

# Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics

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CORNELL W. CLAYTON AND HOWARD GILLMAN, EDS. *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press, 1999. 344 pp. \$55.00, cloth; \$19.00, paper.

HOWARD GILLMAN AND CORNELL CLAYTON, EDS. *The Supreme Court in American Politics: New Institutional Interpretations*. Lawrence: University Press of Kansas, 1999. 302 pp. \$40.00, cloth; \$17.95, paper.

The field of “public law” in political science is somewhat ill defined. Its practitioners range from political theorists interested in the normative underpinnings of the law to statisticians interested in the correlates of judicial voting. The output of the Supreme Court, however, looms large on the landscape for many approaches to the field. In the first decades of the century, political scientists were unlikely to focus specifically on the explanations for the Court’s decisions but were more likely to be interested in a broad range of issues related to the courts and the law. Since the “behavioral revolution” that swept the social sciences in the 1950s, however, judicial decision making has been at the core of the field. Over the past several decades, substantial progress has been made in identifying patterns of judicial voting behavior and the determinants of Court decisions. That progress, though real, has also been narrow. The scholarly focus has been on individual justices and how they cast their votes, leaving a great deal of the judicial process relatively unexplored.

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The publication of two anthologies edited by Cornell Clayton and Howard Gillman marks a transition in how political scientists think about judicial politics. In their introduction to *Supreme Court Decision-Making* (hereinafter *DM*, in citations), the editors explicitly compare that volume to Glendon Schubert's classic 1963 anthology, *Judicial Decision-Making* (p. 12). The Schubert anthology was an effort to organize and advance what was then the new behavioralist approach to the field of public law. In the title of his introductory essay to that volume, Schubert described the field as undergoing a transformation, "from public law to judicial behavior." As he proudly noted, "over 90 per cent of the items listed [in the bibliography] are less than five years old" (Schubert 1963, 2). The field itself was brand new, the new science rendered the old literature obsolete, and Schubert's volume helped redefine the field.

More than three decades later, Schubert's revolution looks safely entrenched. But, as a consequence, much of its revolutionary fervor has been spent, and its ability to provoke new research agendas and methods is in some doubt. The present anthologies represent an effort to rethink the foundations of the field and set a new research agenda for the next generation of scholars. Significantly, the contributors to these volumes argue that the study of judicial behavior is not enough for understanding how judicial decisions get made. Just as Schubert and his contributors sought to apply the new behavioralism that was sweeping through the rest of political science to the study of the judiciary, so Clayton, Gillman, and their contributors seek to apply the "new institutionalism" that has swept through political science in recent years to the study of the courts.

As an effort to show the value of the new institutionalism for the study of the law and the courts, these books both represent and push forward the current state of the field. Clayton and Gillman's work began as a single project featuring new institutionalist approaches to studying the Supreme Court. The eventual division into two separate anthologies reflects the dominance of judicial decision making as the center of focus for political scientists interested in the courts. Accordingly, *Supreme Court Decision-Making* fits most easily within the mainstream of the judicial politics literature of the past three decades. *The Supreme Court in American Politics* (hereinafter *AP*, in citations), however, is potentially the more innovative volume and pushes harder on the borders of the field's current research agenda. Together, the two volumes include many of the leading scholars in the field and cover many of the familiar topics of judicial politics. Although a number of the essays reflect work that has been published in different or longer forms elsewhere, their collection here provides an extremely valuable introduction to the field. Moreover, these essays are uniformly accessible and interesting, and in some cases I found them to be stronger than the versions published in other forms.

*Supreme Court Decision-Making* is divided into three parts. The first is theoretical, focusing on the history and trajectory of the field and different approaches to Supreme Court decision making. The second examines the significance of “internal” structures and norms on Court decision making, including such issues as changing norms in opinion writing and the institutional basis of leadership on the Court. The third considers “extrajudicial influences” on the Court, including the significance of litigants, judicial recruitment, and the other branches to judicial behavior. *The Supreme Court in American Politics* is likewise divided into three parts. The first focuses on the historical development of Supreme Court politics and norms. The second examines the Court in a broader political context, including party and interest group activities. The final section relates the Court to “society,” including race, gender, and capitalism. *The Supreme Court in American Politics* takes a more comprehensive view of the Court and is less focused on how the justices vote and more concerned with situating the Court within an intellectual, social, and political context that can help explain why the Court behaves as it does.

Read narrowly, these books are about the Supreme Court, and the reader is likely to gain useful insights into how the Court reaches decisions. The more valuable and interesting element of the books, however, is their thematic concern with the relevance of new institutionalism to the study of the courts and the law. These books show both the possibilities and tensions in the field and should be highly productive in sparking and orienting new thinking about the courts. *Supreme Court Decision-Making* is particularly interesting in encouraging a dialogue between the two forms of new institutionalism that exist in political science—the historical and the economic.<sup>1</sup> Despite their common emphasis on the importance of institutions in mediating political outcomes, these two schools draw upon different literatures, ask different questions, and often ignore one another. This volume usefully emphasizes the commonalties between these approaches, as well as the differences. Although some of the essays engage in an explicit dialogue with the other new institutionalism, the collection of various examples of scholarship produced by the two schools is itself enlightening.

This essay introduces these two political science approaches to the study of law and the courts and examines some tensions between them and their combined value for enhancing our understanding of legal matters. The first section briefly sketches the behavioralist alternative against which both of the new institutionalisms are reacting. Behavioralism and its immediate legacies have dominated the study of the law and the courts in

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1. The new institutionalist perspective represented in *The Supreme Court in American Politics* is primarily historical. This volume also primarily includes scholars associated with the constitutional theory and law and society traditions within political science, whereas scholars associated with the study of judicial politics dominate *Supreme Court Decision-Making*.

political science for the past four decades, and its lessons remain the starting point for any empirical examination of public law in the discipline. The second section examines the two institutionalist alternatives to behavioralism. Those steeped in sociological traditions to the study of the law will find much to like in each of the two new institutionalisms in political science, though each approach has its own distinctive virtues. The next section pursues a more critical examination of the tensions between them and their respective limitations, as well as their potential contributions to the empirical study of the courts. The final section considers the implications of the new institutionalism for thinking about the law. Although the essays in these volumes suggest the utility of an institutionalist perspective for advancing our understanding of judicial decision making, the real promise of this approach may be its ability to push political scientists beyond such questions. Just as behaviorism brought new subjects and questions to the field as well as new methods and assumptions, so the new institutionalism will come into its own if it succeeds in changing the research agenda and directing political scientists to look beyond the voting behavior of justices.

### BEHAVIORALIST JUDICIAL POLITICS

Behavioralist approaches to the study of the law arose out of the conjoined forces of the constitutional revolution of 1937 and postwar developments in the social sciences. Political scientists studying the courts and the law had long drawn on history, philosophy, and law. Unlike many law professors, however, public law scholars in political science were primarily interested in situating the Court in a political context and considering the production of law as a political activity. As a consequence, legal realism was fully absorbed in political science departments. But without the practical need to train attorneys or the normative need to legitimate the work of the Court, realist sensibilities remained dominant in political science long after they had faded in the law schools. The heated disputes over the Court in the 1930s emphasized the need to understand the Court as a political institution, and Justice Roberts's 1937 "switch in time" and the doctrinal revolution that followed seemed to highlight the importance of individual justices as political agents in their own right. Although Charles Grove Haines, in a 1922 essay, provided unsystematic "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges," most public law scholars focused less on the determinants of individual judicial decisions than on the political values inherent in the American constitutional design and the importance of a kind of statesmanship on the Court in realizing those values (see Clayton's essay in *DM*). This realist perspective was transformed when it was linked to the social scientific urge to count things.

C. Herman Pritchett's 1948 study of the Roosevelt Court is widely regarded as the first significant work in this new vein, though his lead was not seriously followed for another decade. Even so, Pritchett's book was clearly transitional, rather than a radical break from the past. Like those who came before him, Pritchett continued to emphasize the significance of judicial statesmanship and the distinctiveness of judicial politics. But Pritchett's tone was somewhat different, stating flatly that "any examination of the present-day Court must accept the fact that its decisions inevitably have a political character, and the real question is not whether, but how well, its justices perform political functions" (Pritchett [1948] 1969, 20). More strikingly, Pritchett framed his study around the "social and psychological origins of judicial attitudes and the influence of individual predilections on the development of law" ([1948] 1969, xi).

