Articles

Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines

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On May 20, 1996, the Supreme Court for the first time held a state court's punitive damage award to be unconstitutionally excessive under the Due Process Clause. The five-four decision in BMW v. Gore1 is the Court's boldest step yet in its creation of a new due process doctrine designed to restrict and check jury authority in imposing damage awards. Two years earlier, in Honda Motor Company v. Oberg,2 the Court had held that states must allow appellate review of the size of punitive awards determined by state juries. Breaking with a long tradition that deferred to juries' wide discretion in determining such awards, the Court in recent years has issued a series of decisions that seek to limit jury power with restrictions prescribed by legislatures and trial judges—in the form of jury instructions providing guidance on when and how to determine punitive damages—and by appellate review of awards.

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1. No. 94-894, 64 U.S.L.W. 4335 (May 20, 1996).
One interesting feature of this new doctrine is its correspondence to Eighth Amendment jurisprudence designed to limit criminal jury discretion in the determination of death sentences. Beginning several years earlier with the Court's decision in *Furman v. Georgia* in 1972 and *Gregg v. Georgia* in 1976, the Court similarly replaced a long tradition of unfettered jury discretion in capital cases with requirements of limiting instructions before the jury's deliberation and appellate review of its sentencing decision afterwards.

Such constitutional constraints on jury decisionmaking are relatively new. As recently as 1971, the Court, in rejecting a challenge to a death sentence under the Due Process Clause, had concluded that "[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." Even as recently as 1989, the Court had not yet ruled on whether the Due Process Clause governed procedures or outcomes for jury determinations of punitive damage awards. There was passing language in older cases that the Due Process Clause might forbid "grossly excessive" damage awards, but the Court had never defined or enforced that standard. More significantly, in the federal system the Court left review of jury verdicts entirely in the province of trial judges who saw the evidence, and it allowed no role for appellate courts in reviewing jury determination of damages. Until at least 1933, the Court repeatedly forbade federal appeals courts to consider claims that a jury's

3. The Eighth Amendment is applicable to state action through the Due Process Clause of the Fourteenth Amendment. Francis v. California, 329 U.S. 459, 463 (1947).
5. 428 U.S. 153 (1976); see also *Jurek v. Tex.* 428 U.S. 262, 275-76 (1976) (upholding Texas' capital sentencing procedures, which focus juries' objective considerations on the circumstances under which the offense was committed before the death penalty may be imposed); *Woodson v. N.C.*, 428 U.S. 280, 303 (1976) (striking down a North Carolina statute that imposed a mandatory death sentence upon all offenders who committed certain homicidal offenses and provided no guidance to juries exercising "the power to determine which first-degree murderers shall live and which shall die"); *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (striking down Louisiana's mandatory death penalty statute because it failed to provide juries with standards to guide jury deliberations).
7. *See Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989) (noting "we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" and declining to reach that question).
8. *See id.* at 280-81 (Brennan, J., concurring) (citing cases decided before 1920).
verdict was excessive. Moreover, until the late 1960s, the Court almost annually decided at least one civil case in which it upheld or reinstated a jury verdict or damage award (often after reversal by a lower court), reinforcing a long commitment to broad civil jury authority and restricted appellate court supervision.

It is only in the last quarter century, then, that on both sides of the law, a longstanding trust in the appropriateness of the jury’s broad discretion has broken down with regard to the gravest disposition decisions—punitive damages on the civil side, and the death penalty on the criminal side. In fact, both lines of decisions follow a broader trend in the diminution of jury authority. Recent jurisprudence of juries in the death penalty and punitive damages contexts demonstrates a marked shift in the perceived competency of juries. The predominant view is that juries have lost power over the last two centuries.

9. See Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237, 243 & n.33 (citing cases in which the Court refused to allow federal appellate courts to consider arguments that a jury verdict was excessive). Schnapper stated that:

For most of its history the Supreme Court was equally aggressive in protecting the prerogative of a jury to determine the extent of the injuries suffered by an aggrieved plaintiff. The Court repeatedly refused to authorize the federal appellate courts even to consider objections that particular jury verdicts were excessive.... The Court expressly held in eleven cases decided between 1879 and 1933 that it lacked the authority even to consider objections to the size of a jury verdict.

Id. at 243. One of the cases cited by Schnapper is Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-82 (1933), which asserted that:

The rule that this court will not review the action of a federal trial court in... denying a motion for a new trial... has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.

There were narrow circumstances in which appellate courts could overturn jury verdicts on damages. Most important, perhaps, was a determination (from the overall facts of the case rather than award size alone) that the verdict was a result of "passion or prejudice," and that the jury clearly disregarded the trial court’s instructions on the law. Schnapper, supra, at 313-14, nn. 289-93 (citing cases in which new trials were granted based on such findings).

Although the cases cited by Schnapper refer to federal juries and appellate authority, the Court did not encourage a more intrusive role for state appellate courts.

10. See Schnapper, supra note 9, at 240-41 (noting that the Court was “particularly active... in protecting the factfinding prerogatives of juries” from 1938 to 1968).

11. With regard to the many changes affecting jury power that are not discussed in this article, I agree that jury power has been significantly diminished. There are many changes which this article will not address, such as Rule 49 of the Federal Rules of Civil Procedure, allowing special interrogatories to the jury. Fed. R. Civ. P. 49.

For discussions of diminution in jury power, see Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339-44 (1979) (Rehnquist, J., dissenting) (observing that the right to a civil jury
with the implication that decisionmaking, now overseen by judges, is more elitist and less democratic, but also perhaps more rational and less influenced by passion. More ominously, the implication is that as juries have become more diverse and thus more democratic, their power has been curtailed.\textsuperscript{12}

The primary task of this Article is to explain the redesign of jury authority, which I argue is best done by looking to themes of process, structure, and institutional relation.\textsuperscript{13} In support of that explanation, this Article seeks to address a curious gap in the legal process literature and in contemporary models of institutional competence that inform recent public law scholarship. That literature has rarely addressed the role of the jury in dynamic relation to other key institutions, particularly the legislature and judges. Akhil Amar has recently suggested that the Framers intended the jury to fulfill a central role in the structural design of government implicit in the Bill of Rights.\textsuperscript{14} But there is little scholarship, either in modern legal process theory, or trial was regarded by the founders as "an important bulwark against tyranny" and "a safeguard too precious to be left to the whim of the judiciary"); Albert W. Alschuler & Andrew G. Deiss, \textit{A Brief History of the Criminal Jury in the United States}, 61 U. CHI. L. REV. 867, 868 (1994) (claiming that as juries became more democratic, their "role in American civil life declined"); Laura G. Dooley, \textit{Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury}, 80 CORNELL L. REV. 325, 326 (1995) (arguing that modern civil juries have "far less prestige" than eighteenth-century juries); Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) (asserting that there has been a "gradual process of judicial erosion . . . of the essential guarantee of the Seventh Amendment"); Kenneth Klein, \textit{The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial}, 53 OHIO ST. L.J. 1005, 1033 (1992) (observing that "jury rights continue to erode in contemporary American practice"); William E. Nelson, \textit{The Eighteenth Century Background of John Marshall's Jurisprudence}, 76 MICH. L. REV. 893, 904-05 (1978) (emphasizing that eighteenth-century juries had the power to determine both law and fact, unlike modern juries); Schnapper, \textit{supra} note 9, at 238; Note, \textit{The Changing Role of the Jury in the Nineteenth Century}, 74 YALE L.J. 170, 170 (1964) (pointing out the various methods used to limit jury power during the nineteenth century). \textit{See generally} Colleen P. Murphy, \textit{Integrating the Constitutional Authority of Civil and Criminal Juries}, 61 GEO. WASH. L. REV. 723 (1993) (discussing the role of civil and criminal juries throughout American history).

\textsuperscript{12} Alschuler & Deiss, \textit{supra} note 11, at 868; Dooley, \textit{supra} note 11, at 326-27.

\textsuperscript{13} For recent scholarship applying one form of institutional relation analysis to a different context, see William N. Eskridge, Jr. & Philip P. Frickey, \textit{The Supreme Court, 1993 Term—Foreword: Law as Equilibrium}, 108 HARV. L. REV. 26, 28 (1994) [hereinafter Eskridge & Frickey, \textit{Supreme Court}] (asserting that the Supreme Court and other branches seek to "promote [their] vision of the public interest . . . within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs"); \textit{see also} Neil K. Komesar, \textit{Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis}, 51 U. CHI. L. REV. 366, 366 (1984) (arguing for constitutional analysis that focuses on "the relative attributes of alternative institutional decisionmakers").

\textsuperscript{14} Akhil Reed Amar, \textit{The Bill of Rights as a Constitution}, 100 YALE L.J. 1131, 1190 (1991) [hereinafter Amar, \textit{Bill of Rights}].
in other areas focusing on the structure and procedure of government decisionmaking, that analyzes the jury’s contemporary structural role and that role’s effect on constitutional doctrine.¹⁵

Gradually over two centuries, and then dramatically in the last twenty-five years, the jury has been reconceived from a quasi-independent republican institution, with broad constitutional and common law powers and little restraint from other institutions, to a more limited body that is fully incorporated into a contemporary structure of institutional interaction. The broad authority once exercised solely by the jury now has been divided among several bodies—primarily the legislature, judiciary, and the jury.¹⁶ The jury remains our most republican of government actors, but its traditional position of trust has not saved it from incorporation into a newly conceived system of checks and balances on its power. The recent evolution of the constitutional doctrines that oversee capital sentencing and punitive damage determinations integrate the jury into an interconnected institutional arrangement inspired by legal process tenets (and particularly by contemporary theories of judicial review) that aim to foster deliberation, and thereby diminish arbitrary action, in legislatures and administrative agencies. That system of institutional interaction implies distrust for each body. The more distrust a body engenders—the less competent it appears—the less legitimate it is. Formerly, the jury engendered little distrust and consequently had tremendous legitimacy. As skepticism of its capacities increased, its role changed, its authority dwindled, and its place in the institutional hierarchy slipped. One suggestion of this Article is that new judicial supervision of the jury borrows from process-based approaches devised for review of legislatures and agencies.

Part I of this Article will briefly review some basic tenets and commitments of legal process theory that inform recent revisions of jury authority, and their origins in the Framers’ constitutional design. It then broadly traces the shifts in the jury’s institutional role, perceived competency, and gradual integration into an interactive system with other institutions. Part II will outline evolving understandings of the characteristics and weaknesses of key governmental bodies to ex-

¹⁵. For an insightful functional analysis explaining the constitutional authority of civil and criminal juries, see generally Murphy, supra note 11. For scholarship focusing on the structure of governmental decisionmakers, see generally Komesar, supra note 13.

plore why some tasks formerly assigned to the jury have gradually been allocated to other decisionmakers. With respect to most institutions, the critiques—beginning with the Framers and continuing in current scholarship—are familiar: changes in these descriptions account for changes in the authority of each institution. But the structural description of the jury, included in this Part, has been inadequately developed and rarely juxtaposed with those of its institutional counterparts. One implication arising from Part II is that the jury fares well in comparison to its institutional alternatives and brings valuable relative competencies to a system of checks and balances.

Part III will explore two prominent changes in contemporary jury doctrine. This Part will analyze recent capital sentencing and punitive damages jurisprudence to identify the changed conception of the jury and the new structure and premises of its supervision. This Part also develops the thesis that process theory premises, with an emphasis on encouraging deliberative decisionmaking, underlie these recent doctrinal shifts.

Finally, Part IV will speculate on the likely future of the jury's authority and institutional role, and the insights that new legal process scholarship contributes to that evolving role. In particular, it will suggest that while recent developments appear to restrict jury authority substantially, the procedural regime into which the jury has been integrated is not likely to diminish its authority or power as much as the jury's critics hope and champions fear; it may, in fact, improve the jury's competency. Some of the mechanisms designed to cabin jury authority may actually enhance its capabilities. In any event, these mechanisms leave the jury with a considerable role in adjudication, in policymaking via law application, and in contributing to the ongoing public dialogue that shapes our law and public values.

I. Process Theory and the Evolution of Jury Authority

A. Originalist Concerns with Structure and Process

Structural and procedural responses to the central problems of democratic government at the time of the Constitution's drafting are familiar. Madison's key Federalist Papers, Numbers 10 and 51, for example, famously define two central problems of democratic government: the influence of factions or interest groups, and the self-interested motivations of representatives. The Constitution's responses to these fears are largely in the form of institutional design: "the necessary partition of power among the several departments . . . ,
contriving the interior structure of the government so that its several constituent parts may... be the means of keeping each other in their proper places." 17 Thus, for example, the bicameral structure of the legislature varies the constituent pressures on legislators. With differing terms and structure of election cycles, the lower house is relatively closer to, the upper house relatively more insulated from, popular passions or constituent and interest group pressure. 18 Similarly, the separation of powers within the national government is "essential to the preservation of liberty," and so members of each branch "should be as little dependent as possible on those of the others," thereby "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." 19

The dual structure of federalism also serves to check the national government, because "different governments will control each other." 20

The central propositions of structural responses to perceived tendencies of improper action are twofold. First, institutional design shapes and responds to the motives and incentives of actors within them, and so can be used to encourage proper motivations and actions. 21 In particular, improper influences on deliberation, such as factional pressure and self-interest, can be reduced; decisionmaking can then be more public-regarding. Second, when proper motives, which would likely lead to proper decisional outcomes, cannot be assured within an institution, the authority and interaction of other institutions with different structures, incentives, and processes, serves to inhibit improper outcomes. 22 Thus, contemporary scholars have persuasively argued that the Founders combined an interest-group pluralist vision


20. Id.; see also Komesar, supra note 13, at 406-07 (discussing the Constitution as "predominantly concerned with the processes of decisionmaking and allocation of institutional responsibility").

21. See The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (stating that the design of each government branch should give those who occupy it "the necessary constitutional means and personal motives to resist encroachments" from other branches) (emphasis added).

22. Id.; see William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 38-40 (1988) [hereinafter Eskridge & Frickey, Legislation] (explaining Madison's belief that the structure of government served to limit the power that could be gained by "ill-motivated officials").
with structural arrangements that they believed would preserve public virtue and allow government to operate in a fashion consonant with the republican vision; officials could subordinate private interests to achieve some agreement on the common good.

B. The Development of Process Theory

(1) Classic Legal Process Theory

Legal process theory, the seminal text of which is Hart and Sacks’ *The Legal Process,* achieved significant influence in the legal field during the 1950s, and remains an important influence on legal scholarship and judicial action. The approach adapted originalist structural premises to modern jurisprudential dilemmas. In particular, legal process theory acknowledged the indeterminacy of law—the inability of general rules to determine specific case outcomes, and the inability of doctrinal formalism to constrain judicial review. It also conceded the unavailability of widespread consensus on moral absolutes, and emphasized the existence of diverse views on substantive issues arising from the “boundless and unpredictable variety” of modern society.

It addressed the traditional fear of abuse of power by all government actors—even democratically accountable branches—by refining and emphasizing checks and balances concepts and by adding an innovative thesis of relative institutional competencies. Perhaps most famously, Hart and Sacks also posited a new basis for the legitimacy of government action in the absence of substantive agreement on values or issues—the “principle of institutional settlement.” In the absence of a consensus on whether a particular policy or decision is substantively correct, decisionmaking by government bodies is legitimate...
when it comes from institutions that are the most competent (relative to other institutions) to make that decision, and when that institution has followed widely agreed-upon "constitutive or procedural understandings or arrangements," which usually mandate some input or review from other institutional actors.28

The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.

... When the principle of institutional settlement is plainly applicable, we say that the law "is" thus and so .... Yet the "is" is not really an "is" but a special kind of "ought"—a statement that ... a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind "ought" to be accepted as binding ....29

Recognizing the inability to identify widespread substantive agreements on what constitutes "the common interest" or fundamental public values, Hart and Sacks concluded that "substantive understandings" derive from "constitutive or procedural understandings," and such constitutive arrangements are "more fundamental than substantive arrangements."30 Legal process theorists, sharing the "optimistic pluralism" of the 1950s, believed legislatures were fairly good at accommodating and reflecting the citizenry's diverse preferences.31 They viewed the legislative process as unproblematic and thus saw little need for aggressive constitutional review of legislation for problems, such as interest group influence, in its "democratic pedigree."32 Sharing the critique of the Lochner era, they distrusted courts' ability to identify and act upon public values and argued in-

28. HART & SACKS, supra note 24, at 3 (emphasis omitted).
29. Id. at 4-5.
30. Id. at 3 (emphasis omitted).
31. William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. PA. L. REV. 1007, 1014 (1989) [hereinafter Eskridge, Public Values]; William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. PITT. L. REV. 691, 697 (1987) [hereinafter Eskridge & Frickey, Legislation Scholarship]; see also HART & SACKS, supra note 24, at 1415 (maintaining that, when interpreting statutes, courts should assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably").

Process theorists' optimism about government generally contrasts markedly with current public choice theorists' emphasis on legislators' self-interest, domination by interest groups, and inability to make coherent collective choices. See HART & SACKS, supra note 24, at 166 ("Law is ... a purposive activity, a continuous striving to solve the basic problems of social living ... ."); see also infra notes 92-112 and accompanying text.
stead that judges could fulfill their inevitable role of interstitial law-making by looking to (and being constrained by) the legislature's purpose for a statute.\textsuperscript{33} In this respect, they had in common with the Framers a faith that structure had counteracted problems such as interest group influence and created a means for public-spirited lawmaking.

Such judgments gave rise to process theory's determinations of relative institutional competency, which assigned a foundational role to institutional and procedural structures. The premise is simply that some institutions are better at making certain types of decisions than others. For decisions to attain the legitimating "special kind of 'ought'," the system must assign responsibility to appropriate institutions and construct procedural mechanisms and institutional interaction in a manner that will yield acceptable substantive results.\textsuperscript{34}

In Hart and Sacks' understanding, institutional design must confront two unavoidable facts. First, discretion by decisionmakers cannot be eliminated, in large part because of the abandonment of doctrinal formalism: "[a]bstract understandings . . . will necessarily be indeterminate." An essential counter-leaning corollary is that discretion can be limited, guided, and channeled.\textsuperscript{35} Second, Hart and Sacks shared the Framers' concern that all power can be exercised arbitrarily, and therefore procedures must include mechanisms for checking arbitrary exercises of power.\textsuperscript{36} The protections against such abuse are the interdependence of divided powers within government—the foundational structures of separation of powers, federalism, a bicameral

\textsuperscript{33} Id. at 600-01. For an explication of Hart and Sacks' purposive theory of judicial construction of statutes that emphasizes the complex role remaining for courts under that approach, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 143-151 (1994).

