Super-Experts,"<sup>199</sup> finds several analogies in the proposals for reform of the federal courts, including the use of court appointed experts, the creation of panels of experts to examine scientific and technical claims, and the establishment of courts with specialized expertise.<sup>200</sup> Frug argues that this attempt to rely on super-experts will likewise fail because it again requires the drawing of lines between functions that contain both the objective and the subjective.<sup>201</sup>

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196. See Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 HARV. L. REV. 427, 428-32 (1991).

197. See Sargentich, *American Administrative Process*, *supra* note 12, at 419-20.

198. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1318-34 (discussing various real-world ramifications of the expertise model).

199. *Id.* at 1327-31.

200. See generally Dreyfuss, *supra* note 53 (discussing issues with specialized courts); Smith, *supra* note 52, at 458-70 (discussing selection of juries based on education and experience); *The Civil Jury*, *supra* note 52, at 1459 (discussing use of specialized panels); *infra* notes 249-51, 278-82 and accompanying text.

201. Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1330-31. The conflict between the requirements of an independent and informed super-expert "merely reproduces the discussion of the expertise/bias distinction." *Id.* at 1330.

More basically, Frug's examination of the judicial review model as a control of bureaucracy casts doubt on the efficacy of judicial restraints on public and private bureaucracies. The imposition of such restraints forms an important component for the affirmative role of the federal courts.<sup>202</sup> The judicial review model must draw a line between the role of the court and the role of the bureaucracy. In so doing the court can rely on formalist and expertise views of the court, each of which can be interpreted to either expand or contract the scope of judicial review. The court can also draw on formalist and expertise models of the bureaucracy, each of which can again be interpreted to expand or contract the scope of bureaucratic action.<sup>203</sup> The combination of these possibilities explains existing doctrines of judicial review and demonstrates why the judicial review model cannot effectively control bureaucracies.<sup>204</sup>

## 2. The Market

Traditionally, settlement could be seen as reliance on private decision making in which the parties independently examine the alternatives available and choose those alternatives that best fulfill their subjective values.<sup>205</sup> Conceived in this way, settlement seems analogous to market-grounded decision making; that is, courts provide a framework of rules that support this private decision making and ensure adequate information for the determination of rational choice.<sup>206</sup> Even provisions for some public expenditure for these alternatives do not alter their basic private character. This conception of settlement and the role of the courts in it can be seen to be inconsistent with the vision of the role the courts contained in the Public Purposes Ideal. Owen Fiss's critique of settlement<sup>207</sup> demonstrates how advocates of the Public Purposes Ideal can perceive settlement as potentially undermining the involvement of the courts in addressing public values and public rights.

Managerial judging alters the character of settlement; because the judge "encourages" settlement, settlement becomes court-directed. Indeed, managerial judges may move beyond facilitating settlements to influencing the content of settlements.<sup>208</sup> Many settlements may include

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202. See *supra* note 151 and accompanying text.

203. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1334-43.

204. See *supra* notes 88-93 and accompanying text.

205. Cf. Gross & Syverud, *supra* note 161, at 3-4 (noting that party control inherent in the American legal system engenders settlement).

206. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 607-15 (Aspen Law & Bus. 5th ed. 1998) (1974) (noting the importance of litigation in setting rules for settlement even if most cases are settled).

207. See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

208. Cf. Alschuler, *supra* note 7, at 1821-22 (listing judicial pressure to settle cases among the reasons why "the defects of America's adjudicative system have distorted the settlement process"); Marc Gallanter, *A Settlement Judge Not a Trial Judge: Judicial Mediation in the United States*, 12 *J.L. & SOC'Y* 1 (1985) (discussing the powerful influence of judges in directing parties toward settlement); Gross & Syverud, *supra* note 161, at 2-4 (describing incentives for judicial encourage-

provisions reflecting not just the subjective values of the parties but the perspectives and experience of the judge. Conceived in this way, settlement seems less analogous to the market and more reflective of judicial instrumentalism.

In a similar way, perceptions of alternative dispute resolution oscillate between instrumentalism and market analogies. ADR can be seen as privatization of the judicial mechanism. The parties choose, based on their values and interests,<sup>209</sup> from a variety of techniques of dispute resolution. ADR not only rests this choice with the parties, but also provides methods of resolution that give the parties more control over the process of resolution. For example, even with arbitration, one of the more formal options provided by alternative dispute resolution, the parties can choose the decision maker, can influence, if not control, the standards to be applied, and can tailor process and procedure to their individual needs.<sup>210</sup> Under traditional rules, courts may only intervene in circumstances that suggest the equivalent of market failure—where the arbitration is fundamentally unfair or deviates from the agreement of the parties.<sup>211</sup> As with market analogies of settlements, advocates of the Public Purposes Ideal can perceive ADR as a threat to the public responsibilities of the courts, responsibilities that go beyond the resolution of an individual case to implementation of judicial conceptions of the public good. Suggestions that arbitration should not be permitted in certain types of public law litigation, such as employment discrimination,<sup>212</sup> rest not only upon a belief that the agreements to arbitrate may be an abuse of the superior bargaining power of employers, but also upon a conviction that such litigation should involve public judgments made through public officials, particularly judges.<sup>213</sup> The suggestion that public law standards bind arbi-

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ment of settlements); Richey, *Rule 16 Revised*, *supra* note 171, at 71 (advocating greater judicial involvement in pretrial). *But cf.* Dessem, *supra* note 182, at 819 ("Since most judges do not discuss settlement with counsel in cases over which they may preside at trial, a judge other than the trial judge is needed to preside over judicially-hosted settlement conferences.").

209. See, e.g., Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 200 (1995) (noting use of alternative dispute resolution in Latin America as a response to "delays and corruption that characterize the formal judicial system"); Resnik, *Failing Faith*, *supra* note 113, at 537 (showing that managerial judging and alternative dispute resolution share the view that disposition by the parties' consent is preferable to adjudication); Weis, *supra* note 176, at 1387 (discussing innovative procedures available in alternative dispute resolution).

210. *Cf.* Dakolias, *supra* note 209, at 200-01 (asserting that the flexibility and party-based control that ADR offers has led to the willingness of Latin American parties to choose this method as opposed to traditional judicial procedures); Weis, *supra* note 176, at 1387 (proposing that party agreement allows experimentation).

211. *Cf.* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 95-99 (1996) (noting limited procedural safeguards for arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (1994)).

212. See generally *id.* at 77-78 (discussing controversy, in the wake of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), surrounding mandatory arbitration of employment claims).

trators in employment discrimination cases relies on similar instrumentalist perspectives.<sup>214</sup>

Mandatory alternative dispute resolution prior to proceeding in the courts is not a market alternative but rather the application of instrumentalist principles. Indeed, the view that such mandatory provisions are really consumer driven echoes instrumentalist descriptions of bureaucratic activity.<sup>215</sup> It assumes that consumers of dispute resolution services want the most efficient service and that the courts using their experience and expertise determine what services best serve which groups of consumers.<sup>216</sup> Although the mandatory ADR provisions under the Civil Justice Reform Act, which rest the requirement on the amount in controversy,<sup>217</sup> belie any careful consideration of consumer interests, they still reflect judicial judgments about the appropriateness of different forms of dispute resolution.

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213. See, e.g., 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, 36–39 (focusing on superior bargaining power of employers, particularly in the context of pre-dispute agreements, noting such agreements are a form of corporate “self-deregulation,” and emphasizing that these clauses remove important public rights from the courts); cf. Edwards, *supra* note 1, at 928 (arguing that significant public rights should not be limited “by those whom the law seeks to regulate”).

214. Cf. Baker, *Past Extramural Reforms*, *supra* note 32, at 872–73 (expressing concern about the effect of arbitration on underlying legal norms); Breyer, *supra* note 35, at 44 (emphasizing the importance of just settlement in disputes potentially leading to litigation, and the fact that there is uncertainty whether ADR leads to such just settlement); Judge G. Thomas Eisele, *Differing Views—Differing Values: A Comment on Judge Parker’s Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1940–41 (1993) (criticizing judges’ ability to require alternative dispute resolution as opposed to a traditional trial); Malin, *supra* note 211, at 100–02 (emphasizing the role of courts and the important public function of judges, noting that arbitrators are outside the public justice system, and arguing that private arbitral interpretation of Title VII can undermine uniform federal labor standards).

215. See, e.g., FED. JUDICIAL CTR., MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION 2 (“Case management must be directed at tailoring dispute resolution procedures and techniques to the available resources and needs of the case.”); Alschuler, *supra* note 7, at 1840 (arguing that mandatory arbitration reduces backlogs and users of arbitration have high levels of satisfaction); Breyer, *supra* note 35, at 44–45 (discussing the possible unfairness of mandatory, alternative dispute resolution); Judge R. Allan Edgar, *A Judge’s View—ADR and the Federal Courts—The Eastern District of Tennessee*, 26 U. MEM. L. REV. 995, 995–97 (1996) (suggesting that a benefit of using alternative dispute resolution is quality, as well as efficiency); Justice Penny J. White, *Yesterday’s Vision, Tomorrow’s Challenge: Case Management and Alternative Dispute Resolution in Tennessee*, 26 U. MEM. L. REV. 957, 961 (1996) (discussing the Tennessee courts’ ability to provide appropriate dispute resolution and public perception that ADR is less expensive, more efficient, and more satisfactory than litigation).

216. See generally Rowe, *supra* note 8, at 828 (discussing whether litigation or ADR is the most efficient way to handle disputes).

217. See, e.g., E.D. PA. CIV. R. 8 (mandating mediation for cases involving disputes of less than \$100,000). See generally Maull, *supra* note 49, at 246–52 (describing alternative dispute resolution processes adopted under the Civil Justice Reform Act, including the Pennsylvania provision cited above); *id.* at 253 (“Each of the principal ADR processes is mandatory in at least one district.”). The courts’ attraction to alternative dispute resolution may rest on ADR’s ability to remove cases from the courts and to reduce dockets, for many cases that are sent to alternative dispute resolution do not return to the courts.

To the extent that alternative dispute resolution can be described as a market alternative, it remains vulnerable to criticism from advocates of instrumentalism. To the extent that ADR seems to be the application of instrumentalism relying on the discretion and expertise of judges, it is vulnerable to critics of state intervention and the advocates of market-based alternatives. In either instance, the Public Purposes Ideal and this way of talking about bureaucracy collectively illuminate the values at issue.