Pritchett was far less interested in the Court as a political institution than he was in the dynamics of a "small decision making group," as Glendon Schubert (1963, 2) would later characterize it. The startling increase in the number of dissenting opinions in the early 1940s both highlighted individual justices at the expense of the Court as a body and provided the raw material for statistical analyses of individual judicial decisions (Pritchett [1948] 1969, xii; O'Brien *DM*, pp. 95-98). The institutional voice of the Court that Chief Justice John Marshall had struggled to establish at the beginning of the nineteenth century seemed to give way to the conflicting voices of individual justices in the twentieth century. In the process, judicial decisions came to seem more explicitly politicized and less plausibly determined by uncompromising legal reasoning.

The behavioralist turn in public law led to a new emphasis on judges as individuals. As Robert Dahl noted in 1961, the "behavioral mood" in political science was most distinctively concerned with individuals rather than larger political units. As Dahl went on to argue, however, "an individual is not a political system, and analysis of individual preferences cannot fully explain collective decisions, for in addition we need to understand the mechanisms by which individual decisions are aggregated and combined into collective decisions" (1961, 770). At least in the study of the courts, Dahl's caution was not generally heeded. The aggregation of nine votes on the Court seemed fairly straightforward. The background influences that determined how each of those nine justices chose to cast his vote were of far more interest than the rules that made up the judicial institution and determined how those votes were to be aggregated. "Psychological theories of perception and cognition" set the research agenda (Schubert 1963, 2). A leading work of the 1970s simply equated "a theory of decision making in the United States Supreme Court" with "a theory capable of predicting the decisions of the justices" (Rohde and Spaeth 1976, xiv). If you wish to

understand the Court, you must understand what leads each justice to make the choices that he does.

A second and related assumption was just as crucial, that judges were primarily political actors. As Schubert (1963, 3) explained, "the choices of judges, like those of other human beings, may be significantly affected by judicial attitudes toward the issues of public policy and by other psychological stimuli presented by cases which judges are asked to decide." This somewhat tentative formulation has been strengthened and hardened over time into what is now known as the "attitudinal model" of judicial decision making (Segal and Spaeth 1993).<sup>2</sup> The attitudinal model holds that judges decide cases based on their ideological attitude toward various policy outcomes. In any given case, justices will act so as to advance their preferred policies, regardless of such legal factors as precedent, text, or legislative intent. Judges exercise relatively unconstrained discretion so as to achieve favored results. The unique features of the judicial setting are largely irrelevant to judicial decision making; justices behave like any other political actor – only more so, since justices do not have electoral incentives to compromise their ideological preferences. Given judicial independence, the justices have the freedom "to base their decisions solely upon personal policy preferences," and the attitudinalist assumption is that they do (Rohde and Spaeth 1976, 72).

The strength of the attitudinal model lies in its ability to muster quantitative evidence in its support. In order to be scientific, behavioralism emphasized the importance of quantitative evidence of empirical regularities in the observable behavior of political actors (Segal and Spaeth 1993, 67). Several decades of study have demonstrated with increasingly sophisticated methods that justices exhibit a distinctive pattern in their voting that correlates strongly with presumed policy preferences and that is highly predictable, even in the face of varied legal material. Although the interpretation of this data is more controversial than the data itself, the plausible conclusion that attitudinalists have drawn is that judicial decisions simply reflect the political preferences of a majority of the justices on the Court at any given time (for a summary and critique of this extensive literature, see Cross 1997). The two currently leading advocates of the approach, Jeffrey Segal and Harold Spaeth, have concluded that, "at the level of the U.S. Supreme Court, how the justices decide their cases depends upon the free play of

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2. Schubert's formulation has also been significantly modified in that its sociological and psychological determinism has been shed. Whereas the early behavioralists tried to endogenize attitudes through the incorporation of various social psychological theories of the period, the modern attitudinal model simply takes preferences as given and regards their formation as exogenous (Maltzman, Spriggs and Wahlbeck, *DM*, 45). One consequence of this shift, however, was the abandonment of role or socialization theories that might suggest that judges felt constrained by their institutional position from acting on their policy preferences. In the modern attitudinal model, judges are unconstrained preference maximizers.

their individual policy preferences.” The “rules of the judicial game” are notable only “because they are so overwhelmingly insubstantial” (Segal and Spaeth 1993, 360). In the end, the impact of “internal and external non-attitudinal factors” on judicial decisions “appears to be minimal” (1993, 363). “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (1993, 65). Likewise, the Rehnquist Court produces the decisions that it does because it has more conservative members on it than did the Warren Court.

In an interesting new book, Spaeth and Segal provide further evidence for this position by examining the adherence to precedent by Supreme Court justices (Spaeth and Segal 1999). In keeping with behavioralist assumptions, they assume a sharp dichotomy between “internal” and individual judicial “preferences” and the “external” constraint of precedent, between free action and imposed outcomes.<sup>3</sup> As Spaeth and Segal note, “in many cases Supreme Court decision making would look exactly the same whether justices were influenced by precedent or not” (1993, 3). It is easy for justices who agree with the result to “adhere” to precedent. The more difficult test of actual influence is whether precedents can serve as an independent reason in deciding a case, and one that would cause justices to vote contrary to their own preferences.

For precedents to bind the Court, they must be able to cause at least some of the justices to shift their position from how they would have voted prior to the existence of the precedent. Spaeth and Segal canvass all of the Court’s history looking for such evidence. They conclude that “precedent rarely influences United States Supreme Court justices” (1999, 287). Justices who dissented in the original precedent shift toward that precedent in later cases only about 10% of the time. Dissenting justices are so unlikely to be swayed by the decisions of their brethren, that Spaeth and Segal reverse Pritchett’s claim that though justices are policymakers, they are not legislators because they do not exercise an equivalent degree of discretion. Instead, Spaeth and Segal “argue that members of Congress make choices, but they are not the free choices of Supreme Court justices” (1999, 288).<sup>4</sup>

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3. To this extent, Spaeth and Segal’s analysis of legal influence follows Dahl’s (1957, 202–3) classic formulation, “A has power over B to the extent that he can get B to do something that B would not otherwise do.” For a recent analysis and critique of this conception of power, see Hayward 1998.

4. The evidence provided by Spaeth and Segal on the influence of precedent is limited, but quite interesting. In keeping with their narrow understanding of judicial preferences and how they might be measured, for example, they exclude from consideration justices who joined the Court after a given precedent was decided, and their analysis examines precedents only as a decision rule, not as a conceptual system that might also solidify and constrain judicial majorities. Examining only the final votes of dissenting justices may also overstate the importance of judicial preferences. We know that, between the conference and public announcement of a ruling, justices switch their votes in order to defer to the majority in a nontrivial number of cases, known in the literature as “vote fluidity” (e.g., Howard 1968;

## THE NEW INSTITUTIONALISMS

As applied to the study of the courts, the new institutionalism is largely a reaction to the attitudinalist model. Indeed, *Supreme Court Decision-Making* can be read as an extended critique of Jeffrey Segal and Harold Spaeth's monumental *The Supreme Court and the Attitudinal Model* (1993) and an elaborate effort to demonstrate that the "rules of the judicial game" really are substantial and that "non-attitudinal factors" do matter to judicial outcomes. These concerns unite the various essays in this collection in a common purpose and demonstrate the rise of a new and serious challenge to the model of judicial politics that has largely dominated political science since the Second World War. For all of the contributors to this volume, the Court cannot simply be reduced to its personnel. Persistent and distinctive features of the Court as an institution provide important information that must be added to the basic knowledge of who the justices are. Moreover, these essays indicate a variety of ways the Court has to be placed within a larger political system. In this reading, the Court is a particular institution among others and cannot be regarded as interchangeable with legislatures or executive bureaucracies. Both the internal procedures and norms of the Court and the external relationship between the Court and its larger political environment affect judicial outcomes. Judges are not the only relevant actors, and they do not decide cases based only on their personal policy preferences.

*Supreme Court Decision-Making* serves a useful purpose in establishing a general challenge to the reigning orthodoxy. It should be noted, however, that the challenge is not a radical one. The contributors are distinctly postrealist and postbehavioralist; none of them suggests that judges are not policymakers or that they are not, to some degree, influenced by their own ideological predispositions. Although sharing this critical stance and certain agreement over what the attitudinalist model overlooks, the "new institutionalist approaches" contained in this anthology are distinctly plural. It is worth considering the two new institutionalist schools separately and then examining the relationship between them.