\textsuperscript{34} HART & SACKS, supra note 24, at 4; see Schacter, supra note 32, at 630-31 (stating that Hart and Sacks believed "the legitimacy of a democratic order . . . [was tied to] ex ante agreements about dispute resolution"). A result may be acceptable merely because the public accepts it as so; the Court has used the likelihood of public acceptance of case outcomes as a justification for adjudication by juries representing a cross section of the community. See Lockhart v. McCree, 476 U.S. 162, 174-75 (1986) (declaring that the fair cross section requirement is important to preserve "public confidence in the fairness of the criminal justice system") (quoting Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975)). Alternatively, a procedural and institutional structure may be set up in the manner most likely to serve a predetermined substantive value, such as individual sentence adjudication in death penalty cases. See infra notes 219-20 and accompanying text.


\textsuperscript{36} HART & SACKS, supra note 24, at 175 ("Among the great discoveries of American law is the realization that all official power can properly be thought of as limited by a general prohibition against arbitrariness in its exercise . . . .")
legislature, judicial review of legislative or agency action, and executive veto of legislative decisions. All keep one body from acting without some degree of review and approval by another.\textsuperscript{37}

(2) Newer Process Theories

The initial conception of process theory gave a limited role to judicial review,\textsuperscript{38} for the same reasons that the "countermajoritarian dilemma" remains a theoretical difficulty in constitutional law. In a democratic government, most policy decisions should be made by the most representative and democratically accountable branches—the legislature and the executive. Unelected, relatively unaccountable judges should have no significant role in substantive policymaking, and thus should overturn majoritarian decisions only for clear reasons that have some majoritarian or constitutional basis.\textsuperscript{39} Yet as assumptions of institutional competencies changed, the premises of process theory have proven exceptionally adaptable. Arguments for and against an active judiciary, either on constitutional or statutory and regulatory issues, have drawn on process theory themes. Process theory was a central influence, for instance, on Dean Ely's "representation-reinforcement" theory of judicial review that sought to explain and justify the relatively activist decisions of the Warren Court.\textsuperscript{40} Process theory concerns, especially institutional competency and checks against such institutional failures as self-dealing or interest group-dominated decisionmakers, are invoked in arguments for greater judicial review of agency decisionmaking\textsuperscript{41} and of legislative outcomes.\textsuperscript{42} Many of those arguments suggest, in one way or another, the impor-

\textsuperscript{37} Id. at 172-73.

\textsuperscript{38} See Eskridge & Peller, Supreme Court, supra note 13, at 723 (concluding that "legal process [theory] asserted the illegitimacy of activist judicial review while asserting activism in virtually all other institutional settings").


\textsuperscript{40} John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); see also Komesar, supra note 13, at 398, 399-425 (describing Ely's process theory as an "institutionally-based conception of constitutional judicial review" concerned, albeit insufficiently, with relative institutional competencies for various types of decisions).

\textsuperscript{41} Compare Colin Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 552 (1985) (defending deferential judicial review of agencies' decisions) with Cynthia Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 456 (1989) (arguing for less deferential review) and Richard
tance of judicial review to reinforce democratic processes. Courts can check decisions of more accountable branches whose structural imperfections may lead to outcomes that do not accord with majority preferences or the public interest. Similarly, those institutions may, in practice, be less accountable and responsive to the electorate than they formally appear; they may, in short, be “accountable” institutions that do not work as democratically as the countermajoritarian dilemma thesis presumes.43

Despite the sustained criticism of process theory (both Ely’s theory of judicial review and Hart and Sacks’ broader description), central components of process theory continue to animate judicial decisionmaking and scholarship on statutory interpretation and constitutional and administrative law.44 I argue below that, although the jury has been almost completely absent from process theory discussions for decades, process theory premises largely account for recent, substantial changes in the jurisprudence of juries. In particular, insti-


42. See Erwin Chemerinsky, The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 46-47, 80-81 (1989) (arguing that “decisionmaking by electorally accountable institutions should no longer be presumed to be superior to that by the judiciary”); Jerry L. Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849, 874-75 (1980) (arguing for stricter judicial scrutiny of economic legislation); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1693 (1984) [hereinafter Sunstein, Naked Preferences] (asserting that judicial review should scrutinize legislation to ensure that it serves a genuine public purpose rather than a mere interest group transfer); Sunstein, Interest Groups, supra note 17, at 30-31 (advocating the revival of “republican” governance as a basis for evaluating legislative decisionmaking). See generally Farber & Frickey, supra note 17, at 124 (“Much of constitutional law turns on the degree of deference to be given to various governmental actions.”).

43. See infra notes 92-112 and accompanying text. For examples of such scholarship, see Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 580-81 (1993) (discussing misconceptions in the premises of the countermajoritarian dilemma, emphasizing the relative unaccountability of the legislature, the accountability of the judiciary, and thus the legitimacy of judicial review); Mashaw, supra note 42; Frank I. Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 16-17 (1986) (contending that less judicial deference to other branches is appropriate and does not violate republican ideals); Cass Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1542 (1988) [hereinafter Sunstein, Republican Revival] (arguing for the reincorporation of certain republican values into governmental decisionmaking); Sunstein, Interest Groups, supra note 17; Sunstein, Naked Preferences, supra note 42.

For a persuasive critique suggesting that process flaws, such as interest group influence, do not justify greater judicial review without separate normative commitments, see Einer Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 34-35 (1991).

44. For an argument that process theory centrally informed Supreme Court decisions in the 1993 term, see Eskridge & Frickey, Supreme Court, supra note 13, at 27-30.
tutional and procedural arrangements mandated or encouraged by the Court under the Due Process Clause can be explained in large part by the conceptual evolution of the jury into its current image as just another imperfect, potentially arbitrary government body with specific, limited competencies. Similarly, the process theory faith in procedural arrangements to guide discretion, and then to employ other institutions to double-check that discretion, animates the doctrinal reforms that recently have revised the jury's authority and institutional role.

C. Incorporation of the Jury into Process Theory-Inspired Institutional Arrangements

While the Framers conceived for the jury a central structural role to balance other government decisionmakers, deep trust in the jury largely exempted it from significant checks on its own broad and discretionary power. Interestingly, in the Federalist Papers and other early commentary on the Constitution, amidst all the discussion of the need for internal and external checks on each government department, there is virtually no mention of the need for such safeguards on the much-vaunted institution of the jury. The Founders expressed little fear of arbitrary action by juries; they distrusted every other government body more. This lack of concern reveals much about the trust placed in the jury. That trust is confirmed in what we know about the broad authority and discretion juries exercised in the late eighteenth century. Similarly, the integration of juries into a more interconnected institutional framework came late in the intellectual history of process theory. Even after the jury evolved in the nineteenth and early twentieth centuries into a body of more limited powers increasingly checked by other institutions, virtually no process theory scholarship incorporates the jury into the interconnected structure of institutional relations.

45. Amar, Bill of Rights, supra note 14, at 1183.
47. Hart and Sacks' seminal work on legal process contains extended discussions of the legislature, the executive branch, administrative agencies, and the judiciary, but no discussions of the jury—even in a section on "popular construction" of statutes. HART & SACKS, supra note 24, at 1296-1301 (emphasis added).
The jury had long been a body which was essentially independent of other institutions. At the time the Constitution and Bill of Rights were drafted, juries had wide-ranging authority that included, at least in many areas and in the view of some prominent observers, the power to judge the law as well as the facts.48 It was a time when court authority was broad, encompassing many administrative and regulatory functions over economic and social life that we today do not consider judicial.49 Nevertheless, John Adams, Andrew Hamilton, and John Jay all insisted that jurors could judge both law and facts, could in their discretion disregard instructions on the law from judges without being overturned, and were under no obligation to return a special verdict that may have exposed their reasoning.50 Many colonies (and then states) used constitutional or statutory guarantees to protect the jury’s power to determine law, and jury law-finding power was apparently widely practiced into the 1800s.51

Support for broad jury authority was a preeminent concern of Anti-Federalists, who saw it as a popular bulwark against potentially tyrannical executive power52 as well as judicial bias in favor of the

48. Alschuler & Deiss, supra note 11, at 903-06; Nelson, supra note 11, at 904-17; see also Morris S. Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829, 848 (1980) ("[T]here is ample evidence that the jury was revered in most of the American colonies, so much so that jury trial found a regular place in chancery ... ").

49. Nelson, supra note 11, at 903-04.

50. See Nelson, supra note 11, at 906, 916-17 (noting that John Adams contended that juries had no obligation to deliver special verdicts); Alschuler & Deiss, supra note 11, at 873 (discussing the remarks of Andrew Hamilton, counsel in a landmark 1735 trial for seditious libel, declaring that juries “have the right beyond all dispute to determine both the law and the fact”); id. at 906 (quoting John Adams’ statement that it was “an Absurdity to suppose that the Law would oblige [jurors] to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience”); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (presiding over the Supreme Court’s last jury trial, Chief Justice John Jay charged the jury, that while it is “presumable, that the courts are the best judges of the law,” jurors could disregard this presumption and exercise the “right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy”), quoted in Sparf and Hansen v. United States, 156 U.S. 51, 64-65 (1895).

51. See Alschuler & Deiss, supra note 11, at 909 (discussing a Massachusetts statute passed in 1808 that also permitted juries to judge law and fact); id. at 910 (noting that by 1851, at least 15 states protected jury power to determine law by either statute, constitutional provision, or judicial decision); Ronald J. Bacigal, Putting the People Back into the Fourth Amendment, 62 Geo. Wash. L. Rev. 359, 370 & n.63 (1994) (citing a nineteenth-century scholar, Josiah Quincy, who claimed that the right of juries to determine the law was accepted practice until the early nineteenth century); Nelson, supra note 11, at 914 (observing that Georgia’s constitution barred judges from interfering with the jury’s fact-finding powers, and a New Jersey statute accomplished the same).

52. See Scheiner, supra note 46, at 148-50 (focusing on the Anti-Federalist belief that the civil jury served to protect ordinary citizens from overreaching government officials);
executive and wealthy private interests. Support for law-finding juries was apparently reflected in early Congresses. In the 1805 impeachment of Justice Samuel Chase, the House of Representatives charged him with trying to “wrest from the jury their indisputable right to . . . determine upon the question of the law, as well as on the question of fact.” Judges’ instructions, which frequently were cursory and rudimentary (and sometimes nonexistent), generally were not binding, and thus verdicts were not overturned for failure to follow them. And in the rare eighteenth century jurisdiction in which instructions were deemed binding, the remedy was grant of a new trial—sending the case to another jury. Apparently, few procedural devices of the time—special pleading, special verdict, compulsory nonsuit or demurrer to evidence—effectively controlled jury authority. In short, the jury was held in high regard equivalent to the faith that first-generation legal process theorists placed in the legislature. Decisions of this representative body of citizens, like the legislative outcomes for process theorists, were presumed to be so trustworthy that they required little scrutiny from other institutions, particularly the elite, unaccountable judiciary.

Beginning in the early nineteenth century, nearly every state’s courts began to grant motions for new trial in civil cases if juries returned verdicts contrary to legal instructions. In the first half of that century the consensus shifted significantly away from ensuring juries the power to determine law, and this trend accelerated in the latter half of 1800s. By 1835, Justice Story denied “that, in any case, civil or criminal, [jurors] . . . have the moral right to decide the law accord-
ing to their own notions” and declared it “the most sacred constitutional right of every party accused of a crime, that the jury should respond . . . to the facts, and the court as to the law [and] [it is the duty of the jury to follow the law, as it is laid down by the court.”61

Jury power in criminal cases remained broader than its authority in civil cases well into the late 1800s. Nevertheless, the effective death knell of formal recognition for juries’ authority over the law came in the Supreme Court’s 1895 decision in a criminal case. In *Sparf and Hansen v. United States*,62 the Court, acknowledging earlier authority to the contrary and much disagreement on the issue, held that judges alone determine the law and federal juries are bound by their instructions. This conclusion foreshadows process theory themes of institutional competence and interaction with the suggestion that division of authority is essential to preventing abuse of authority by either body of the judicial branch: “In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of public and private rights.”63 Substantive values would be best protected by procedural and institutional arrangements that check and balance imperfect decisionmakers with one another, and assign to each the tasks for which it is best suited.

Doubts about the jury’s law-determining capacities in the nineteenth century gave rise to the doctrine of binding legal instructions from judges. Yet, not until well into the nineteenth century did trial or appellate courts possess other significant authority to reverse or alter jury verdicts as a matter of law, such as the directed verdict, judgment notwithstanding the verdict, or remittitur.64 Well into the current century juries continued to retain authority that today seems substantial. Even after juries were bound by instructions from the judge, the law that judges gave juries was at key points sparse, providing jurors with little assistance or constraint. In particular, juries had “untrammelled” discretion to impose the death penalty in capital cases, unguided by statute or instructions. Their authority in determining civil damage awards, including punitive damages, was equally

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62. 156 U.S. 51 (1895).
63. *Id.* at 106; see generally Bacigal, *supra* note 51, at 379-92 (discussing *Sparf* and the end of “the practice of permitting the jury to determine law”).
64. See Schnapper, *supra* note 9, at 239-46 (discussing the evolution in the use of directed verdicts, remittiturs, and judgments notwithstanding the verdict throughout the nineteenth century).
broad and unguided. Appellate review of both decisions was minimal and, to a large extent, formally forbidden.65 As to factual determinations and fundamental law applications, at least, the jury into the 1960s was still largely viewed with the optimism that pluralists of the 1950s accorded to the legislature.66

By the 1970s, when process theory was well established, even the jury’s remaining breadth of authority seemed increasingly anomalous with the process-based assumption that law is legitimate when produced by duly authorized institutions. The jury powers that remained—arising from the general verdict form, authority over capital sentencing and civil damage awards, and foremost from broad and cursory jury instructions that relied on the jury’s conscience to inform its discretion—clashed with key process theory premises: the indeterminacy of substantive values,67 discretion that is channeled and limited, decisional tasks tailored to particular institutional competencies,68 and checks on arbitrary action by balancing government bodies against each other.69 The jury came to be viewed as pos-

65. Id. at 313-16, n.298 (discussing case law from the period and observing that prior to 1933, the Supreme Court had insisted on at least a dozen different occasions that neither the appellate courts nor the Supreme Court itself had any authority to overturn a jury verdict because it appeared either too large or inadequate).

66. The broad trust placed in the jury through the mid-twentieth century can be understood to reflect the enduring influence of a liberal theory of law. Liberalism accords legitimacy to legal decisions according to how directly that decision can be traced to majority sentiment; law derives from consent of the governed. On this view, the jury’s broad authority was legitimate because, like the legislature, it was assumed to serve as an accurate surrogate for “We the People.” See Eskridge, supra note 33 at 111, 121 (summarizing liberal theories of law and asserting that Congress serves as a “Surrogate” for “We the People”).

One could trace that legacy to the early, all-powerful jury admired by Adams, Jefferson, and Jay, which was effectively checked not by other government branches but only by its collective conscience giving it effective veto power over determinations of law by the legislature and judges. William Nelson has written that eighteenth-century juries were given such broad-ranging and unchecked authority in large part because communities of that time recognized themselves to have a widely shared consensus on core values, which a jury’s conscience-based decisions would reflect. Nelson, supra note 11, at 901, 917-24.

67. The absence of public consensus on substantive values has implications for the jury. Alschuler & Deiss, supra note 11, at 916; see generally Eskridge & Peller, supra note 27, at 719-23 (explaining how legal process scholars concluded that “broad dispersion of problem-solving” was the optimal method of dealing with diversity in American society). One can no longer rely on small bodies of randomly selected citizens to consistently identify the same substantive criteria on which society should make fundamental decisions such as which citizens to put to death.

68. Eskridge & Peller, supra note 27, at 720.

sessing at least as many imperfections as legislatures, courts, or agencies, yet without the same constraints. With that changed conception, the jury had to be incorporated into the system of checks and balances. It required a new structure of institutional interaction that takes advantage of the jury’s ability to counter the weaknesses of other institutions, improves its capacity to make rational decisions, and offsets its weak points with the relative strengths of other bodies.

As part of this revision, judicial review of juries has borrowed from recent revisions of legal process-inspired approaches that emphasize the capacity of judicial review to foster deliberation within agencies and legislatures and to check their decisions for public- or private-regarding outcomes or improper considerations. These approaches also help describe the recent redesign of doctrines governing the jury.

II. Relative Competencies of Public Decisionmakers

The design of government institutions responds to concerns about how officials will behave within their structural and procedural regimes. Changes in social contexts also prompt revision of institutional arrangements. Our government has gradually increased the mechanisms for, and influence of, direct democracy, and other developments (mass media, instant polling, communications advances) have subjected representatives to more direct constituent pressure than the Founders’ intended. Those developments helped prompt the rise of judicial review. Hart and Sacks based their process theory on the advent of a large, complex, modern society and the concomitant demise of easy consensus on fundamental substantive values. No longer could “a council of elders,” exercising functions we divide as judicial, administrative, and legislative, suffice as an adequate governing structure.

(1959). For a discussion of legal process theory (one that has influenced this portion of this Article), see Eskridge & Peller, supra note 27, at 709-23.

70. See Eskridge & Frickey, Supreme Court, supra note 13, at 29 (suggesting that many public law issues arise when “social ... or economic changes have rendered an equilibrium [between institutions] unstable”).

71. See Friedman, supra note 43, at 616 (maintaining that the American political process has become more inclusive) (emphasis omitted).

72. Id. at 621-22; cf. William N. Eskridge, Jr., & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 533 (1992) (“The world of the Framers is not our world.”).

73. See Friedman, supra note 43, at 625 (declaring that “the role of judicial review has grown alongside the rise of majoritarianism”).

74. HART & SACKS, supra note 24, at 1-6, 180-83; see also Eskridge & Peller, supra note 27, at 719-22 (describing the basic tenets of Hart and Sacks’ legal process theory).

