In his splendid “Afterword” to this volume, Lawrence Baum offers an important observation, one that resonates with those of us who have been deploying models or utilizing quantitative methods in various institutional vineyards to these many years. If told as a fable, it would go something like this: Once upon a time a tribe of modelers (or methodologists) invaded a substantive field, believing (perhaps a bit too confidently) they had something to contribute to making sense of extant empirical patterns, practices, and regularities there. Their arrival was not greeted with uniform enthusiasm by the local tribes living in the field. The modelers thought of themselves as hail fellows well met. (If truth be told, some of their number harbored a view of themselves as heroes or saviors.) Whatever! They were regarded by many of the locals as an occupying force. Over time, however, the modelers began to acquire and appreciate the local knowledge of substantive specialists who worked in this field, while substantive scholars began to see some virtue in the tools and techniques brought in from the outside. New intellectual crops were harvested, yields of both the old and the new were up, arbitrage replaced conquest as the operative endeavor, and tensions declined as modelers and substantive scholars sat at the same table and broke bread together – in subsequent generations, at least, if not in the first. The fable is on-going and, alas, it is too early to conclude that these tribes will live together happily ever after. Hostility on the one side, and hubris on the other, have not dissipated entirely; but it is fair to report that respectful dialogue and productive collaboration have become dominant modes of interaction.

This is a story of one path of intellectual development. Let me be clear, all is not sweetness and light; it is a fable after all. In reality, there are downs as well as ups. There are bumps in the road. Yet the papers in the present collection, written mostly by younger scholars (with a grizzled veteran here and there) who have mastered both theoretical tools and substantive knowledge, are an affirmation of this developmental pattern. The papers are analytical without being pedantic; they are not mere exercises in technical virtuosity. They tackle questions easily recognized as substantively central and fundamental. They place considerable weight on the structure of the judiciary – a single court, an entire court system, or the environment occupied by other institutions – as the context in which judicial performance (strategic, attitudinal) occurs. They focus on puzzles:
• Are judges generally strategic? Or is strategic behavior more evident in one sector (constitutional pronouncements) or another (statutory interpretation), in one court or another, or perhaps not at all?

• Why would (intelligent) judges defer (even) to (relatively ignorant) legislators?

• Why an autonomous judiciary? Will it not usurp legislative power?

• How are declarations of the court enforced – by lower courts? by legislatures and executives? Why are they honored at all? Indeed, are they?

• Does a judicial hierarchy with an appellate system correct mistakes?

• Why do judges adhere to precedent as a matter of principle, even when adhering to it sometimes produces holdings they do not prefer?

• In a world of many principals, for whom are judges actually agents? To whom do they listen? Are they agents at all?

Just listing the puzzles should whet the reader’s appetite. The papers develop arguments and resolve puzzles in a systematic way, so I will not give away any of the surprises found in them. I will instead spend a few moments on some thorny issues with which models of courts and judges must grapple. (Some of these are re-visited by Baum in the concluding essay.) I should be clear here that this does not put modeling at a disadvantage, because these very same issues also haunt nearly every other approach to courts and judges – at least those that place explanatory weight on the political structure of the judiciary and the role of judges and Justices. Indeed, because the modeling tradition places so large a premium on transparency and consistency in arguments, it makes these problems more apparent than other approaches do, even though they lurk in the interstices of nearly all these other approaches as well.

Judicial Preferences. At a conference some years ago on the new institutional economics, I asked Judge Richard Posner, “What do judges maximize?” I prefaced the question by suggesting to him that political scientists were reasonably confident about the objectives of legislators (reelection, chamber influence, good public policy) and bureaucrats (budgets, authority, slack), but had always been, and continue to remain, puzzled by judges – especially those with life tenure. The usually loquacious and articulate founder of the law and economics tradition was rendered mute by my question – but not for long. In a paper published less than a year after my question had stumped him, he put the puzzle thus:
At the heart of economic analysis of law is a mystery that is also an embarrassment: how to explain judicial behavior in [rational] terms, when almost the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives – to take away the carrots and sticks, the different benefits and costs associated with different behaviors, that determine human action in an economic model…The economic analyst has a model for how criminals and contract parties, injurers and accident victims, parents and spouses – even legislators, and executive officials such as prosecutors – act, but falters when asked to produce a model of how judges act (Posner, 1993: 2).