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Maltzman and Wahlbeck 1996). The cases in which justices make public their dissent are the instances of most intense disagreement among the justices, and thus the instances in which the dissenting justices are least likely to defer in the future. In essence, by publishing a dissent, the minority justices have already demonstrated their unwillingness to defer to the new precedent, and so it is not surprising that they maintain that opposition to the new rule in later cases. Likewise, the individual focus of the analysis may underestimate the Court's institutional respect for precedent. It is fairly costless for a dissenting justice to continue to dissent; it is a rather more significant step for a justice to cast a decisive vote that abandons an existing precedent. Nonetheless, it is worth noting that they find "strongly preferential" behavior, in which dissenting justices explicitly adhere to their dissenting position in later cases, 25% of the time (Spaeth and Segal 1999, 287 n. 3). Of course, none of this demonstrates the insignificance of "the legal model," since adherence to precedent is only one value among many internal to the legal model (e.g., Lee 1999; Peters 1996; Levinson 1993).

## Rational Choice New Institutionalism

Rational choice models of judicial politics have coexisted with behaviorist studies from the beginning. Glendon Schubert (1963, 3) noted that “economic theories of rational choice have provided models for pilot research” in judicial behavior and had experimented with rational choice methods and assumptions in some of his own prior work (1959). Walter Murphy produced a seminal work on strategic behavior on the Court grounded in game theory in 1964. The attitudinal model itself has come to reflect a kind of stripped-down rational choice model, positing judges as single-minded maximizers of their policy preferences. But such tentative suggestions were not generally followed up, as the behaviorist persuasion emphasized quantification rather than formal analysis and freedom rather than constraint. As Segal and Spaeth (1993) concluded, the “rules of the judicial game” did not seem to matter. The decisions of individual judges could be aggregated, but there was relatively little concern with how judges interacted with their surroundings, whether other judges, litigants, other government officials, or their own judicial office.<sup>5</sup> Behaviorist judges responded to stimuli. They did not make choices.

Rational choice institutionalism (also known as the positive theory of institutions) developed in political science primarily out of the study of congressional politics. The study of Congress has long revolved around rational choice assumptions. Beginning in the early 1970s, legislative scholars accepted the basic assumption that congressmen could be understood as single-minded seekers of reelection (see especially, Mayhew 1974). Regardless of what other goals a legislator might have, they could not pursue them unless they retained office. Reelection was necessarily the first priority. Subsequent research has demonstrated the productive power of this simple starting point, and a substantial amount of congressional activity can be understood as a result of the strategic calculations of goal-seeking legislators. Moreover, Congress is particularly fertile ground for such models. Congress has a clear and relatively stable set of rules. It is composed of individual actors with strong motivations to pursue a limited set of goals while employing identifiable but limited resources. It includes a large number of players with repeated interaction. Moreover, congressmen face a variety of different kinds of strategic situations, from campaigning to legislating.

It is the legislative environment itself that fed interest in the development of a rational choice new institutionalism. Congressmen face a variety of collective action and social choice problems. Standard social choice theories contend, for example, that the aggregation of individual preferences

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5. Political scientists did intermittently examine such relationships in “impact” and “process” studies, but despite some notable achievements in those areas they were not effectively integrated into the analysis of judicial decision making and lost prominence in the field (e.g., Rohde and Spaeth 1976, 211–14; Pritchett 1968; Clayton, *DM*, pp. 35–37).

through voting is extremely difficult in most complex situations. Any given outcome will be unstable because there will always be possible alternatives that could attract the support of a majority of voters. Legislative minorities should be always able to upset the status quo by introducing new issues that drive wedges into the current majority (Riker 1980). It should be very difficult, therefore, to preserve a stable legislative majority, and yet observed legislative outcomes are quite stable. Thus, contrary to social choice expectations, legislative outcomes were neither arbitrary nor unstable.

Congressional scholars influenced by rational choice models responded to this conflict between theoretical expectations and empirical observations by examining the function of institutions. From early on, rational choice theories explained the ways institutions could be designed and manipulated so as to better achieve legislators' goals. More interestingly, the specifically new institutionalist analysis explained how institutions could create results that were different from those that would emerge from an environment without institutions or from those that might be immediately preferred by a majority of legislators. Most basically, jurisdictional rules governing committees, for example, advanced the specific electoral goals of their members by allowing selected congressmen to control the legislative products of greatest interest to their own constituencies. More generally, institutions such as procedural rules and committee structures helped structure legislative choices so as to force more stable outcomes than could be had under simple majority-rule in an undifferentiated legislative chamber. By restricting choices, enhancing information about preferences and outcomes, and lowering transaction costs of coalition formation, institutions made collective action within Congress easier and more profitable. Similarly, institutions that were outside the control of Congress itself, such as its constitutionally mandated bicameral structure or apportionment rules, took on new theoretical significance for their ability to mediate political outcomes (e.g., McCubbins and Sullivan 1987; Shepsle and Weingast 1995).

Rational choice institutionalism has drawn from a variety of economic theories and has spread beyond the subfield of congressional studies. This variant of new institutionalism was influenced in part by the "new economics of organizations," which emphasized the efficiency gains that could be had through organizational forms that reduce transaction costs (e.g., Moe 1984; Williamson 1985). It has similarly exploited delegation models that examine the mechanisms by which "principals" relate to their "agents" in order to insure compliance with their goals (e.g., Kiewiet and McCubbins 1991; Epstein and O'Halloran 1999). Such theories usefully supplement more traditional rational choice accounts of individual behavior under conditions of uncertainty and limited information, repeated interaction, and significant transaction costs. Although most extensively developed in relation to legislatures, the theoretical approach has found a range of

applications in American politics, comparative politics, and international relations. Its application to judicial politics is relatively recent, but increasingly significant.

As applied to judicial politics, scholars working within rational choice institutionalism tend to share several important features. First, they share a set of assumptions about how political actors behave. Notably, individuals are assumed to have fixed preferences, act instrumentally so as to maximize the realization of those preferences, and engage in strategic calculations as to how to achieve those goals. As with attitudinal models, the formation of preferences is exogenous to rational choice analysis, which is largely unconcerned with explaining how and why the justices have come to adopt those legal positions. Although these behavioral assumptions are largely shared with attitudinalists, rational choice scholars emphasize the constraints on individual actors. Thus, the attitudinal model posits that a judge will vote so that the case outcome is as close to her preferred position as possible. The only real constraint that Supreme Court justices face is the necessity of gaining majority support for their position. A simple spatial model would indicate that Court decisions should reflect the preferences of the median justice on any given issue, the pivotal swing justice. Judicial decisions are a relatively simple matter of counting noses. Each justice can be expected to vote sincerely—that is, vote in a way that reflects his or her true preferences on that issue—and attitudinalists have been able to claim impressive success in being able to predict case outcomes based on the prior voting behavior of the justices.<sup>6</sup>

Rational choice scholars, by contrast, assume that the constraints faced by justices are more severe and also that some of those constraints are mutable. Notably, the choices of relevant actors may be interdependent. As a result, in order to achieve their desired outcome, it may not be enough for judges to act sincerely. They may need to act *strategically*, in the sense of understanding and anticipating the likely responses of others to the judge's own actions. Judicial decisions may not simply reflect judicial attitudes, but may also reflect the larger strategic environment. To take a drastic example, in deciding whether to recognize and enforce William Marbury's commission, the Marshall Court had to take into account not only its own immediate preference that Marbury gain his office but also the possibility that favoring Marbury in his case might provoke serious retaliation by the Jefferson administration that would permanently damage the independence of the judiciary. The outcome of the case thus reflected a strategic calculation on the part of the justices, not their sincere preferences (Epstein and Knight 1996b). At other times, the strategic environment may allow judges to vote

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6. Segal and Spaeth (1993, 229) report, for example, that a regression model incorporating both attitudinal measures and basic factual information correctly predicts 74% of individual justices' decisions in search and seizure cases.

their sincere preferences, but the point is that judges are assumed to take into account various constraints in making their decisions. At the very least, context matters.

Rational choice new institutionalism is further distinguished by how it conceptualizes the constraints that judges face. Constraints are imposed by other actors and by the institutional context. Of course, the actions of others gain significance for judges as a consequence of the institutional context, so the immediate focus can simply be on the institutions rather than on the choices of those who occupy them.<sup>7</sup> In this approach, institutions are understood primarily as a kind of constraint on individual behavior. As one essay in *Decision-Making* explains, "these constraints often take the form of formal rules or informal norms that limit the choices available to political actors" (Maltzman, Spriggs, and Wahlbeck p. 46). These constraints work by "affecting justices' beliefs about the consequences of their actions. Institutions therefore influence strategic decision makers through two principle mechanisms--by providing information about expected behavior and by signaling sanctions for noncompliance" (p. 47). The rules of the game tell judges who the relevant players are, how they are likely to act, and what the consequences of their actions are likely to be. Institutions can facilitate judicial decisions by reducing the costs associated with uncertainty about the consequences of decisions. They can also constrain choices by imposing costs on some possible judicial actions. For example, the norm of *stare decisis* might force judges to compromise on their preferences in order to make their decision consistent with existing precedents. Other political actors could rely on judges following precedent, and violations of precedent might be costly to a potentially rebellious judge.