75. HART & SACKS, supra note 24, at 3.
Social changes similarly prompted changes in jury authority. William Nelson’s description of the eighteenth-century jury reveals one that resembled, more than we might now expect, Hart and Sacks’ all-purpose “council of elders.” 76 Several factors subsequently made the unchecked law-finding power of quasi-independent juries seem inappropriate. The growth and diversity of society cited by Hart and Sacks makes it less likely that juries will have a widely-shared consensus of values on which to base their decisions. The growth of codified and recorded common law makes jury law-finding duties seem less appropriate. 77 The increasing faith in legal precedent, and the capacity of judges to determine general rules from common law cases, along with the rise of instrumentalist concerns in American legal thought, argue against broad jury authority, 78 as does the size and complexity of some modern litigation. Additionally, eventual recognition of the jury’s potential to be as much a tyrannical majority as a protector of the individual against overreaching government called for checks on its authority. 79

76. See Nelson, supra note 11, at 902-05, 917-19; id. at 903 (stating that courts were the primary body of eighteenth-century government, whose work was “of an undifferentiated, pervasive character,” and who played a central role in “[c]olonial government[s] regula[tion of] its subjects’ lives in pervasive detail”); HART & SACKS, supra note 24, at 3.

77. See Alschuler & Deiss, supra note 11, at 868, 917 (correlating the diminishment of jury authority with the rise of “book law” which offered the more consistent “guidance of legal rules” rather than the “uncertainties of ad hoc community judgments”).

78. On the rise of instrumentalism in American legal thought, see ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 26-34 (1982). For an instrumentalist analysis limited to tort law, see G. EDWARD WHITE, TORT LAW IN AMERICA (1980); for one limited to criminal law, see GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978).

Legal determinations by judges carry the incontrovertible weight of common sense that jury determinations do not in the post-Langdellian, post-Holmesian legal world in which we are used to seeking general principles from specific cases. See John H. Langbein, Chancellor Kent and the History of Legal Literature, 93 COLUM. L. REV. 547, 566 (1993) (discussing the rise of “legal professionalism,” which triumphed over a conception of the legal system as an essentially lay arbitrator relying mostly on common sense, as a response to “unavoidable complexity in legal rules and procedures”).

Juries are quintessentially corrective justice institutions with limited capacity to compare similar cases, consciously seek consistent outcomes across comparable cases, or observe the long-term consequences of their decisions. See Catheriné Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348, 2408-10 (1990) (arguing that juries are essential to a corrective justice justification of tort law). Jury law-finding seemed less incongruous in the eighteenth century when more than a few judges had no legal training, and when reported decisions were often not practically available. See Alschuler & Deiss, supra note 11, at 903-06.

79. See generally Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1280-82 (1992) [hereinafter Amar, Fourteenth Amendment] (pro-
Social changes, however, are only one contributing factor to evolving theories of institutional authority and interaction. Shifting perceptions of institutional action and competency motivate changes in roles, procedure, and interaction. On this point debates over the scope of judicial review for constitutional issues and statutory interpretation serve as a model for theories of jury competency and review. Traditionally, the legislature has been assumed to be the most democratic branch, aggregating collective preferences in a representative body. Courts, in contrast, are unelected and relatively unaccountable and so should have little role in a democracy in overturning the decisions of representative bodies. Those premises form the basis of the countermajoritarian dilemma and have justified theories for limited review of legislative decisions—limited, for instance, by clearly applicable and unambiguous constitutional provisions, or the intent of the Constitution's drafters. Comparable themes animate theories of statutory interpretation. A traditional position is that courts should defer to executive and agency interpretations of statutes, because both have more expertise in a given substantive area than courts, and both are more democratically accountable than courts. On that view, courts should defer to agency interpretation of statutes (overturning them only if they are unreasonable), unless clear statutory language specifically addresses the issue.80 These process-based approaches to judicial review share the relatively sanguine view of legislatures that infuses Hart and Sacks' legal process theory. Courts defer to legislative decisions because legislatures are presumed to function well in reflecting and refining popular preferences through conscientious, public-regarding deliberation.

Once descriptive assumptions of each institution change, however, those models break down. In recent decades we have seen a wealth of scholarship challenging these premises. Public choice theo-

posing that a federal judge, rather than a jury, may be more likely to safeguard "currently unpopular ideas from a current majority').

Perhaps more cynically, the increasing representative nature of the jury (which may inspire familiar criticisms of its incompetence) correlates with diminishment of its authority. See Alschuler & Deiss, supra note 11, at 868 (noting the decline in jury power as they became "more democratic"); Dooley, supra note 11, at 326-27 (exploring the growing restrictions on jury power as the jury system becomes more inclusive).

rists have described legislative, executive, and agency actors as susceptible to rent-seeking\textsuperscript{81} special interests which aggravate the possibilities of self-interested action.\textsuperscript{82} Similarly, republican theorists posit public-regarding policies as the goal of legislative and agency decisionmaking and have identified potential flaws in legislatures and agencies that hinder public-regarding outcomes.\textsuperscript{83} Both critiques, buttressed by theories about means by which courts can intervene more actively while limiting the substitution of their own normative judgments for those of the legislature, have been used to justify more expansive judicial review.\textsuperscript{84} Statutory interpretation scholarship has taken a similar turn, identifying flaws in legislative and agency action that can be at least partly corrected by judicial action. Judicial activism in this area is buttressed by descriptive theories which posit that judges are not in fact constrained by traditional, restrictive theories of interpretation. To minimize the unavoidably substantive task of judicial review, judges should focus on the likely process failings (such as interest group dominance) of legislatures and agencies.\textsuperscript{85}

One would expect change in the jurisprudence of juries to reflect similar reevaluations of structural characteristics and relative competencies. In fact, changing views of the jury do account for much of the doctrinal shift, particularly with regard to complex litigation that requires adjudicative expertise akin to an agency's. But that changed

\textsuperscript{81} "Rent-seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market." Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 224 n.6 (1986).

\textsuperscript{82} See generally Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371 (1983); James M. Buchanan & Gordon Tullock, The Calculus of Consent (1962) (exploring the role of special interests in political decision-making); Farber & Frickey, supra note 17. (discussing "interest group theory" and the impact of interest groups on American government); Dennis Mueller, Public Choice (1979) (applying economic theories to the study of political decisionmaking); Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965) (explaining the dynamics of lobbying groups).

\textsuperscript{83} See generally Sunstein, Republican Revival, supra note 43, at 1589-90 (arguing that modern government actors should honor the "basic republican commitments" of "political equality" and "deliberation").

\textsuperscript{84} For a discussion and critique of theories urging broader judicial review in response to institutional flaws such as interest group dominance, see Elhauge, supra note 43, at 44-48.

\textsuperscript{85} See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1479-81 (1987) [hereinafter Eskridge, Dynamic Statutory Interpretation] (arguing that courts should examine the "societal or legal context" in which statutes were passed when subjecting them to judicial scrutiny). As noted elsewhere, assessments of interest group influence require a normative choice about how much influence such groups should have. See Elhauge, supra note 43, at 48-59.
view has not occurred as a result of a systematic descriptive analysis of
the jury. Scholars, particularly public choice and process theory schol-
ars, have done very little work on developing a description of jury
action.\footnote{For an insightful, functional theory of jury authority that does not draw on process
to public choice, see generally Murphy, supra note 11.} Neither the Court nor scholars have developed their critique
of the jury within the context of descriptions of its institutional alter-
natives. What follows is a synthesis of traditional and contemporary
theories of the key institutions with which the jury interacts. The sur-
vey is necessarily cursory and incomplete, but it emphasizes originalist
descriptions of each institution, legal process assumptions of each, and
more recent analyses invoked to explain a more active, normative role
for courts in counteracting the structural or procedural deficiencies of
other institutional players. I add to this synthesis a survey of some-
what ad hoc notions of jury competency (particularly those cited by
the Court), which should yield some insight on the recent, dramatic
changes in jury doctrine discussed in the next Part.

A. The Legislature

(1) Characteristics and Relative Competencies

The government institution perceived to possess the greatest
democratic legitimacy has always been the legislature.\footnote{In
republican government, the legislative authority necessarily predominates.”; see \textit{Farber
& Frickey}, supra note 17, at 123 (discussing cases that “suggest . . . Congress is at the peak
of the legitimacy hierarchy”).} Its members
are directly elected by the people\footnote{Senators were directly elected only after passage of the Seventeenth Amendment
in 1913. \textit{See U.S. Const.} amend. XVII.} and are accountable through peri-
odic elections. Its members are at least nominally lay citizens; unlike
judges, no special training is required for
\footnote{Judges are “selected for their knowledge of the laws, acquired by long and laborious
study, while legislators, for want of the same advantage, cannot but be deficient in that
knowledge. The members of the legislature will rarely be chosen with a view to those
qualifications which fit men for the stations of judges”).} If it can resist the
inordinate power of interest groups, the legislature will represent the
popular will. Its members will be familiar with the sentiments of their
constituents, will have more time to study facts and deliberate among
themselves than the citizenry as a whole does, and will implement pol-
icies that are refined versions of the public’s preferences.

The legislature has a strong deliberative capacity (an aptitude
shared with the jury), enabling it to examine and debate facts and pol-
icy options from a wide collection of viewpoints, and is supported by its broad-ranging fact-finding capabilities. Additionally, legislators are "repeat players"—they deal with more than one issue or case, and many serve long enough to deal with the same issues repeatedly over time; as an institution the legislature can assess the long term consequences of its actions. Yet it is predominantly limited to setting general rules or policies. It does not decide individual cases and must draft laws that apply across time and individual circumstance to a variety of individuals or settings. Thus, it relies on other institutions to adjust these general rules to the particularities of individual cases.

(2) Critique of the Legislature

Despite its advantages, distrust of the legislature—the most democratic and representative of government bodies— informs the Framers' choice about the structure of the institution. The influence of factions was a key concern of Federalists, as was the related concern that legislators would grow either too remote from their constituents or too responsive to them—that is, responsive to pressure from momentary popular passions. Motivated by those concerns, the Framers sought to answer them with the institutional design of Congress, making the lower house more responsive to current popular sentiment via more frequent elections among smaller constituencies. In contrast,
the Senate’s structure strives for deliberation and distance from majoritarian passions: terms are longer, constituencies larger, and procedural rules empower minority groups.

In the decades since Hart and Sacks’ optimistic image of the legislature, several sources of scholarship and case law have identified other potential problems with elected bodies. One such source is voting rights and elections law jurisprudence. A basic issue in this area is that even after the structure of the legislature is settled, election procedures make a tremendous difference in the body’s composition. Any number of electoral arrangements exist that are both constitutionally sound and meet prevailing notions of fairness, yet would yield very different sets of representatives from the same body of voters (even when they cast the same votes from among the same selection of candidates). In short, who gets elected depends not merely on voters’ preferences but also on the design of the electoral system. Elections create the same collective action problems that Arrow’s theorem identifies in legislative action.\(^9\) Mechanisms such as ballot access rules, single-member districts, winner-take-all rules, and cumulative or limited voting systems can significantly change the composition of elected bodies without any change in voter sentiment.\(^{93}\) This critique decreases faith in the legislature’s ability to reflect societal preferences (and has prompted calls for other electoral systems),\(^{94}\) and thereby adds to arguments for decreased deference to legislative decisions.

Other contemporary analyses of legislatures develop the traditional concern of factionalism in contemporary contexts with modern

92. In *Davis v. Bandemer*, 478 U.S. 109 (1986), for instance, the Supreme Court found no constitutional violation of a state legislature gerrymander that yielded Democrats only 43 of the 100 state House of Representatives seats in an election in which 51.9 percent of votes were cast for Democratic candidates. *Badham v. Eu* presented a similar challenge to the gerrymander of California’s congressional districts, which resulted in Republicans receiving 40 percent of the seats (18 of 45) from a popular vote in which 50.1 percent of ballots were cast for Republican candidates. 694 F. Supp. 664 (N.D. Cal. 1988), aff’d, 488 U.S. 1024 (1989).

On Arrow’s theorem and collective action problems, see infra notes 99-100 and accompanying text.


94. For a sampling of criticisms and calls for new systems, see *id*. Proposals for alternative electoral structures are complicated by the need for electoral systems to serve other values, such as preventing proliferation of parties and factionalism within the legislature, and by the effect electoral arrangements have on shaping public preferences as well as reflecting them. *Cf. infra* text accompanying notes 104-06 (discussing Professor Friedman’s challenge to the notion that a coherent “majority will” exists that legislators could represent).
analytical tools. One current variation of the perennial concern with special interest influence focuses on private financing of elections and the concomitant influence of wealthy constituents and interest groups.\(^9\) More broadly, public choice scholars have persuasively described legislatures as bodies motivated by their members' own self-interest and the influence of narrow interest groups.\(^9\) Only relatively small groups with strong, specific interests can overcome collective action problems to lobby legislatures effectively; interests shared by broader segments of the electorate are less likely to overcome those hurdles, such as the free-rider problem, to organize equally effective lobby campaigns.\(^9\)

A second insight from public choice scholars raises separate concerns about the legitimacy of legislative action. Insights from decision theory suggest that, at least in some circumstances, collective decision-making bodies are incapable of reflecting anything that can fairly be labeled majority will, or even of implementing coherent policy choices. The seminal insight is Arrow's Theorem, which posits that, under certain conditions, every process of collective decisionmaking is arbitrary in that outcomes are affected by procedural mechanisms.\(^9\) In the most common example, it suggests that in a setting of at least three people, each of whom has differently ranked preferences among three options, the outcome of a collective vote will depend on the choice of procedure—the order in which the votes are taken—rather than a determinant majority preference.\(^9\) Thus, the implementation

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95. See generally Symposium on Campaign Finance Reform, 94 COLUM. L. REV. 1125 (1994) (examining possible campaign finance reforms and problems with the existing system for funding political campaigns).

96. See supra notes 82-83 (citing various public choice theorists).

97. Jack M. Beermann, Interest Group Politics and Judicial Behavior: Macey's Public Choice, 67 NOTRE DAME L. REV. 183, 183-84 (1991) (describing the views of public choice scholars, who assert that politics is "likely to be dominated by small groups composed of . . . relatively wealthy institutions . . . that are able to overcome collective action problems and organize"); see also Komesar, supra note 13, at 419 ("[O]verrepresentation of concentrated interests appears to be a serious malfunction in our legislative process.").

98. More precisely, "Arrow's Impossibility Theorem proves that it is impossible to construct any process of collective decisionmaking that simultaneously (1) avoids intransitivity, (2) is nondictatorial, (3) adopts Pareto preferences, (4) does not restrict how individuals order their [private] preferences, and (5) decides between two policy alternatives without regard to independent alternatives." Elhauge, supra note 43, at 101.

of common procedural rules, such as Robert's Rule of Order, can affect substantively the outcome of legislative processes independent of majority preferences. Power is exercised by those who control procedural rules, rather than solely majority will. Moreover, even when coherent outcomes reflecting actual consensus are possible, internal rules and procedures combined with actual legislative practices and politics may mean they are not always realized. Thus, "there is a fundamental and inescapable arbitrariness to majority rule."

Underlying most theories of legislatures is an assumption of coherent majority preferences among the populace. That notion itself, independent of the legislature's ability to reflect it, has also been challenged. Barry Friedman has criticized the "erroneous assumption... that such a thing as 'majority will' exists to legitimize decisions of the 'representative' branches." He argues that "no majority will is identifiable" because "majorities come and go as the public engages in debate. At best there is a constantly shifting tide of public opinion." Citizens often face a multiplicity of choices that they implicitly rank on a continuum, and those preferences are often fluid and relative, contingent upon possible and likely alternatives, or upon information and discussion. That description matches the important premise of republican theory that preferences are not exogenous to the political system and waiting to be aggregated, but are endogenous and thus shaped in part by public debate and deliberative processes.

The collective result of these observations matches our informed intuition of the legislature as a distinctly imperfect institution. The legislature's limited capacity to represent fairly and consistently a ma-

Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Preference, 74 VA. L. REV. 373, 374-75 (1988) (arguing that "legislatures cannot be relied upon to protect citizens' rights in any area") (emphasis omitted).

100. See Saul Levmore, Parliamentary Law, Majority Decisionmaking, and the Voting Paradox, 75 VA. L. REV. 971, 971-74 (1989) (exploring the impact of the use of parliamentary rules of order on political and nonpolitical entities).

101. See, e.g., Friedman, supra note 43, at 633 ("[T]he voting representatives themselves have little cognizance of many statutes, instead following the lead of floor leaders and committee chairs."). The U.S. Senate's rule requiring 60 votes to end a filibuster (often instigated by one or a few members) is one example of an internal rule that frustrates realization of coherent majority preferences.


103. Friedman, supra note 43, at 638.

104. Id.

105. Id. at 638-42; see id. at 639 n.307 (citing Allan Gibbard, Wise Choices, Apt Feelings: A Theory of Normative Judgment 247 (1990)).

106. See Sunstein, Republican Revival, supra note 43, at 1541; Eskridge & Peller, supra note 27, at 748.
jority will while avoiding majoritarian tyranny raises the need for checks from other institutions with different relative competencies. One of those checks is the executive veto.107 Another is the role of judicial review. Professor Ely's seminal formulation of political process theory108 identified as its starting point two crucial and recurrent problems of legislatures—failures largely resulting from limits on access and participation,109 and the tendency of controlling majorities to discount or ignore interests of discrete and insular groups, such as racial minorities, even if such groups have the franchise and formal access.110 Ely assigned to courts the task of correcting those flaws. Comparable concerns, such as interest groups' ability to shape legislative outcomes toward rent-seeking rather than public-regarding statutes, justify new legal process theories of activist judicial review that set up courts as a check on legislative action.111

B. Judges

(1) Characteristics and Relative Competencies (When Appointed)

Judges in both state and federal contexts usually face formal and de facto requirements of formal education, training, and experience.112 Thus, judges bring to their jobs a tutored perspective distinct from that of lay citizens.113 On the federal model, judges are democratically the most unaccountable government actors. Judges enjoy appointments for life with little fear of impeachment, removing them further, in theory, from public sentiment and public accountability via elections, or special interest pressure114 via lobbying, campaign support, or party politics.115 Both of these features—expertise and inde-

107. See U.S. Const. art. I, § 7. All fifty states' governors have an equivalent veto power.
108. See generally Ely, supra note 40.
109. Id. at 73–134.
110. Id. at 135–79.
111. See generally Schacter, supra note 32; Eskridge, Dynamic Statutory Interpretation, supra note 85; Sunstein, Naked Preferences, supra note 42.
114. Eskridge, Public Values, supra note 31, at 1016. One might consider that freedom from interest group pressure somewhat qualified by variations in litigant resources, which affect judge (and jury) access to information and argument. See discussion infra notes 182–84.
115. Macey, Judicial Preferences, supra note 112, at 631 (judges "are less susceptible to the political pressures that affect the decisions of elected officials"); compare THE FEDERALIST No. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("pestilential
pendence—should permit rational, dispassionate consideration of public issues. Yet, such prerequisites traditionally resulted in judges predominantly coming from the upper classes, raising fears of judicial bias toward wealthy interests and the executive branch. Judges’ status as long-term, repeat players may heighten their distinction from the experience of lay citizens. In some contexts that repeat experience may lead to a jaded perspective, but it should also give judges some ability (at least relative to juries) to examine the consequences of their decisions over time while engaging in incremental decisionmaking.

breath of faction may poison the fountains of justice” if judicial functions were placed in the legislative branch).