The Public Purposes Ideal conceives a radically different role for the courts than the Rule of Law Ideal.<sup>218</sup> The Public Purposes Ideal celebrates discretion, while the Rule of Law Ideal shuns it.<sup>219</sup> For this reason, the Public Purposes Ideal places the discussion regarding managerial judging within a normative framework that contrasts sharply with that encountered in the Rule of Law Ideal<sup>220</sup>—a normative framework that generates different arguments and different concerns. The Rule of Law Ideal opposes the broad judicial decision making inherent in the Public Purposes Ideal. It opposes judicial policy making rather than judicial application of existing standards.<sup>221</sup> On the other hand, the Public Purposes Ideal opposes the narrow and constricted view of the judicial role advocated by the Rule of Law Ideal.<sup>222</sup> Both the Rule of Law and the Public Purposes Ideal, however, perceive the judicial role for good or ill as countermajoritarian.<sup>223</sup> In this regard, they both conflict with the Democratic Process Ideal.<sup>224</sup>

#### D. *The Democratic Process Ideal*

According to Sargentich, the Democratic Process Ideal rests on a participatory and representative decision-making process in which agency officials consider the views of those affected by administrative decisions.<sup>225</sup> This ideal sees the administrative process primarily as a pluralist political process because its core embodiment relies on public participation in that process.<sup>226</sup> Public participation conflicts with the bureaucratic structure of administrative decisions, and challenges the principle that public employees are politically neutral actors. A number of practical and policy considerations also limit the possibility of wide pub-

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218. See Sargentich, *American Administrative Process*, *supra* note 12, at 411.

219. See *id.*

220. Cf. *id.* (discussing the nature of the Public Purposes Ideal).

221. See *id.* at 397.

222. See *id.* at 411.

223. See *id.*

224. See *id.* at 425.

225. See *id.*

226. See *id.* at 426–27.

lic participation.<sup>227</sup> For example, the limited resources of many interest groups will prevent them from meaningfully participating in the administrative process.<sup>228</sup> Indeed, the need for administrative discretion in deciding which groups to permit to participate, and which, if any, groups to subsidize, involves nondemocratic decisions by agency officials.<sup>229</sup>

Given the restraints on the core embodiment of participation, the Democratic Process Ideal offers an alternative expression of oversight by politically responsible officials.<sup>230</sup> This alternative expression, of course, abandons direct public participation central to the ideal. It also rests on doubtful assumptions about the responsiveness of the President and Congress "to a full range of public interests."<sup>231</sup> The methodology of this ideal is politics: the process of balancing and compromising affected interests.<sup>232</sup> This methodology manifests the judgment that the administrative process is a political one.

As part of the market/pluralist model, Frug critiques the view that "demands of the political process can (or do) protect the constituents of the bureaucracy from domination by bureaucratic officials."<sup>233</sup> He notes, as does Sargentich, that participation in bureaucratic decision making requires an identification of the relevant interests, a description of the nature of their participation, and rules to resolve conflicts between the various interests.<sup>234</sup> Each of these issues, he believes, creates a subjective/objective combination that potentially undermines the model.<sup>235</sup> For example, because every interest group cannot participate, the choice of the relevant groups requires an objectification by the bureaucracy of the subjective desires of the people.<sup>236</sup> The character of interest group participation combines the insight that interest groups represent narrow subjective interests while together they represent the objective constituency of the agency.<sup>237</sup> The rules of interest group conflict cannot be objective, but must chose between views of formal equality of groups or real equality—considering financial resources, organization, and other social capital—a choice that will lead to radically different outcomes.<sup>238</sup> Rather

227. *See id.* at 428–29. Sargentich notes that "despite the continuing power of the democratic process ideal, the gap between its core embodiment and the existing process is so profound that the core, if fully realized, would radically transform rather than merely reform it." *Id.* at 429.

228. *See id.* at 430.

229. *See id.* at 431.

230. *See id.* at 431–38.

231. *Id.* at 436.

232. *See Sargentich, Future of Administrative Law, supra note 14, at 774–75.*

233. Frug, *Ideology of Bureaucracy, supra note 19, at 1356* (internal quotation marks omitted).

234. *See id.* at 1368–69.

235. *See id.* at 1369.

236. *See id.*

237. *See id.* at 1371 (asserting the theory that interest groups are therefore alternatively described "as representatives of subjective desire and representatives of objective neutrality").

238. *Cf. id.* at 1372 (discussing how, within the pluralist mechanism, specified rules must be implemented). As Frug notes:



than participation within the bureaucracy, Frug advocates participatory decision making that would serve to undermine rather than the support the legitimacy of bureaucracies.<sup>239</sup>

### 1. Participation

The Democratic Process Ideal seems particularly ill-suited to a discussion of the future of the federal courts. The Constitution gives federal judges tenure on good behavior for life and limits the ability of Congress to reduce the salaries of judges.<sup>240</sup> These provisions implement an attempt to insulate judges from much of interest group politics. Although some states provide for the popular election of judges,<sup>241</sup> and many others require judges to stand against their record for re-election,<sup>242</sup> the role of judges contained in the Rule of Law Ideal and the Public Purposes Ideal so dominates our perceptions of federal judges that these other methods of judicial selection and accountability appear notable principally as examples of the risks of corruption and politicization of judges posed by the application of electoral practices to the courts.<sup>243</sup> Direct interest group participation seems anathema to a perception of the judge, either as a neutral arbitrator applying formal standards to individual cases, or as a disinterested expert policymaker or judicial manager.

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Simply sketching these three solutions to the problem of class differences—disregarding them, financing the poor, reorganizing the economic structure—should demonstrate the range of possible rules for interest group conflict. . . . These rules create not a neutral arbiter but a battleground for determining the kinds of messages that will influence the bureaucratic process.

*Id.* at 1373.

239. *See id.* at 1370.

240. *See* U.S. CONST. art. III, § 1 (Compensation Clause) ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). On three particular occasions, federal judges have challenged actions that they argued reduced their salaries, including failure of Congress to increase salaries with the rate of inflation. *See* *United States v. Will*, 449 U.S. 200, 218 (1980); *Hatter v. United States*, 953 F.2d 626, 629-30 (Fed. Cir. 1992); *Atkins v. United States*, 556 F.2d 1028, 1045, 1048 (Ct. Cl. 1977), *overruled by* *American Fed'n of Gov't Employees, AFL-CIO*, 806 F.2d 1034, 1039 (Fed. Cir. 1986). *See generally* THE FEDERALIST NO. 79 (Alexander Hamilton) (asserting that judges are entitled to fair compensation that should not be lowered).

241. *See* Schwartz, *supra* note 57, at M2 (noting that 21 states popularly elect judges).

242. *See id.* (noting that 38 states require judges to run against their records); *see also* WHEELER & LEVIN, *supra* note 57, at 8 (stating that most states have such a provision at least in some courts and that seven states have popular recall provisions for judges).

243. *See, e.g.*, WHEELER & HARRISON, *supra* note 7, at 6 (noting that at the time of the Constitution, state legislatures appointed judges in most states and approximately half had the power of removal); Epstein, *supra* note 154, at 840-41 (suggesting how appointment rather than election of judges limits application of some aspects of public choice); Langbein, *supra* note 1, at 853-54 (expressing hesitation in having elected Illinois state court judges exercise powers through German-type civil procedure, as a large number of Chicago judges are indicted for corruption, yet noting that "[r]emodeling of civil procedure is intimately connected to improvement in the selection of judges"); Wilkinson, *supra* note 1, at 1156-57 (implying concern about an elected judiciary adjudicating civil rights and liberties). *But see, e.g.*, Guarnieri, *supra* note 177, at 251-54 (describing how factions and interest group politics have arisen in the appointed Italian judiciary).

The federal courts, however, contain two institutions, both ancient in origin, that rely on public participation in the judicial process. Until recently, these two institutions—the lay jury in civil actions and the adversary system—have seemed inextricably linked to American conceptions of civil litigation. The Seventh Amendment protects the role of the lay jury<sup>244</sup> and centuries of tradition and the assumptions of civil procedure buttress the adversary role.

The civil jury involves members of the public—usually persons without legal training or experience in the judicial process. Ideally, juries are representative of the community at large, and the authority of their judgment lies in good part on their representative character.<sup>245</sup> A substantial body of law and practice seeks to insure that representative character<sup>246</sup> and the current controversy about the status of the peremptory challenge can be viewed as illustrative of the importance placed on the jury as a surrogate for the community.<sup>247</sup> In addition, because juries are not part of any judicial bureaucracy, they serve as community observers whose presence alone helps to validate the judicial process.<sup>248</sup> Even in civil litigation they can perform as dispensers of justice by avoiding the harshness of established rules.

Indeed, juries embody participatory decision making; they are important decision makers, not simply advisers to others. In this sense, juries offer an example of public participation unlike any in administrative agencies. The decision-making powers of juries have engendered a framework of trial and appellate procedures designed to limit and control that power.<sup>249</sup> Much of civil procedure chronicles the attempts by the judiciary to constrain popular decision making that often lies at the heart of civil trials. At different stages in American history, public responses to

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244. See U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

245. Cf. RICHARDSON & VINES, *supra* note 2, at 174 (insinuating that although the federal courts represent the very embodiment of legal order, they also represent institutions intrinsically linked to popular democracy); Eisele, *supra* note 214, at 1977 (discussing the jury as a political institution crucial to a heterogeneous, democratic community committed to protecting the interests of "outs"). Akhil Reed Amar and Alan Hirsch contend that the Constitution originally conceived the jury as an institution of self-government that would check the power of judges. See AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 52–53 (1998).

246. See, e.g., Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1871 (1994) (establishing guidelines for the selections of grand and petit juries in federal courts).

247. See *supra* note 54.

248. See, e.g., Weis, *supra* note 176, at 1390–91 (suggesting that litigants may more readily accept the judgment of juries because of anonymity, lack of continuity, and the fact that jurors "are perceived as having no interest in the outcome of the case").