Neo-institutionalist approaches to judicial politics break from behavioralist approaches in rendering decisions interactive, not just reactive, and in shifting attention from the individual as the central unit of analysis to the institutional environment. Strategic judges must calculate what others will do and adjust their behavior accordingly. As a consequence, decision making occurs in stages and the ordering of those stages can matter. Institutions are players in their own right, and the primary unit of analysis is institutions that empower some actors and define sanctions. Justices need to know not only their own and other justices' preferences in a given case but also the preferences and powers of presidents, legislatures, interest groups, and lower courts.

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7. Judicial scholars adopting this approach, however, have tended to focus on the interaction of the justices with other individual actors, rather than on the institutional context itself. As a result, in the judicial politics literature rational choice institutionalism tends to be referred to as the "strategic model" of judicial behavior, emphasizing its narrow dialogue with behavioralist models of judicial decision making rather than its similarities with historical new institutionalist analyses or the broader positive theory of institutions.

## Historical New Institutionalism

The historical new institutionalism has completely different roots, and, though it too emphasizes the importance of institutions, it conceptualizes institutions and their importance very differently than does the rational choice new institutionalism. In many ways, historical new institutionalism rehabilitates elements of traditional public law. In doing so, it links the normative and legal concerns of traditional public law scholarship with the empirical concerns of the judicial politics literature. For historical new institutionalists, the law matters to judicial behavior, and part of their analytical goal is to determine what the law is understood to be and how it plays into judicial decisions. More generally, historical new institutionalists tend to be much more concerned with placing the judiciary and the law within a larger social and intellectual context that both shapes the course of law and helps define legal meaning.

As in the case of rational choice neo-institutionalism, historical new institutionalism first developed in other areas of political science. Whereas rational choice neo-institutionalism was developed in response to the inability of social choice theory to explain legislative stability, historical new institutionalism was developed in response to the inability of either behavioralist pluralism or Marxist determinism to explain the course of twentieth-century developments in the political economy. Although pluralism emphasized the political conflict between divergent interests over scarce resources, it seemed unable to adequately account for the inequality among those competing interests or to explain the particular political outcomes that emerged in different issues and in different countries. The economic determinism of even sophisticated Marxist theories likewise seemed inconsistent with historic developments. Government policy did not seem to neatly reflect social cleavages as such theories had predicted they would.

Beginning in the late 1970s, a number of scholars began to call for increased attention to the importance of the state itself as a significant political actor (Skocpol 1979; Katzenstein 1978; Skowronek 1982). Although there had been notable precursors to the current group of historical new institutionalists, the dominant tendency in political science after the behavioralist revolution was to minimize the relevance of institutions and highlight the importance of individuals acting on their own preferences (cf., Lowi 1969; Huntington 1968). Behavioralism grew up rejecting the supposed arid formalism of the "old" institutionalism of the early twentieth century, which sought to understand politics by examining the law on the books—constitutions, statutes, or administrative procedures. Behavioralism promised new realism by focusing attention on how actual individuals behaved in practice, not on the normative rules codified in law. In the behavioralist account, the political arena was surprisingly undifferentiated.

"Influence" was a more valuable analytical concept than "authority," and the concept of "the state" largely dropped out of political science. In presidential studies, for example, Richard Neustadt (1960) dismissed the importance of distinctive formal presidential powers of the type emphasized by old institutionalists such as Edward Corwin (1940). Far more important, Neustadt argued, was presidential persuasion and bargaining. The president simply occupied another seat at the pluralist table, and the constitutional system was best characterized as "separated institutions *sharing* powers" (1960, 42).

The "new" historical institutionalists, by contrast, argued that the particular structure of individual states mediated between social pressures and interests and political outcomes. Institutional design could help channel or mitigate social reform efforts. In American politics, early attention focused particularly on the relatively undeveloped American bureaucracy and the consequences of this lack of state capacity for the political response to economic modernization. Without sufficiently strong state institutions to exploit, social pressures for economic reform would be relatively ineffective and ultimately dissipated. Significantly, these scholars called attention to the fact that many institutions had independent goals and methods of operation that could not be reduced to the preferences of various social actors. The state was a political actor in its own right and not simply a neutral arbiter or tool of social interests. Likewise, institutions like the presidency tended to give their occupants both a distinct perspective on public problems and a unique set of resources that could be employed on behalf of their goals (Evans, Rueschemeyer and Skocpol 1985; Steinmo, Thelen, and Longstreth 1992).

Much of the original historical institutionalist literature focused on bureaucracies, which were seen as the key to the state capacity to intervene in social relations in the twentieth century. The law and the courts soon became major objects of scholarly attention, however. Although the limited American bureaucracies of the early twentieth century helped explain the failure of reformist efforts to build a European-style interventionist state, the instrumentalities of the state had also been active in subverting reform movements and building the corporate economy. Even in the context of the relatively weak nineteenth-century American state, the courts had proven quite successful in derailing what appeared to be otherwise powerful and popular social movements. Like the bureaucracy, the courts proved capable of taking forceful and independent action against social interests, operated according to internal institutional norms that were distinct from those of other political and social institutions, and were fairly resistant to outside pressure. Courts were important to understanding American politics, the new institutionalists suggested, because the American constitutional structure made judges uniquely powerful figures and because the motives and

operations of the courts were distinctive. Even as behavioralists within the subfield of judicial politics were arguing that judicial behavior was hardly different than the behavior of other political actors, historical institutionalists operating within other traditions were concluding that the American courts were often out of step with more representative government officials and acted to preserve and apply ancient common law principles that had long since lost saliency in other political institutions (Orren 1991; Hattam 1993; Gillman 1993; Berk 1994).

As applied to judicial politics, historical institutionalism differs from both behavioralism and rational choice institutionalism in emphasizing the distinctiveness and particularity of the courts. As Cornell Clayton notes in *Decision Making*, “at the heart of the new institutionalism is a challenge to the reductionist and instrumentalist conception of politics that characterized behavioralism, and a renewed appreciation of the constitutive and normative conceptions of politics and the role that institutions play in the latter” (p. 30). Historical institutionalism makes its most radical break from the other approaches by historicizing political actors. Individuals cannot be conceptualized as autonomous, free choosers who just happen to find themselves in a particular institutional context. Institutions do not merely impose constraints on choices; they constitute preferences. In an influential article, James March and Johan Olsen argued that new institutionalists “deemphasize metaphors of choice and allocative outcomes in favor of other logics of action and the centrality of meaning and symbolic action” (1984, 738). Significantly, “the new institutionalism, in company with most research on preferences, argues that preferences and meanings develop in politics, as in the rest of life, through a combination of education, indoctrination, and experience” (1984, 739). Institutions become an important site of preference formation and the constitution of a normative order. Justices are likely to think about and act on public problems differently as a consequence of their experiences and expectations on the Court.<sup>8</sup>

For historical institutionalists, institutions are both regulative and constitutive. They constrain choices by structuring incentives, but they also shape preferences by influencing ideas. This assumption implies that historical institutionalists not only think about the nature of politics rather differently than do behavioralists or rational choice institutionalists, but also that they include a wider range of phenomenon under the term “institutions.” In the first significant effort to apply historical institutionalism to judicial politics, Rogers Smith took an inclusive view of institutions, focusing on “relatively enduring patterns of behavior that (1) have arguable importance

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8. The recent “discovery” that judicial “preferences” are not fixed but change over time not only “complicates” traditional quantitative research but also emphasizes the importance of research traditions that have not regarded “preference formation” as exogenous (Epstein, Hoekstra, Segal, and Spaeth 1998).

for human decisions that significantly shape social development and (2) appear subject to meaningful modification through such choices and conflicts" (1988, 91). Such a definition includes not only the relatively formal rules and norms of rational choice institutionalism, but also cognitive structures, habits of thought, routines, and traditions of political discourse. Clayton (*DM*, pp. 33-35) usefully points out the danger that such a broad definition may hamper empirical analytical rigor and normative critical leverage. But such a broad conceptualization also permits a fuller understanding of how individual actors are embedded within a particular social and political situation. The language of rules and norms invites the analyst to externalize institutions as constraints on choice. Recognizing the existence of meaningful political discourse and cognitive structures forces attention to the ways individuals and contexts are interdependent.