117. See Scheiner, supra note 46, at 150-53 (summarizing Anti-federalist suspicions that judges favored the government and the wealthy); see also Cheryl Wade, San Diego L. Rev. (forthcoming 1995) (arguing that judges more readily understand litigants in contexts that match their own social background, such as securities litigation, rather than circumstances with which judges are likely to have little personal experience, such as educational malpractice); Grossman, Social Backgrounds and Judicial Decisions: Notes for a Theory, 29 J. Pol. 534 (1967) (discussing relationship between judges’ social backgrounds and judicial decisions); see infra note 129 (discussing potential for judicial bias in favor of the executive in hopes of appointment to higher court).

118. Spaziano v. Florida, 468 U.S. 447, 481-84 (1984) (Stevens, J., concurring and dissenting) (stating that judges are “more tutored but perhaps less sympathetic” than juries) (citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)); cf. Schnapper, supra note 9, at 248 (arguing that rates of appellate reversal of civil jury decisions can be explained “to a substantial degree [by] the background of the judges who compose the particular appellate panel that decides each case”).

119. See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (referring to judges’ possible responses as “professional,” “over-conditioned,” or “biased”); Johnson v. Louisiana, 406 U.S. 356, 373-74 (1972) (discussing juries as protectors of innocence against possible judge partiality); Duncan, 391 U.S. at 156; cf. The Federalist No. 65, at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting that juries may be an insufficient safeguard of liberty and property because they “are frequently influenced by judges” and “act[ ] under the auspices of judges who had predetermined [a defendant’s] guilt”).

Adversary litigation provides extensive factual information about the issues of the case, but relatively little about broader policy concerns implicated in the case. When factfinding is not controlled by the jury, judges thus have considerable informational resources on which to base decisions. Additionally, their law-finding abilities are considerable; they have the training, experience and resources to determine applicable law. Single-judge courts are not deliberative, though judges usually have some time for reflection before rendering a decision. Appellate courts are deliberative, albeit on a limited basis and among a nondiverse membership. Judges' training and "book law" resources have served as bases for new legal process scholars to identify and endorse more activist judicial roles that include review of statutory interpretation in light of public values drawn from a variety of sources—the Constitution, other statutes, and case law. More recent legal process theorists, sometimes building upon an activist reading of Hart and Sacks' purposive theory of judicial interpretation of statutes, describe judges as inevitably engaged in a more dynamic, normative process of interpretation.

Other scholars, drawing on public choice theory, have identified several possible incentives on judicial behavior in light of their protected institutional setting. These incentives should remove judges from the pressures that face legislators, such as financial self-interest and the influence of rent-seeking special interests. One such

Judges usually cannot revisit particular cases to examine the effects of rulings (except in the context on ongoing supervisory jurisdiction such as in school desegregation cases). But they do gain a sense of the consequences of decisional choices over time by repeatedly dealing with similar cases, or even (as is often the case in state criminal courts) the same litigants. But see Elhauge, supra note 43, at 78 ("[C]ourts tend to underweight, or be underinformed about, the systemic prospective consequences of their decisions . . . ").

121. I am leaving aside here a discussion of judges as fact-finders in bench trials and other settings.

122. Federal appellate courts, for instance, sit in panels of three judges who deliberate before reaching a collective (though not necessarily unanimous) decision. Like juries, and unlike legislatures (or agencies in their rule-making capacity), judges decide individual cases rather than design broad rules, giving them, formally at least, only interstitial law-making capacity. That description is more qualified in the appellate context, where judges effectively use the adjudication of individual cases to set rules that govern similar future cases.


124. See 28 U.S.C. § 455(b)(4) (1988) (judges must not preside over cases in which they have a financial interest). Note that this prohibition does not prohibit judges from partici-
judicial incentive is respect (including self-respect), because judges "value the prestige and esteem associated with their position and wish to maintain and enhance their reputation," both for personal pride and to increase their influence. A judge may also seek ideological utility from implementing her own policy preferences and "influencing public events," perhaps to "favor[] groups of which the judge is a member" or simply as "an exercise in power, which may be valued for its own sake." Furthermore, a judge may seek appointment to a higher court, which could lead her to attempt to tailor her decisions to the ideology of the executive branch, or to seek to avoid reversal on appeal. Finally, a judge may simply seek to increase leisure time and reduce her work load (to the extent it does not conflict with other goals, such as producing work product worthy of professional respect),


126. Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051, 1055 (1995); see also Beermann, supra note 97, at 223 (finding public opinion and respect to be an incentive for judicial decisions); Cohen, Explaining Judicial Behavior, supra note 124, at 184.

127. Shapiro & Levy, supra note 126, at 1055; see also Beermann, supra note 97, at 221-22 (finding judicial incentives to be the desire to increase influence and impose values on society, among others).

128. See Cohen, Explaining Judicial Behavior, supra note 124, at 184, 189; see also Mark A. Cohen, The Motives of Judges: Empirical Evidence from Antitrust Sentencing, 12 Int'l Rev. L. & Econ. 13, 27 (1992) (presenting findings that judges respond to incentives such as promotion to a higher court); Jonathan R. Macey, Competing Economic View of the Constitution, 56 Geo. Wash. L. Rev. 50, 70 (1987) [hereinafter Macey, Competing Views] (discussing judicial incentives generally); Jonathan R. Macey, The Internal and External Costs and Benefits of Stare Decisis, 65 Chi.-Kent L. Rev. 93, 94 (1989) [hereinafter Macey, Internal and External] (analyzing stare decisis as it relates to the judiciary gaining influence); Posner, supra note 116, at 505 (evaluating the argument that judges cater to influential interest groups to increase their chances of promotion). The goal of being upheld on appeal might cut more than one way. Judges might become more outcome-oriented, seeking to match the predicted outcome of the higher court, or might try to reach a decision controlled as much as possible by determinant precedent and rules of interpretation. See generally Shapiro & Levy, supra note 126 (discussing the competing tensions on judges become outcome-orientation and "craft norms" that ideally would control case outcomes).
because judges gain no direct financial rewards for good job performance.\textsuperscript{129}

(2) \textit{Characteristics and Relative Competencies (When Elected)}

Most states have some form of popular election for at least some members of the state judiciary.\textsuperscript{130} That design is intended to and does change a judge's accountability to the public and responsiveness to popular sentiments.\textsuperscript{131} In theory, election should make judges more attuned to popular sentiment and majoritarian pressures. But public choice theory suggests it also makes them more prone to interest group pressure and to key constituencies important to reelection. Otherwise, elected judges share the same incentives, opportunities and limitations as their appointed counterparts: some requirement of special training; limited fact-finding capacity; repeat involvement in a range of cases over time; a focus on individual adjudication rather than the development of general rules.

(3) \textit{Critique of Judges}

The primary criticism of judges as authoritative decisionmakers in democratic governments is their lack of accountability.\textsuperscript{132} The central

\begin{itemize}
  \item \textsuperscript{129} Shapiro & Levy, \textit{supra} note 126, at 1056; Cohen, \textit{Explaining Judicial Behavior, supra} note 124, at 189.
  \item \textsuperscript{131} For an extensive analysis of the theoretical problems of elective judiciaries, with particular attention to the problem of majoritarian pressures on a judiciary charged with protecting anti-majoritarian constitutional principles, see Croley, \textit{supra} note 130. For a critical study of judges in the death penalty context, see Stephen B. Bright & Patrick J. Keenan, \textit{Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases}, 75 B.U.L. REV. 759 (1995).
  \item \textsuperscript{132} At the state level, many judges stand for election—either popular election or a retention election after appointment. \textit{See supra} note 131. To the extent their democratic accountability is improved, the criticisms that apply to federal judges are inapplicable. They may, however, then be open to some of the criticisms directed to legislators—susceptibility to influence from campaign contributors and key constituencies important to their re-election. Moreover, to the extent that judicial elections are often noncompetitive and largely ignored by voters, elected judges may still be in a position analogous to federal judges; they face real accountability (real risk of losing their seats) only during unusual, often extreme judgments likely to draw public attention and a vigorous election challenge. That situation might be analogized to federal judges' faint fear of impeachment or (except for Supreme Court justices) appellate reversal for rulings or actions well out of the mainstream.
\end{itemize}
premise of the countermajoritarian difficulty, and the preoccupation of constitutional theory for the last several decades, has been that judicial review allows unelected, relatively unaccountable judges to hold invalid laws and policies adopted by more democratic, representative branches.\textsuperscript{133}

The relationship between the judiciary and the legislature gives rise to several potential problems. One is a coherent theory for judges’ actions. Much scholarship on theories of judicial review struggles to identify a principled basis for judicial action that does not amount to judges’ substituting their own substantive value judgments for those of elected officials.\textsuperscript{134} Value imposition is seen as illegitimate for officials whose democratic \textit{bona fidey} are indirect and attenuated. When not focused on theories to justify or constrain judicial action, much legal scholarship, particularly in constitutional law and statutory interpretation, critically identifies judges’ illicit imposition of substantive value judgments.\textsuperscript{135}

A rare example of the Supreme Court explicitly criticizing the institutional competency of the judiciary is found in Sixth Amendment cases. To emphasize the need for a representative jury, the Court pointed to the perpetual fear of an “overconditioned” or “compliant, biased or eccentric judge.”\textsuperscript{136} The perceived traits in judges arise from factors in the institutional design of the judiciary and the nature of its task. The inability to easily remove judges from the bench gives rise to the fear that an “eccentric” will remain on the bench once appointed. And because trial judges sit alone, the possibility that any one person’s judgment will be idiosyncratic and not countered by


\textsuperscript{134} See, e.g., Chemerinsky, supra note 42, at 46 (analyzing the Rehnquist Court’s majoritarian approach to judicial review which seeks to avoid judicial value imposition); Ackerman, supra note 23, at 1016 (seeking to “dis-solve,” rather than solve, the countermajoritarian difficulty). See generally Bickel, supra note 39 (widely credited with initiating focus on the countermajoritarian difficulty in the last three decades).

\textsuperscript{135} See Friedman, supra note 43, at 628 (“The typical scholarly response [to the countermajoritarian difficulty] is to offer a normative theory of constitutionalism and judicial review that contains a set of rules designed to constrain judges.”).

\textsuperscript{136} Duncan v. Louisiana, 391 U.S. 145, 156 (1968); see also Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (quoting this language from \textit{Duncan}); see also Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (stating that juries protect against the “perhaps overconditioned or biased response of a judge”).

For similar discussion in the civil context, see Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (noting that the civil jury was regarded by the founders as “an important bulwark against tyranny” and against the “whim” of the “sovereign’s judges”).
others adds to the fear of an individual judge's eccentricity. That is confirmed when citizens and trial lawyers experience "judge-shopping."\textsuperscript{137} Trial attorneys certainly realize, as do many citizens who have had some involvement in court processes, that outcomes can vary substantially according to the judge who presides over a case.\textsuperscript{138} The considerable power concentrated in a single individual gives rise to fear of "arbitrary action."\textsuperscript{139} In a legislature, jury, or even multi-member appellate court, the fear of one eccentric participant is substantially diminished.

Additionally, concerns that a judge will become "overconditioned," "biased," or "compliant" arise in large part from the nature of the office. Judges see hundreds or thousands of cases, which may hinder their ability to view each as individual and unique. That gives judges a different experience through which to view each case from that of the general population. Judges' experiences necessarily differ from those of ordinary citizens; presumably, then, so may their judgments. The choice between judges and juries is in part a choice of which experience will inform decisionmaking. That helps explain the preference for a panel of lay citizens, rather than professional jurists, for the "commonsense judgment" of the community to inform factfinding and some judgments of normative discretion.\textsuperscript{140}

C. Administrative Agencies

\textbf{(I) Structural Characteristics and Relative Competencies}

Of the government decisionmakers discussed here, administrative agencies have the least interaction with juries. Nevertheless, a brief look at the problems arising from agency structure, and judicial responses to those problems, is a useful comparison to the jury. For one, some tasks the jury now handles could be (and have been) trans-

\begin{itemize}
\item \textsuperscript{137} See Elhauge, \textit{supra} note 43, at 78 (discussing litigants' strategic behavior upon learning their case has been assigned to "the type of judge . . . likely to lead to an unfavorable precedent").
\item \textsuperscript{138} See, \textit{e.g.}, \textsc{Edward Humes, No Matter How Loud I Shout: A Year in the Life of Juvenile Court} 79 (1996) (case study describing "wildly different outcomes for similar cases" among Los Angeles Juvenile Court judges).
\item \textsuperscript{139} \textsc{Duncan}, 391 U.S. at 156. \textit{Cf} Friedman, \textit{supra} note 43, at 600 (arguing that "[d]etermining precisely why a judge . . . decided a case in a particular fashion is, of course, extremely difficult" because written opinions are often unclear and "may be nothing more than post hoc rationalizations for judicial imposition of the judges' own values").
\item \textsuperscript{140} \textsc{Johnson}, 406 U.S. at 373. For an argument that judicial revision of jury damage awards is motivated frequently by different normative conclusions about the nature and extent of the harm, see Schnapper, \textit{supra} note 9, at 328-36.
\end{itemize}
ferred to agencies, or agency-like bodies.\textsuperscript{141} The Court’s “public rights” doctrine permits administrative agencies to adjudicate claims and set damages or penalties in cases that might otherwise be determined by juries under the Seventh Amendment.\textsuperscript{142} Moreover, some proposals for reform of juries include making them more like agencies—emanipulating juries of specially qualified experts, for instance, instead of lay citizens, especially for complex litigation.\textsuperscript{143} Most importantly, some models of judicial review of agency action provide useful models for judicial supervision of juries. As we shall see, the efforts of the courts to improve the rationality of agency decisionmaking have strong similarities to judicial attempts to encourage comparable changes in jury decisionmaking.

Agency officials share with judges the quality of some formal training or experience in the area of their specialty. The original conception of agencies stressed their status as specialized bodies that can

\textsuperscript{141} Some alternative dispute resolution (ADR) structures, for instance, share some characteristics of agencies. ADR bodies increasingly replace judges and juries with arbiters who are often chosen for their expertise in the subject matter of the dispute as well as their neutrality, and in that sense borrow from the agency model of specialized decisionmakers. Arbitration forums can issue binding, legally enforceable determinations and damage awards. Federal district courts across the country are increasingly encouraging, or mandating, ADR procedures. See William K. Slate II, \textit{Arbitration Comes of Age, in The American Lawyer} (Litigation Supplement), May 1995, at 8; see also Federal Arbitration Act, 9 U.S.C. § 3 (1988) (mandating referral of a Federal suit to arbitration when a binding contract to do so has been entered into); Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1215-19 (1995) (upholding punitive damages awarded by an arbitration panel and noting a “national policy favoring arbitration”).


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apply expertise to policy development and execution.\textsuperscript{144} Concomitantly, agencies do not necessarily bring a popular perspective to bear on decisionmaking tasks and are not in that respect especially close to public sentiment. Agency officials are, however, fairly aware of the political dynamics of their subject area, particularly of executive and legislative preferences.\textsuperscript{145} They are not directly accountable to the public by election, and some even have certain protections from executive branch supervision, but they are generally more accountable than courts.\textsuperscript{146} Moreover, the legislature and judiciary attempt to increase agency accountability, largely through oversight hearings and the passage and interpretation of the Administrative Procedure Act.\textsuperscript{147}

Agencies generally share with legislatures a deliberative capacity and, like legislatures, they are not free from interest group pressure. They have relatively good information-gathering capacities and are repeat players in governmental decisionmaking. Finally, administrative agencies have general rule-making powers—to set guidelines for a range of cases and situations—and at other times adjudicative responsibility for individual cases.\textsuperscript{148} The combination of these characteristics—expertise, information-gathering capacity, deliberation, some political accountability—are often cited to justify deference to agency decisionmaking in complex policymaking.\textsuperscript{149}

(2) Critique of Agencies

A central problem of agencies is that they exercise broad discretion with only tenuous, indirect, or intermittent supervision from more accountable branches. A central concern motivating administrative law, in light of that discretion, is “capture” of the agency by private interests, that is, co-option of government power by private groups,

\textsuperscript{144} See Sunstein, Factions and Self Interest, supra note 123, at 281 (“ Agencies were created in a period of faith in administrative expertise.”); Schacter, supra note 32, at 615 (finding the theory of interpretive deference to administrative agencies to be “rooted in the perceived expertise of agencies”).

\textsuperscript{145} Eskridge & Frickey, Supreme Court, supra note 13, at 71-72 & n.199.

\textsuperscript{146} See generally Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. ECON. & ORG. 243 (1987); Sunstein, Factions and Self Interest, supra note 123, at 291 (asserting that judicial insulation from political accountability safeguards against agency self interest or private pressures); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984) (finding the agencies accountable indirectly through the Executive).

\textsuperscript{147} Sunstein, Interest Groups, supra note 17, at 59-68.

\textsuperscript{148} Id.