249. This framework consists of the Rules of Evidence, presumptions, elements of claim, instructions, Rule 49, directed verdict, judgment as a matter of law, and renewed motion for judgment as a matter of law.

these attempts<sup>250</sup> have generated political controversy and significant legal responses.<sup>251</sup>

Likewise, the adversary process can be justified as an institution of public participation in the judicial process. Commentators have expressly linked this process to the protection of individual rights and the furtherance of individual autonomy.<sup>252</sup> The individual, through her representative, plays an important role in the determination of her claim. The adversary process, like any scheme of participation, addresses basic issues regarding which persons or interests will have an opportunity to present views to an official decision maker, what will be the character of the participation, and what will be the rules of conflict between representatives of different groups. Because federal courts act only upon cases or controversies brought before them, the participation of others is necessary to invoke judicial power. The courts are reactive and lack the proactive powers of most administrative agencies.

In courts, the rules of participation are quite democratic. Any person who has a claim within the competence of the court may bring that claim.<sup>253</sup> The parties decide what interests to represent and the parties initiate the process. Individuals can bring claims that affect large segments of the public, and these actions are clearly representative in their character. For example, the civil rights litigation leading to *Brown v. Board of Education*<sup>254</sup> used individual plaintiffs in cases where the interests of millions were asserted.<sup>255</sup> Class litigation more explicitly accepts this representative role, and the adequacy of representation is not only a

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250. See, e.g., ARIZ. CONST. art. XVIII, § 5 (containing populist provisions that prohibit judges from directing verdicts on the issue of contributory negligence); OKLA. CONST. art. XXIII, § 6 (stating that the defense of contributory negligence shall be a question of fact left to the jury).

251. See, e.g., Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 ARIZ. ST. L.J. 1, 1 (1991) (discussing the power of juries to reach verdicts that may be "inconsistent with the traditional application of facts to the law").

252. See, e.g., Kipp & Lewis, *supra* note 8, at 308 (arguing that individual autonomy is vindicated in individuals invoking the judicial process and in individuals retaining control over all relevant aspects of the process); *id.* at 347-48 (criticizing the Civil Justice Reform Act on the ground that the Act "represents a clear diminution in the absolute autonomy of individuals who invoke the civil justice system," but implying that the Act could increase substantive liberty, "namely access to a more meaningful federal civil adjudicative process").

253. For general comments dealing with court openness, accessibility, and accountability, see Martineau, *supra* note 3, at 11-13 (stressing that oral argument is needed for institutional purposes of openness and accountability); *id.* at 19-20 (analyzing participation as a value supporting oral argument in light of the need of courts to deal with sharply increased appellate caseload); Meyer, *supra* note 1, at 662 (commenting favorably on the greater accessibility of the courts compared with legislatures); Redish, *supra* note 164, at 1776-77 (addressing arguments that advocate a role for consumer choice in shaping jurisdiction); Resnik, *Failing Faith*, *supra* note 113, at 504-05 (describing central consideration of the adversary process in the drafting of the federal rules).

254. 347 U.S. 483 (1954).

255. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976) (addressing, among other things, the fact that *Brown* was a consolidated opinion).

constitutional touchstone but also a preeminent requirement of federal procedure.<sup>256</sup> Clearly, some persons seek to represent only themselves, while many cases are driven by interest group considerations rather than the desires of the individual party. Within this range, however, representation of others seems more common and less the exception. Although professional representation is not a prerequisite to such participation, as a practical matter, professional representation is usually a necessity. Not surprisingly, litigation in the United States becomes an important form of interest group activity. Many factors influence this use of litigation but the ease of participation is particularly important.

Participation by litigants representing different groups also serves to educate judges about the interests and problems of broad segments of the public. The breadth of this education can create a democratic bias in judges who see the claims of all groups and social classes. For example, one long-standing critique of the Chilean judiciary was its separation from the concerns and interests of the vast majority of Chileans.<sup>257</sup> Many believed that this insulation from the polity of the state contributed to the inability of the judiciary to respond to the human rights abuses of the military regime.<sup>258</sup> Proposals for reform in Chile seek to increase public participation in the courts as a way of inculcating democratic values in judges.<sup>259</sup>

Attempts to limit access to the courts can appear undemocratic, and therefore provoke especially strong reactions. These attempts can take the form of reducing the ability of individuals to raise the interests of others. Both the controversy and confusion of the Supreme Court's standing decisions demonstrate the difficulties when the court seeks to articulate standards for participation.<sup>260</sup> These attempts can also seek to discourage the use of the courts by certain groups or interests. A strong undercurrent of the discussion of civil justice reform proposals, particularly those proposals affecting access to the courts, articulates the suspi-

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256. See FED. R. CIV. P. 23. Of course, class actions can prevent or limit the participation by members of the class in independent litigation. The limitation on participation is especially true for those class actions seen as mandatory and in which the members of the class are not given an opportunity to opt out. See *id.*

257. See Vaughn, *Judicial Reform*, *supra* note 94, at 587–88.

258. See *id.* at 588 (noting the commonly held view of the Chilean Judiciary—that it “used formalism to justify its conservative biases,” in turn ignoring or condoning human rights abuses at the time of the military regime).

259. See *id.* at 595–96.

260. See, e.g., William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennet v. Spear*, 49 ADMIN. L. REV. 763, 764–75 (1997) (discussing recent Supreme Court jurisprudence on standing that “raises difficult separation of powers and interpretation issues, and potentially results in even more skewed standing criteria . . . disfavoring claims brought by the beneficiaries of regulation”); Edwards, *supra* note 1, at 907–09 (discussing the possible intentions behind the Supreme Court’s approach to standing, section 1983, habeas corpus, class actions and implied private rights of action). “[T]he Supreme Court has endeavored to alter the litigation-producing nature of prior doctrines and to replace those doctrines with litigation limiting or door closing rules . . .” *Id.* at 908.

cion that these proposals are intended to make the courts less hospitable to consumer and civil rights litigants, thereby reducing the participation of these interests.<sup>261</sup>

The adversary process also establishes extensive individual control over the character of participation. Adversarial procedural rules rely on the adversaries to choose the judicial forum, to investigate independently, to control the collection of information, to structure litigation positions, to frame issues, and to present arguments supporting their respective party's position.<sup>262</sup> In addition, adversaries possess ways of directly influencing decision makers: arguments, questions to witnesses, selection of jurors, use of experts, and the preparation of written briefs.<sup>263</sup> Appellate

261. See, e.g., ELIZABETH PLAPINGER & DONNA STIENSTRA, 14 ALTERNATIVES TO HIGH COST LITIGATION 10-11 (1996) (discussing the impact of user fees in ADR); Alschuler, *supra* note 7, at 1814 (discussing how plaintiffs are adversely affected by increasing the costs of justice and that "[w]rongdoers would be required to 'internalize' a smaller portion of the cost that their conduct has inflicted on others"); Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996) (arguing mediation as a rebuke of an inefficient adversary legal system in a state-by-state survey of mediation provisions); Hensler, *supra* note 8, at 249 (noting that the Council on Competitiveness' proposals "seek to change the current balance between individual plaintiffs and corporate defendants, in favor of the latter"); Patrick E. Longan, *Congress, the Courts and the Long Range Plan*, 46 AM. U. L. REV. 625, 645-53 (1997) (discussing how the increased congressional regulation of procedure is making practice in the federal courts more complex because of the use of different procedural rules for different types of cases, particularly those arising under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-1 to 78u-4 (Supp. I 1995))); Resnik, *Failing Faith*, *supra* note 113, at 531-33 (discussing how existing rules and their interpretations by courts can harm civil rights litigants by reducing the number of civil cases filed and tried); Tobias, *supra* note 123, at 832-33 (suggesting that local courts could structure procedure unfairly to disadvantage certain counsel and litigants and such changes are likely to affect litigants with the least financial and political power).

Mullenix notes the politically charged atmosphere that hovers over the Civil Justice Reform Act:

[T]he disguised political agenda is to remove disagreeable cases and disagreeable litigants from the federal courts. The blatant agenda is to allow local groups to create innovative procedural rules to enhance litigation efficiency; the disguised agenda is to foster certain kinds of procedural rules that will favor certain types of litigants. The blatant agenda is to "democratically" give procedural rulemaking authority to users of the system; the disguised agenda is to strip the judicial branch of its traditional rulemaking functions and transfer that function to unelected elite advisory groups dominated by business interests and corporate and insurance civil defense attorneys.

Mullenix, *Counter-Reformation*, *supra* note 56, at 439. Edwards highlights the political issues surrounding rationing plans:

[R]ationing plans, like attempts to expand supply by creating new specialized courts, must be designed to avoid conveying the impression that they are intended to limit disfavored rights or to divert the business of the poor and powerless from the federal courts [sic] in order to preserve a convenient forum for the wealthy and powerful.

Edwards, *supra* note 1, at 923.

262. See generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE (2d ed. 1993) (examining the tools available to attorneys who bring or defend civil suits including how they should frame their cases in order to properly bring them before a particular court and how the case proceeds from its inception to a final enforceable judgment).

263. See generally THOMAS A. MAUET, TRIAL TECHNIQUES at xix (4th ed. Aspen Law & Bus. 1996) (1980) (stating the effectiveness of a trial lawyer is based on the attorney's development of an

briefs and arguments forcefully present the perspective of the adversaries and can lay the grounds for other cases and other arguments. Because the character of participation emphasizes attempts to influence judicial officials directly through a variety of formal means, social scientists recognize litigation as a form of lobbying, analogous to the attempts to influence legislative and executive bodies.<sup>264</sup>

Finally, the Rules of Civil Procedure set the rules for the resolution of conflicts between participants.<sup>265</sup> Commentators recognize that these rules generally assume a formal equality between participants with the anticipated result that groups representing lower social and economic interests are disadvantaged.<sup>266</sup> Still, in the context of the Democratic Process Ideal, the adversary process seems a highly developed institution for public participation in the judicial process.

The Civil Justice Reform Act adopts the language of participation. In what is described as "bottoms up" decision making, the Act directs the formation of local advisory groups composed of those affected by the procedures of federal trial courts.<sup>267</sup> The affected interests are given a direct role in advising the courts in the development of rules to implement the goals of the Act.<sup>268</sup> Therefore, the Act involves the participation of local interests in the development of procedural rules. This involvement is substantially at odds with the uniform and national character of existing rulemaking procedures. Linda Mullenix attacks these participation requirements, stating that they are the imposition of congressional judgment on the courts and act to further the goals of specific interest groups, particularly defense counsel representing the insurance industry and the corporate bar.<sup>269</sup> Although she believes that the Act reflects cen-

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effective method for analyzing and preparing cases for trial and the attorney's technical ability to present their side persuasively at trial).

