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Courts and Judges

LEE EPSTEIN AND JACK KNIGHT

If there is one word that characterizes the study of courts and judges it is diversity – diversity in the kinds of questions scholars raise, the theories they invoke, and the methodologies they use to assess the expectations their theories generate.

Given this mix, it would be, on the one hand, a near-daunting task to cover all the research developments in a single essay; that would necessitate a much larger volume, perhaps even two or three. And it would require not just two scholars who work primarily as political scientists and legal academics but rather many, hailing from the disciplines of anthropology, economics, psychology, and sociology. These social sciences, and various pockets in the humanities as well, have produced mounds of research on the subject of courts and judges – at least some of which has, for all the usual reasons, failed to join the piles already on our desks.

On the other hand, despite the multiplicity of specific research questions, theories, and methodologies, analysts of courts and judges have coalesced around a similar set of general substantive concerns. We can group these under four headings: judicial selection and retention, accessing judicial power, limitations on judicial power, and judicial decision making.

In what follows, we devote space to each of these topics. But, out of the belief that any attempt to cover all the questions specialists have raised about them and the results their inquiries have yielded would be superficial at best and misleading at worst, we explore one key debate within each. What these explorations reveal is that, over the past decade or so, scholars have made great strides in their quest to understand the various phenomena associated with courts and judges but still have some distance to travel. While the gaps in our understanding may be narrowing, they nonetheless remain wide.

An Overview of Questions, Theories, and Methodology

Before turning to the four substantive topics, we take a brief detour. In this section we consider the three building blocks of most research programs – questions, theory, and methodology – and offer some observations about their use in studies of judges and courts.

Substantive research questions

Since we dedicate the bulk of this essay to exploring four substantive topics, we need not say too much here about the kinds of substantive questions scholars ask. But one point bears some emphasis: over the past two decades – perhaps even longer – the types of questions engaging analysts have not changed all that much. So, for example, in his classic treatment of judicial selection and tenure, Haynes (1944: 44) pointed to the immense scholarly and public interest in the subject. In the "United States alone," he noted, "whole shelves could be filled with the speeches, debates, books and articles that have been produced . . . dealing with the choice and tenure of judges." Writing nearly 40 years later, Dubois (1986: 31) claimed that "It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection."

What has changed – actually expanded – are the empirical targets of questions regarding courts and judges. While scholars writing just a decade ago may have framed their questions in general terms, they almost invariably studied them in the context of the US Supreme Court. That has changed, almost remarkably so. Today, when we pick up a study on judicial selection, it is just as likely to explore practices in the US states or as they pertain to lower federal court judges as it is to consider US Supreme Court nominations. When we read a scholarly essay on judicial decision making, it might still focus on US Supreme Court justices but some nontrivial probability exists that it is about lower appellate and trial judges – both in the states and in the federal ladder.

Perhaps more intriguing, research is beginning – though just beginning – to branch out beyond the American context altogether, to consider courts and judges throughout the world, in Europe (e.g., Stone, 1994), Latin America (e.g., Helmke, 1999), Asia (e.g., Ramseyer, 1994), and even Africa (e.g., Widner, 2001). Important comparative studies on virtually all the topics we cover in this chapter, from judicial selection and tenure to judicial decisions, are now appearing both in disciplinary journals as well as in the more specialized ones.

In what follows we are attentive to what *may be* this sea-change in the study of courts and judges – the expansion of the targets of our inquiries – discussing and exploring specific research findings (with the caveat that because much of the literature on courts and judges continues to focus on the US Supreme Court, our essay must, to some extent, follow suit). For now, and assuming that this potential development is as exciting and self-evidently important to readers as it is to us, it seems worthy to consider, first, why it seems to be occurring and, in turn, what steps the law and society community might take to ensure that it does.

Of course we are only speculating here but one factor contributing to the new emphasis on US judges other than "the Supremes" is simple observation. We live in a

day and age when lower appellate court decisions – such as those over affirmative action, which have divided circuits all over the country but into which the US Supreme Court seems reluctant to tread – and even those of trial courts (think Microsoft) seem to be making more news than virtually any the Supreme Court has issued in the last few years (save *Bush v. Gore*, 2000). The old wisdom, that trial courts simply "adjudicate" and courts of appeals merely rubberstamp the "adjudications" of their lower court colleagues seems just that – old and even more to the point, wrong (Mather, 1995). We also live in a day and age when we, as citizens, are bombarded with press reports of courts throughout the world generating major policies. Tribunals in Hungary and South Africa have ruled the death penalty unconstitutional; those in India and Germany have rendered constitutional "positive discrimination" programs for discriminated-against minorities; and courts in Germany and Ireland have upheld the rights of fetuses to life. These issues strike at the heart of democratic policy making, and yet the final word came from courts. Which means, as more and more scholars are acknowledging, we ignore the growing importance and power of courts abroad at our own peril.

But there is more – at least in the US context. Over the past decade or so, we have seen the production of several multiuser public databases on courts and their decisions. We think here of Harold J. Spaeth's US Supreme Court Data Base, which contains scores of attributes of Court decisions, handed down since 1953, ranging from the date of the oral argument to the identities of the parties to the litigation to how the justices voted; and Donald R. Songer's US Court of Appeals Data, which houses information on cases decided in the courts of appeals between 1925 and 1996.

To be sure, these databases are not panaceas; they cannot directly answer every question scholars may have on courts and judges. On the other hand, users can adapt them to suit many purposes, thereby answering a range of perennial ones. That scholars are now doing so seems evident, for, at least in our estimation, the existence of these multiuser databases has contributed enormously to the expansion of our empirical reference points. To see this, we only need consider the growth of research on the US Courts of Appeals. Just a few years ago, prior to the appearance of Songer's data set, circuit courts received only limited scholarly attention at conferences and in the journals; today, entire panels are devoted to courts of appeals and articles about them are no longer a rarity.

This makes the lack of an equivalent to the US Court of Appeals or US Supreme Court Data Base for courts outside America's borders all the more unfortunate. Several efforts are in progress – we think here of the project C. Neal Tate and his colleagues have undertaken to collect information on decisions of several high courts abroad. But, again assuming agreement over the desirability of efforts focusing in part or in full on courts elsewhere, we would encourage the community to develop more of these critical resources. Some, such as the Tate project, might mirror the existing US Supreme Court and US Court of Appeals databases to the extent that they would focus on court decisions. But we could imagine others that would be more institutionally based, containing data on factors such as the formal rules and norms governing the selection of judges elsewhere and those pertaining to jurisdiction and standing, as well as data on workloads. As anyone who has tried to collect such information on a large-scale basis can attest, this will be no easy task. But it is one that would provide an important and perhaps even necessary – if the Court of Appeals project is any indication – inducement for more research on courts abroad.