\textsuperscript{149} See generally Chevron, 467 U.S. at 864-66; Eskridge, supra note 33, at 161-63, 170 (analyzing the Chevron opinion’s treatment of deference to agency decisions).
particularly the very ones the agency is designed to regulate.150 This concern—a variation on the problem of faction that plagues legislatures—is the likely source of "arbitrary" action that motivates the structure of administrative law jurisprudence, including judicial review.151 Reliance on agencies' expertise does not alleviate fully the fear of arbitrary or eccentric action that exists also in legislatures, juries and judges. Agency structure does not solve the problem of factional influence. Related to that, and as additional sources of arbitrary action, scholars have identified four broad characteristics of agency officials arising from institutional structures: desire to maximize the budget of their agency, to advance the objectives of their programs, to serve constituents (either special interest groups or the broader public), and generally to advance their personal positions.152 Because agencies face some oversight from the legislature and ultimately depend on that body for their budget and policy mandate, they are likely to be susceptible to the influence of interest groups that have influence with the legislature in their policy area.153

Expertise or technical knowledge rarely determines agency action. Officials inevitably have considerable discretion that allows, if not requires, value judgments to interpret data and governing statutes. The unavoidability of discretion and value choice, as well as factional influence, has led to reform in administrative law which foreshadowed some reforms of jury decisionmaking. Thus, judicial review in administrative law encourages "reasoned decisionmaking" through a deliberative model of agency action. That approach discloses relevant considerations in a decision to public view, checks for fidelity to the

150. Sunstein, Interest Groups, supra note 17, at 60, 74-75; Stewart, supra note 41, at 1684-85 (commenting on the theory that agencies can be "captured" by private interests); see, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 49 (1983) (analyzing the dispute between the automobile industry and their ignoring of agency attempts at safety regulation).


152. Beermann, supra note 97, at 192.


governing statute (if the statute is sufficiently specific), and subjects agency decisions to scrutiny and review.\textsuperscript{155}

D. The Jury

(1) Characteristics and Relative Competencies

The jury incorporates a mix of features found in other institutions. Like the legislature, the jury is a representative body of lay citizens rather than trained professionals. This is one feature of the jury that has undergone some evolution. In recent decades the Court has developed the fair cross section doctrine from the impartial jury clause of the Sixth Amendment. That requirement attempts to make the jury venire, from which the petit jury is drawn, representative of the local community. That representative ideal stands in contrast to an earlier conception of the jury as a deliberately nonrepresentative "blue ribbon" panel, selected by a "key man" system and composed of the locality's most upstanding citizens (a model, that is, interestingly enough, vaguely comparable to agencies).\textsuperscript{156} It gives the jury its chief virtue of infusing decisions with public sentiment and lay perspectives. That majoritarian input not only affects substantive decisions but also provides popular legitimacy to the judicial process.\textsuperscript{157}

\textsuperscript{155} Colin Diver, \textit{Policymaking Paradigms in Administrative Law}, 95 HARV. L. REV. 393, 409-16 (1981) (describing a shift since the 1960s toward a model of "comprehensive rationality" for agency policymaking that includes more rigorous judicial review); see also Sunstein, \textit{Factions and Self Interest}, supra note 123, at 284-85 (noting the need for explicit findings of the relevant values and considerations in order to subject agencies to public scrutiny and review).

\textsuperscript{156} See Akhil R. Amar, Note, \textit{Choosing Representatives by Lottery Voting}, 93 YALE L.J. 1283, 1287-91 (1984); see generally Darryl K. Brown, \textit{The Role of Race in Jury Impartiality and Venue Transfers}, 53 MD. L. REV. 107, 113-24 (1994). The blue-ribbon jury selected by the "key man" system has been explicitly declared unconstitutional. The Court has proven inhospitable to such methods of jury selection and requires them to yield representative jury venires. The Court has, however, continued to state that a jury may be made up of select citizens deemed to be of better-than-average integrity. See generally Alschuler & Deiss, \textit{supra} note 11 (noting, however, that such juries must still meet fair cross section requirements).

The heyday of the "blue ribbon" jury, which attempts to mimic with a lay citizen panel some of the special qualifications of judges or agencies, continued into the mid-twentieth century, the era of traditional process theory with its faith in the neutral expertise of trained administrative agency appointees. Both models began to lose legitimacy as their elite, undemocratic nature came to be seen as nonneutral, and both were reconceived beginning roughly in the 1960s, on more democratic models.

\textsuperscript{157} Spaziano v. Florida, 468 U.S. 464, 481-85 (1984) (Stevens, J., concurring and dissenting) (asserting that juries are "a significant and reliable objective index of contemporary values" and "play[ ] an essential role in legitimating the system of criminal justice").
While sharing with legislatures a structure of a representative body of lay citizens, the jury lacks any significant form of public accountability—a feature it shares with appointed judges. Its members do not stand for election and cannot be easily removed from office, and its decisions need not be justified by written findings as is the case with judges and agencies. The upside of its lack of accountability is its freedom from the central problems of legislatures: the inordinate influence of interest groups, and self-dealing. The traditional requirement of unanimity also serves to diminish some forms of factionalism; a rule of unanimity is the ultimate form of minority veto. Though it leaves room for strategic behavior, the requirement of unanimity serves to encourage another great virtue of juries—democratic deliberation among multiple viewpoints.

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158. However, judges and juries do face some minimal accountability, interestingly, in somewhat similar ways. Both face removal from office for clear malfeasance such as bribe-taking. Other than impeachment, however, judges face no other significant form of accountability except, below the Supreme Court level, being double-checked by other judges via judicial review. Similarly, without clear malfeasance or procedural breaches such as ex parte discussion of the case or contact with witnesses, juries will not be disempaneled and face only a deferential level of appellate review.

159. Some states, however, adopt a procedure that many scholars endorse: requiring the trial judge to provide written reasons for upholding the verdict, thereby providing a sort of proxy written justification for appellate review. See, e.g., David G. Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 385 (1994) (urging trial judges to provide a written explanation justifying an award of punitive damages).

160. See Bacigal, supra note 51, at 418 (arguing that the jury is much less politically compromised than the legislature).

161. Of course, super-majority rules to protect minorities have precedents elsewhere in American government institutions, most obviously in the Senate.

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158. See Bacigal, supra note 51, at 425 (supporting jury review in Fourth Amendment cases because “the process of deliberation and the presence of more than a single viewpoint forces critical re-examination of current norms and practices”); see generally Brown, supra note 156, at 114-24, 140-52. For an analysis that applies collective decision theory to juries and explores opportunities for strategic behavior, see Edward P. Schwartz & Warren F. Schwartz, Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules, 80 Geo. L.J. 775 (1992).
ture also facilitated by the secrecy of and the absence of time limits on jury deliberation. Biased jurors are excused during the *voir dire* process, and the resulting panel is free from interest group pressure, which eliminates the need for checks by other institutions against such influence (as in the case of judicial review of legislation).¹⁶³

Jurors are also unique in being one-time players; they are empaneled for a single case and then disbanded.¹⁶⁴ They have at best, then, a lay citizen’s speculative sense of the long-term consequences of their decisions, but they possess no institutional means to assess decisions over time.¹⁶⁵ The Court has suggested, in the criminal context, that this fresh perspective makes jurors preferable to judges who are at risk of becoming jaded from having seen perhaps hundreds of similar cases.¹⁶⁶ Juries decide individual cases rather than setting general rules as legislatures or agencies do, or even as appellate judges do in recognizing the precedential effect of case decisions.¹⁶⁷ In so doing, they nevertheless take on some of the interstitial lawmaking tasks that judges and agencies accomplish.¹⁶⁸ Finally, although juries’ fact-gathering capacities are limited to evidence presented by litigants in court, the adversary process, at least between well-financed litigants, yields

¹⁶³. See Beermann, *supra* note 97, at 202-04 (analyzing Macey’s view of the role of judicial review as a check on the legislature).


¹⁶⁵. This institutional limitation makes juries less competent to serve instrumentalist goals than corrective justice goals—as scholarly and judicial rationales shift to the former goal, juries will seem less competent. Evidence rule revisions conceivably could alleviate that incapacity somewhat by informing jurors of verdicts in comparable cases and allowing counsel to argue the consequences of such verdicts. But the primary response to that jury limitation has been to counter this weakness with the relatively higher competence of judges by making consistency of verdicts a focus of appellate review. See *infra* Part IIIA.


¹⁶⁷. See Sparf & Hansen v. United States, 156 U.S. 51, 174-75 (1895) (Gray, J., dissenting) (“The purpose of establishing trial by jury was not to obtain general rules of law for future use, but to secure impartial justice between the government and the accused in each case as it arose.”); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1376 (1971) (“[T]he jury . . . mediate[s] between ‘the law’ in the abstract and the human needs of those affected by it.”); see generally Saltzburg, *supra* note 120, at 342-45 (summarizing relative advantages of juries over judges).

¹⁶⁸. For example, Alabama juries give content to that state’s punitive damages law, which allows for punitive where there is “oppression, fraud, wantonness, or malice,” terms defined with such general phrases as “unjust hardship in conscious disregard of [a] person’s rights.” Ala. Code § 6-11-20(a),(b); see BMW v. Gore, 64 U.S.L.W. 4335, 4342 (May 20, 1996) (J. Breyer, concurring).
considerable information. As noted above, the adversary system, structured by discovery and evidentiary rules, is designed to produce a full picture of the facts relevant to a particular case. Juries have broad authority, subject only to the most deferential review, to find facts and draw inferences from evidence.

(2) Critique of the Jury

Traditional jury critiques range from the skeptical to the scathing. The general diminution of its power and authority in modern

169. See supra note 121 and accompanying text.

170. There are also circumstances in which jurors, during the course of a trial, receive evidence that is broader than the particular case, that provides some social context, and that is in some ways comparable to facts one would gather for making broader policy decisions. For instance, psychiatric testimony in criminal trials may teach jurors about battered spouse syndrome generally, giving jurors a stronger basis for deciding whether such a syndrome should provide an excuse for criminal behavior. But see Elhauge, supra note 43, at 78 (adversary litigation yields a trial record that reveals less information about "the social and economic consequences of the court's possible decision than does the information presented to legislatures or administrative agencies").

171. The breadth of the jury's fact-finding authority is comparable to the legislature, though of course the legislature exercises its fact-finding powers in the service of much broader policy decisions. In both instances, however, courts give broad deference to each body's fact-finding and the inferences they draw from it, whether to support a general verdict or enactment of a statute. The comparison suggests a deep-seated structural assumption that untrained citizens, rather than legally trained professionals, are our preferred fact finders, either because we assume them to be the most accurate or, realizing that fact finding (and especially drawing inferences from evidence) is inevitably a subjective process affected by one's perspective, we normatively prefer their bias to the bias of institutional actors with less democratic legitimacy.

172. I am not dealing here, of course, with the judge's evidentiary control over what information jurors may access. That analysis would somewhat complicate this cursory description. Strictly speaking, the legislature also limits jury access to information by enacting evidence rules and thereby deciding, for instance, that jurors will not have access to certain character evidence or certain forms of hearsay. One might even extend the analysis in the criminal context and suggest that the executive branch, in the form of the prosecutor, makes decisions about jurors' access to facts, with the underlying motivation not simply to prevail as a litigant but to see justice done.

times has met with some academic and judicial opposition, but that opposition mainly takes the form of support for something like the jury's current role, or for one that is slightly expanded. There is a broad consensus that the jury's authority should not return to the level of its heyday in the late eighteenth century, when there was widespread agreement that juries could judge law as well as facts, consider instructions merely advisory, and face no limitation in the nature of the directed verdict or judgment notwithstanding the verdict.

Traditional criticisms of the jury have emphasized the jurors' lack of training and a purported propensity to be swayed by emotional rather than rational argument—giving in to passion (or confusion) over reason, especially in long trials involving complex evidence and technical issues. Yet even in complex cases, it is not clear how much worse their competency is compared to that of trial judges, particularly judges with no expertise in the subject matter of the litigation. Similarly, those in the lower tiers of the bench's implicit hierarchy, whose legal education and practical experience, as well as their close ties to the local communities of their jurisdictions, may distinguish them less from jurors than often assumed. Nevertheless, this perceived propensity for irrational action driven by parochial biases has emerged as the Court's chief concern for arbitrary action by juries. Beginning in the 1970s, capital cases repeatedly emphasized jurors' "wanton and freakish" and "arbitrary" decisions. More recent punitive damages cases are even harsher: they point out jurors' quick

174. See supra note 10.
175. For a description of the jury's broad authority in the late eighteenth century, see Nelson, supra note 11.
176. See also Scheiner, supra note 46, at 190-93 (concluding that the dominant consensus was that judges apply law while juries find facts, but noting that the Framers' conception of "facts" included all discretionary judgments, and that decisions on "law" reserved for judges were conceived as narrow and clear determinations that limited judges' discretion).
177. That consensus reflects a changed social context, but also wide acceptance of a core legal process commitment: that government should not be "unbalanced" by placing too much unchecked authority in any one body.
179. Anecdotes of judicial quirkiness and caprice abound. As one example, I suspect many practitioners have encountered judges like one federal judge I encountered who openly concedes to disregarding all expert testimony, on the premise that parties can pay authorities to testify to anything.
180. See Furman, 408 U.S. at 249, 274, 277; Gregg, 428 U.S. at 189, 207.
tendencies toward irrationality, bias, passion, and prejudice.\textsuperscript{181} In that sense, this fear is the counterpart of the factional influence and self-interest present in legislatures and agencies that lead to arbitrary action in those bodies. The suspicion that jurors are inclined to “redistribute wealth” from out-of-state parties to local ones\textsuperscript{182} corresponds to the fear of legislators or agency officials granting “rents” to influential special interests.\textsuperscript{183} As we will see, this perceived institutional tendency is used by the Court to justify more intrusive judicial review in a manner analogous to the way in which interest group theory prompts more judicial scrutiny of legislative or agency decisionmaking.

There appears to have been little effort to describe the structural characteristics of the jury beyond such fairly cursory and boilerplate assumptions of provincialism and wavering rationality. Little public choice literature, for instance, has analyzed the jury’s institutional preferences based on the economic model of self-interested behavior.\textsuperscript{184} That approach might suggest, for example, that jurors pursue leisure and avoid work by rushing deliberations and agreeing to compromise verdicts that conclude their duties more quickly.\textsuperscript{185} In a small minority of publicized cases, jurors may be conscious of public react-

\textsuperscript{181} See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2725 (1993) (Kennedy, J., concurring); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O’Connor, J., concurring). For an argument that the perception—by the court and others—that civil damage awards have “skyrocketed” is incorrect and unsupported by empirical evidence, see Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?, 140 U. Pa. L. Rev. 1147, 1242, 1254 (1992).

\textsuperscript{182} See, e.g., TXO, 113 S. Ct. at 2736-37 (O’Connor, J., dissenting) (stating “it seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation”; “Courts long have recognized that jurors may view large corporations with great disfavor”; “Corporations are . . . unlikely to be viewed with much sympathy”; “juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from ‘wealthy’ corporations to comparatively needier plaintiffs”).

\textsuperscript{183} Cf. Sunstein, Factions and Self Interest supra note 123, at 287 (discussing judicial strategies to “flush out” impermissible motivations” in agency decisionmaking).

\textsuperscript{184} One of the few such analyses is Schwartz & Schwartz, supra note 162, which examines jury decisionmaking through positive political theory (especially collective decision theory).

The voir dire process screens jurors for any connection with the parties or interest in the litigation and otherwise seeks to eliminate clear self-interest or bias before they are empaneled. But a juror could define her self-interest more broadly and be “biased” by a calculation such as, “I’m scared of violent crime, so I’m voting for conviction of this armed robber,” or, “I’m scared liability insurance costs will put my corporate employer out of business, so I’m voting against the plaintiff in this product liability action.” But that is not the sort of self-interest we worry about. That is closer to the community sentiment and common sense for which we want lay juries in the first place.

\textsuperscript{185} That tendency, plus the unanimity requirement, may induce strategic behavior on the part of jurors who can hold out for a verdict with which most other jurors disagree.
tion to their verdict and tend toward a decision likely to be more popular in their community. Also, motivations of ideological utility, comparable to those identified for judges, may affect their decisions. Finally, jurors' decisions could be affected by uneven litigation resources and quality of counsel. All trial practice pedagogy is premised on the determinant difference that litigation skill, supplemented by adequate resources, can make in case outcomes. The Court has implicitly acknowledged the advantage of skilled representation as well. Disproportionate resources on one side of an adversary proceeding is analogous in some ways to the influence of monied factions on the legislative process. There are of course no rules limiting the resources that parties may spend, though trial judges may exercise some authority in limiting the number of counsel and type of evidence permitted at trial. Beyond that, this concern is addressed effectively by courts only through review of competency-of-counsel claims, which purports to ensure that criminal defendants be provided representation sufficient not to affect the outcome of the case. But heightened concern for litigation resources could become a component of review of jury decisions comparable to examining agencies' fact-finding processes.

E. Newer Legal Process Approaches to Institutional Interaction

Contemporary public law theory builds on evolving descriptions of institutions to refine arrangements of institutional interaction. Just as no broad rule determines an individual case, no broad descriptive theory mandates particular institutional arrangements. Nevertheless, conclusions about institutional traits can shape doctrinal

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187. See Elhauge, supra note 43, at 68-80 (discussing the litigation process's susceptibility to interest groups influence and differential resources of parties, which affects the amount and type of information tribunals receive); Paul H. Rubin, Common Law and Statute Law, 11 J. LEGAL STUD. 205 (1982) (arguing the common law reflects an "interest group bias" because organized interests more often litigate issues of concern to them); see generally Mark Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limit of Legal Change, 9 L. & SOC. REV. 95 (1974).

188. See Strickland v. Washington, 466 U.S. 668, 686 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

189. Cf. Elhauge, supra note 43 (arguing that interest group theory, even if descriptively correct, does not justify more intrusive judicial review without separate normative judgments as well).
choices. Recent legal process (or post-legal process) scholars have identified means for a more aggressive judicial role that emphasizes process and structure in new ways and at the same time confronts the normative components in judicial action. One approach, offered by a variety of scholars in recent years, is to acknowledge and develop the substantive component of judicial review within a larger procedural orientation. Such a role assumes that courts, at least in comparison to other institutions, are at least somewhat competent to make substantive assessments within democratic government. The inevitable normative aspect of judicial review can be guided, if not limited, by drawing from democratically legitimate influences, such as the values implicit in statutes and the Constitution. That guidance, together with the need to counter the imperfections (such as interest group influence) on other institutions, supports a more intrusive judicial role.