It is worth noting two other features of historical institutionalism that have not been significantly integrated into studies of judicial decision making but are nonetheless important for thinking about the law and courts more generally. First, from its origins, historical institutionalism has been concerned with the inequalities in power relations that are associated with institutions. Institutions convey power to those who occupy them or who are better situated to exploit them. In work that was a precursor to historical institutionalism, Theodore Lowi (1969) complained that liberal pluralists had camouflaged the operation of state power by pretending that the state was a neutral arbiter of competing social interests. Instead, Lowi argued, the brokerage state of the postwar era systematically favored some interests at the expense of others who were less organized and less influential in the corridors of power. State institutions magnify the power of some social actors, while undercutting the power of others, and the law is one mechanism by which power is redistributed.

Relatedly, historical institutionalism has been particularly concerned with the "path dependence" of political development. The past matters for present politics. Institutions are relatively persistent, and thus both carry forward in time past political decisions and mediate the effects of new political decisions. The creation of institutions closes off options by making it more costly to reverse course, by differentially distributing resources, and by tying interests and identities to the status quo (e.g., North 1990). On the other hand, the persistence of institutions across time can foster political crises and change as they enter radically changed social environments or abrade discordant institutions (Orren and Skowronek 1994). Howard Gillman's (1993) examination of the political crisis provoked by the Court's maintenance of the Federalist Constitution into the era of industrialization suggests the utility of this dimension of the historical institutionalist project.

## RETHINKING THE COURT

*Supreme Court Decision-Making* includes a diverse collection of essays, and that diversity suggests both the strength and weakness of the institutionalist approach. The authors are judicial specialists ranging from leaders in the rational choice institutionalism, such as Lee Epstein and Jack Knight, to those who have been closely associated with the historical institutionalism, such as Howard Gillman and Ronald Kahn, to those with no clear prior connection to institutionalist approaches, such as Lawrence Baum and David O'Brien, and even to the most prominent current attitudinalist, Jeffrey Segal. These choices reflect the prominence of institutional issues on the current research agenda in judicial politics and the fact that most judicial scholars now regard institutions as at least potentially important factors influencing judicial decision making. After several decades of inattention, legal institutions are no longer being ignored. Even Segal has begun to focus on the effects of institutions, though he still concludes that attitudinal factors best explain judicial decisions. In this volume, Segal details the particular institutional context that allows justices to make relatively unconstrained decisions and thus follow their policy preferences. In a different and more constrained institutional context, judges could be expected to behave differently, and Segal has engaged in neo-institutional analyses of judicial confirmations, Supreme Court certiorari decisions, and lower-court adherence to precedent (Cameron, Cover, and Segal 1990; Songer, Segal, and Cameron 1994; Cameron, Segal, and Songer 2000).

The essays in this volume, however, suggest that, like behavioralism before it, new institutionalism is more of a mood or persuasion than a clear theory or analytical approach. The theoretical essays in the first part of the book draw sharp boundaries between the two new institutionalisms and between institutional approaches and their predecessors and suggest fairly substantive commitments on the part of institutionalism. By contrast, the empirical essays in the latter two sections are generally less doctrinaire and less particularly "institutionalist." Simply removing references to "norms," "rules," and "institutions" from the text of several of the essays would hardly affect their substantive content.

The institutionalist perspective is probably most significant in calling attention to the context within which decisions are made and in encouraging a return of the law in empirical analysis of judicial politics. Although there have always been exceptions, the dominant tendency in the study of judicial politics has been to examine the Court as an enclosed system. The members of the Court held a set of fixed policy preferences. They selected cases so as to act on those policy preferences, and they voted on those cases so as to express their preferences. External political events were usually reflected, if at all, only through the exogenous shock of a judicial

appointment. With fixed preferences, the justices were assumed to be unaffected by social movements, political debate, jurisprudential theory, or changing social conditions. Problems in the implementation or effectiveness of judicial decrees were relegated to other areas of scholarly inquiry and separated from the question of how judges made decisions. But it is quite evident that the justices do not operate simply in a world of their own making, and therefore the contours of judicial institutions must be recognized and they must be situated within larger political environment.

Several of the essays in these two volumes are notable for exploring how resources are made available to the justices and how constraints are recognized. In his contribution to *Decision-Making*, Charles Epp emphasizes the extent to which the availability of cases to be decided imposes a resource constraint on the Court. Although behavioralists often note that the Court is a reactive institution and cannot initiate its own cases, they usually argue that the modern Court's control over its docket gives the justices free rein to pursue their individual policy agendas. As Epp points out, however, the justices must still choose from a pool of cases brought to them by litigants, and litigating a case to the Supreme Court requires a substantial investment of resources and unusual dedication. Without the institutional support of independent actors such as the ACLU and the NAACP, even an interested Court will not be able to significantly advance a civil liberties agenda. In this case, an institutionalist approach to judicial decision making creates an opportunity to make connections with the extensive law and society literature on litigation in order to enhance our understanding of the Court. Relatedly, Kevin McGuire, in *American Politics*, examines the ways the attorneys who argue cases before the Court carry a substantial portion of the Court's burden in processing its workload. In filtering information and analyzing alternatives, the Supreme Court bar enhances the Court's effectiveness and facilitates its ability to achieve desired results. The key role played by these attorneys also allows them to strategically influence the Court's agenda and shape legal outcomes, however.

The interrelationship between the Court and other institutions also tends to place judicial decision making within a particular historical context. The superficially abstract and timeless conclusions of behavioralist research are rendered historically contingent by noting the particular configuration of forces that were necessary to produce those patterns of behavior. Models of contemporary judicial behavior might be time bound relative to both the past and the future, and institutionalist analysis is likely to be crucial in identifying the conditions under which such models might be expected to apply. David O'Brien's (*DM*) discussion of the postwar rise of individual opinions on the Court, Lawrence Baum's (*DM*) examination of the declining importance of prior electoral experience in the recruitment and selection of justices, Mark Silverstein's (*AP*) analysis of the effects of

the modern confirmation process on judicial appointments, and Cornell Clayton's (*AP*) exploration of the Rehnquist Court's "drift toward pragmatism" help clarify the distinctiveness of the modern judicial era. It cannot be assumed that all justices are motivated by the same concerns and act on their interests in the same way. As Sue Davis (*DM*) notes, William Rehnquist's behavior has been partly shaped by his elevation to Chief Justice. As a consequence of his new position, Rehnquist has been able to pursue his goals through a wider variety of activities than an examination of judicial voting behavior would recognize and has undoubtedly developed some new goals as a consequence. And as Baum would point out, Rehnquist's approach to his post is likely quite different from that of a Chief Justice such as Earl Warren (who came to the bench from a more political background), and his task is undoubtedly different as a consequence of inheriting a Court composed of justices shaped more by academia and the judiciary itself than by elective or administrative office.

### Bringing the Law Back In

The institutionalist perspective has also encouraged a return of law to the empirical study of the Court. Normative constitutional theory and doctrinal analysis had survived within political science, but had been disconnected from empirical analysis of how the Court actually behaved. Behavioralist assumptions that the justices were primarily policymakers and that the work of the Court could best be understood through what it did (decide cases) rather than what it said in opinions made the law itself largely irrelevant. Institutionalism makes the law relevant again. Concern with the law and legal forms is clearly a defining characteristic of the judiciary, and the new institutionalism would suggest that such features should matter. The question is, in what sense does the law matter? To that question, the two forms of new institutionalism provide quite different answers.

For rational choice institutionalists, as for behaviorists, the law is instrumental. The law serves as a tool that judges use to advance their favored policies. The law is purely external to judicial actors and their motives. It is simply something to be manipulated in the pursuit of prior and independent goals, which in a different context such as a legislature or a bureaucracy could be similarly pursued using other tools. As a judicial instrument, the law has effects on others, but does not affect the judge. Rational choice institutionalists modify this last element, however, for they contend that the law does sometimes have effects on judges. After all, the judge is not the only actor within the political environment, and other actors also use law as an instrument to achieve their goals.

The law can be a conduit between judges and others, and strategic judges will have to take into account how others will react to and use the

law for their own purposes. In this sense, the law can also be a constraint on judges. In an earlier article, Lee Epstein and Jack Knight (1996a) defended "the norm of *stare decisis*" against an attitudinalist critique by Jeffrey Segal and Harold Spaeth (1996a). There they contended, somewhat shockingly in judicial politics circles, that "precedent can serve as a constraint on justices acting on their personal preferences" (Epstein and Knight 1996a, 1021). Although judges might prefer to ignore precedent in favor of their preferred policies, they were constrained by the utility of precedent in fostering social stability and judicial legitimacy. Others would react negatively if the Court violated precedent. In support of the significance of precedent in judicial decision making, they pointed to the ubiquity of citations to precedent not only in published judicial opinions but also in the arguments of litigants and the private discussions of the justices themselves. As Segal and Spaeth (1996b, 1076) pointed out in response, ubiquity does not equal influence, and more recently Spaeth and Segal (1999) have amassed evidence that suggests justices feel little social pressure to adhere to precedents. But the important point for present purposes is Epstein and Knight's understanding of the relationship between precedent and the justices. They, like Segal and Spaeth, assumed that the justices do not actually care about the law itself, only with how it could be used. The interests of the justices are already determined. Judicial institutions only affected how those interests are expressed.