Theory

If there has been a growth industry in the study of courts and judges it is in the realm of theory – "a reasoned and precise speculation about the answer to a research question" (King, Keohane, and Verba, 1994: 19). Just a little over 50 years ago, the vast majority of studies lacked any; many were simply doctrinal analyses of the products of judicial deliberations – that is, decisions and opinions – that were heavy on the doctrine, short on analysis, and devoid of theoretical underpinnings. But, as Thomas Walker (1994: 4) has written, all that changed in the late 1950s and early 1960s: "Theoretical innovation exploded. Attitude theory, social background theory, role theory, fact pattern analysis, and others were used in attempts to explain judicial decision making." To Walker's list, we – writing in 2001 – could add dozens more that scholars now invoke to guide their work on courts and judges (and not just research on judicial decision making), ranging from theories that are simple, small, or tailored to fit particular circumstances to those that are grander in scope, seeking to provide insight into a wide range of phenomena.

This is not to say that atheoretical work on courts and judges no longer sees the light of day. But these days scholars working in the traditional academic disciplines, along with their counterparts in the law schools, are acknowledging, in increasing numbers, the value of using theory to develop "observable implications" (i.e., things that we would expect to detect in the real world if our theory is right) that they can then assess against "data" (more on this below). Eskridge's (1991a, 1991b, 1994) seminal work on statutory interpretation, which invokes positive political theory (PPT) to understand how justices interpret statutes, serves to make the point. Under his use of PPT, justices have goals, which, according to Eskridge, amount to seeing their policy preferences written into law, but realize that they cannot achieve them without taking into account the preferences and likely actions of other relevant actors – including congressional gatekeepers (such as chairs of relevant committees and party leaders), other members of Congress, and the President – and the institutional context in which they work.

To develop observable implications from this account, Eskridge employs pictures of the sort we display in Figures 10.1a and b. In each, we depict a hypothetical set of preferences over a particular policy, say, a civil rights statute. The horizontal lines represent the (civil rights) policy space, here, ordered from left (most "liberal") to right (most "conservative"); the vertical lines show the preferences (the "most preferred positions") of the relevant actors: the President, the median member of the Court, of Congress, and of the key committees and other gatekeepers in Congress that make the decision over whether to propose civil rights legislation to their respective houses. Note we also identify the committees' indifference point "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber" (Eskridge, 1991a: 378).

Now suppose that the Court has accepted a case that calls for it to interpret the civil rights statute. How would the Court proceed? From Eskridge's theory the following observable implication emerges: given the distribution of the most preferred positions of the actors, the 10.1a Court would not be willing to take the risk and interpret the statute in line with its most preferred position. It would see that Congress could easily override that position and that the President would support Congress. Rather, under Eskridge's theory, the best choice for justices interested in seeing the law reflect their policy preferences is to interpret the statute near the

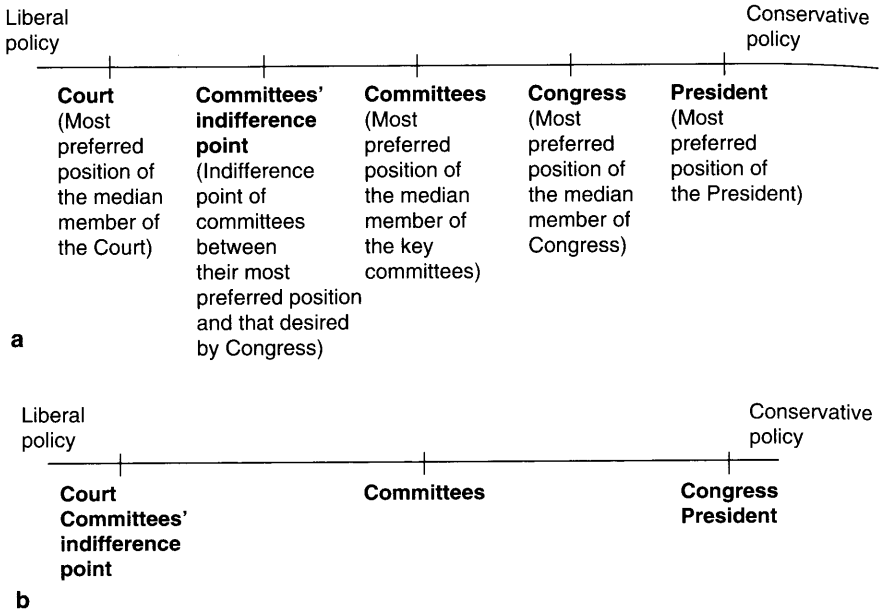

Figure 10.1 **a** Observable implication 1: Policy is set on the commitee's indifference point. **b** Observable implication 2: Policy is set on the commitee's indifference point/Courts' most preferred position.

committees' indifference point. The reason is simple: since the committees are indifferent between that point and the position preferred by the median legislator, they would have no incentive to introduce legislation to overturn a policy set at their indifference point. Thus, the Court would end up with a policy close to, but not exactly on, its ideal point without risking a congressional backlash. The distribution of preferences in Figure 10.1b points to a different observable implication: the Court would set policy in a way that reflects its sincerely held preferences. For if it votes its preferences (which are comparatively liberal) and sets the policy at its most preferred position, the relevant congressional committees would have no incentive to override the Court: since their indifference point is the same as the Court's most preferred position, they would be indifferent to the policy preferred by the Court. Note that for both implications the theory suggests the main explanatory variables – the preferences of the key actors relative to one another and the dependent variable – of the Court's interpretation of a statute.

Positive political theory is not the only or necessarily best tool (though we believe it is) for analyzing statutory interpretation. But the broader point of the Eskridge example should not be missed – and happily, at least these days, it is not – the importance of starting with theory, and "good" theory ("good" to the extent that it is capable of generating observable implications about the phenomenon it seeks to describe or explain) to guide *empirical* research.

Methodology

We emphasize "empirical" to acknowledge that our discussion thus far has, in fact, focused primarily on empirical research – research based on observations of the

world (i.e., on data or facts about the world). We do so for a simple reason: even though *purely* normative or theoretical work on courts and judges exists, the vast majority of studies in this field, including the many articles whose main purpose is normative, are empirical. This is not to suggest, however, that all research on courts and judges, at least in terms of its methodology, is similar. Quite the opposite: it differs on at least two dimensions – the types of data invoked and tools used to analyze data.