Comparable process-inspired approaches seek to control normative discretion in judicial review even more by stressing a focus on review of institutional processes and structures. Models of judicial review known as "structural due process" or the "due process of law-making" identify court decisions employing this approach, which distrusts courts' substantive review of legislative and executive decisions. Scrutiny of process and structure, on this thesis, should help ensure outcomes influenced most by democratic debate and should diminish influence of factional pressure, self-dealing, inadequate information, irrationality or incompetence. Structural due process

190. See, e.g., Cass & Gillette, supra note 153, at 261-62 (discussing the need to choose between two paradigms of government action—the "perfect government model" in which government officials are motivated by a shared conception of the public good, or the "interested actors model," in which they pursue personal or institutional objectives such as budget maximization—and discussing the effects each would have for judicial review and tort rules).

191. See, e.g., Sunstein, Factions and Self Interest, supra note 123, at 290-91 (implying that courts can "extrapolate principles" broadly from statutes to review value choices in agency action); Sunstein, Naked Preferences, supra note 42, at 1730-31 (arguing that judicial review should scrutinize legislation to ensure it pursues a genuine public purpose rather than a mere interest group transfer); see generally Michelman, supra note 43 (identifying a creative, "jurisgenerative" role for judges); Eskridge, Public Values, supra note 31 (arguing statutory interpretation is inevitably influenced by background assumptions and values of courts, and that courts should identify and update public values in the interpretive process according to changing economic and social needs). For a skeptical discussion of substantive judicial review, see FARBER & FRICKEY, supra note 14, at 340; FARBER & FRICKEY, supra note 17, at 118-31.
adopts the Hart and Sacks notion of relative institutional competencies, but gives a greater role to courts to scrutinize substantive outcomes by assessing the jurisdictional and procedural regularity of other decisionmakers. Thus, under one structural due process model, courts reviewing executive or legislative judgments turn to a hierarchy of legitimacy among institutions to check whether the proper body made the decision.\footnote{193. FARBER & FRICKEY, supra note 17, at 118-31 (and sources cited therein).}

Consider *Hampton v. Mow Sun Wong*,\footnote{194. 426 U.S. 88 (1976).} which struck down a civil service regulation barring aliens from most federal jobs but implied that Congress could legislate the same bar. *Hampton* has been read as a "notable judicial attempt to protect against governmental abuses, not by substantive judicial review but by improving the structure of decisionmaking."\footnote{195. FARBER & FRICKEY, supra note 17, at 121. For further analysis of *Hampton*, see Komesar, *supra* note 13, at 384-87.} That is, before approving such a sensitive, discriminatory policy, the Court sought to force Congress to deliberate such a policy rather than allow its implementation by an agency of the executive branch. This approach to judicial review of executive action could require reevaluation of suspect policies by "invalidat[ing] a particularly sensitive decision by an entity comparatively unsuited to render it . . . leaving open the possibility that the same decision could be reimposed by a more legitimate entity."\footnote{196. FARBER & FRICKEY, supra note 17, at 122.}

A separate but related process-based model focuses judicial review on searching for evidence of serious legislative deliberation or detailed consideration of sensitive policy choices. *City of Richmond v. J.A. Croson Company*\footnote{197. 488 U.S. 469 (1989).} has been read as employing this approach. The Court criticized the failure to hold hearings—evidence of careful fact-finding and deliberation—before the program’s adoption.\footnote{198. FARBER & FRICKEY, supra note 17, at 122.} It also employed the institutional legitimacy model: the Court held that a city could not adopt a program similar to one Congress had enacted without such fact-finding. Inadequate hearings meant the decision was made without sufficient informational resources or deliberation.

Finally, a more limited conception of such structural due process review simply ensures that the decisionmaking body, such as the legislature, followed its own procedural rules prior to passage of a statute. Subversion of rules may signal improper decisionmaking processes,

\begin{footnotes}
\footnote{193. FARBER & FRICKEY, supra note 17, at 118-31 (and sources cited therein).}
\footnote{194. 426 U.S. 88 (1976).}
\footnote{195. FARBER & FRICKEY, supra note 17, at 121. For further analysis of *Hampton*, see Komesar, *supra* note 13, at 384-87.}
\footnote{196. FARBER & FRICKEY, supra note 17, at 122.}
\footnote{197. 488 U.S. 469 (1989).}
\footnote{198. FARBER & FRICKEY, supra note 17, at 122.}
\end{footnotes}
motivations and outcomes. This model has been the least influential on judicial review of jury decisionmaking.

In administrative law, a comparable approach exists in the "hard look" doctrine and the process-oriented deliberative model of agency action. Arising from the analysis of agencies subject to excessive influence, or "capture," of the interests they regulate, and from distrust of agency expertise to eliminate politics from decisionmaking, the doctrine seeks to ensure that agency decisions are the result of broad-based, objective fact-finding and thoughtful consideration of alternative policy options. In response to fears of factional pressure, the doctrine encourages deliberative, fully informed decisionmaking. "Hard look" review is another effort, built on conclusions about institutional weaknesses, to structure the institution's own processes and resources (in the form of factual information and awareness of all policy alternatives) in a manner that improves its capacity to reach rational decisions. Recognizing the inevitability of broad discretion under most statutes, this approach encourages informed, broad-ranging deliberation of all relevant factors and decisional alternatives. Judicial review of "arbitrary and capricious" action checks agency action based on this deliberative model and should minimize substantive judicial intervention as well as improper motivations within agency decisionmaking processes.

All of these theories build on assumptions about institutional competencies drawn from descriptive critiques. Fearing dominance by special interests or self-motivated legislators who control the legislative agenda, courts try to ensure that policy options are thoroughly debated among fully informed members. Fearing agency officials informed mostly by the self-interested perspective of the firms they regulate, review of agencies seeks to ensure that their officials had available a full range of information and considered all options. Fearing the involvement of unelected judges in substantive policy decisions, these approaches focus courts' attention on processes and


200. See Sunstein, Interest Groups, supra note 17, at 59-64; Schacter, supra note 32, at 615.

201. Sunstein, Interest Groups, supra note 17, at 59-64.


204. See Sunstein, Factions and Self Interest, supra note 123, at 286-87.
mechanisms by which decisions are made. They depend on judges to improve the decisionmaking of agencies and legislatures by ensuring that decisions "are informed, reflective, and contemporary."205

Contemporary doctrines regulating the jury have borrowed many of these premises and have used them to check and improve jury decisionmaking. As conceptions of jury competency evolved and process approaches informed theories of judicial review, courts and legislatures revised the procedures and structures into which juries are integrated. In particular, the jury's role in capital sentencing and punitive damage awards has been revised on a deliberative model with more rigorous judicial review. Just as administrative law has responded to analogous concerns about discretionary agency decisionmaking, the Court has refashioned discretionary jury decisionmaking to ensure that "the relevant considerations, including actual value judgments by the [jury], are disclosed to the public and subjected to general scrutiny and review."206

To that end, the Court has encouraged and endorsed jury instructions that enumerate factors that juries must consider (or explicitly find) before imposing capital sentences or damage awards.207 Detailed instructions focus jury deliberation on factors deemed relevant by the legislature and minimize consideration of irrelevant factors. Similarly, it has mandated judicial review of jury verdicts—preferably first by trial judges, then by appellate courts—on both procedural and substantive grounds. By arranging jury decisionmaking into a deliberative process structured by identifiable legal principles as well as the factual record, the Court simplifies the task of judicial and public scrutiny of jury verdicts while also providing an improved basis for deferring to the jury's value-laden exercise of discretion.208

205. Schacter, supra note 32, at 609.
206. Sunstein, Factions and Self Interest, supra note 123, at 281.
207. Gregg v. Georgia, 428 U.S. 153 (1976) (approving jury instructions that give jurors a list of aggravating and mitigating circumstances and requires them to find one aggravating factor before deciding to impose capital punishment).
208. From an historical perspective, this contemporary deliberative conception of juries signals the jury's descent in the hierarchy of legitimacy among government institutions. Originally there were few checks on the jury, either from instructions or judicial review. Where juries were once trusted to judge the law, judges have replaced juries as the preeminent institution for that task. Juries were once trusted to decide what factors are relevant to consider in death penalty or punitive damage determinations; now the legislature designates those factors. In contrast, the jury remains the most trusted institution for factual interpretation, and its judgments on those issues receive broad deference. And despite increased procedural checks, the jury continues to enjoy support as the best means of incorporating a community's moral sentiment into decisions that unavoidably contain a moral component, such as capital sentencing and (more controversially) punitive damages.
III. Juries in Capital Sentencing and Punitive Damages

A. The Criminal Jury: The Example of Capital Sentencing

The first dramatic step in the contemporary revision of jury doctrine occurred in the capital sentencing context. In 1972, the Court held unconstitutional capital sentencing procedures that gave juries "uncontrolled discretion" to impose the death penalty.\(^{209}\) Under most capital sentencing statutes of the time, neither statutes nor jury instructions provided any real limitation or guidance for the decision to impose the death penalty. This regime was reminiscent of the jury at its most powerful.\(^{210}\) While formally juries could find only facts but not the law, the unguided discretion to impose the death penalty was equivalent to determining what law would apply; it was equivalent to the law-judging power of colonial juries.

Four years later, in a group of decisions defining constitutionally permissible means of capital sentencing, the Court rejected a very different regime of death penalty imposition: "automatic" capital punishment, mandated by statute, for those convicted of certain felonies.\(^{211}\) Under such statutes, the jury determined only guilt and had no role in sentencing. The death penalty was set solely by the legislature in the form of a general rule for certain categories of murders, with no means to individualize its application to discrete cases.

The overriding concern that reshaped capital sentencing doctrine was the same as that which animates process theory: arbitrary decisions arising from unguided discretion, unchecked by other decisionmakers. The Court condemned the appearance of "arbitrary"

\(^{209}\) Furman v. Georgia, 408 U.S. 238, 253 (1972) (Douglas, J., concurring). Compare McGautha v. California, 402 U.S. 183, 207 (1971) ("[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.").

\(^{210}\) While the jury generally had broader authority in the late eighteenth century, in the area of capital sentencing specifically, it formally had less authority. That period was characterized by many crimes carrying a mandatory death penalty upon conviction; thus, the jury had no formal role in determining sentence after conviction. It was widely acknowledged, however, that jurors usurped capital sentencing authority by refusing to convict in cases in which it thought the death penalty inappropriate, and so in this sense the jury in practice retained substantial power over capital sentence dispositions. See Furman, 408 U.S. at 245-48 (quoting McGautha v. California, 402 U.S. 183, 198-99, 207-08 (1971) (Douglas, J., concurring)). Unguided jury discretion in capital cases began in the nineteenth century. See id. at 339 (Marshall, J., concurring) (quoting McGautha, 402 U.S. at 199); id. at 402 (Burger, C.J., dissenting).

imposition of the death penalty\textsuperscript{212} and insisted “that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”\textsuperscript{213} by sentencing authorities (which are primarily juries\textsuperscript{214}). As it has done even more harshly in the punitive damages context, the Court characterized the jury pejoratively, claiming that “[l]eft unguided, juries imposed the death sentence in a way that could only be called freakish.” Yet with guidance from judges and legislators, the Court concluded, juries will no longer “wantonly and freakishly impose the death sentence.”\textsuperscript{215} At the same time, the Court recognized the positive structural role juries can play in checking arbitrary action by judges or prosecutors.\textsuperscript{216}

The safeguards approved by the Court effectively require detailed jury instructions, a bifurcated trial process, and appellate review of the sentencing decision. Jury instructions, usually arising from statutes, give juries “guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.”\textsuperscript{217} “A carefully drafted statute” will “ensure[ ] that the sentencing authority is given adequate information and guidance.”\textsuperscript{218} A bifurcated trial (with separate guilt and sentencing phases) allows the jury to be “apprised of the information relevant to the imposition of sentence [which may be inappropriate to consider during the guilt phase] and provided with standards to guide its use of the information.”\textsuperscript{219} The procedure seeks to “require

\textsuperscript{212} See Furman, 408 U.S. at 249 (Douglas, J., concurring); id. at 274, 277, 293, 295, 305 (Brennan, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 313-14 (White, J., concurring); Gregg v. Georgia, 428 U.S. 153, 206 (1976).

\textsuperscript{213} Gregg, 428 U.S. at 189.


That the same procedural strictures apply to judges and juries reveals the equivalent competencies the two decisionmakers are now viewed to possess. While in other places one or the other will be deemed more trustworthy, no longer is the jury considered worthy of distinctly more trust and authority than a judge.

\textsuperscript{215} Gregg, 428 U.S. at 206-07.


\textsuperscript{217} Gregg, 428 U.S. at 192; see id. at 193-95 (“While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.”).

\textsuperscript{218} Id. at 195.

\textsuperscript{219} Id.; see id. at 204 (“We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.”).
the jury to consider the circumstances of the crime and the criminal before it recommends sentence."\textsuperscript{220} The decision to impose the death penalty "ha[s] to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."\textsuperscript{221} Finally, appellate review aims to double check that "death sentences are not imposed capriciously or in a freakish manner."\textsuperscript{222}

The Court's structure aims to serve two substantive values in capital sentencing: consistency (or at least the appearance of consistency) of jury verdicts over time,\textsuperscript{223} and individualized adjudication. (The latter takes precedence over the former.)\textsuperscript{224} The ban on legislatively mandated death sentences is required because the legislature is not capable of sufficiently individualizing sentences; that task must be assigned to a decisionmaker more competent to make a case-specific determination. Additionally, this structure builds on the idea that the jury (like other institutions) needs checks on its discretion other than its collective conscience, both to improve consistency across cases and to prevent arbitrary decisions. Its deliberative process needs to be structured by other institutions. Guidelines, provided by the legislature aim to limit and regularize sentencing verdicts by stating the factors on which the decision must be based.\textsuperscript{225} They encourage rational, deliberative decisionmaking by the jury. Those guidelines also form the basis for judicial review. Appellate courts now have more specific statutory law against which they can check (or take a "hard look" at)

\textsuperscript{220} Id. at 197.

\textsuperscript{221} Id. at 199.

\textsuperscript{222} Id. at 195; see id. at 198, 204.

\textsuperscript{223} This is another way of condemning arbitrariness in sentencing; arbitrary decisions are not consistent. Yet it also implies, I believe, an increased concern with the instrumental function of criminal sentencing. Consistent application of a sanction is thought to be the most effective deterrent, so elimination of arbitrariness is important for that value. It may be less crucial for moral justification of the sanction, however, if the arbitrariness arises from random grants of mercy rather than random, improper imposition of the penalty. Random grants of mercy make outcomes inconsistent over a class of cases, but at least those who received the penalty deserved it on the merits of their case. Nevertheless, there remains the separate but forceful objection that like cases were not treated alike, and mercy should be dispensed as consistently as justified sanction.

\textsuperscript{224} See, e.g., Stringer v. Black, 503 U.S. 222, 231-32 (1992). These two values are functionally, though not theoretically, in tension. Sentencing decisions can be both individually adjudicated and consistent across cases, as long as different outcomes are explainable by consistent criteria found in the facts of each case. In practice, however, such individualized decisionmaking, especially by different decisionmakers (whether judges or juries) inevitably yields the appearance of inconsistency in comparable cases.

\textsuperscript{225} It was not always so. See McGautha v. California, 402 U.S. 183, 207 (1971).
the jury's law-application decision; statutory criteria should also limit discretion in judges' review.226

Thus, powers formerly possessed by the jury have been divided into a legal process-inspired institutional arrangement. The legislature, instead of the jury, determines what factors are relevant in the sentencing determination. Juries now cannot impose the death penalty for a specific reason—say, that the victim was a police officer or a child, or the murder involved torture or another felony—unless the legislature approves such a consideration as a basis for capital punishment. And appellate courts now review the jury's determination with greater scrutiny, employing the criteria specified by the legislature; they even have limited authority in certain instances which replicate the jury's decisional process to double-check the determination.227 No single body has absolute control; no decision is final without the input of several different institutional actors. Each institution's power and input checks and balances the others.228 Consistent with core process theory tenets, "law that is a balance among three interacting branches is superior to law as it might be produced by a single institution"; it should be "better informed, more widely acceptable law.... Three heads [are] better than one, especially if... each head brings a special expertise and satisfies different requirements the citizenry expects from its government."229

The Court's more recent cases can be read to continue this process-based model of institutional arrangements in which no single decisionmaker controls the sentencing decision. In Sumner v. Shuman,230 the Court held that the legislature cannot mandate the death penalty for even the most narrow group of defendants—those convicted of murder while already serving sentences of life without parole. The legislature does not have the institutional capacity to

226. While providing a basis for more active review, legislatively specified criteria also limit the judiciary's discretion in review, because judges can overturn jury decisions only on the basis of criteria identified by the legislature. Cf. Shapiro & Levy, supra note 126, at 1051-52 (arguing that more specific guidelines from Congress would limit courts' discretion in appellate review of agency action and thereby constrain result-oriented judicial decisions).

227. See generally Stringer, 503 U.S. 222 (holding that when a factor is deemed invalid, the court can re-weigh factors and evidence to see if the jury's death penalty can be upheld). That's still a shift of authority from juries to judges; the alternative would be let a jury make the decision again without the invalid factor or other error that affected the first verdict.