This instrumentalist perspective has been quite useful in political science, as several decades of research have helped provide empirical support for the kind of claims about legal indeterminacy and judicial politicization that the legal realists only asserted. Along with scholars working in the law and society tradition, those working in judicial politics have helped undermine formalism and clarify the extent to which "law in practice" diverged from the law on the books. This hard-nosed realism about how judges behaved, however, has often been combined with a simplistic and formalistic account of how law might work.

Given a highly mechanical "legal model," behavioralists have had little difficulty showing the ways judges deviate from such an idealized account. If the law mattered, it must have been because it was explicit, specific, determinate, and coercive. Recognizing that law was rarely so certain, behavioralists concluded that law was largely irrelevant. Echoing the realists, Segal and Spaeth (1996a, 973) concluded, for example, that since "legal factors such as text, intent, and precedent are typically ambiguous, justices are free to make decisions based on their personal policy preferences." Rational choice institutionalists differ from the attitudinalists only in their assumptions about the description of the legal environment, not in their assumptions about how the law works. Their image of the law is also clear and coercive. They are simply more likely to believe that such laws do exist.

This account ignores how law operates as a conceptual system. The law is not only a decision rule that clearly establishes a calculus of costs and benefits. The law is also a set of ideas that frame how individuals think about and relate to the social world (Kahn 1999). Although as sophisticated players of the legal game judges might see through much of the mythology that surrounds the law, through training and inclination they are also among the most likely to adopt an internal perspective towards the law. Indeed, Segal and Spaeth (1996b, 1065) report with some surprise that members of the faculty at some elite law schools claim to believe that the law actually determines judicial behavior; but Segal and Spaeth are quite willing to attribute such beliefs to a kind of false consciousness on the part of lawyers with no substantive effect.

The result of such instrumentalist approaches is an account of law that has no place for authority or the social practices intertwined with the law. In the instrumentalist account, law has neither ideological significance nor normative weight. Legal categories do not help to structure judicial behavior or provide any leverage for altering behavior. But legal discourse is notable for its ability to constitute communities and new social relations (Burgess 1993). For both attitudinalists and rational choice theorists, the only important thing that justices do is exercise choice through their votes. But of course judges do quite a bit more than that. They help constitute a meaningful community by sustaining a discourse of description, explanation, and justification. The judicial politics of constituting meaning was central to the traditional public law literature and has been reintegrated into political science in the new historical institutionalism, which emphasizes the ways judges participate in a meaningful politics that both shapes and is shaped by them.

Institutionalism is not the only framework within which to think about such discursive practices (e.g., Burgess, *AP*). But the concept of an institution is broad enough in the historical school that coherent discursive practices can be included, and historical institutionalism has in practice been the most accepting opening within empirical political science for discussing such features of political life. One way of incorporating such constitutive concerns in judicial politics comes through situating the Court within a larger political, social and ideological system. Rogers Smith (1988, 95), for example, notes the value of identifying correlations between judicial votes and factual elements of search-and-seizure cases.

But we might learn more about the crucial factors in judicial politics by also asking if there are established police practices, or inherited values, that lead justices to think searches in certain places are more problematic; or if we identify the content and sources of the typical experiences influencing judicial attitudes that attributes like educational and professional background signal; or if we study the institutional constraints

on the sorts of justices that are likely to be sitting on the bench at a given time.

Patterns of legal training, personnel selection, and judicial socialization all serve to shape how the Court approaches an individual case.

By taking judicial preferences as given, the attitudinalists place in the background much of what formed the status quo more generally. The systematic intellectual and material processes that restrict the range of possible judicial outcomes are ignored. The attitudinalist model tells us a great deal about how a given justice is likely to vote in a case that raises particular issues, but it tells us little about how such cases arose, how those issues had been framed, and why the justices approach their task in these ways.

The consequence of these analytical choices is not merely a reductive and truncated view of judicial politics, but also a misunderstanding of how judges behave because the determinants of their behavior are misspecified. The consequences for judicial behavior of such basic developmental features of American political history as the rise of industrial capitalism, the growth of the modern women's movement, or the expansion of the welfare state cannot be adequately incorporated within an instrumentalist view of the law. In these volumes, Elizabeth Bussiere (*DM*) discusses the ways a given conceptual framework composed of precedents and legal principles precluded the establishment of a positive constitutional right to welfare by the Burger Court, despite the apparent ideological predispositions of its membership, and Keith Bybee (*AP*) examines how the justices' understandings of the requirements of democracy and the problem of race have shaped their decisions in redistricting cases. Elsewhere, Howard Gillman (1993) has elaborated the difficulty with which justices steeped in neo-Jacksonian ideology and common-law reasoning faced Progressive reforms in the early twentieth century, and Ronald Kahn (1994) has explored how decision making on the Warren and Burger courts was shaped by the justices' efforts to develop and maintain a coherent constitutional theory in the face of an increasingly complicated litigation environment. Significantly, such accounts highlight the ways the justices struggle with new legal puzzles and learn what the Constitution means as they seek to solve them. Such studies do not treat the Court as if it were some kind of idealized philosophy seminar, but they do take the intellectual work of the Court seriously and seek to place the justices within a specific social context. Such studies have highlighted the extent to which judicial decision making is dependent on prior cognitive maps that shape how the justices approach a given case and imagine the available choices.

Another method by which the historical institutionalism seeks to incorporate the constitutive element of the law is through the concept of an institutional mission. For rational choice institutionalism, institutions exist

as a set of resources and constraints, a complex strategic environment that structures the incentives faced by individual actors. Institutions may be able to induce certain kinds of behavior, but they exist to be manipulated by individual actors as they pursue their own prior goals. Individuals, in this view, behave in pretty much the same way whether they hold judicial or legislative office, differing only in the political resources available to them and the external constraints placed on them. But, as Howard Gillman (*DM*, p. 74) explains in one of his contributions, "if we are interested in understanding the factors that influence Supreme Court decision making, it would seem appropriate to adopt an understanding of institutional politics that is able to take into account the possibility that some judicial preferences are shaped or constituted within the normative terrain of their institutional context." Individuals are not only forced to pursue their goals through the mediation of a particular institution, but their institutional position also creates new goals that they will pursue in addition. As presidential scholar Stephen Skowronek (1995, 94) has elaborated, "different institutions may give more or less play to individual interests, but the distinctive criteria of institutional action are official duty and legitimate authority. Called upon to account for their actions or to explain their decisions, incumbents have no recourse but to repair to their job descriptions."

Institutions have a mission to the extent that they possess "an identifiable purpose or a shared normative goal that, at a particular historical moment in a particular context, becomes routinized within an identifiable corporate form" (Gillman, *DM*, p. 79). The development and maintenance of this shared normative goal distinguishes those within the institution from those outside of it and imposes a distinctive set of responsibilities and motivations on those who are integrated into the institution (Brigham, *AP*). Institutions socialize and constitute, as well as reward, their members. "They influence the self-conception of those who occupy roles defined by them" both by defining a set of values that individuals come to adopt and by creating a set of routines that individuals follow (Smith 1988, 95). The justices of the Supreme Court may well understand their role as being different than that of a legislator, and behave accordingly. Judicial doctrine, opinion craftsmanship, and intellectual coherence may become goals in themselves and not simply means in pursuit of favored public policies or personal wealth and adulation. The faithful interpretation and application of the law or the duty to protect individuals and minorities may be important motivations of the justices that are inadequately captured in attitudinalist and rational choice explanations of judicial behavior. More basically, thinking within the law may become the unconscious background within which particular judicial decisions get made.

Recognizing law as a conceptual system makes room for recognizing the authority of law, as well as its coercive force. The justices may adhere to the law because, in an important sense, that is what justices *do*. Litigants and justices make reference to statutory text, legislative intent, or judicial precedent in part because they expect judges to be responsive to such considerations, to recognize their authority within the institutional context of the judiciary. Legislators and lobbyists, by contrast, are relatively unlikely to employ such argumentative tools because their intended audiences see such things neither as particularly important parts of their normative environment, unlike, say, the duty to represent constituents, nor as familiar cognitive heuristics that facilitate decision making. For legislators, judicial doctrine may be an important definitional backdrop (“this is what ‘property’ means”) or a strategic constraint that has to be respected (“this is what the Court will strike down”) but is relatively unlikely to have independent normative force or intellectual appeal. For judges, by contrast, the call to adhere to precedent carries weight and they may take positive action to heed that call. The careful application of precedent is often simply accepted as the appropriate way to make a decision.