On both, the range is large. "Data" on courts and judges come in quantitative (numerical) and qualitative (nonnumerical) forms; they are in some studies historical and, in others, contemporary; they may be based on legislation or case law, the results of interviews or survey research, or the outcomes of secondary archival research or primary data collection. Some data that scholars in this field use are quite precise, relatively certain, or both; others are vague or very uncertain. They have been directly observed or indirect proxies, and they have been anthropological, sociological, economic, legal, and political. In other words, if the word "empirical" denotes evidence about the world based on observation or experience, then that evidence, in research on courts and judges, comes in just about every conceivable form, from just about any conceivable source.

Ditto for the types of tools scholars invoke to analyze their data. These days analytic strategies range from simple categorization to complex multivariate models. In other words, methodological diversity abounds, as does methodological innovation. That is (at least in part) because specialists in methodology (though not necessarily in things judicial) have come to see that the unique sorts of data scholars have amassed on courts and judges can provide useful fodder for the development and assessment of innovative analytic strategies (e.g., Caldeira, Wright, and Zorn, 1999; Caldeira and Zorn, 1998; Martin, 2001). We think here of work making use of Bayesian hierarchical (Martin and Quinn, 2001) and event count (Spriggs and Hansford, 2001) models, to name just two.

What results have these and the multitude of other procedures yielded? In the next sections, we address this question via an exploration of four substantive topics that have long intrigued scholars of courts and judges.

Judicial Selection and Retention

Of all the difficult choices confronting societies when they go about designing legal systems, among the most controversial are those pertaining to judicial selection and retention: how ought a nation to select its judges and for how long should those jurists serve? Indeed, some of the most fervent constitutional debates – whether they transpired in Philadelphia in 1787 (Farber and Sherry, 1990) or in Moscow in 1993–4 (Hausmaninger, 1995) – over the institutional design of the judicial branch implicate not its power or competencies; they involve who would select and retain its members.

It is thus hardly surprising to find an immense amount of scholarship on questions pertaining to judicial selection and retention, ranging from the primarily normative (Garrow, 2000; Oliver, 1986) to the mainly empirical (Segal, Cameron, and Cover, 1992), to work falling between the two (Hall, 2001). In this section, we focus on one that has generated considerable debate in recent years: what effect(s) do rules governing selection and retention have on the types of men and women who will serve and, in turn, the choices they, as judges, will make? This is a question that

strikes at the heart of many debates over the constitutional design of the judicial branch but it is one that yields mixed responses from scholars.

Let us begin with the extent to which the rules affect who becomes judges. At least at the US federal level, where Article II of the Constitution mandates that judges attain their positions through presidential nomination and Senate confirmation, the answer appears to be a good deal. For, depending on the level of the position (trial, circuit, or supreme court), the president enjoys some latitude on who to nominate and, thus, at least according to Sheldon Goldman (1997), are relatively free to advance one or some combination of motivations: the personal (using the nominating power to please a friend or associate), partisan (viewing nominations as vehicles for shoring up electoral support for their party or for themselves within their party or policy), and policy (attempting, via nominations, to enhance the substantive policy objectives of an administration).

Undoubtedly, then, because the formal rules embedded in Article II of the Constitution bestow on the President the power of nomination, presidents have been able to pursue distinct objectives, leading to the nomination of different kinds of people to the bench. But – and this is a big but – because the rules also specify that presidents must obtain the Senate's approval of their nominees, the rules may constrain their ability to achieve their goals (whatever they may be). And, indeed, research has shown that presidents understand this constraint and act accordingly (Moraski and Shipan, 1999). So when the President and the Senate share preferences over the future direction of the judiciary the President is relatively free to appoint a nominee of his choice; but when they are distant, the President must move toward the Senate if he wants to see his nominee confirmed. Seen in this way, the formal rules governing judicial selection not only seem to have an impact on the actors charged with appointing judges but, and more relevant here, they have an effect on who will and will not attain seats on the nation's judiciary. Robert Bork, though clearly a favorite of the Reagan administration, was simply untenable, ideologically speaking, from the Senate's point of view; Anthony Kennedy, though perhaps not Reagan's ideal appointment, was acceptable.

Do we find the same impact of rules at the state level? Surely if it were the case that if most governors operated under the same institutional context as presidents, we might find similar, if not identical, effects. But most do not. These days, election (whether by partisan or nonpartisan ballot) is the principal method of selection of appellate judges in 22 states; the legislatures elects the judges in two states; and the so-called merit plan operates in 22 states. Only in four states does the executive (with the approval of elected bodies in New Jersey and New Hampshire) appoint judges.

Whether these different procedures yield different kinds of judges is an interesting question, and, after years of debate, some consensus appears in the offing. At the very least, it appears clear that the various mechanisms fail to yield judges with "markedly different or superior judicial credentials" (Glick and Emmert, 1987: 232). Slightly more controversial is whether the mechanisms produce a more diverse bench. But even here researchers are converging – with the vast majority now agreeing with Flango and Ducat (1979: 31): "it appears that neither educational, legal, local, prior experience, sex, race, nor role characteristics clearly distinguish among judges appointed under each of the five types of selection systems" (see, e.g., Alozie, 1990; Berg, Green, Schmidhauser, and Schneider, 1975; Canon, 1972; Champagne, 1986; Dubois, 1983; Glick, 1978; Glick and Emmert, 1987; Watson and Downing, 1969; but see also Graham, 1990; Scheb, 1988; Tokarz, 1986; Uhlmann, 1977.)

But these findings do not speak to the second part of the question (and, perhaps the more consequential one at that) that we asked at the onset of this section: what effect(s) do rules governing selection and retention have on the choices that the actors appointed under those systems – judges – make? Do different methods of selection recruit judges with distinct outlooks toward their roles, substantive issues of public policy, or both?

While attempts to address these questions have generated scores of scholarly papers, unfortunately little agreement exists. Some commentators contend that judges who are elected are not likely to behave any differently from those who are appointed (Canon and Jaros, 1970; Flango and Ducat, 1979; Lee, 1970). And it has been strongly argued that accountability to the people, the reason for electing judges, does not occur, because voters are usually unaware and uninformed about the activities of judges. So judges in these electoral states are just as free as their appointed counterparts to ignore the whims of the public and political officials when making their decisions. Other scholars disagree. Hall (2001) shows that judicial elections are as competitive as those for Congress. Given that more than 90 percent of congressional incumbents who stand for re-election win, this figure is not dramatic, but it may mean that elected judges cannot afford to ignore public sentiment when making their decisions.