228. See, e.g., Gregg, 428 U.S. at 206-07 ("No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.").

229. Id. (footnote omitted).

individualize sentences sufficiently, even to such a specific class and after a jury's individualized determination of guilt. A separate line of cases can be read as establishing a counterbalance between the subsidiary institutional players in the sentencing process, the legislature and appellate judges. In several cases the Court has declared unconstitutional an aggravating factor that is excessively vague because a "vague aggravating factor . . . fails to channel the sentencer's discretion." In such cases, courts double-check that the legislature is doing its job of sufficiently delineating the basis for sentencing decision in a manner that gives juries consistent and relatively specific criteria. It prevents the legislature from delegating its duty to identify sentencing criteria to the jury, and from avoiding its responsibility to rationalize sentencing of an exceedingly unpopular group, such as murderers, perhaps in the hope that arbitrary sentencing decisions will work to the detriment of that group and in favor of factional interests with

231. In a more puzzling line of cases that includes Hitchcock v. Dugger, 481 U.S. 393, 395-99 (1987), and Lockett v. Ohio, 438 U.S. 586, 604-05 (1977), the Court held that the legislature cannot limit what mitigation evidence submitted by a defendant that the sentencer may consider. It may enumerate a non-exhaustive list, but the value of individualized adjudication can be served only by having the sentencer make the final determination of what mitigation evidence is relevant. That shifts a judgment about relative competencies back in favor of the jury, which can add to decisional criteria on one side of the scale (in mitigation, but not in aggravation). If it makes sense at all, it must be on the strength not just of individual adjudication but also the goal of erring on the side of undue mercy rather than undue harshness; only the jury is in a position to make a final judgment on all factors relevant to mitigation. This structure is likely, however, to undercut the goal of consistency in sentencing. That goal was undermined by earlier jury doctrines of which this is reminiscent, when the only check on the jury's decision (as to this single element) is its conscience.

It might be informed as well by a public choice critique of the legislature's presumed institutional bias against an exceedingly unpopular group—murderers—who are likely to have a weak lobby in comparison to law enforcement and victims' representatives. That bias might be counterbalanced by the jury essentially reviewing the legislature's list of mitigating factors to make sure no relevant ones were excluded.

232. Most capital sentencing systems approved by the Supreme Court require the sentencer to find at least one "aggravating factor"—out of the several enumerated in the state's statute—as "a means of genuinely narrowing the class of death-eligible persons and thereby channelling the jury's discretion." Lowenfield v. Phelps, 484 U.S. 231 (1988). See, e.g., GA. CODE ANN. § 17-10-30 (Harrison 1990) (non-weighing state); MISS. CODE ANN. § 99-19-101 (1972) (weighing state).

more influence in the legislature, such as police, prosecutors, and victims' representatives.235

B. The Civil Jury: The Example of Punitive Damage Awards

Similar structural changes, driven by legal process themes, mark the Supreme Court's more recent series of cases establishing due process guidelines for jury determination of punitive damage awards. While acknowledging the long history of wide jury discretion in punitive awards, for which the only traditional limitation was (historically toothless) appellate review for reasonableness and grant of a new trial,236 the Court has refashioned punitive award determinations so that jury decisionmaking is guided by input from the legislature, then reviewed substantively by the trial and even appellate courts (both of which are also guided by legislative standards).

The Court's most recent and dramatic foray into restructuring the process is its decision in BMW v. Gore. And it is Justice Breyer's concurrence in BMW—signed by three members of the five-justice majority—that proves to be a model of these legal process ideas. Breyer's entire opinion focuses almost solely on the ways in which the BMW trial lacked a legal process tenet that the Court has already revised for capital sentencing: constraint of jury discretion (and also of judicial discretion in reviewing the jury's award) by legal standards that guard against arbitrary, biased or idiosyncratic verdicts.

Breyer's reasoning recalls the early death penalty cases beginning with Furman. His recurrent concern is the risk of "arbitrary results" and "caprice" if discretionary decisionmaking is not meaningfully constrained by legal standards that limit discretion.237 The jury was not given "legal standards that provide 'reasonable constraints' with which 'discretion can be exercised,'" and with which trial and appel-

235. A separate explanation of the anti-vagueness requirement might be that more specific instructions improve the jury's decisionmaking capacity. Specific instructions increase its informational access to the law (while evidence law mediates its access to the facts) and thereby empowers the jury to interpret and apply the law to the facts it has found. Thus, while the jury's discretion is channelled in some sense, the jury is trusted with a powerful interpretive task; it is given the resources—the law—to do more than make an instinctual conclusion about justice in a particular case. It is trusted with the interpretive task of law application, which is a broader task than merely finding facts to which the court applies the law.


237. BMW v. Gore, 64 U.S.L.W. at 4342 (stating that the standards employed in BMW "are vague and open-ended to the point that they risk arbitrary results."'); id. at 4344 ("the record contains nothing to suggest that the . . . award in this case is [not] explained by . . . arbitrariness and caprice").
late courts can meaningfully review the reasonableness of the jury’s
decision. Alabama’s standards “must offer some kind of constraint
upon the a jury’s or court’s discretion, and thus protection against
purely arbitrary behavior.”238 This failure in the structure of decision-
making denies the decision (in Hart and Sacks’ phrase) its “special
kind of ought.” The judgment’s flawed procedural pedigree denies it
the “strong presumption of validity” and necessitates a second-best
check against injustice—substantive appellate review.239 Justice Ste-
vens’ opinion for the Court carries out that scrutiny by refining broad
and tentative “guideposts” the Court will employ to review the size of
awards; Justice Breyer’s concurrence (speaking for a majority of the
majority) explains the process theory premises that justify the Court’s
new incursion into review of substantive outcomes by state court
juries.240

The decision in BMW develops the two components of legal pro-
cess-inspired jury verdict reform—legislative inputs to guide deliber-
ation, and judicial review informed by the same inputs—that the Court
began five years earlier. In Pacific Mutual Life Insurance Company v.
Haslip, the Court affirmed an Alabama jury’s award of $840,000 in
punitive—approximately four times the amount of compensatory
damages241—and thereby upheld Alabama’s broad grant of discretion
to the jury, subject to fairly minimal limitations. Though its decision is
fact-bound and left the mandatory elements of a constitutional puni-
tive damages system unclear, the Court stressed the familiar elements
of guided jury discretion and post-verdict review. It concluded that
the jury instructions ensured that “discretion [was] exercised within
reasonable constraints,” and therefore met the underlying concern
about “unlimited jury discretion—or unlimited judicial discretion for

238. Id. at 4342 (Breyer, J., concurring). See also id. at 4342-43 (stating that the rule
that the punitive award bear a reasonable relationship to the harm is “empty . . . of mean-
ingful content”; the “reprehensibility” standard is “a concept without constraining force”;
instruction on the “financial position” of the defendant “is not necessarily intended to act
as a significant constraint”; the state courts have not “made any effort to find . . . any other
standard, that . . . might have supplied the constraining legal force” the regime now lacks);
id. at 4344 (no “community understanding or historical practice . . . provide[s] background
standards constraining arbitrary behavior”; “no other legislative enactments . . . signifi-
cantly cabin the fairly unbounded discretion”).

239. See id. at 4345 (“[W]here legal standards offer virtually no constraint, I believe
that this lack of constraining standards warrants this Court’s detailed examination of the
award.”).

240. BMW, 64 U.S.L.W. at 4342 (stating that vague standards “risk arbitrary results”
and “invite the kind of scrutiny the Court has given the particular verdict before us”).

241. 499 U.S. 1, 12 (1991) (noting that until this case, the Court had “rejected or de-
ferred” opportunities to rule on due process challenges to punitive damage awards).
that matter," which "may invite extreme results." Instructions encourage "rational decisionmaking" and "impose[ ] a sufficiently definite and meaningful constraint on the [jury's] discretion." The Court further endorsed "meaningful and adequate review by the trial court" and appellate review based on a "comparative analysis" with awards in other cases and upon "substantive standards" for "evaluating punitive awards."

BMW strengthens the mandate of Haslip for jury instructions as well as some form of substantive post-verdict review. Though that substantive review will be deferential if the verdict's procedural structure is adequate, the Court's more recent decisions in TXO Production Corporation v. Alliance Resources Corporation and Honda Motor Company v. Oberg make clear that the capacity for substantive review must remain regardless of the process that yielded the verdict. TXO Production mandated a substantive "reasonableness" review of the size of jury punitive awards, in addition to any post-verdict review dictated by procedural due process requirements. Oberg then reaffirmed substantive review as an essential element of any regime of jury-imposed punitive awards. In that case, the Court required every punitive verdict be reviewed for "excessiveness" in the size of the verdict.

BMW does little to improve on the problem created by TXO Production and Oberg of the nebulous and manipulable standards under which judges are to review the punitive awards, a difficulty that the BMW dissenters emphasize. Nevertheless, the decisions together give appellate courts a more substantive role, ensuring—as in the capital sentencing context—that the final decision is one that has been

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242. Id. at 20, 22.
243. Id. at 20-21.
244. 113 S. Ct. 2711 (1993).
246. TXO Production reiterated the deferential nature of that review, however, noting that in light of the jury's superior competence only "grossly excessive" verdicts should be reversed. 113 S. Ct. at 2718. The facts of the case confirm that deference: the Court affirmed a $10 million punitive award even though it was 526 times greater than the $19,000 compensatory award. Id.
247. 114 S. Ct. 2331, 2341 (1994). The Court went out of its way in Oberg to mandate substantive review of the verdict's size; Oregon was the only state that lacked such review, id. at 2338, and it had more rigorous procedural safeguards at other stages than many states. Id. at 2334-48 (Ginsburg, J., dissenting).
248. See 64 U.S.L.W. 4347-48 (Scalia, J., dissenting) ("These criss-crossing platitudes yield no real answers in no real cases . . . . The Court has constructed a framework that does not genuinely constrain . . . ."). See also The Supreme Court, 1992 Term—Leading Cases, 107 Harv. L. Rev. 144, 189-90 (1993).
reviewed by judges after the jury's deliberative process has been focused by the legislative standards (which also constrain appellate review) transmitted as jury instructions. Again, three heads are better than one; each institution brings comparative strengths that check the relative weaknesses of the others. The legislature can encourage consistency with general rules; the jury employs a unique capacity for individualized assessment, and the judiciary attempts to ensure both similar dispositions across comparable cases and fairness in each adjudication by watching for illicit factors such as bias, or gross misassessments of elements such as reprehensibility of conduct. This regime is likely to have no more success than post-Gregg death penalty jurisprudence has had forcing consistent application of capital punishment across a broad range of comparable cases. But legal process theory retains sufficient theoretical power, that it seems to be the most promising approach, especially given that the alternative of unfettered jury discretion has not proven any better.

To recall the analogy to administrative law, BMW, Oberg, and TXO Production ensure punitive awards will get a "hard look" via appellate review, at least (or especially) when their procedural pedigrees are most suspect. Greater substantive review arises from growing distrust of a single decisionmaker, the jury, to determine the final judgment, and of the capacity for procedural arrangements (such as instructions and bifurcated proceedings) to make its decision merit extreme deference. Thus, after BMW, we might expect to Court to embark on an ongoing process of reviewing the legislative standards that guide juries, much as it has done for two decades in the death penalty cases, but also to develop the decisions in BMW and its predecessors into something like the hard look doctrine, or like theories of review that examine legislative action for public-regarding purposes. 249 Agencies are reviewed for arbitrariness under a "narrow" scope of review in which the "court is not to substitute its judgment for that of the agency." Yet courts do a searching review of an agency's database, analysis, and "rational connection" between the evidence and decision. 250 Similarly, substantive review of juries might actively employ a normative component (drawn from other public policy indi-

249. See Sunstein, Naked Preferences, supra note 42; Eskridge, Public Values, supra note 31. With regard to jury verdicts, examination for "special interest" influence may scrutinize verdicts most closely that seem to favor those groups likely to inappropriately influence the jury—a local party whose opponent was a foreign party, for instance.

cia, on the model of statutory interpretation methods)\textsuperscript{251} while still placing significant emphasis on procedural components to encourage and check for rational, deliberative jury decisions. The following Part explores the likely form that judicial review of jury verdicts could take, and the implications for continued, significant jury authority.

IV. Reflecting on the New Conception: Prospects for the Jury's Role

Arguments for the jury's central structural role in democratic governance notwithstanding\textsuperscript{252} one may fairly characterize the role that the Court has constructed for juries in these two areas as a secondary and restricted one. Though widely used for both determinations, juries are not constitutionally required for either capital sentencing or punitive damage determinations.\textsuperscript{253} Even when they are utilized for those decisions, the Court has approved restrictive regimes, such as "quasi-mandatory" capital statutes,\textsuperscript{254} that greatly restrict discretionary jury authority. Additionally, we have seen that jury decisions are now distrusted unless guided by instructions and reviewed by courts. The conception of the jury implied by these developments helps justify intrusive appellate review.

On the other hand, recent developments regarding mandatory instructions and judicial review may be read as seeking to improve jury competency and legitimacy by giving juries the resources and procedural support to reach rational decisions. In this sense, judges play a complementary role that improves the quality and coherence of jury decisions,\textsuperscript{255} which in turn would justify more deference to those decisions during substantive appellate review. The Court's redesign of capital sentencing and punitive damage doctrines suggests two broad paths that future developments could take, and two broad trends in

\textsuperscript{251} Id.
\textsuperscript{252} See Amar, Bill of Rights, supra note 14.
\textsuperscript{255} See, e.g., Spaziano, 468 U.S. at 455 (noting that the motivation for some rules in capital sentencing doctrine is to "eliminate the distortion" in jury decisions caused by limiting the jury's information and options); cf. Schacter, supra note 32, at 631-32 (discussing the "complementarian" approach to statutory interpretation, in which judges employ a more "open-textured" and "dynamic" theory of interpretation that "actually improve[s] the quality, efficacy, and coherence of statutory law").
future jury authority. One would significantly restrict jury authority and transfer much of that power to judges. The other, however, would leave significant authority in the jury, build upon its specific institutional capacity to make reasoned decisions informed by popular sentiments, and reinvigorate it as a populist-democratic check on other institutional actors.

What follows is a brief discussion on the alternative forms that substantive review could take in the wake of BMW and the new, legal-process informed conception of the jury. This new substantive scrutiny of jury verdicts is likely to extend to the criminal (particularly the capital) context as well. The Court has made it clear that civil defendants (even those facing the "quasi-criminal" sanction of punitives) are not entitled to more protection than criminal defendants facing the death penalty. If the Court applies the doctrine consistently, BMW in all likelihood will lead to a comparable criminal case mandating substantive excessiveness review of all capital sentences imposed by juries.256

A. The Prospect of a Further-Diminished Jury

The Court’s redesign of capital sentencing and punitive damage doctrines suggests two broad paths that future developments could take, and two broad trends in future jury authority. One would significantly restrict jury authority and transfer much of that power to judges. The other, however, would leave significant authority in the jury, build upon its specific institutional capacity to make reasoned decisions informed by popular sentiments, and reinvigorate it as a populist-democratic check on other institutional actors.

The Court’s move toward substantive judicial supervision of civil jury verdicts may portend a continued shift toward diminishing the importance of the jury’s institutional role. An obvious factor is the current Court’s solicitude, at least with regard to jury-determined punitive damages, toward civil corporate parties and its disfavor of criminal defendants.257 This observation is not solely a bluntly realist one about judicial personal preferences. The Court is responsive to popular sentiment, particularly as represented by legislatures (however distorted by interest group influence).258 Congressional action in recent years—largely matched by many state governments—clearly tends to-

257. See Eskridge & Frickey, Supreme Court, supra note 13, at 43-46, 50-51.
258. See id. at 53-55; Friedman, supra note 43.
ward restriction of criminal procedure rules favoring defendants and toward expansion of the death penalty. At the same time, corporate business interests, perceived to bear the worst brunt of excessive punitive verdicts, are currently favored in legislative arenas with proposals for lighter regulatory burdens generally, and for restrictions on punitive awards in particular, which have been significantly restricted. That suggests the prospect of a substantially diminished jury in the civil context, while leaving the criminal jury, inconsistently, with broader discretion. The confluence of the Court’s ideological preferences with legislative ones could yield a doctrine of substantive due process review that, while formally mandated for both punitive and capital verdicts, effectively superintends the latter more closely than the former.

The anti-jury rhetoric of recent opinions supports that reading. In *Oberg* and *TXO Production* there is no hint of the benefits a civil jury provides as the final protection (to the community and litigants) against arbitrary action from biased judges or faction-dominated legislators. Instead, due process requirements must serve to guard against “bias, passion or prejudice on the part of the jury.” A central concern of due process protections is “the possibility that a jury will not follow [ ] instructions and may return a lawless, biased, or arbitrary verdict.” Justice O’Connor, the Court’s most vociferous critic of

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259. See JAMES A. HENDERSON & AARON D. TWEERKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESSES 302 (2d ed. 1988) (collecting state statutes that limit the scope and amount of punitive damages).

260. See Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 406-07 (1995). That prospect is supported by the inarguable disparities in outcomes approved in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which shows the limits of procedural regimes to regularize outcomes. The Court approved significant case outcome variations based on the impermissible factor of race despite extensive statistical proof. Yet in the punitive damages context, where the Court’s knowledge of variations in verdicts is much more partial and anecdotal, the superior rationality of judges is employed to double-check impermissible jury decisions. (The Court’s anecdotal impression of the vulnerability of corporate parties is also probably incorrect. See Owen, *supra* note 159, at 372; Thomas Koenig & Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 Jus. Sys. J. 21 (1993)). That distinction may also indicate one flaw in the Court’s descriptive conception of juries. It seems implausible to assume that juries are more rational and dispassionate in judging accused murderers than in judging corporate entities that employ citizens without prompting a significant union movement, often maintain corporate image and charitable giving campaigns, and retain much better paid counsel to communicate with juries than most capital defendants.


juries, argues that jurors are “more susceptible to . . . influences impermissible in our system” than judges. She emphasizes concerns about juries’ “caprice,” “passion,” “bias,” “prejudice,” and “arbitrariness” in arguing that the common law tradition of broad discretion in jury determination of damage awards should be held unconstitutional.

Moreover, if courts take the task of searching for passion or prejudice as the focus of substantive review, they inevitably take on a normative endeavor that substitutes judicial sentiment for the jury’s. Einer Elhauge has noted that if courts undertake judicial review of legislative or agency decisions with the goal of identifying improper interest group influence, they cannot make such a judgment without an underlying normative theory of how much influence any one group should have, or an equivalent theory about what sort of regulation serves public rather than private interests. Critiques of Ely’s process-based theory of constitutional review identify comparable problems; one cannot identify the effect of prejudice in legislative deliberations through a nonnormative analysis. Similarly, a court cannot conclude that a punitive award, such as that in TXO Production, reflects a bias against out-of-state corporations and for local plaintiffs, without first setting a normative baseline with regard to the size of a punitive award such a defendant should bear on those facts in the absence of such bias. Given the inevitable subjectivity of setting any such baseline, substantive review, particularly when focused on a search for excessive awards arising from local bias, may shift to the courts the effective authority for setting punitive damage amounts.