264. See RONALD J. HREBENAR, *INTEREST GROUP POLITICS IN AMERICA* (1997) (discussing judicial lobbying).

265. See generally FED. R. CIV. P. (articulating the rules for commencement of actions, pleadings and motions, parties, discovery, trials, judgments and remedies).

266. Cf. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 95-97 (1974) (suggesting redistributive reformation in the legal system to facilitate equalizing change).

267. 28 U.S.C. § 478 (1994). Because the decisions of planning groups are only suggestions, their participation may be illusory. Indeed, courts could use the process to validate a pre-existing judicial agenda.

268. 28 U.S.C. §§ 471, 472 (articulating the particulars of developing and implementing a civil justice expense and delay reduction plan for the federal district courts in conjunction with the implementation of advisory groups).

269. See Mullenix, *Counter-Reformation*, *supra* note 56, at 406-07 (arguing that in the Brookings-Biden task force "business, corporate, and insurance industry litigators were heavily represented in comparison to other constituencies with interests in the federal courts"); *id.* at 438 ("Congress's central preoccupation with protecting the special interests of business and insurance concerns supplied the bill's rationale that litigation costs impair the ability of American corporations to compete at home and abroad."); Mullenix, *Separation of Powers*, *supra* note 56, at 1287 (stating that the Civil Justice Reform Act will "irretrievably politicize federal procedural rulemaking"); see also Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act*

tralized rather than participatory decision making,<sup>270</sup> her fears of interest group dominance of the process reconfirms the participatory aspects of the Act; for, from this dominance follows the advantage that some groups have over others.

Some literature suggests an advantage of alternative dispute resolution is its ability to increase the participation of the parties.<sup>271</sup> In ADR, the parties are encouraged to interact early and often in the course of the process. Such participation permits the parties to appreciate how their efforts have contributed to the outcome or how they "own" the process and its results.<sup>272</sup> Alternative dispute resolution also rests on the core of the Democratic Process Ideal in another way. That core embodiment sees governmental decision making as a political process where values are selected through a bargaining process among affected private actors and government officials that leads to some legally sanctioned result, a process potentially satisfied by many forms of alternative dispute resolution. Many forms of ADR could be seen in this same way. In fact, judge-controlled settlements could also be viewed as a bargaining process involving the affected parties and a government official leading to an outcome to be given legal effect.

The participation, however, conceived in the Democratic Process Ideal, focuses on participation in a forum that allows the presentation of views to government officials responsible for decisions that affect the interests of the persons or groups participating; it assumes openness and broad public participation. It becomes difficult to define involvement in private decision making as the participation conceived in the ideal.

Alternative dispute resolution also fails to fit within the Democratic Process Ideal's conception of participation because ADR ignores values of participation that exist independent of outcome. Feminist literature stresses the importance of narrative and storytelling in order to legitimate group values, to validate perspectives, and to recognize the dignitary interests of individuals.<sup>273</sup> For example, the right of battered women to

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of 1990, 59 BROOK. L. REV. 879, 893-96 (1993) (noting that although women and minority attorneys are underrepresented in the advisory groups to federal courts, the groups seem balanced between plaintiffs' and defendants' attorneys).

270. See Mullenix, *Counter-Reformation*, *supra* note 56, at 407 (stating that "the Civil Justice Reform Act amounts to a superficial layer of local pluralism that disguises what is essentially congressionally-dictated civil justice reform").

271. See John B. Attanasio, *Foreword: Verstehen and Dispute Resolution*, 67 NOTRE DAME L. REV. 1317, 1317-19 (1992) (discussing Max Weber's concept of "understanding" (*Verstehen*) in light of increased interest and participation in ADR).

272. Cf. Resnik, *Rereading the Federal Courts*, *supra* note 29, at 1052 (discussing the possibility that the federal court system is increasingly at risk as individuals with resources opt out of the federal system to "buy their own set of private judges").

273. Cf. Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2477 (1993) (noting in the context of reconstructing legal ethics how a function of the legal system is to sort through stories in an "orderly, nonviolent, [and] civilized manner"); Richard Lempert, *Telling Tales in Court: Trial*

tell their stories in a public forum before officials representing the power and authority of a democratic community vindicates these other values of participation.<sup>274</sup> In particular, the gender bias studies of certain courts demonstrate that these values of participation are most important to groups which are least likely to be able to participate in the judicial process because of their lack of political or economic power or because of discrimination or bias.<sup>275</sup>

The antimajoritarian perspective of the Rule of Law Ideal and the Public Purposes Ideal would be expected to create some dramatic conflicts with the institutions of participation. The Public Purposes Ideal in particular would challenge existing forms of participation; for it sees the insulation of judges from interest group politics as fundamental.<sup>276</sup> The literature suggests that these challenges are now critical to a discussion of the future of the federal courts.<sup>277</sup>

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*Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559-73 (1991) (discussing trial procedure in the context of the significance given to different interpretations of stories); Philip N. Meyer, *Will You Please Be Quiet, Please? Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 567-68 (1994) (describing legal culture as one of storytelling); Kim Lane Scheppele, *Just The Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 127 (1992) (describing how reluctance to accept the revised or delayed stories of women regarding sexual harassment or abuse particularly disadvantages them as the legal system does not recognize these stories as "singular, immediately apparent, and permanent" as the truth or reality). See generally Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (examining the growing trend of storytelling in legal scholarship). A "storytelling" rationale can also support alternative dispute resolution. In ADR, participants are entitled to tell their stories in their own ways, unhindered by the rules of evidence. Therefore, one of the benefits of ADR is the sense that participants are able to speak in their own voices.

274. Cf. Baron, *supra* note 273, at 282 ("The point of these stories . . . is to demonstrate the gap between the reality of the described experiences, on one side, and existing legal doctrine, on the other."); Florida Sup. Ct. Gender Bias Study Comm'n, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. at i, xxxii (1990) [hereinafter Florida Gender Bias Study] (underscoring the importance of victim participation in litigation).

275. Cf. Baron, *supra* note 273, at 266-67 (storytelling in legal scholarship is particularly important for "outsiders" or "those who lack power or who represent those who do" because storytelling becomes a critique of power). See generally MARYLAND SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS, REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS (1989); George Lange, III, *Second Circuit: Study of Gender, Race, and Ethnicity*, 32 U. RICH. L. REV. 703, 703 n.1 (1998) (discussing the development of circuit gender bias studies based on the 1992 resolution of the Judicial Conference of the United States); Hon. Dolores K. Sloviter, *Third Circuit: Gender, Race, and Ethnicity—Task Force on Equal Treatment in the Courts*, 32 U. RICH. L. REV. 707 (1998) (discussing the judicial councils' studies of gender bias in their circuits); Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990) (stating that gender bias affects many areas of Florida court system and affects the availability of the courts).

276. See Sargentich, *American Administrative Process*, *supra* note 12, at 413-14 (arguing that it is "irrational to seek to rely primarily upon courts in policing agencies' exercise of their peculiar expertise").

277. Cf. Florida Gender Bias Study, *supra* note 274, at xv-xlvi (describing how judicial attitudes can affect the outcome of court proceedings).



In recent years, the civil jury has increasingly come under attack.<sup>278</sup> Few convincing efficiency arguments seem to support civil juries. Jury trials are more costly and time consuming and a similarity of jury decisions and those of judges indicates that the additional costs may not be worth the benefits.<sup>279</sup> Moreover, deviations between the decisions of juries and judges, particularly regarding damages, can be cast as evidence of the improper bias of juries as decision makers.<sup>280</sup> Supporters of civil juries recommend a number of proposals to improve the fact finding and decision-making ability of juries.<sup>281</sup> Still, constitutional provisions for jury trials are often analyzed as impediments to the establishment of more efficient dispute resolution procedures, particularly ADR.<sup>282</sup>

Moreover, managerial judging makes jury trials less important. Because managerial judging occurs principally at the pretrial stage, it is judge centered.<sup>283</sup> To the extent that managerial judging seeks to resolve disputes without trial, its success depends upon avoiding trials, particularly jury trials.

Likewise, managerial judging increasingly casts doubt on the viability of the adversary process. Judges increasingly control the course of the litigation, the extent of fact finding, and the likelihood of disposition

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278. See, e.g., Gross & Syverud, *supra* note 161, at 3 (noting that a system geared to settlement avoids the jury); Judge Robert M. Parker & Leslie J. Hagin, "ADR" *Techniques in the Reformation Models of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1920-24 (1993) (expressing concern about the role of jury in hindering ADR and suggesting a balancing test for the right to trial by jury); Rowe, *supra* note 8, at 854-55 (describing how the presence of the jury has a more pervasive and widespread impact on trial procedure, preparation, and costs than is sometimes perceived).

279. But see Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1072 (1964) (defending jury decisions as similar to those reached by judges and stating that "debate about the merits of the jury system should center far more on the value and propriety of the jury's sense of equity, of its modest war with the law, than on its sheer competence").

280. See James K. Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751, 754-56 (1985) (suggesting that the type of defendant influences the amount a jury awards). But see Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5, 6 (1991) (summarizing literature and concluding no across-the-board jury bias or antipathy to doctors existed in the malpractice awards studied).

281. See Weis, *supra* note 176, at 1391 (noting many limitations on juries are no longer justified and suggesting, for example, that jurors be permitted to submit questions and that restrictive rules of evidence be reconsidered); see also *supra* note 52 and accompanying text.

282. See Magistrate Judge J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1007, 1018 (1996) (discussing how "trial disincentive[s]" under the Civil Justice Reform Act discourage requests for trials de novo following arbitration awards; for example, if the party requesting trial did not obtain results at trial more favorable than arbitration, the cost of arbitration would be assessed against the party; and noticing that in some state courts a party must pay costs of arbitration in order to obtain trial); Eisele, *supra* note 214, at 1951-52 (discussing and rejecting the position of advocates of mandatory alternative dispute resolution that greater disincentives to requesting a trial after arbitration be imposed).