And there is mounting evidence that they do not. Academics have demonstrated that popularly elected justices are more likely to suppress dissent (Brace and Hall, 1993; Vines, 1962; Watson and Downing, 1969) and reach decisions that reflect popular sentiment (Croly, 1995; Gryski, Main, and Dixon, 1986; Hall 1987a, 1987b; Pinello, 1995; Tabarrok and Helland, 1999).

Though these findings are intriguing, far more scholars ought to weigh in before we can answer conclusively questions about the effect of judicial selection and retention systems on judicial choices. That work could (continue to) commence at the state level, where variation in formal mechanisms abounds. But, to us, the most promising avenues for future study lie beyond the borders of the United States. Indeed, as readers will undoubtedly notice, notably missing from our discussion thus far are analyses of judicial selection and retention abroad. That is because such analyses are notably missing from the literature, even though the variation abroad makes for the stuff of truly comparative analyses. For, while many nations, typically those using the civil law system, have developed similar methods for training and "choosing" ordinary judges, they depart from one another rather dramatically when it comes to the selection of constitutional court justices. In Germany, for example, justices are selected by Parliament, though six of the 16 must be chosen from among professional judges. In Bulgaria, one-third of the justices are selected by Parliament, one-third by the President, and one-third by judges sitting on other courts. Moreover, in some countries with centralized judicial review, justices serve for a limited period of time. In South Africa, for instance, they hold office for a single 12-year term, in Italy a single nine-year term. In others, including the Czech and Korean Republics, justices serve for a set, albeit renewable, term.

Variation is even present in societies that grew out of similar legal traditions and created their court structures at roughly the same historical moment. Table 10.1, which depicts the formal institutions governing the selection of constitutional court judges in the former republics of the Soviet Union, makes this clear: The republics

Table 10.1 Selection systems used in the former republics of the Soviet Union

Country	*Selection system*	*Tenure*
Armenia	Parity in appointment: Parliament and President.	Life tenure
Azerbaijan	Nominated by President. Appointed by Parliament.	10-year renewable terms[a]
Belorussia	Parity in appointment: President and upper Chamber of Parliament	11-year renewable terms
Estonia	Nominated by the Chief Justice of Supreme Court. Appointed by Parliament	Life tenure
Georgia	Parity in appointment: President, Parliament, Supreme Court	Nonrenewable 10-year term
Kazakhstan	Parity in appointment: President, Chairs of Upper and Lower Houses	Nonrenewable 6-year term but half members must be renewed every 3 years.
Latvia	3 nominated by Parliament; two each by the Cabinet of Ministers and Supreme Court. Appointed by Parliament.	Nonrenewable 10-year term
Lithuania	Parity in nomination: President, the Chairs of Parliament and Supreme Court. Appointed by Parliament.	Nonrenewable 9-year term
Kyrgyzstan	Nominated by President. Appointed by Parliament.	Nonrenewable 5-year term
Moldova	Parity in appointment: Parliament, the President, and Magistracy	6-year renewable terms[a]
Russia	Nominated by President. Appointed by upper chamber of Parliament.	Was life tenure; changed to nonrenewable 12-year term.
Tajikistan	Nominated by President. Appointed by Parliament.	Nonrenewable 5-year term
Turkmenistan	Nominated and appointed by President.	5-year term but President can remove before completion
Ukraine	Nominated by President. Appointed by Parliament.	Nonrenewable 5-year term
Uzbekistan	Nominated by President. Appointed by Parliament.	Nonrenewable 5-year term

Notes: [a] Different procedures may be used for nomination and appointment of the Chief Justice.

took at least five different approaches: (1) executive/legislative parity (each able to appoint a specified number of judges; (2) executive/judicial (along with, in some instances, legislative) parity; (3) executive nomination (usually) with legislative confirmation; (4) executive/legislative/judicial parity in nomination with parliamentary confirmation; (5) judicial appointment.

We ought to exploit this variation to address some of the perennial concerns in this area of inquiry – for example, those we have considered in this section – as well as to open some new avenues. While so much of the literature has focused on the effects of judicial selection, and we have followed suit, future work ought to consider questions that scholars have devoted almost no time answering – those

associated with institutional choice: why do societies choose particular selection and retention institutions? Why do they formally alter those choices? Comparative analyses, again owing to variation among countries, present an extremely fruitful way to gain leverage on these sorts of important but heretofore unaddressed questions.

Access to Courts

Just as institutions governing judicial selection vary from country to country, so too do those pertaining to access to courts. But, as a general matter, judges can only decide issues when they come to court in accordance with the jurisdictional rules that the constitutional text or the legislature has prescribed. Yet even then, the judicial process does not automatically go into operation. Judges, in the United States and throughout the world, have imposed a series of informal barriers or developed norms that act as barriers to their courtrooms.

The use of formal and informal norms has given rise to many questions, ranging from whether those norms work to the advantage of particular litigants, to what effect they (and other forces) may have on the agendas of courts. Here we explore yet another – what factors, whether norms or others, influence how judges serving on discretionary courts make decisions over which disputes to hear and resolve and which to reject, that is, how do they go about setting their agendas? This question has fascinated generations of judicial specialists (e.g., Boucher and Segal, 1995; Caldeira and Wright, 1988; Schubert, 1959; Tanenhaus, Schick, Muraskin, and Rosen, 1963; Ulmer, 1972) – as well it should. After all, agenda setting is one of the most important activities undertaken by justices, or any political actors for that matter (see Cobb and Elder, 1983; Kingdon, 1984; Riker, 1993). And it is made even more so in the case of courts, given that the workloads in some are truly monumental – the US Supreme Court receives roughly 7,000 requests for review, the Russian Constitutional Court about 8,000 – and their discretion seemingly equally as high – these days, Supreme Court justices typically hear and decide fewer than 100 cases per term, Russian justices roughly 40. Even courts with fewer cases on their dockets, such as the Canadian Supreme Court, which receives about 450 requests for leave each year, may exercise a substantial degree of discretion; indeed, the Canadian Court decides only about 80 per year.