If appellate courts act upon the Court’s derogatory rhetoric toward juries, or if they take BMW as a signal to scrutinize verdicts more freely, the key constraint on that normative decisionmaking power—

264. Id. at 2729; see also Pacific Mut. Ins. Co. v. Haslip, 499 U.S. 1, 63 (1991) (O'Connor, J., dissenting) (criticizing punitive damages rules that “give[ ] free reign to the biases and prejudices of individual jurors”).
265. Cf. BMW v. Gore, 64 U.S.L.W. 4335, 4346 (May 20, 1996) (Scalia, J., dissenting) (arguing that the majority opinion “is really no more than a disagreement with the community's sense of indignation or outrage . . . which is hardly an analytical determination.”)
268. For an analysis of federal appellate decisions revising jury awards and an argument that such revisions are largely due to judges' personal, normative perspectives, see Schnapper, supra note 9, at 313-36.
deference to the competence of the jury's normative judgments—likely will decrease.269

Rhetorical condemnation of the jury and mandatory substantive review of its decisions both are in addition to the basic restrictions that began with Furman, and for civil juries, with Haslip. Continuation of that trend would seem likely in light of the judiciary's institutional self-interest. Not only does the allure of legal process theory continue in BMW, but it corresponds with a cynical view of judicial behavior. Substantive due process review increases judges' power and authority and correspondingly diminishes that of juries. It creates an increase in judicial workload of the type that judges are likely to favor. It gives judges an opportunity to contravene jury decisionmaking in a manner likely to please those groups from whom judges gain respect, prestige, and post-judicial employment opportunities.270 At the same time, juries have virtually no institutional capacity to respond to attempts to infringe on their power or denigrate their competency, and such an effort by the judiciary would match the Court's shift in rhetoric about the jury that is evident in the punitive damages context.271 Those arguments also support the Court's following, in the punitive damages context, the model of its capital sentencing jurisprudence. On that model, regulation of jury authority could be served by requirements of more detailed, effective jury instructions that more fully inform the jury of the legislature's considered judgments.

B. The Prospect of Substantial Jury Authority

An alternative reading of the capital sentencing and punitive damages decisions, particularly in light of newer public law scholarship, suggests continued broad authority for juries within existing due

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269. For an argument that such deference has in fact decreased in federal appellate courts, and that courts have usurped normative decisionmaking via appellate review, see id. at 238-59, 313-36.

270. Compare the Court's increase in judges' duties regarding punitive jury verdicts with its recent decisions restricting habeas petitions in the criminal context. See Eskridge & Frickey, Supreme Court, supra note 13, at 64-65. Habeas petitions have the potential to substantially increase, if not overwhelm, judicial resources (compared to the relatively modest workload increase of reviewing punitive awards, which are in fact relatively infrequent), and they present issues and decisions about which judges can expect little social reward of any type. See also Bacigal, supra note 51, at 378 (discussing the jury's diminished role in search and seizures cases and arguing "a judiciary jealous of its power undermined the political role of the jury in our government").

271. Cf. Eskridge & Frickey, Supreme Court, supra note 13, at 49 (arguing that "the Court is less deferential to institutions that cannot respond as effectively," such as states compared to Congress; "in such cases, the Court's conservative values tend to manifest themselves most strikingly").
process and Eighth Amendment constraints. In the new institutional
arrangements, the primary constraints upon jury decisionmaking are
instructions and judicial review. Neither need eviscerate the jury's au-
thority, and the former (with the possible exception of quasi-
mandatory capital statutes) probably cannot. The jury thus retains
significant authority, and judicial review may serve to strengthen re-
spect for its verdicts. BMW, in this view, may not signal new judicial
intrusion into the jury's realm so much as an effort to ensure that the
jury has the full resources to make informed, reasoned judgments,
which the Court could then deferentially review. After all, where jury
instructions and the trial process are found adequate, as in TXO Pro-
duction, the Court has affirmed punitive awards just as extreme (in
proportion to the compensatory award) as those in BMW.

(1) The Constraint of Jury Instructions

The constraint of jury instructions is more formal than real. For
one, instructions approved by the Court in fact provide only minimal
guidance in both the punitive damages and capital sentencing context.
As noted above, Haslip specifically examined and approved the
broad, general instructions given to that jury and found them suffi-
cient. In the death penalty context, Gregg v. Georgia approved in-
structions that limit juries only minimally. Once a Georgia capital
jury finds an aggravating factor (which is often clear on the facts of the
case, such as where the victim was a police officer, or where the mur-
der was committed during another felony), the jury effectively has un-
restrained discretion. It can consider any evidence in mitigation, but
is not required to weigh aggravating or mitigating factors. For both
civil and criminal juries, then, the Court has been satisfied with the
most minimal instructions that give some nominal appearance of
guidance.

Even when states choose to impose more elaborate, constraining
jury instructions, however, those instructions are no more likely to

272. See supra note 234 and accompanying text.
273. See Scott W. Howe, Resolving the Conflict in the Capital Sentencing Cases: A De-
(Harrison 1990).
274. Some states give juries lists of aggravating and mitigating factors and instruct
them to "weigh" each against the other. See, e.g., Stringer v. Black, 503 U.S. 222, 229-31
(1992) (describing the differences between "weighing" state procedures, such as found in
Mississippi and Florida, and "nonweighing" procedures, as found in the Georgia and Loui-
siana statutes).
restrict jury discretion than theories of judicial review, or canons of statutory construction, constrain judges’ decisions. Instructions necessarily leave the jury with a discretionary interpretive task analogous to that which judges face with regard to statutes; they present the jury with a task of statutory interpretation. Recent scholarship on statutory interpretation (though ignoring the jury’s role as an interpreter) makes clear that rather than limiting the jury’s options, interpretation of statutes (such as instructions) is a creative opportunity. Rather than constraining previously limitless discretion, instructions redirect discretion to a new project—interpreting the legislature’s input to the decision now facing the jury. It draws the jury into a dialogue with other institutions while leaving it with a decision that, in a significant sense, is a discretionary normative judgment.275

Juries interpret instructions—which include statutes—in many of the same ways judges interpret statutes. The assumption, probably encouraged by many customary jury instructions, is that jurors will follow an instruction’s plain meaning. That is of course a prominent theory of judicial interpretation as well, and an approach many judges purport to follow. Alternatively, early process theorists saw the interpretation of statutes as determined largely by the purpose underlying the statute. The goal of effectuating a statute’s clear purpose, while requiring creative application as new contexts arise, should constrain the interpreter’s discretion.276 Jurors may be likely to gravitate toward this approach as well, and counsel certainly can try to encourage it in their argument to juries.

More significantly, recent scholarship on statutory interpretation has emphasized the inadequacy of both approaches, arguing convincingly that neither approach actually constrains an interpreter’s task, nor even accurately describes interpretation process. Borrowing from pragmatist and hermeneutic theories, scholars such as William Eskridge and Philip Frickey have suggested that statutory interpretation by judges in fact involves several factors—textualist concerns, assessments of a statute’s purpose, interpretation of the legislature’s intent, public values served by a particular application, and the inevitable interaction between the text, the current context, and the interpreter’s

275. See generally STANLEY FISH, DOING WHAT COMES NATURALLY 1-33, 87-119 (1989) (arguing generally that significant constraints on interpretation are impossible).
276. See supra note 33 and accompanying text.
perspectives, tradition, and values. The interpretive process is inevitably dynamic, creative, historically situated, and dependent on some normative choice.

Jury interpretation of instructions, including statutes, works in many of the same ways. Jurors, lacking formal training, are unlikely to know about, or consciously try to employ, a methodology such as textualism or purposivism (though a jury instruction could encourage them to). They may construe their mandate to use common sense and to serve as the conscience of the community as an invitation to apply the law in whatever means necessary to yield an outcome that is, to their minds, just. On the other hand, jurors may instinctively assess their institutional role as a limited one, in which case they may aim to apply the law as neutrally and directly (textually) as possible, leaving policy changes to the legislature. This may then leave them feeling disempowered to interpret the law in a manner which would facilitate corrective justice in the present case.

There is evidence, in fact, that they do both. One of the few available videotapes of jurors deliberating in an actual case reveals jurors with just such competing conceptions of their task. One juror felt his duty was simply to apply the letter of the law and not to second-guess the legislature or mediate the law's application with the jury's sense of justice. Another objected that he "was not a computer" and felt authorized, even required, to use his judgment to reach a just conclusion rather than one that seemed to effectuate a literal, mechanical application of statutory text.

Jury instructions, then, have an effect on jury deliberations, largely by setting the agenda for deliberations and focusing jurors' attention on certain factors. In a capital case, jurors may have the task of determining whether the facts constitute an aggravating factor, whether they reveal a mitigating circumstance, and whether one "outweighs" the other. Under more determinative capital sentencing regimes, such as Texas law, the jury faces three yes-or-no questions that determine the penalty. Jurors likely experience those narrowly framed instructions as more constraining. Nevertheless, they know

278. See Eskridge, Dynamic Statutory Interpretation, supra note 85; Eskridge, Public Values, supra note 31; Schacter, supra note 32, at 613-18 ("[S]tatutory construction can be a veiled form of policymaking.").
the purpose and result of their decisions; if the outcome strikes them as unjust or contrary to strong public values, some jurors, at least, are likely to find interpretive leeway to answer the instruction questions in a manner that yields a just outcome.

Jury instructions, in short, involve the jury in an interpretive task in which jurors often retain considerable authority. Instructions engage the jury in a dialogue with the legislature (and perhaps the executive branch prosecutor in criminal cases, and even civil cases brought by the government). Since we presume an absence of widespread agreement on norms and values, they give different juries a common starting place, a shared set of issues, factors, or guidelines on which to initiate deliberations. And as wide discrepancies in verdicts might indicate, instructions (as interpretive theory would predict) are relatively unsuccessful at constraining juries and yielding consistent outcomes across a class of comparable cases.  

(2) The Constraint of Judicial Review

The other constraint on juries, judicial review, may serve to reinforce the jury's normative role and discretionary authority. Review of the jury's decision may serve, as it does in reviewing the decisions of legislatures and agencies, to check its democratic and normative legitimacy by making inferences from the outcome (the verdict) and from procedures leading to the outcome (access to evidence and instructions). To be sure, judicial review entails the normative judgment of judges employed to assess the normative judgment of juries. Again, judges cannot say that a punitive award is excessive, or that it is the product of bias or illicit redistributive inclinations, without an underlying normative baseline of what an appropriate award would be against a given party. Nevertheless, by adopting methodologies from statutory interpretation theory that aid courts in checking decisions for consistency with broader public values and background rules implicit in existing statutes and constitutional doctrines, and from review of agency action,  

281. See McCleskey v. Kemp, 481 U.S. 279 (1987). Of course, the problem with making conclusions about consistency of verdicts across cases is that each jury adjudicates a different case. The empirical findings at issue in McCleskey controlled for such variables about as much as is feasible, but the fact remains that each case is unique and the differences may contribute to the seeming disparity in comparable cases.

282. See supra notes 247-49 and accompanying text; Schacter, supra note 32, at 618-36.

for those of jurors. On this view, judges may become "open collaborators" with the jury (and legislature) in creating final adjudicative outcomes and statutory policy, while leaving for juries significant normative authority.\footnote{284} They may acknowledge and respect the jury's consensus on normative elements of a decision, especially where societal consensus is hard to determine otherwise,\footnote{285} and they may employ substantive review to assess whether the jury consensus seriously conflicts with their own assessment of preexisting commitments drawn from statutory, constitutional, and common law sources. There is, in fact, some indication that the Court endorses such an approach and does not encourage judicial usurpation of the jury's discretionary authority. Despite its rhetorical grumbling about jury competency, the Court rarely overturns the substantive jury decisions, civil or criminal, if trial processes—from jury selection and evidence presentation to counsel argument and instructions—are sufficient. In any case, substantive review of jury verdicts faces courts with the perpetual challenge that legal process theory poses: continually recalibrating the balance between deference to outcomes achieved with procedural regularity, and substantive assessment (by unelected judges) of normative decisions.

Other doctrines, though not often thought of as bearing on the validity of verdicts, also reinforce jury legitimacy by focusing judicial review on procedural and structural issues. One, suggested above, is some judicial effort to partially limit the effects of unequal resources between litigants, because that inequity distorts the factfinding and law application process.\footnote{286} There are, however, relatively few means for judges to effectuate that goal. Another option is review of the jury's composition, which implicitly protects the normative jury decision without substantive assessment. The Sixth Amendment's fair cross section doctrine, reinforced by \textit{Batson},\footnote{287} prevents the "capture" of the jury by one segment of the community and ensures that the verdict arises from deliberation and consensus among all viewpoints of a locality. Much of the jury's moral authority was lost when South-
ern juries refused to convict white defendants accused of harming or murdering African-Americans. Such verdicts betrayed the dark side of the jury as a populist-democratic body in a manner comparable to the civil rights movement's revelation that formally democratic legislatures were functionally unrepresentative bodies capable of oppressing large groups of citizens. Rigorous enforcement of the mechanisms ensuring the jury's representativeness (such as the fair cross section doctrine) would likely have prevented many unjust verdicts, if only by yielding hung juries.\textsuperscript{288} Judicial review will strengthen jury authority and legitimacy if it focuses on strengthening the jury's capacity to reach reasonable decisions—ensuring its representativeness, its capacity to deliberate, and its access to relevant evidence and statutory law. Justice Breyer's opinion in \textit{BMW} may be read to have this goal: once juries are fully informed about the considerations relevant to damage determinations, their judgments deserve extreme deference.

**Conclusion**

Recognizing that the contemporary jurisprudence of juries is centrally informed by legal process themes may prove useful in several respects. Not least, it points to the need for sustained, descriptive study of the jury in a manner that identifies its relative competencies and weaknesses in a more systematic, empirical fashion than the Court's ad hoc, context-specific conclusions.\textsuperscript{289} That description could then inform the refinement of institutional relations and procedures with the goal of bringing substantive, rather than merely formal, regularity to the singular decision of capital sentencing and the economically important one of punitive damages. Additionally, this recognition may be helpful to counsel who must devise arguments to persuade the Court (or other courts) on behalf of litigants.

More generally, the incorporation of legal process premises in jury doctrines raises the prospect that the same weaknesses and conundrums found in legal process theory by recent scholarship exist in jury doctrines. In particular, the imposition of constraints on discretion such as jury instructions (especially in the minimal form the Court has approved) may not meaningfully limit or guide discretionary decisionmaking; minimal substantive review requires considerable deference to (and trust in) the decisionmaker. Newer public law and legal

\textsuperscript{288} In the context of Southern trials of whites, they at least would have yielded hung juries instead of complete acquittals.

\textsuperscript{289} See Cecil et al., \textit{supra} note 178, and Lempert, \textit{supra} note 178, for reviews of empirical literature that reveal misperceptions about juror ability and need for more research.
process scholarship suggests means to strengthen the jury’s decision-making capacities (thereby justifying deference). Allocation of authority among interacting institutions can focus the jury’s authority on the areas of its greatest competency; it can structure legislative and judicial roles to reinforce, utilize and respect juries’ legitimate discretionary authority. In particular, substantive review of juries could look to models for reviewing decisions of agencies and legislatures, with which it already shares key components, for guidance in developing judicial supervision of juries with a focus on preserving the jury’s discretionary authority while checking its decisions against extant public values and policies. Such review, however, always leaves the possibility of judges usurping authority from other decisionmakers, and may bring no greater consistency to decisions than existing processes.290 The malleable “guideposts” employed by the BMW majority may invite just such usurpation and inconsistency.

Juries bring valuable institutional competencies to the structure of divided government powers. In the wake of the fair cross section doctrine,291 juries have increased democratic legitimacy as representative bodies comparable to legislatures, yet without key structural disadvantages—vulnerability to constituent and interest group pressure or the opportunity to seek “rents” or personal gain from their decisions.292 They share with judges a status as unelected, unaccountable decisionmakers with unique access to facts of individual cases, yet without the tendency to become jaded from judging innumerable similar cases, to lose touch with popular sentiment, or to make judgments without considering diverse viewpoints. Yet juries are suspected of distinct weaknesses: somewhat like legislatures, they are thought to be susceptible to irrational decisionmaking driven by momentary passions or parochial biases, but they lack the bicameral legislature’s structural protections against those problems.

Doctrines such as those developed under the Due Process Clause and Eighth Amendment, which contribute to our jurisprudence of juries, need a contemporary vision of the jury around which to refine its institutional role. That vision would take advantage of the jury’s capacities to provide valuable checks on the flaws of other institutions,

290. See Eskridge, supra note 33, at 172 (discussing the “quandry for legal process theories” of opting for substantive judicial review that meaningfully scrutinizes decision-making but which allows nonelected judges to make value choices).

291. See Brown, supra note 156, at 113-21.

as the Founders intended. One important context that may suggest the need for a greater jury role is death sentencing, where studies suggest prosecutors contribute much more to racial disparities than jury decisions. Likewise, it would structure the role of other institutional actors to improve the jury's decisionmaking where possible and limit it where necessary, in light of contemporary contexts. And that vision would respect the jury's traditional substantive capacity, drawing on its democratic character and special access to local sentiments and ability to achieve consensus among a diverse group. Likewise, it would integrate jury competencies with judges' legal expertise and legislatures' longer-term deliberation of more general principles from a broader constituency. With a clear conception of jury capacities to inform institutional arrangements, with revision of instructions and trial procedures to improve jury decisionmaking, and with clarified doctrinal goals in such areas as capital sentencing and punitive damages, the jury could serve as a more effective player in the ongoing process of lawmaking, broadly conceived. The jury's distinct institutional voice, integrated into a dynamic system of institutional interaction, would continue to secure the democratic legitimacy of adjudicative processes and contribute to the continuing national dialogue on public values and policy.


294. See Schacter, supra note 32, at 647-48 (lawmaking is not a "discrete act that ends when the statute comes off the legislative 'assembly line,' but instead [is] the ongoing evolution and incremental development of legislation," constituting a "larger, more fluid and evolutionary process of law-creation").