283. Cf. Gross & Syverud, *supra* note 161, at 2 ("We prefer settlements and have designed a system of civil justice that embodies and expresses that preference in everything from the rules of procedure and evidence, to appellate opinions, to legal scholarship, to the daily work of our trial judges.").

before trial. The cumulative effect of reforms, including those regarding discovery and those advocated by the Civil Justice Reform Act, questions the appropriateness of extensive adversarial involvement. John Langbein, for example, has argued that managerial judging has already moved our procedure much closer to the continental inquisitorial model—a model that conceives a much more limited role for attorneys.<sup>284</sup> As importantly, managerial judging is deeply embedded in the normative assumptions of the Public Purposes Ideal. These normative assumptions, stressing judicial expertise, professional discretion, and political neutrality, clash directly with those that conceive of the adversarial process as an important institution for popular participation in the judicial process. The language of bureaucracy helps to identify this clash of normative assumptions.

## 2. Oversight

When the efficacy of participation is in doubt, Sargentich would suggest consideration of political oversight by democratically accountable institutions.<sup>285</sup> The Constitution creates methods of oversight both by Congress and the President.<sup>286</sup> The President appoints federal judges with the advice and consent of the Senate.<sup>287</sup> The appointment power is an important presidential prerogative, and the requirement for consent by the Senate is likewise important for the legislature. The appointment power seems the constitutional mechanism by which, over a period of time, the attitudes and political perspectives of federal judges can be altered. The last two decades have witnessed a number of bitter conflicts between presidents and the Senate regarding the appointment of justices to the United States Supreme Court.<sup>288</sup> Although lower federal court appointments are overwhelmingly partisan, with the President often appointing members of his own party,<sup>289</sup> conflicts have rarely become public. Procedures in the Senate, however, have begun to delay the appoint-

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284. See Langbein, *supra* note 1, at 833–35 (emphasizing that continental inquisitorial procedure preserves party interest by limiting adversarial influence in fact finding, but the adversarial role is preserved in the attorney's positions on the evidence); see also Kipp & Lewis, *supra* note 8, at 309 (contrasting traditional American view of judicial involvement to "the activist model . . . pervasive in continental Europe"); cf. LONG RANGE PLAN, *supra* note 162, at 82–84 (anticipating an increasing managerial role for the federal judge).

285. See Sargentich, *American Administrative Process*, *supra* note 12, at 431–32.

286. See U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6; art. II, § 2, cl. 2; art. III, § 1; art. III, § 2, cl. 2 (setting the constitutional oversights of the judiciary by Congress and the President).

287. See *id.* art. II, § 2, cl. 2.

288. See HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 48 (1988) [hereinafter SCHWARTZ, PACKING THE COURTS] (describing controversial appointments prior to 1980); *id.* at 103–49 (discussing more recent appointments).

289. See WHEELER & LEVIN, *supra* note 57, at 6 ("Consistently, over 90% of any President's judicial appointments have been of his own political party . . ."); see also Clark, *supra* note 1, at 137 (describing Nixon's appointment of primarily Republican judges).

ment of new federal judges and have been accompanied by attacks on "activist judges."<sup>290</sup>

The Constitution not only gives Congress, through the Senate, an important role in the appointment of judges, but also provides for impeachment of judges by Congress.<sup>291</sup> In addition, Congress has extremely broad, but not unlimited, authority to modify the jurisdiction of the federal courts<sup>292</sup> and to alter the structure of the courts.<sup>293</sup> Within the Constitution, Congress also enjoys considerable discretion in the appropriation of moneys for the judiciary.<sup>294</sup>

A number of recent developments regarding federal procedure and substantive reform indicate that congressional oversight of the judiciary has become more extensive. Perhaps best known is the Civil Justice Reform Act of 1990,<sup>295</sup> which some commentators see as congressional intervention in the preeminence of the courts' procedural rulemaking.<sup>296</sup> The Act embodies a congressional view of procedural reform and imposes mandates to ensure that the judiciary follows that view. The significance of this recent congressional action is demonstrated by renewed interest in both the scope of the Rules Enabling Act<sup>297</sup> and constitutional limits on the power of Congress in this field.<sup>298</sup>

290. See Schwartz, *supra* note 57, at M2. In his report on the federal judiciary, Chief Justice William Rehnquist expressed concern about the Senate's delay in filling judicial vacancies: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. In the latter case, the President can then send up another nominee." William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (visited Dec. 12, 1998) <<http://www.uscourts.gov/cj97.htm>>.

291. U.S. CONST. art. I, § 3, cl. 6.

292. See U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned [and not subject to original jurisdiction], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make."); cf. Wilfred Feinberg, *Constraining "The Least Dangerous Branch:" The Tradition of Attacks on Judicial Power*, 59 N.Y.U. L. REV. 252, 252-54 (1984) (discussing attempts by Congress to make changes in the jurisdiction of the federal judiciary in response to decisions that they did not agree with).

293. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

294. See, e.g., Longan, *supra* note 261, at 629-34; Tacha, *supra* note 55, at 1542-44.

295. 28 U.S.C. §§ 471-482 (1994).

296. Cf. Baker, *Future of Judicial Federalism*, *supra* note 32, at 779-82 (stating that the Civil Justice Reform Act decentralized, destabilized, and politicized rulemaking and that more congressional intervention is likely); Mullenix, *Counter-Reformation*, *supra* note 56, at 379 ("The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch."); Mullenix, *Separation of Powers*, *supra* note 56, at 1288, 1314-22 (concluding that the Civil Justice Reform Act violates the separation of powers).

297. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072-2074 (1994)).

298. See, e.g., Longan, *supra* note 261, at 640-42; McCabe, *supra* note 123, at 1684-86; see also *supra* note 296.

Other commentators have expressed concern that modified impeachment procedures, motivated in good part by congressional convenience, threaten to erase the constitutional limits on the exercise of this power.<sup>299</sup> These procedures expedite the impeachment process by limiting "trial" of impeachment charges to committees or groups within the Senate.<sup>300</sup> To some, these changes, by making impeachment proceedings less burdensome on Congress, may encourage its expanded use.<sup>301</sup>

Congress has also acted to reduce the discretion of federal judges in important areas. One of these areas involves criminal, rather than civil, justice reform, but nevertheless marks the direction that Congress has taken with the courts. Perhaps best known are the Sentencing Guidelines,<sup>302</sup> which were opposed by many federal judges as undue and unwise interference with judicial discretion.<sup>303</sup> Although a Sentencing Commission rather than Congress establishes the guidelines,<sup>304</sup> the guidelines implement a congressional judgment to limit judicial discretion.

Tort reform proposals, although not principally directed at federal courts, represent another manifestation of a congressional taste for greater oversight over the courts. These proposals alter state tort law, an area traditionally within the common law domain of the courts.<sup>305</sup> Some critics suggest that Congress will become a court of appeals with nationwide jurisdiction over state courts, removing industry after industry from substantive regulation by state common law.<sup>306</sup> Such an approach, which brings interest group conflict directly to bear on the exercise of judicial

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299. See Williams, *supra* note 57, at 856 (criticizing the Senate's use of shortcut procedures for impeachment); Schwartz, *supra* note 57, at M2 (describing threats of impeachment for content of opinions). See generally WHEELER & LEVIN, *supra* note 57 (discussing methods of judicial dismissal and removal).

300. Williams, *supra* note 57, at 886-87.

301. *Cf. id.* at 886-88. The Senate Rule XI Committee only assembles facts for action by the Senate. *Cf. id.* Congressional procedures are unlikely to be successfully challenged. The Supreme Court has held that Congress may choose its impeachment procedures and that a challenge to these procedures raises a political question which the judiciary will not adjudicate. *Nixon v. United States*, 506 U.S. 224, 226 (1993) (addressing Rule XI procedures).

302. U.S. SENTENCING GUIDELINES MANUAL (1997).

303. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685-87 (1992). In instituting the sentencing guidelines, Congress arguably adopted the vision of the judiciary contained in the Rule of Law Ideal. This vision emphasizes a judiciary whose discretion is guided and controlled by legal rules. See Sargentich, *American Administrative Process*, *supra* note 12, at 398. See generally Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992) (discussing the effects of reduced judicial discretion due to the implementation of the sentencing guidelines).

304. See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A.

305. See Andrew F. Popper, *A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PROD. & TOXICS LIAB. 105, 113-14 (1994) (discussing congressional attempts to federalize state tort law).

306. See *id.*

power, is unlikely to be limited to the state courts.<sup>307</sup> Congressional assumption of such "jurisdiction" over state courts implicates the traditional jurisdictional standards and practices developed by the federal courts to regulate their relationship with state judiciaries. Looking at recent legislation, commentators insinuate that Congress now treats the judiciary less and less like an independent branch and more and more like another government agency.<sup>308</sup>

Some detect greater attention by Congress and the President to judicial selections.<sup>309</sup> If the judiciary was to become a campaign issue, partisan political considerations might increasingly be brought to bear on appointment and confirmation of trial and appellate judges. In the appropriate political climate, the line-item veto, with some changes in the appropriation process, might give the President and factions in Congress significant new power of fiscal oversight over the judiciary.<sup>310</sup> Given that the President's political constituency does not necessarily reflect the public's views on particular issues regarding the federal judiciary, placement of such oversight authority in the President will allow the involvement of some, but not all, affected interests. Likewise, Congress, although a collective body, suffers from a similar disability. Because of the crucial roles that particular committees and specific members of Congress or their staffs play, this oversight is likely to be an exercise for the benefit of some, but not all, affected interests.

Of the three ideals, the Democratic Process Ideal fits less easily into the current discourse regarding the future of the federal courts. In part, this difficulty flows from the dominance of the Rule of Law and Public Purposes Ideals—both of which insulate judges from politics. Yet existing institutions and procedures of the federal courts serve to implement this ideal as well. The way in which Sargentich and Frug speak about

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307. See Baker, *Future of Judicial Federalism*, *supra* note 32, at 759–60 (stating that despite its attempts to limit the impact on federal jurisdiction, national tort reform has clear implications for congressional treatment of the federal courts).