And, yet, despite all the literature on this topic, scholars have not come to agreement on an answer. Some offer *legal or jurisprudential* models to explain the agenda-setting process (Provine, 1980); others see it as a clear example of *sincere* voting to further policy goals (Krol and Brenner, 1990); still a third set suggest that it is laden with *strategic* calculations (Caldeira, Wright, and Zorn, 1999); finally there are those who point to the *litigants* themselves (Ulmer, 1978). This disagreement, we should stress, is not just a matter of emphasis; it is fundamental and it is an impediment to the development of an understanding of a crucial part of the judges' work – the establishment of their institutional agenda. We return to this point later in the section. For now, let us consider the four basic perspectives with the acknowledgement that while all are dominant, no one dominates.

Scholars adhering to a legal or jurisprudential account hold that judges seek to reach principled decisions at the agenda-setting stage – those based largely on the impartial dictates of various rules governing their review process. In the United

States, that would be Rule 10, which specifies that the justices will accept cases over which conflict exists in the state and federal courts or with Supreme Court precedent; in Canada, the key institution is Section 40(1) of a 1975 amendment of the Supreme Court Act, which places emphasis on the "public importance" of issues raised by counsel (Flemming, Krutz, and Schwank, 1999). When judges follow these sorts of rules, so the argument goes, they are engaging in principled agenda setting because the rules themselves are impartial as to the type of possible result over a particular petition. If judges looked only at whether conflict existed or not or whether the dispute was of public importance their agenda-setting decisions would not reflect their own policy preferences over the substantive consequences of a case but, rather, those of the dictates of the rule itself.

Certainly, there is some support that judges do, in fact, behave in this way. Based on interviews with US Supreme Court justices and their clerks, Perry (1991: 127) concludes that: "Without a doubt, one of the most important things to all the justices is when there is a conflict in the circuits. All of them are disposed to resolve conflicts when they exist and want to know if a particular case poses a conflict." Flemming et al.'s (1999) research reinforces this general conclusion from beyond the borders of the United States. Based on a painstakingly detailed analysis of the Canadian Supreme Court's agenda-setting decisions, they conclude that "jurisprudential factors that reflect the 'public importance' rule" (1999: 21) are the most significant predictors of review.

While virtually all scholars who study agenda setting believe that the legal approach has some merit, many would take issue with the view that it provides *the* key to explaining agenda setting, at least in the US Supreme Court. As Caldeira and Wright (1988: 1114) write, Rule 10 is not all that helpful in understanding "how the Court makes gatekeeping decisions." During the 1989 term, for example, the justices declined to review more than 200 petitions that in one way or another met the criteria stated in its rule (Baum, 2001); and, of the 184 cases it agreed to decide during its 1981 term, only 47 (25%) possessed real conflict (O'Brien, 2000).

Seen in this way, the legal considerations listed in various court rules may act as constraints on the justices' behavior (e.g., the American Supreme Court might reject petitions lacking genuine conflict) but they do not necessarily further our understanding of what occurs in cases meeting the criteria. That is why scholars have looked elsewhere, with one set urging for the adoption of the *sincere policy model* (also called an error-correction or reversal approach). On this account, judges have policy goals at the review stage – that is, they would like to see the final opinion of their court reflect their preferred position – and they achieve them by voting sincerely. In operational terms, judges will vote to grant those cases in which they disagree with the lower court outcome. For example, a right-of-center judge will vote to hear cases in which the lower court reached a liberal decision; a left-of-center justice would prefer to review those decided conservatively below.

Because in many countries constitutional tribunals are not part of the ordinary court system, this hypothesis is quite difficult to assess outside the context of American-styled judiciaries. Nonetheless, at least within the United States, a good deal of support exists for it. In a study that considered the effect of policy preferences while holding constant other factors that may affect the agenda-setting decision, Caldeira and Wright (1988: 1120), for example, conclude that "justices' ideological predilections affect their decisions in much the same way that other elite political actors are motivated by their personal ideological agendas." Providing some

confirmation of these results, albeit of agenda setting of a somewhat different form, is George's (1999) study of the determinants of the decision to grant en banc review by US Courts of Appeals. Her data show that "extremely conservative courts of appeals . . . are far more likely to rehear a liberal decision en banc than a conservative one" (1999: 256).

In light of these sorts of findings, many scholars have come to accept the view that judges are policy-oriented and actively make choices to advance that goal at the review stage or, for that matter, at all others (see, e.g., Caldeira, Wright, and Zorn, 1999; Epstein and Knight, 1998; Eskridge, 1991b; Gely and Spiller, 1990; Maltzman, Spriggs, and Wahlbeck, 2000; Spiller and Gely, 1992). Where questions arise is over whether they pursue their policy goals in a vacuum (i.e., they always vote on the basis of their sincere preferences) or they pursue them with some consideration of the preferences and likely actions of their colleagues. On the *strategic policy account*, they do the latter: in deciding whether or not to review a case, judges take into account the likelihood of their ability to win at the merits stage. After all, proponents of this account ask, why would policy-oriented justices vote to review a case if they did not think their side could muster sufficient support at the merits stage?

Does the evidence support this view? Yes but it is not monolithic. As early as 1959, Schubert relied on inferences from patterns of data (rather than actual certiorari votes) to argue that during the 1940s, liberals on the US Supreme Court chose to grant FELA cases in which the lower court had decided against the worker *and* in which the worker would have a good chance of winning at the merits stage. In other words, justices "defensively deny" (when they decline to review cases that they would like to hear because they believe they will not prevail at the merits stage) but they do not "aggressively grant" (when they take a case that "may not warrant review because they have calculated that it has certain characteristics that would make it particularly good for developing a doctrine in a certain way, and the characteristics make it more likely to win on their merits . . . " Perry, 1991: 208). But Boucher and Segal (1995) claim that justices pay attention to probable outcomes when they wish to affirm (an aggressive grant strategy) but not when they desire the Court to reverse, while Caldeira and his colleagues (1999) find evidence of both aggressive grants and defensive denials.

Yet a fourth perspective on agenda setting asserts that the status of particular parties, whether "repeat players" or "one-shotters," "upperdogs" or "underdogs" explains review decisions. McGuire and Caldeira (1993), for example, show that the US Supreme Court is more likely to grant review when an experienced attorney represents the appellant; Ulmer (1978) demonstrates that upperdogs, under certain conditions, have a clear advantage in the American high court; and Flemming and his colleagues (1999: 23) assert that "the status of parties and kinds of lawyers who represent them influence the odds of leave" in the Canadian Supreme Court – though with the caveat that "they take a backseat" to those factors designed to capture the "public importance" rule. Finally, along similar lines, numerous studies have indicated that when the federal government is a petitioner to a suit, the US Supreme Court is more likely to grant review (Armstrong and Johnson, 1982; Caldeira and Wright, 1988; Tanenhaus et al., 1963; Ulmer, 1984).