“Law talk” creates problems for both the attitudinalist and rational choice accounts of judicial behavior. It is clear that the courthouses are filled with talk of precedent and textual meaning, but it is not clear what work such discursive practices could be doing in instrumentalist accounts. The justices must engage in such talk either because they are self-delusional or because some external audience unaccountably values such rhetoric.

In their contribution to *Supreme Court Decision-Making*, Lee Epstein and Jack Knight provide an important neo-institutionalist account of why legal players employ such rhetoric that exemplifies the rational choice approach and its limitations. Specifically, they are interested in explaining the value of *amici curiae* to judicial decision making. If, as the attitudinal model would have it, judicial preferences on cases are fixed and known and the justices are unaccountable for their decisions, why would so many parties expend resources writing, filing, and reading *amici*? For Epstein and Knight, organized interests filing *amici* “play a role for justices similar to that lobbyists play for legislators: they provide information about the preferences of other actors, who are relevant to the ability of justices to attain their primary goal—to generate *efficacious* policy that is as close as possible to their ideal points” (p. 215). Because strategic justices must worry about how other powerful political players are likely to react to their decision, they need costly information on the preferences of others, such as congressmen and the president. *Amici* are valuable to the extent that they tell the justices how Congress might react to their decision. *Amici*, in this model, do not cite legal authorities that should persuade the justices, but rather threaten the justices with hostile reactions if they rule against them.

This explanation of *amici* is quite innovative. Judicial scholars have long regarded *amici* as providing information about the importance of cases. Thus, a large number of *amici* filed in a given case could signal the enhanced political salience of the issue to the justices, encouraging them to hear the case. Epstein and Knight's model allows for a more substantive role for *amici*. The ability of the strategic model to more fully incorporate *amici* into judicial decision making indicates the value of an institutional approach and represents a potentially important advance over attitudinalist models. Moreover, *amici* could fill an important gap in strategic accounts of the Court's relationship with external actors, explaining how the Court might be able to recognize the necessary strategic moves that academic observers have only been able to posit after the fact (Epstein and Knight 1998; Eskridge 1991; Gely and Spiller 1990).

The theoretical argument on behalf of the informational role of *amici* is plausible, but the empirical heart of Epstein and Knight's argument is their coding of a sample of *amici* for information regarding the preferences of various political actors, from those of the enacting legislature to those of the current legislature, executive, state governments, or general public. The authors find that the vast majority of *amici* do provide this type of information and also that the justices regularly cite these briefs in their opinions, suggesting real influence on the Court. Such evidence is not conclusive that *amici* matter to judicial decision making, but it suggestive. This line of research is clearly worth pursuing and is on the agenda only as a result of the institutionalist perspective.

Serious questions remain, however, as to how such data are to be interpreted. Epstein and Knight characterize themselves as coding for signals of the "preferences" of other actors who might impose constraints on the realization of judicial preferences. We have clear instances where such information might have been useful to the Court. For example, the Marshall Court may have wanted to know whether the Jeffersonians would refuse to recognize a writ of mandamus, or even have acted to dismantle the Court, if it had ruled in *Marbury's* favor in 1803 or struck down the repeal of the Judiciary Act of 1801 as unconstitutional. The information coded by Epstein and Knight, however, does not generally appear to indicate the political consequences of a particular judicial decision. Instead, the *amici* generally make claims regarding such things as the legislative intent behind statutory language, recent executive interpretations of the statutory or constitutional text at issue, and what is in the public interest (*DM*, p. 226). Although such *amici* are clearly providing information to the justices, it is not at all clear that the best interpretation of those briefs is that they are clarifying the constraints imposed by external actors on strategic justices. A much more straightforward reading of the briefs is that they employ material that is relevant for judges seeking to interpret the law.

A historical institutionalist account employing a sophisticated model of how the justices understand their role and the construction of the law would plausibly make better sense of the substance of the briefs and how they fit into judicial decision making. Such an interpretation of the *amici* requires, however, a willingness to credit legal authority, a commitment on the part of the justices to a particular social practice, and legal reasoning as a real entity. By imposing an external, instrumentalist conception of judicial behavior onto this institution, the meaning of this social practice is lost. Although potentially new insights into the judicial process can be gained by making such an assumption that might have been missed if *amici* were either ignored or treated as purely legal documents, readily available alternative interpretations of the data should be recognized.

### The Problem of Legal Interpretation

A second type of difficulty with the purely instrumental account of law is in how it deals with indeterminacy. The instrumentalist account tends to be ambivalent on the determinacy of the law, with somewhat greater implications for rational choice institutionalism than for the attitudinalist model. Both accounts assume that, in order to constrain, the law must provide clear, objective, coercive rules that can determine judicial outcomes. A starting point for the attitudinal model is the belief that such conditions of legal efficacy are unlikely to be realized in practice. According to attitudinalists, a judge can always find the legal support to rationalize and legitimize a decision. If mechanical jurisprudence is not possible, then politics reigns. Rational choice institutionalists, by contrast, are dedicated to the assumption that rules matter, but their understanding of how rules might matter is quite similar. The judicial decision making environment is filled with rules that constrain judicial choice by providing clear directives to the justices that are backed by a schedule of costs if those rules are violated. Institutions work by conveying to individuals relatively unambiguous information about the consequences of choices. Institutional constraints are "hard," even if they allow discretion within a finite range bounded by rules.

This understanding of the law creates problems for the rational choice variants of new institutionalism. Perhaps most basically, rational choice institutionalists have had difficulty answering the attitudinalists' charge that the "rules of the judicial game" cannot constrain the justices because those rules are too indeterminate to be seriously binding. Rational choice institutionalists have generally been content either to assume that rules matter in order to examine the implications of different arrangements of decision rules or to note that rational legal actors expend substantial resources in conflicts over the definition of rules suggesting that the rules must matter. Unfortunately, this answers neither the empirical nor the theoretical point.

The law often does appear to be ambiguous, and rational choice models have no mechanism for dealing with ambiguity. As a result, scholars in this tradition have tended to produce highly stylized models of judicial behavior with unclear relevance to actual decision making.

Both the attitudinalists and the rational choice institutionalists embrace a positivistic understanding of legal interpretation. Rules are written by a distinct lawmaker to constrain the behavior of those subject to them through the application of coercive force (e.g., McNollgast 1994). The resulting image of the law, especially for the rational choice institutionalists, bears a striking resemblance to that described by H. L. A. Hart (1961). Hart was quite critical of the legal realists' "rule-skepticism," which denied that judges were constrained at all by the law, but he did think that law was inherently "open textured" such that "at the margin . . . the courts perform a rule-producing function" (1961, 132). Within the constraints imposed by "plain cases" of the rule, judges act as legislators, creating new law rather than interpreting or adhering to existing law. The law limits, but does not exclude, judicial discretion (Hart 1961, 143). The attitudinalists would, however, deny that the Supreme Court, at least, ever deals with "plain cases."

Within jurisprudential theory, this positivist argument has come under attack most forcefully from Ronald Dworkin. In contrast to Hart's constrained legislator model of judging, Dworkin (1978, 1986) has proposed a more interpretive account. Judges construct determinate answers from diverse legal materials that include abstract principles as well as narrow rules. These principles provide guidance to and impose obligations on judges as they seek to apply the law to a particular case. Judges do not exercise discretion in a strong sense; the law is always present. In hard cases, the application of the law may not be clear, but judges are not left free to act on their own external preferences. The judge is constantly constructing a determinate, if contestable, understanding of what the internal principles of the law require. Dworkin's account of judicial decision making is primarily analytical and normative rather than systematically empirical, and his interpretive theory remains controversial even within jurisprudential circles. For present purposes, however, those concerns are of less relevance than the substantial implicit challenge that Dworkin poses to the instrumentalist conceptions of law assumed by the attitudinalists and rational choice institutionalists. Dworkin offers a compelling account of what it means to think like a judge, whereas the instrumentalist account assumes that judges do not have to think, only act.

The Dworkinian model of legal interpretation suggests a much richer and more important role for the law in judicial decision making than even rational choice institutionalist accounts allow. The Dworkinian account has gained widespread acceptance not only because of its normative appeal but

also because of its intuitive plausibility as a description of the experience of judging. It indicates how judges may feel constrained even within the interstices of the law. Significantly, Dworkin emphasizes the internal purposes of the law. For historical institutionalists, it is this sense of purposiveness that is often the most significant feature of an institution. Individuals not only operate within the boundaries of an institution, they also participate within the social practice that is an institution. Through their own actions, they reproduce the institution itself. The purposes of the institution become an independent reason for individual action. Thus, in Skowronek's phrase, a given individual may recur to his "job description" to explain his actions. Actions that would simply make no sense within a legislative context become appropriate and routine behavior in the courts.