308. Cf. Longan, *supra* note 261, at 668 (concluding that Congress is too involved with judicial procedure, structure, practice, and policy). *But cf.* Tacha, *supra* note 55, at 1555 (taking a more optimistic view of the relationship, and seeing the necessity of dialogue, tolerance, and understanding to gain more effective results).

309. Schwartz, *supra* note 57, at M2 (indicating recent attacks on the judiciary by members of Congress). Professor Schwartz has also recognized the greater willingness of recent presidents to guide selections by political criteria. See SCHWARTZ, *PACKING THE COURTS*, *supra* note 288, at 48–49, 77. Schwartz, however, argues that the Reagan administration relied on political ideology in a way previously unknown. See *id.* at 77. Historically, judicial appointments have been overwhelmingly partisan with Democratic presidents appointing Democrats and Republican presidents appointing Republicans. See WHEELER & LEVIN, *supra* note 57, at 10 ("Consistently, over 90% of any President's judicial appointments have been of his own political party.').

310. Cf. Longan, *supra* note 261, at 635 (noting the fear that the line-item veto may "impair the independence of the judiciary in cases involving the executive branch"). Constitutional scholar Louis Fisher takes a similar view of the line-item veto arguing that oversight responsibilities over the judiciary rest properly in Congress and not the executive because the executive branch has more lawsuits in the federal courts than any other litigant. Fisher, *supra* note 55, at 53.

bureaucracy allows a systematic consideration of a group of values often obscured in the debate.

## II. THE FUTURE OF THE FEDERAL COURTS

If I have been successful, the first Part of this article has demonstrated that the analytical schemes of two prominent administrative law scholars can organize and illuminate the debate regarding the future of the federal courts. The Sargentich and Frug articles permit examination of these proposals in ways that highlight the values at issue. In this sense, these works, contemporaneous with one another,<sup>311</sup> create a way of talking about bureaucracy applicable to the courts. In this Part, I seek to show how this language about bureaucracy can be used in additional ways to evaluate as well as to organize the debate. Such use requires a reexamination of the Sargentich and Frug articles with greater attention to their analytical approaches.

Sargentich and Frug write from different traditions, different perspectives that contain contrasts and conflicts. Despite these differences, their articles contain a number of similarities that suggest approaches to evaluating the debate. Specifically, these similarities indicate how to assess a number of proposals as well as the arguments that can be marshaled for and against a variety of proposals. Their approaches require a recognition that combinations of arguments contain individual arguments that reflect specific visions of the judiciary. Evaluation requires linking each argument to the corresponding underlying vision or model from which it comes. According to both Sargentich and Frug, this act alone will expose the weakness of an argument and the possible inconsistency of arguments that have been placed together.<sup>312</sup> As discussed in Part I, Sargentich's methodology uncovers inconsistencies in arguments that superficially appear compatible. Some specific examples from the debate regarding the future of the federal courts illustrate these points.

The similarities between the two analytical schemes expose the vagueness and indeterminacy of broad terms, such as "judicial independence" and "individual rights," that populate much of the literature. The meaning of these terms shifts with the vision of the judiciary that uses them. Frug highlights more general objections to the use of such terms in resolving the conflict of values.<sup>313</sup> Again, the literature of judicial reform elucidates these observations.

The Sargentich and Frug articles offer some general rules for the evaluation of the methods of analysis used in the debate regarding the future of the federal courts. For example, both are suspicious of analysis

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311. The articles were both published in 1984.

312. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1287-88; Sargentich, *American Administrative Process*, *supra* note 12, at 394.

313. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1287.

that relies on the balancing of values seen to be in tension with one another.<sup>314</sup> Both recognize a paradox or contradiction at the heart of the most certain of arguments and perceive arguments, particularly complex combinations of arguments, as hiding rather than resolving that inconsistency.<sup>315</sup> Both accept that arguments alone cannot reconcile the conflicts that they represent.<sup>316</sup> These striking similarities in approach, despite differences in perspective, emphasize the importance of the language chosen to debate the future of the federal courts and affirm the contributions of a language about bureaucracy to that debate.

Finally, these two articles require that evaluation look beyond the specific arguments surrounding particular proposals to confront the implications of conflicting normative visions of the judiciary. These articles indicate that argument must, at some point, yield to judgment; that judgment must address issues of value and politics. Such judgments will be troubling, for this way of talking about bureaucracy suggests both the necessity for and the difficulty of the choices required.

#### A. *Evaluation of Arguments*

Although a number of caveats should always accompany a limited characterization of such broad works, the two articles reflect different perspectives. Sargentich writes from a classical political and administrative theory perspective.<sup>317</sup> At the heart, his ideals of administrative law reflect classical political theory regarding the role of the state and of administration. His article presents these ideals as representing broad theories in administrative and public law. As such, they have direct application to the reformist debate regarding administration.

Frug writes from a critical legal studies perspective, particularly that aspect of the movement that emphasizes contradictions arising from prevalent but unsustainable concepts, such as the distinction between the objective and the subjective.<sup>318</sup> The presence of this dichotomy in legal

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314. See *id.*; Sargentich, *American Administrative Process*, *supra* note 12, at 441.

315. See *infra* note 341 and accompanying text.

316. See *infra* note 341 and accompanying text.

317. In his article, Sargentich identifies the ideals of administrative law with British and American political theory. See Sargentich, *American Administrative Process*, *supra* note 12, at 397-426. For example, the Rule of Law Ideal is associated with contractarian views of political life. See *id.* at 397-98 (citing John Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1960)). The Public Purposes Ideal is associated with an activist state reflected by New Deal theorists. See *id.* at 411-12 (citing JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938)). The Democratic Process Ideal "derives its intellectual force from democratic theory." *Id.* at 425-26.

318. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1288 (drawing on the work of Jacques Derrida, particularly his idea of the "dangerous supplement" to develop the contradictions contained in different models for the control of bureaucracy). For a general discussion of this aspect of the critical legal studies movement, see James Boyle, *Introduction to CRITICAL LEGAL STUDIES* at i, xiii-xlvi (James Boyle, ed. 1992).

theory and doctrine regarding bureaucracy drives much of Frug's critique. His models justifying bureaucracy are presented as more contingent than Sargentich's ideals.<sup>319</sup> His analysis of these models demonstrates that supposedly objective legal doctrines are rhetoric designed to assuage our fear of bureaucracy, and are devices designed to retard a democratic agenda for reducing the power of bureaucracies.<sup>320</sup>

These differences in perspective explain the contrast in the character of the projects undertaken by the two articles<sup>321</sup> and suggest conflicts regarding the reality of structures of arguments that form the focus of the articles. For our purposes, however, the similarities are more important than these differences. The similarities between the two articles, particularly those evident in their conclusions and implications, offer guidelines for evaluating arguments in the debate regarding judicial reform and the future of the federal courts. Although both articles draw on historical developments, neither employs historical or empirical analysis nor do they focus on detailed examinations of specific proposals or doctrines. Both, however, are concerned with the structure of argumentation. This emphasis on broad structures of argumentation makes them particularly useful in evaluating arguments in the debate about the future of the federal courts.

Each of the articles identifies a paradox or contradiction that lies at the heart of the ideals or models that it analyzes.<sup>322</sup> This contradiction or paradox limits arguments flowing from each ideal or model. Although Sargentich stresses that the pure vision of administration contained within each of his ideals conflicts with the reality of the administrative process, a reality that incorporates aspects of other inconsistent ideals,<sup>323</sup> he identifies a paradox within each ideal that also limits its application.<sup>324</sup>

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319. For example, Frug does not assert that his models actually represent the state of legal doctrine but rather expose the contradictions in attempts to persuade us that bureaucracy and its potential for domination and alienation are appropriately limited. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1282.

320. See *id.* at 1278-79.

321. Sargentich seeks to show how the debate about reform of the administrative process has a deep structure based on normative conflict that arises from conceptions about the role of government and administration. See Sargentich, *American Administrative Process*, *supra* note 12, at 396-97. The debate is "more self-contained and limited in scope than it may initially appear." *Id.* This project contrasts with Frug's exposure of these models of control as an antecedent to the construction of a democratically-based approach to our social and economic life. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1277-79.

322. Frug uses the inability to separate the objective and subjective as the basis for the contradictions he identifies in each of his models. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1286-87. His critique of the market/pluralist and judicial review models rests on his discussion of the contradictions in the formalist and expertise models. See *id.* at 1297. Sargentich, as the following discussion illustrates, relies on aspects of each normative vision that are self-defeating and paradoxical. See *infra* notes 323-28 and accompanying text.

323. See Sargentich, *American Administrative Process*, *supra* note 12, at 394 (discussing the character of this limitation on the core embodiment of each ideal).

324. See *id.*



As Sargentich puts it, the implementation of these ideals would require reforms of administration that would undermine the ideal itself.<sup>325</sup> The core embodiment of each ideal is therefore "self-defeating."<sup>326</sup> Formalism's drive to subject all administrative action to restraint by norms requires norms of such indeterminacy that they no longer provide any restraint.<sup>327</sup> Instrumentalism's attempt to reach the optimal solution considering all relevant factors requires that virtually all factors be taken into account, depriving analysis of any content and leading to indeterminacy in outcome.<sup>328</sup> Finally, participation's desire to include all affected parties in decision making either leads to the participation of all idiosyncratic interests or the selection of participants by nondemocratic means.<sup>329</sup>

Frug's critique rests on the necessity that the models justifying bureaucracy separate the subjective from the objective.<sup>330</sup> Each of the attempts, reflected in the models of control of the bureaucracy, finds it impossible to draw such a line.<sup>331</sup> With respect to formalism's attempt to set the goals of the bureaucracy by means external to it, the nondelegation doctrine demonstrates that no effective standard can separate the need to subject the bureaucracy to external standards from its need for discretion or can separate the legislative need for discretion in delegation of functions from the need to restrain that discretion.<sup>332</sup> The expertise model fails to explain how professional standards intended to restrain the discretion necessary to the exercise of expertise can act as restraints when interpreted by the bureaucracy which they are designed to limit.<sup>333</sup> In pluralism, the attempt to define those interests which will participate in the administrative process and how they will participate implicates the bureaucracy in the selection of those who will determine the outcome of administrative decisions and raise the familiar difficulty of attempting to separate the subjective from the objective.<sup>334</sup>

Frug's description of the weaknesses in these three stories or models parallels Sargentich's description of the self-defeating character of the core embodiments of his three ideals.<sup>335</sup> These similarities suggest that arguments regarding judicial reform should be linked to the ideal or model which they represent. Such a linkage identifies the theoretical

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325. *See id.*

326. *Id.*

327. *See id.* at 403-04.