Why the United States (which is represented by the Solicitor General in the Supreme Court) is so successful is open to speculation. What we do know, and what we hope readers can gather from even this short review, is that it is easy to

understand why some scholars have concluded that the agenda-setting literature is a "mess" (Boucher and Segal, 1995). Even those who agree on the basic motivation of judges at the review stage – the pursuit of policy – disagree over whether judges advance that goal by always voting sincerely or by making strategic calculations about the eventual outcome at the merits stage.

It is also worth stressing that this "mess" is a nontrivial one. To the contrary: it has a major effect on our ability to reach a precise understanding of the agenda-setting process, to generate clear-cut predictions. Compounding matters even further is the existence of other plausible explanations that scholars have yet to consider in any serious fashion. For example, it is possible that judges do engage in strategic agenda setting but not with regard to one another; rather they may be attentive to the preferences and likely actions of other relevant actors – such as executives and parliaments – when they go about their agenda-setting task. Consider this comment, from a justice on the Russian Constitutional Court:

> When in December 1995, before the [parliamentary] elections and in the very heat of the electoral campaign, we received a petition signed by a group of deputies concerning the constitutional validity of the five percent barrier for party lists. We refused to consider it. I opposed considering this request, because I believe that the Court should not be itching for a political fight... The Court must avoid getting involved in current political affairs, such as partisan struggles. (Nikitinsky, 1997: 85)

Though this does not provide proof positive of the existence of yet another explanation of agenda-setting decisions, it is suggestive: The field may be even messier than many scholars think.

What then could be done to clean up this "mess"? Several things come to mind. First, scholars ought to refrain from taking certain "short cuts" when they conduct their studies – short cuts that are potentially problematic and may explain the mixed findings in this area. One that comes readily to mind is selection on the dependent variable: in a nontrivial fraction of published studies (e.g., Brenner, 1979; Krol and Brenner, 1990; Palmer, 1982; Provine, 1980) the authors analyze only those cases to which the court in question granted review rather than the full set of petitions – grants and denials. We understand why scholars invoke this strategy – they may lack the time, resources, or both to take another route. But we also must acknowledge that it is replete with potential pitfalls, the most important one being the introduction of bias: since we know (at least in the US context) that cases granted review are not representative of the universe of petitions – in fact, a great deal of research has demonstrated that they vary systematically from nongranted cases – it may be difficult to reach high quality inferences about the way in which justices select cases to review by considering only those petitions they grant. Second, as scholars eliminate this and other shortcuts, they could make an important addition. Just as with the case for judicial selection and retention, they ought to increase the reach of their studies to include discretionary courts abroad. As the author of one of the few comparative analyses in this area (Flemming, 1997: 1) put it: "Very little is known about agenda setting by courts of final appeal in countries other than the United States. As a consequence, we do not know if the large and well-developed American literature on this topic can be generalized beyond the U.S. Supreme Court." Having just undertaken an extensive review of the relevant literature, we could not agree more.

Limitations on Judicial Power

In the last section we examined research exploring how judges on discretionary courts make decisions that, in effect, limit access to their tribunals; this section considers scholarship investigating the limitations imposed on judges by their political and institutional settings. Just as the other bodies of literature we have thus far considered are vast, so too is the research in this area – with previous work suggesting that judges must be (or need not be) attentive to the preferences and likely actions of a wide range of actors, from members of the executive and legislative branches (e.g., Eskridge, 1991a, 1991b; Spiller and Gely, 1992) to judges on higher courts (Segal, 1995; Songer, Segal, and Cameron, 1994) to citizens (Mishler and Sheehan, 1993, 1996; Stimson, MacKuen, and Erikson, 1995).

In what follows, we have chosen to focus on literature exploring the limits that elected political actors may (or may not) impose on judges. We do so for several reasons, chief among them is this: while questions concerning the effect of elected actors are not new – scholars have been raising them for nearly a half century, maybe longer – today's researchers have invoked new theories and methodologies, as well as expanded their substantive concerns to incorporate courts abroad and to explore them. Accordingly, this line of inquiry has a very contemporary feel to it and one worthy of consideration here.

The central question within this recent spate of literature is a simple one: to what extent do members of legislatures and executives constrain the behavior of judges? Developing clear responses, though, is far from simple. To begin with there is the matter of why we even pose this question, at least as it pertains to judges who need not face re-election or attain approval from elected actors to retain their jobs; in other words, why would we even expect judges with, say, life tenure, to pay heed to the preferences and likely actions of elected actors? Some scholars say we should not. Segal and Spaeth (1993), for example, claim that, under certain institutional conditions – including the existence of life tenure, the lack of superiors in the judicial hierarchy, and the dearth of political ambition – judges on high or constitutional courts will be free to ignore the desires of elected actors. Under these conditions, the judges will simply behave in ways that accord with their own policy preferences.

But others say that even judges who meet Segal and Spaeth's conditions must take into account the preferences and likely actions of legislatures (Epstein and Knight, 1998; Epstein, Knight, and Martin, 2001; Murphy, 1964; Rosenberg, 1992). They make this claim on a number of grounds: key among them is that even if judges are "single-minded seekers of legal policy" (George and Epstein, 1992: 325) as Segal and Spaeth contend, why would those judges not care about the ultimate state of that policy? To rephrase the question: why would justices who are policy-preference maximizers take a position they know the legislature would overturn? To argue that justices would do this – merely vote their attitudes – is to argue that courts are full of myopic thinkers, who consider only the shape of policy in the short term. Such an argument does not square with much important writing about how American-style courts interpret statutes – including Eskridge's (1994, 1991a, 1991b), which we discussed earlier. It also does not seem to sit comfortably with an emerging body of literature on constitutional adjudication. While legislatures and executives cannot typically pass legislation to overturn decisions reached by courts on constitutional grounds, they can take many other steps to punish "errant" courts, thereby making it

difficult for them not just to achieve policy goals but to develop or maintain some level of legitimacy, as well. Rosenberg (1992) outlines a few of these steps, all of which the US Congress, the President, or both have attempted to take:

> (1) [U]sing the Senate's confirmation power to select certain types of judges; (2) enacting constitutional amendments to reverse decisions or change Court structure or procedure; (3) impeachment; (4) withdrawing Court jurisdiction over certain subjects; (5) altering the selection and removal process; (6) requiring extraordinary majorities for declarations of unconstitutionality; (7) allowing appeal from the Supreme Court to a more 'representative' tribunal; (8) removing the power of judicial review; (9) slashing the budget; (10) altering the size of the Court. (Rosenberg, 1992: 377)

Rosenberg's list of weapons pertains directly to the American context. Even more radical steps have been taken abroad. In Russia, for example, President Boris Yeltsin, angry at its ability to check his power, suspended his nation's constitutional court in 1993. The justices were not able to resume their work until nearly two years later, when Russia adopted a new constitutional text.