The differences between the positivistic and interpretivist understandings of law have important implications for the empirical study of the courts. At one level, of course, the distinction could be reduced to a merely descriptive point. Instrumentalist accounts of judicial behavior may not accurately describe the feeling or internal processes of judging, but they may nonetheless adequately predict judicial outcomes. Judges may feel constrained by the internal purposes of the law, but scholars may treat them "as if" they were exercising political discretion. An institutionalist approach of judicial decision making, however, is preferable because of its ability to take into account a wider range of judicial activities and incorporate richer understandings of the judicial experience. Perhaps more importantly, the historical new institutionalism in political science approaches the new institutionalism in sociology in noting the extent to which rational action is defined partly in institutional terms (Powell and DiMaggio 1991). Institutions help establish the meaning of individual action and provide a framework for how individuals should respond to the world. Precedents, for example, can be a heuristic for judicial action as well as a constraint on judicial discretion. They are an interpretive framework for understanding the world and an authoritative structure defining what judicial actions are appropriate. Careful attention to these features of the law can help establish how the law maintains itself over time and the preconditions for legal change.

### THE FUTURE OF PUBLIC LAW

There remain very serious disagreements among adherents of behavioralism and the new institutionalisms, and undoubtedly research agendas, methodologies, and substantive conclusions of scholars working within the field will continue to reflect those disagreements. Nonetheless, it is probably not useful to pursue research primarily directed at demonstrating which model of judicial behavior is "right." The different models considered here

direct our attention to somewhat different features of the judicial system. In addition, the assumptions and approaches that are indicated by these different approaches are not readily comparable. This research in judicial decision making is most productive when it focuses on substantive problems rather than alternative academic models. Empirical research must be guided by agendas and hypotheses that emerge out of particular theoretical perspectives, but the results are most compelling when they are explaining particular empirical arguments rather than when they are used to make broad claims about the superiority of a universal model of judicial behavior.

The increasing influence of the new institutionalist approaches in judicial politics will hopefully avoid continued debate over whether judicial behavior is determined by “law” or “politics.” Emphasis on this sharp dichotomy is most pronounced when scholars of the Court are engaged in competition over models of judicial behavior. The irrelevance of law in judicial decision making has often been both the starting point and the conclusion of judicial behavior research. Such sweeping conclusions are rarely satisfactory, and the evidence needed to substantiate such claims is difficult to identify and gather. In contrast to behaviorist approaches that eventually became committed to the claim that law did not matter to judicial behavior, the institutionalist approaches suggest that both law and politics should influence judicial outcomes. Although conflicts between attitudinalists and new institutionalists have led to some fruitless debates over whether law matters, the more interesting questions are how and under what conditions law might matter in the courts. By attending to the particular structures of the courts, the new institutionalists are wary of sweeping theories that purport to explain all aspects of judicial behavior. If institutions mediate political outcomes, then an exploration of the diverse and particular contexts within which the justices operate—from the procedures for setting the docket and deciding cases to the constellations of external interests to the intellectual climate and doctrinal legacy—should add to our knowledge of the Court.

It is perhaps too much to expect a new synthetic theory of judicial politics to emerge. There remain significant differences in the assumptions and methods of the various approaches to judicial behavior that would be difficult to bridge. Those differences have tended to separate political scientists studying the courts into distinct camps, which has hampered dialogue and development. The gap is particularly wide between historical institutionalists and other empirical judicial scholars, and scholars working in the other traditions have tended to ignore relevant insights developed by historical institutionalists. Hopefully, the appearance of these volumes will help close those gaps and indicate both the many commonalities between these camps and the potential fruitfulness of their differences. A useful step forward is these anthologies’ effort to demonstrate that both brands of

institutionalism address important aspects of contemporary judicial behavior. In keeping with this goal, Gillman (*DM*, p. 66) adopts the term *interpretive institutionalism* rather than *historical institutionalism*.<sup>9</sup> Although interpretive institutionalists in public law have been as likely to treat contemporary subjects as historical ones (and all of their work has contemporary significance), the historical label has often been used to marginalize their work as antiquarian. These books represent another effort at engagement on the part of historical institutionalists with their empirically oriented colleagues. One can hope that that invitation to cooperate will be broadly accepted and future research in public law will be less fragmentary.

A true synthesis of these various approaches to analyzing judicial politics seems unlikely. It should be possible, however, to at least achieve a better integration of them. A genuine conversation among these different research traditions would provide a more complete picture of judicial politics and a richer research agenda. The institutionalist framework can be a bridge between behavioralist scholars who emphasize the politics in the courts and the more traditional public law scholars who remain primarily concerned with the law. The development of these approaches should encourage scholars to explore the ways various legal actors are concerned with strategy *and* principle, law *and* politics. As Michael McCann (1999, 15) has pointed out, the historical new institutionalism's "emphasis on institutional 'practice' provides an opportunity to redefine or reexamine 'strategic' action in ways that make sense within the constitutive framework for analyzing legal institutions." The law is not either regulative or constitutive, but rather it is both. The institutionalist perspective should be able to incorporate both aspects of the law and facilitate efforts to think about the relationship between them.

Several of the contributions to *The Supreme Court in American Politics* point the way toward a more wide-ranging examination of judicial politics. The essays by Michael McCann and by John Gates detail the wide variety of ways the Court has been used by political actors to gain strategic advantage in their own conflicts and the ways the Court has intervened in and redirected ongoing political debates. Mark Graber's contribution to the volume provides an important account of the Marshall Court and its struggle to operate within a complex political environment and enhance its own influence long after the artful decision in *Marbury*, and Howard Gillman offers an exploration of the linkages between the Court and the development of capitalism in the United States. These essays demonstrate the value of moving beyond vote counting and individual decisions and examining the role

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9. The *interpretive* descriptor also invokes the intellectual traditions and methodological form of much of the historical institutionalism. Historical new institutionalism has been greatly influenced by and is part of both the larger interpretive and historical turns in the human sciences generally (Rabinow and Sullivan 1988; McDonald 1996).

that the Court plays in the American political system as a whole. In doing so, they also point to interpenetration of law and politics and the difficulty of regarding them as either separate spheres or trying to collapse one category into another. Certainly work by interpretive institutionalists such as Michael McCann (1994), John Brigham (1996), Mark Graber (1995), and Rogers Smith (1992) have been deeply concerned with strategic action. Recent work by rational choice scholars similarly points the way toward an integration of analysis of strategic judicial behavior and the production and influence of the law (Cross and Tiller 1998). Such studies provide a much stronger sense of the Court's place in American political life than much of the recent literature in judicial politics provides.

For political scientists, the rise of the new institutionalisms creates an opportunity for moving beyond the historically narrow focus on Supreme Court and variations on counting the votes of the justices. The project that Pritchett initiated in the 1940s has provided some genuine insights into how courts work, but we appear long past the point of declining returns from further investments in that approach. A renewed attention to other forms of judicial and legal behavior offers the possibility of a richer and better understanding of legal and judicial politics. A concern with the importance of a wide range of institutions offers points of connection between empirically minded political scientists interested in the law and scholars working in a variety of other traditions and disciplines, including law and society. The examination of judicial decision making is already benefiting from efforts to link the courts to other political and social actors and to situate the judiciary within a nested set of discourses and social practices.

More broadly, the institutionalist approach has encouraged the examination of connections, disjunctions, and interactions between the law, the courts, and other political and social institutions. Power and authority have been minimized in the effort to explain the interaction of a small set of justices, and the new institutionalisms have been significantly motivated by a concern with reintegrating such concepts into political analysis. Ultimately, institutionalist approaches call for a recognition of the many ways power is exercised both inside the Court and out.

The behavioralist turn in public law marked a radical break from its predecessors, shedding old research agendas, methodologies, interdisciplinary linkages, and substantive assumptions. There is greater continuity between the new institutionalist approaches and behavioralism. In some forms, the new institutionalism merely adds new variables to the old studies. In its more radical forms, the new institutionalism promotes a substantial expansion of the field, but does not turn its back on the older scholarship and its concerns. In calling attention to the significance of and commonalities among the new institutionalist approaches, these collections will hopefully foster an enhanced dialogue not only among scholars working within

the narrow area of judicial decision making but also among scholars in a variety of disciplines concerned with the empirical practice of law and the courts.

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