328. *See id.* at 415-16.

329. *See id.* at 428-30.

330. *See Frug, Ideology of Bureaucracy, supra* note 19, at 1287.

331. *See id.*

332. *See id.* at 1300-05.

333. *See id.* at 1321-22.

334. *See id.* at 1368-69.

335. Frug's fourth model, the judicial review model, permits him to demonstrate that the mixing of models, formalism, and expertise does not avoid the contradictions contained in each of those models. *See id.* at 1334-38.

vision of the courts contained within it. That argument will be limited by or "infected with"<sup>336</sup> the paradox or contradiction contained within that vision. Although Sargentich and Frug would give slightly different criteria for identifying the contradiction in the argument, the argument's pedigree permits evaluation of it apart from the particular proposal that it supports or opposes.

In the debate regarding the future of the federal courts, a number of arguments will be presented in support or opposition of particular proposals. These sets of arguments will combine arguments from different ideals and from different models. Frug's discussion of the judicial review model explores how arguments using both the formalist and expertise models can be combined, but explains how once recognized, critique of them within those specific models can be combined to deal as well with the mixing of them.<sup>337</sup> Sargentich's analysis permits a similar approach but emphasizes that arguments arising from different ideals will necessarily conflict with one another because they reflect different visions of the administrative process.<sup>338</sup>

Sargentich's recognition of a core embodiment and alternative expression of each ideal allows a more searching evaluation of multiple arguments presented regarding a particular proposal. Although the core embodiments of the three ideals cannot be easily combined without their inconsistency becoming apparent, the alternative expression of one ideal may be combined with the core embodiment of another without apparent inconsistency.<sup>339</sup> Still, a recognition of the vision reflected by the alternative expression allows identification of the inconsistency between arguments placed together.<sup>340</sup>

The literature regarding the future of the federal courts illustrates a number of these guidelines regarding the evaluation of arguments. Alternative dispute resolution provides one example. The previous discussion of ADR introduced many of the arguments regarding the use of ADR in

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336. *Id.* at 1330.

337. *See id.* at 1334-38.

338. *See Sargentich, American Administrative Process, supra* note 12, at 392-97.

339. Sargentich notes an overlap between the formalist core embodiment and the market, the alternative expression of the Public Purposes Ideal. The core embodiment of the Public Purposes Ideal, instrumentalism, also overlaps with political oversight, the alternative expression of the Democratic Process Ideal. The core embodiment of the Democratic Process Ideal, participation, also is linked to proceduralism, the alternative expression of the Rule of Law Ideal. *See id.* at 440-41. "[B]oth approaches emphasize innovation in decisional processes, the language of fairness, and the interests of affected parties in becoming involved in administration." *Id.* at 440.

340. For example, the relationship between formalism and the market fails to appreciate that they reflect different visions of the administrative process. The market approach permits, in the name of market failure, administrative action far beyond the scope of the confining legal norms accepted by formalism. Instrumentalism places a faith in agency expertise and the importance of "rational decision making" that is at odds with the vision of public participation that supports political oversight. Participation accepts politics in the administrative process that would be anathematic to the focus on legal rules that supports proceduralism.

federal courts.<sup>341</sup> That discussion also shows that a number of supporting arguments arise from the Public Purposes Ideal. ADR proposals, however, oscillate between the core of instrumentalism and the alternative expression of the market. Although tensions exist between these conceptions of ADR, both draw on a similar vision of the judiciary.

The fundamental incompatibility of the core embodiments of opposing ideals suggests that arguments representing the core of these visions could not be combined. Arguments resting on the core embodiment of participation do not support alternative dispute resolution without redefining the term "participation" in ways that remove the definition from the core vision that it represents, including its emphasis on transparency of process.<sup>342</sup> To the extent that participation can be invoked to justify political bargaining among affected parties and government officials, it is at conflict with the Rule of Law's emphasis on legal formalism as the legitimate method of official decision making. Likewise, arguments relying on formalism cannot be combined with those arising from instrumentalism. For example, mandatory ADR, reflecting instrumentalism, rests on judicial activism and discretion<sup>343</sup> contradicting the limited judicial role conceived by formalism.

Sargentich, however, suggests that an unstable alliance can be forged between the alternative expression of the market and the core embodiment of formalism:<sup>344</sup> "[B]oth adhere to the notions that the public and private spheres must be kept separate, that legal norms help provide the necessary boundaries between the two realms, and more particularly that public laws should preserve private entitlements from undue impositions by the state."<sup>345</sup> Arguments regarding alternative dispute resolution do combine the types of arguments contained in this alliance. Arguments supporting voluntary ADR not only emphasize placing dispute resolution in the hands of private parties<sup>346</sup> but also seek to limit heavy-handed judicial interference with private arrangements.<sup>347</sup> However, the alternative expression of the Public Purposes Ideal retains a part of that vision of the judiciary. That vision emerges in the variety of arguments that justify judicial involvement in these private arrangements, justifications analogous to ones supporting administrative intervention in the market.<sup>348</sup> Formalism, on the other hand, would not permit judicial involvement based on such broad and unbounded grounds. These argu-

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341. See *supra* notes 209–16 and accompanying text.

342. See *supra* notes 271–74 and accompanying text.

343. See *supra* notes 215–16 and accompanying text.

344. See Sargentich, *American Administrative Process*, *supra* note 12, at 440–41.

345. *Id.* at 440.

346. See *supra* notes 209–13 and accompanying text.

347. See *supra* note 211 and accompanying text. This view is particularly apparent in the debate regarding arbitration of employment discrimination claims. See *supra* notes 212–13 and accompanying text.

348. See *supra* notes 209–13 and accompanying text.

ments for judicial intervention expose the inconsistent visions of the judiciary that undermine this alliance.

A similar unstable alliance can exist between instrumentalism and political oversight. "[T]hey both stress the multiplicity of goals and interests that must be balanced in the context of administrative decision making."<sup>349</sup> Part of the recent expansion of ADR follows the congressional mandate that ADR be included in the delay reduction plans of local federal district courts.<sup>350</sup> Of course, the arguments supporting this action emphasize political oversight and congressional prerogative but they also stress that Congress rather than the judiciary is the most competent to make the broad balancing of costs and benefits necessary to ensure that judicial procedure is more rational and efficient.<sup>351</sup> Congressional oversight, however, shares the emphasis of the Democratic Process Ideal on popular participation in establishing judicial policy, a view at odds with instrumentalism's emphasis on judicial expertise and discretion.

This example, regarding ADR, demonstrates that this way of talking about bureaucracy can help to evaluate, as well as to organize, arguments and proposals by linking arguments to the vision of the judiciary upon which they rely and by identifying inconsistent arguments that are placed together. This method of evaluation can also be applied to other sets of arguments and proposals.<sup>352</sup>

### B. *Evaluation of Analysis*

Both of the articles offer some similar guidelines for evaluation of the forms of argumentation and analysis that occur frequently in the debate regarding the future of the federal courts. The first of these guidelines questions the usefulness of broad concepts that often frequent the debate about bureaucracy. Frug expressly attacks the use of abstractions on the ground that appeals to abstractions seek to use them to deduce a particular form of bureaucratic organization.<sup>353</sup> "Instead, contradictory forms of life can be consistent with the same abstract goal."<sup>354</sup> Abstractions are easy to manipulate and can hide alternatives and make particular forms of organizations seem natural.<sup>355</sup>

Sargentich's critique of abstractions is indirect but can be implied from his analysis. His implied critique is quite similar to Frug's express one. Abstractions, such as participation, openness or discretion, have

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349. Sargentich, *American Administrative Process*, *supra* note 12, at 440.

350. *See supra* notes 215-16 and accompanying text.

351. *See supra* notes 296-97 and accompanying text.

352. For example, the debate about the size of the federal judiciary permits a similar analysis. *See supra* notes 41-44 and accompanying text.

353. *See Frug, Ideology of Bureaucracy*, *supra* note 19, at 1293.

354. *Id.*

355. *See id.* at 1294-95.

multiple meanings; the key to understanding them is recognition of the ideal or vision that they are used to support. The uneasy alliance between the core embodiments of some ideals with the alternative expressions of others rests in part on the ability to manipulate abstractions.<sup>356</sup>

The debate regarding the future of the federal courts contains two abstractions that populate much of the debate—judicial independence and individual rights. The critique of abstractions would suggest these abstractions can support more than one vision of the judiciary and can be used to make inconsistent visions seem the natural result of the abstract goals suggested by the terms, judicial independence and individual rights. The literature of judicial reform supports this suggestion. Judicial independence is an abstraction repeatedly appealed to as a basic value of the judiciary.<sup>357</sup> The impact of proposals or practices on judicial independence often forms the basis for support or opposition to the proposals. Conceptions of judicial independence, however, vary and can support differing visions of the judiciary.<sup>358</sup>

The *Long Range Plan for the Federal Courts (Long Range Plan)* illustrates the elusive character of the abstraction, judicial independence.<sup>359</sup> The *Long Range Plan* identifies judicial independence as a core value of the federal judiciary. Judicial independence is defined in terms of the ability of federal judges “to perform their duties in an atmosphere free from fear that an unpopular decision will threaten their livelihood or existence,”<sup>360</sup> and links independence to tenure in office.<sup>361</sup> The *Long Range Plan* uses judicial independence as an abstraction, a broad concept that is used to deduce a particular form of judicial tenure.