It is these sorts of weapons, scholars argue, that lead judges to pay attention to the preferences and likely actions of those in a position to deploy them. But is such behavior on the part of justices wide-scale and wide-ranging? Given the state of existing literature, it is hard to tell.

Which takes us to a second complication: even if we believe that judges feel constrained by legislatures and executives, documenting that is extremely difficult. The chief problem is this: when judges rule in favor of, say, the existing regime, they may do so because they share the preferences of that regime, not because they are attempting to appease that regime. And distinguishing these forms of behavior – sincerely and sophisticated, respectively – turns out to be no easy task.

This is not to say that scholars have not tried. Quite the opposite: they have produced interesting analyses of the relationship between executives and legislatures and courts in Argentina (Helmke, 1999), Russia (Epstein, Knight, and Shvetsova, 2001), Germany (Vanberg, 1999), and, of course, the United States (Spiller and Gely, 1992). But the results have been somewhat mixed and the literature insufficiently developed to reach any firm conclusions yet.

What this suggests is that we still have a long distance to travel before we fully understand the effect elected actors may have on courts. We could say the same about the flipside – the constraint courts may place on legislatures and executives, which is, as some scholars have recognized, a topic ripe for further systematic analysis (Martin, 2001; Stone, 1994, 1995; Sweet, 2000) as well as about the many other actors with whom courts, directly or indirectly, interact. These include, as we mentioned at the onset, the public and other judges in the hierarchy. We are making substantial progress on these fronts but both deserve even more sustained attention given the potentially important role they may play developing a fuller appreciation of the role of courts in their societies.

Judicial Decision Making

It seems that we have started each new section with the claim that "this area has generated an immense amount of research." This is certainly true with regard to the other areas but it is doubly so for judicial decision making. Over the past five

decades, members of the law and society community have produced mounds of paper attempting to explain judicial decisions – be they decisions that involve fact finding, using precedent, or interpreting laws or constitutional texts. The result is a vast literature that approaches the subject from normative and positivist perspectives, with theories adopted and adapted from the social sciences and humanities, and with data that are qualitative and quantitative.

Once again no one chapter, much less a section of one chapter, could consider all this scholarship. And we will not try. Rather, our intent is to highlight an area that has attracted considerable attention from scholars studying judges in common law (and now even civil law) systems: what role does precedent play in court decisions? Research has supplied three distinct answers: a lot, some, or none.

When it comes to lower tribunals, there is little disagreement among scholars that precedent probably matters a lot – though they disagree on why that may be so. To some, the explanation lies in the hierarchy of justice (Segal, 1995; Songer, Segal, and Cameron 1994): because lower court judges do not want to be reversed by their "superiors," they abide by precedent established by those superiors. Take trial court judges: although their superiors – jurists on intermediate appellate courts – give a certain presumption to their judgments, reversals of lower courts' rulings do occur. By the same token, tribunals of last resort may have the opportunity to review decisions made by intermediate appellate courts; and they, too, have not hesitated to reverse their colleagues on lower courts. Rehnquist once explained why the US Supreme Court had, in the early 1980s, reversed 27 of 28 rulings by the Court of Appeals for the Ninth Circuit: "When all is said and done, some panels of the Ninth Circuit have a hard time saying no to any litigant with a hard luck story." Such extensive monitoring of one particular circuit may be exceptional; but, as Segal and his colleagues have demonstrated (Segal, 1995; Songer, Segal, and Cameron, 1994), the mere threat of review by the Supreme Court may induce judges of intermediate appellate courts to follow the commands of their superiors.

To others, the explanation lies not in the desire of judges to avoid reversal but in their interest in following "their professional obligations," in reaching principled decisions. Research adopting this view, as Kahn (1999) puts it,

> assumes that justices make decisions in an institutional context which informs the choices they make. It assumes that the Court's institutional norms and commitments are important for the maintenance of constitutional principles and Court decision-making. Moreover, justices must be principled in their decision-making process if they are to have the continued respect of their colleagues, the wider interpretive community, citizens, and leaders. Justices must not only convince us that a specific case decision is wise, but also that the principles upon which they base their decision, and upon which future cases are based, are appropriate. (Kahn, 1999: 176)

This perspective informs not just the use of precedent by lower court judges but, quite pointedly, by courts of last resort as well. And it is this part of the explanation – along with many others suggesting that precedent matters a lot for jurists serving on their nation's highest courts – that is the source of substantial disagreement. While Kahn and other adherents of his brand of "historical institutionalism" suggest that justices will follow principles, such as *stare decisis*, even when the principles are at odds with their preferences, others respond "poppycock": when judges do not have superiors, when they have life tenure, they need not be constrained by precedent just as they need not be attentive to the preferences of legislatures and

excutives; they can vote in accord with their own policy preferences (Segal and Spaeth, 1993, 1996; Spaeth and Segal, 1999).

There is yet a third response – one that lies between these two extremes: precedent neither is completely determinant or indeterminate of judicial outcomes; rather, it can serve as a constraint on justices acting on their personal preferences (Epstein and Knight, 1998; Knight and Epstein, 1996). On this account, judges have a preferred rule that they would like to establish in the case before them, but they strategically modify their position to take account of a normative constraint – a norm favoring precedent – in order to produce a decision as close as is possible to their preferred outcome.

Why would they do so? At least two reasons come to mind. First, there are prudential reasons to suggest that judges might follow precedent rather than their own policy preferences. *Stare decisis* is one way in which courts respect the established expectations of a community. To the extent that the members of a community base their future expectations on the belief that others in that community will follow existing laws, courts have an interest in minimizing the disruptive effects of overturning existing rules of behavior. If courts seek to radically change existing rules, then the changes may be more than that to which the members of the community can adapt, resulting in decisions that do not produce rules that will be efficacious. Second, there are normative reasons why justices may follow precedent as opposed to their own preferences. If a community has a fundamental belief that the "rule of law" requires courts to be constrained by precedent, then judges can be constrained by precedent even if they personally do not accept that fundamental belief. The constraint follows from the effect of the community's belief in its willingness to accept and comply with the decisions of their courts. If the members of the community believe that the legitimate judicial function involves the following of precedent, then they will reject as normatively illegitimate the decisions of any court that regularly and systematically violate precedent. To the extent that judges are concerned with establishing rules that will engender the compliance of the community, they will take account of the fact that they must establish rules that are legitimate in the eyes of that community. In this way a norm of *stare decisis* can constrain the actions of even those judges who do not share the view that they should be constrained by past decisions.

Just as all three responses to questions about the importance of precedent have their logical merit, so too do they have empirical support. As for the view that precedent has a major effect on court decisions, we already have mentioned a study by Segal and his colleagues substantiating as much at the intermediate appellate court level. At the highest rungs of judicial systems the effect too has been documented both in studies relying on historical and qualitative evidence (e.g., Kahn, 1999) and on contemporary and quantitative data (e.g., George and Epstein, 1992).

But there are equally as many studies that dispute these findings, that claim precedent has an almost negligible effect on decisions – even in those produced by lower courts. Research by Cross and Tiller (1998) suggests that judges of US Court of Appeals are less than faithful followers of precedents they do not like. When there is a "whistleblower" on the court – that is, a judge "whose policy preferences differ from the majority's" (Cross and Tiller, 1998: 2155) and who will expose the majority's failure to apply relevant precedents – the majority will follow *stare decisis*. But when a whistleblower is not present, according to Cross and Tiller, the court will attempt to manipulate precedents to conform to its political values. Segal and Spaeth (1996), focusing on the US Supreme Court, invoke a clever research design to arrive at a similar conclusion. They hypothesize that if precedent matters, it ought to affect the subsequent decisions of members of the Court. If a justice dissented from a decision establishing a particular precedent, the same justice would not dissent from a subsequent application of the precedent. But that was not the case. Of the 18 justices included in their study, only two occasionally subjugated their preferences to precedent (see also Spaeth and Segal, 1999).

Finally, in a critique of Segal and Spaeth's work, we (Knight and Epstein, 1996) offered widespread evidence of behavior that is consistent with the existence of a norm of respect for precedent and that is inconsistent with the lack of such a norm. That evidence ranged from the use of precedent in attorneys' briefs, to appeals to precedent made by Supreme Court justices in their private conferences, to citations to precedent in court decisions.

Undoubtedly, this debate will continue as all sides muster more and more support for their positions. Some of that support will inevitably come from research that maintains a focus on US courts at all levels, but we think researchers would be well advised to gather evidence from other tribunals. Work that systematically looks at the correlates of judicial decisions in other common law systems certainly exists (for a view, see Tate and Haynie, 2001) but much of it is dated or considers just a few (with precedent often not among them). At least to us, scholars of different minds on the importance (or lack thereof) of precedent should find it nearly irresistible to turn to courts abroad to develop and assess more and more observable implications of their theories. We could of course say the same about virtually every topic we explored herein.

Discussion

If anything, this brief essay has lived up to a promise we made at the onset: we could only skim the surface (and now have). We did not cover many strains of research in the areas we did cover; we left uncovered many areas altogether. Within the latter, we are particularly regretful that we lacked space to discuss the impact of courts and judges – a subject that is of considerable interest to law and society scholars and one that has generated deep debate in recent years, or at least since publication of Rosenberg's (1991) *The Hollow Hope*. In that path-breaking book, Rosenberg argued that *Brown v. Board of Education* (1954) produced little integration in public schools in the South until Congress, at the insistent urging of the President, the Department of Justice, the US Commission on Civil Rights, and the broader civil rights movement, had enacted various pieces of civil rights legislation. This specific finding, along with Rosenberg's more general claim – that only under a very particular set of circumstances can courts generate significant social change – has its share of supporters and detractors. Standing out among the latter is McCann (1994) who documents how various groups and attorneys used litigation to extract from reticent employers compliance with statutes and appellate decisions promoting the cause of equal pay for women.

And, yet, even with this (and other) glaring omission(s), we see the emergence of several themes. Some concern the role rules play in structuring the choices judges make; others implicate the generalizability of findings across judges working at different levels in their legal systems and in different societies. But at least one takes us back to our starting point: while scholars have traveled some distance in

their quest to understand various features of judicial processes as they pertain to courts and judges, substantial gaps remain in our knowledge. Assuming a continued emphasis on the development of theory, the expansion of our empirical targets, and the application of cutting-edge technology, however, judicial specialists will fill these gaps and fill them soon enough to make the task of those who write chapters on "Courts and Judges" for future volumes even more daunting than the one we faced.

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11

Jurors and Juries

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Many countries employ some form of lay participation, including the jury, in their legal systems. Lay participation in legal decision making is justified on a number of grounds. For example, supporters of the jury system claim that it improves decision making and reduces the impact of biased or corrupt judges. The lay jury more fully represents the community than elite law-trained judges. Jury service is said to educate the public about the rules and responsibilities of citizenship. Jury decisions better reflect contemporary community values and are thus more likely to be seen as legitimate. This chapter surveys the theoretical ideas, empirical studies, and political context surrounding the use of the jury in criminal and civil trials.

The enthusiasm for lay participation in the form of the jury has waxed and waned over the centuries, and in recent times has again become increasingly controversial. Some opponents maintain that although laypersons may once have been appropriate as legal decision makers, today's criminal and civil disputes are often too complex on evidentiary and legal grounds for lay jurors to fully understand. The jury is also charged with being soft on crime, racist, and holding other prejudices. Business leaders chime in with complaints about the anticorporate bias and unpredictability of civil jury decisions. Criticisms over incompetence and bias have stimulated political and legal efforts to reduce the jury's scope.

The political controversy over the jury has encouraged a good deal of scholarly work about the jury as an institution. In the tradition of law and society scholarship, some researchers have examined the historical, social, and political factors that encourage or discourage the use of the jury and other forms of lay participation in legal decision making.

Other scholarship has focused more specifically on how the jury fulfills its multiple functions. Models of juror and jury decision making and empirical studies of the impact of evidence, legal instructions, individual attitudes, and personal characteristics have provided new insights into how jurors undertake their task. Additional work has addressed the criticisms that jurors are incompetent and biased. Results