The multiple meanings of judicial independence are both exposed and explained by examining the term in the context of each of the visions

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356. See Sargentich, *American Administrative Process*, *supra* note 12, at 440–41 (describing how arguments obscure their normative inconsistency). His description of the overlap shows that the inconsistency in arguments placed together in part is obscured by the use of abstractions, such as protection of the private sphere, openness, presidential competency, and responsiveness. *See id.*

357. See, e.g., JUDICIAL CONFERENCE, *LONG RANGE PLAN*, *supra* note 162, at 8 (identifying judicial independence as a core value of the federal judiciary); RICHARDSON & VINES, *supra* note 2, at 175 (“Certainly judicial independence in America does not mean an objective, nor detached, judiciary. Rather, it broadens the range of possible political responses that a judge may make.”); Dakolias, *supra* note 209, at 175 (stating that “[p]ersonal independence for judges can be achieved through appropriate methods of appointment, removal and supervision”); Fiss, *Forms of Justice*, *supra* note 151, at 43–44 (discussing judicial independence in terms of the ability to protect individual rights and civil liberties); Langbein, *supra* note 1, at 848–55 (equating judicial independence with bureaucratic organization and hierarchical control of judges); cf. Resnik, *Failing Faith*, *supra* note 113, at 540 (stating that, among other things, “minimal judicial decisionmaking will [hopefully] produce just results”).

358. JUDICIAL CONFERENCE, *LONG RANGE PLAN*, *supra* note 162, at 8. The statement of this core value specifically refers to life tenure and protection against decreases in salary. *See id.*

359. *Id.*

360. *Id.*

361. *See id.*

of the judiciary. The concept of judging changes with alterations in the character of the judicial role. A brief examination of the core embodiments, formalism, instrumentalism and participation, exposes the chameleon nature of the term. Formalism conceives a limited role for the judge, a limited role that renders vulnerable an unelected judiciary. Therefore, this aspect of formalism could be used to argue for more limited tenure for judges.<sup>362</sup> On the other hand, the obligation of judges to apply formal rules to limit state interference in the private sphere supports arguments for greater protection of the tenure of judges. In other words, formalism could support arrangements regarding tenure similar to those now existing or it could support ones less protective of individual judges.

Instrumentalism conceives a more active role for the judge, arguably one calling for greater protection. This need for greater protection from outside interference supports rigorous protection of judicial tenure. The more expansive role for the judge, however, suggests the need for methods of accountability that could radically transform the role of individual judges by making them accountable to a hierarchical judicial bureaucracy.<sup>363</sup> The conception of the judiciary as a powerful independent bureaucracy challenges the authority and discretion of individual judges.<sup>364</sup>

Participation conceives of a more democratically accountable judiciary. This conception is the one most likely to resist life tenure for judges, an approach that can be most easily justified under instrumentalism. To the extent, however, that the core embodiment of participation emphasizes decision making by juries and control of the trial process by the parties, it could coexist with an unelected judiciary. The more the judge is removed from direct involvement as an actor in the process and instead serves principally as an umpire, the less important the democratic accountability of the judge.

In describing how the visions of the judiciary can support differing views, the discussion above adopted the focus of *The Long Range Plan* on judicial tenure as the principal indicator of judicial independence.<sup>365</sup> A variety of other topics, however, could be considered crucial to judicial

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362. If the formalist critique focuses on the political isolation of judges, one response is to alter the tenure of judges; however, as distinguished below, this response would be inconsistent with the formalist focus on the application by judges of legal rules that limit state interference with private liberty. See *infra* notes 366–68 and accompanying text. In this regard, formalism can be of two minds regarding judicial tenure and more ambiguously supports life tenure than instrumentalism.

363. See *supra* notes 175–79 and accompanying text.

364. Judges continue to exercise considerable discretion but would themselves become subject to bureaucratic control.

365. The *Long Range Plan*, when referring to judicial independence, also states that “[t]he federal court system must continue to be in control of its own governance, albeit within the limitations set by the Constitution’s system of checks and balances.” JUDICIAL CONFERENCE, *LONG RANGE PLAN*, *supra* note 162, at 8.

independence including selection of judges, discipline, training, funding, and relationships to other centers of political power. Examination of judiciaries in Latin America questions whether a judiciary is independent if it retains authority of many routine matters but cedes the punishment of political dissenters to other branches.<sup>366</sup> Each of these other topics could be analyzed similarly from the perspective of each of the visions of the judiciary. Indeed, the ranking of these various topics in importance would vary depending upon each such vision.<sup>367</sup> Judicial independence is an abstraction that obscures a variety of issues and that can be used to support inconsistent approaches to judicial reform.

Similar observations can be made regarding the use of the abstraction, contrasting individual rights.<sup>368</sup> For example, that term carries substantially different meanings in formalism, instrumentalism, and participation. In formalism, the courts protect individual rights by adhering to rules that establish the boundary between the state and the private sphere; in instrumentalism, the courts protect individual rights by ensuring that the individual is protected from abuse by both state and private bureaucracies. What formalism could perceive as the protection of individual rights by limiting state interference in private affairs, instrumentalism could see as the abandonment of the individual and the failure of the courts to ensure the implementation of public values. Participation challenges formalism because in formalism the rules applied are not generated by direct democratic participation. The tension between the independence of the jury as decision maker and the preservation of judicial integrity in the service of the rule of law demonstrates this conflict. Likewise, decisions resting on participation implicate a political process that may exclude important public values in ways that are inconsistent with instrumentalism.

Both articles suggest another guideline for the evaluation of argumentation and analysis. Both articles are suspicious of analysis that relies on the balancing of values seen to be in tension with one another. Frug presents a strong general critique of balancing as a method of analysis or argumentation.<sup>369</sup> In his specific discussion of the judicial review model, he views balancing as a judicial technique that restates the problem to be solved.<sup>370</sup> This critique of judicial balancing in the context of judicial

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366. See Vaughn, *Judicial Reform*, *supra* note 94, at 601-07.

367. For example, instrumentalism places great weight on the insulation of the judge. This emphasis suggests that tenure in office and appointment procedures are likely to be of most importance. Formalism might place greater weight on rules and procedure that limit the boundaries of judicial power.

368. Fiss captures the distinction between the conceptions of individual rights contained in formalism and instrumentalism when he decries an individualism that leaves the individual "at the mercy of large aggregations of power." Fiss, *Forms of Justice*, *supra* note 151, at 43.

369. See Frug, *Ideology of Bureaucracy*, *supra* note 19, at 1291-95.

370. See *id.* at 1341-43.

review is also more generally applicable to balancing as a method of argumentation and analysis.

Sargentich's objections to balancing naturally follow from the themes of his article. Again, these objections are quite similar to Frug's. Balancing the values contained in the different ideals of administrative law cannot resolve the conflicts between them because these values represent contradictory views of the administrative process.<sup>371</sup> Balancing simply restates the conflict and claims a certainty of outcome that belies the normative inconsistency of the ideals. Within each of the ideals, Sargentich's analysis suggests skepticism of balancing. For example, his discussion of the problem of administrative discretion in the Rule of Law Ideal would deny that the difficulty can be resolved by balancing in each case the need for discretion against the requirement that administrative action follow articulated legal norms.<sup>372</sup>

This guideline would caution that balancing is unlikely to resolve the conflicts that arise from inconsistent visions of the judiciary. An examination of the literature supports such caution. Balancing does seem to restate rather than resolve fundamental inconsistencies between differing visions of the judiciary. The limitations of balancing become more apparent when abstractions are balanced against one another because the abstractions balanced can each carry a variety of meanings.<sup>373</sup>

Of course, the two articles represent, in one sense only, a subset of more general objections to balancing as a technique of analysis. A similar statement can also be made regarding the other guidelines as well. The extraction of these guidelines from these two articles, however, is particularly important and suggests an applicability beyond that provided by more general methodological critiques. This article seeks to develop a way of talking about bureaucracy from these two comprehensive analyses of administrative bureaucracies. In this undertaking it is significant that the guidelines arise organically from the analysis of Frug's and Sargentich's theories about such bureaucracies. The context of their development validates the subsequent application of these guidelines. Also, the particular applicability of this way of talking about bureaucracy to the debate regarding the future of the federal courts, discussed in Part I, specifically recommends these guidelines to an evaluation of that debate.

### CONCLUSION

The way in which the Sargentich and Frug articles talk about bureaucracy permits the organization of the debate about the future of the federal courts. This language about bureaucracy places the welter of pro-

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371. See Sargentich, *American Administrative Process*, *supra* note 12, at 438-42.

372. See *id.* at 402-04.

373. Such balancing of abstractions include efficiency balanced against individual rights (or efficiency balanced against justice), judicial independence balanced against judicial accountability, or national standards balanced against local autonomy.



posals within a normative framework that demonstrates that the debate is more structured and self-contained than the number of proposals and accompanying arguments might suggest. As importantly, this language clarifies the perspectives that guide the debate and highlights a perspective, the Democratic Process Ideal, that otherwise could be obscured.

The way in which the Sargentich and Frug articles talk about bureaucracy also permits evaluation of the debate. Particularly, it allows the evaluation of specific arguments and proposals as well as combination of sets of arguments. It also questions some approaches to analysis that populate the debate. The language about bureaucracy suggested by the Sargentich and Frug articles does not purport to resolve the debate regarding the future of the federal courts. This way of talking about bureaucracy does not recommend the choice of one proposal over another. Like any systematic way of talking about a subject, these articles offer a useful perspective and permit the debate to be structured in some new and enlightening ways.

The conclusions drawn from these articles provide no solace from uncertainty and present no plan for the future of the federal courts. Indeed, the language suggested by these analytical models of bureaucracy threatens the grounds upon which some of the debate has been conducted. It does so in several ways. No set of arguments can resolve the debate. This failure results not simply from the lack of persuasive power of the arguments but also from the limits of the arguments themselves. These arguments and proposals reflect inconsistent alternatives. Not all visions can guide the future. In addition, the visions represented by the arguments and proposals contain contradictions that make it impossible to adopt fully any particular vision. The lack of consensus about the future of the federal courts results from conflicts between normative visions that inhere in modern American public law. These conflicts will not disappear.

The application of these articles to the debate about civil justice reform does not resolve that debate. The articles, however, do identify suppressed normative visions, explain inconsistencies in argumentation as clashes between these normative visions, and demonstrate that civil justice reform is inextricably intertwined with the most fundamental value conflicts in American public law.

These articles demonstrate the highly contingent nature of the debate. They deny resolution and certainty. They do, however, permit a clearer appreciation of the conflict of visions and values. In this sense, the way of talking about bureaucracy contained in the Sargentich and Frug articles is encouraging. It permits us to see better the conflicts between values and perspectives that will inform our decisions. It emphasizes the possible futures of the federal courts. It affirms that the choices are ours, painfully ours.