He went on to reason that just as politicians generally are not thought to be extraordinary or super-human – even though the history books are dominated by the few who made their marks – so it must be with judges and Justices:

Politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest. By treating judges and Justices as ordinary people, my approach makes them fit subjects for economic analysis; for economists have no theory of genius. It is fortunate for economic analysis, therefore, that most law is made not by the tiny handful of great judges but by the great mass of ordinary ones…(Posner, 1993: 3-4).

Posner goes on to examine various objectives that he believes animate the actions of “ordinary” judges. I will not detail his argument here (it may be found in the original article, of course, as well as in Shepsle and Bonchek, 1996, pp. 405-31). Suffice it to say that Posner pushes the employment relation (using the analogy of working in a non-profit organization) and the idea of on-the-job consumption.

In contrast, most of the papers in the present collection – and most work in the modeling of courts and judges more generally – employ what I call the “legislator in robes” view of judges. Accordingly, the perspective on legislator objectives made famous by Fenno (1973) and Mayhew (1974) more than a quarter of a century ago applies. Judges, like politicians more generally, seek re-election (re-appointment), good public policy, and institutional influence. To this we may add career advancement (see below) for those who are not at the pinnacle of a judicial career. In those cases where appointment is for life, and in which institutional influence is a less significant attraction, judges are animated by their conception of good public policy.
This, in fact, is the conception most commonly adopted in the literature, and in the papers of this volume. With most of the work in this area committed to judges with policy preferences, the issue of paramount concern is whether they act directly on their preferences, as in the attitudinal model, or behave strategically, as in many game-theoretic formulations. (In some circumstances, these approaches are observationally equivalent, with strategic actors behaving in equilibrium in “sincere” accord with their preferences.)

The problem in my view is that the contexts in which judges engage in judicial behavior are not identical. Indeed, the fact that we employ a common label for such a variety of judicial circumstances may mislead us. Justices of the peace are not the same as Justices of the U.S. Supreme Court. The issues, opportunities, and constraints facing an administrative law judge differ from those presiding in other jurisdictions. Elected state courts differ in important ways from the life-tenured federal bench. (To the untutored eye of someone like me not trained as a judicial scholar, the class of politicians we call “judges” appears far more heterogeneous than the class we call “legislators.”) We risk being too facile in homogenizing judicial objectives if the heterogeneous political circumstances judges face shape their objectives. But even if they do not – that is, even if objectives are exogenous – political circumstances may nevertheless sort and select different “types.” It is my view, a sentiment echoed and elaborated in Baum’s “Afterword,” that attention must be given, theoretical as well as empirical, to the connections between context, selection, objectives, and ambitions.

Judicial information. The opening sentence of any brief history of formal theory in political science is something like: “In the beginning there was Arrow.” Kenneth Arrow did not invent formal political theory – and there were many pre-cursors (recounted in McLean and Urken, 1995) of whom Condorcet is perhaps the most eminent. The significance of this “first sentence” is to underscore the central place in formal political theory of problems of social choice – the aggregation of preferences and the institutional arrangements by which this is facilitated. Many of the models reported in the papers of this volume follow in this tradition – with multi-person courts, like multi-person legislatures, arriving at decisions through some sort of preference aggregation in accord with exogenously established procedures.

The present collection of papers, however, reflects two significant theoretical transformations in the social choice theoretic foundations of positive political theory. The first is the move to game theory. Social contexts and institutional settings are not merely the places in which preferences, exogenously arrived at, are faithfully revealed. The institutional setting constitutes a “game form,” a process or structure that transforms (strategically considered) actions
into social outcomes. Preference revelation is, itself, a matter of calculation, premised on personal objectives to be sure, but undertaken with an eye to what others are up to and how procedures and arrangements “manufacture” social outcomes.

The second theoretical transformation is informational, and several papers in this volume make this a major focus of their analysis. Institutional actors, in the courts themselves and in the larger political environment, operate behind a veil of uncertainty. Even if an actor knows what he or she wants, there still may be uncertainty about what to do, what others want, what others know, or what others do. Rational agents take this on board. So, from Rogers we learn that there are circumstances in which even knowledgeable judges may defer to legislators because the aggregation of information from which a legislative decision was taken will be informative to the judges. From Cameron and Kornhauser we learn that appeals processes often give prominence to those with an informational advantage (litigants), so that the very choice by a losing litigant to appeal transmits valuable information to informationally challenged appeals judges. From Bueno de Mesquita and Stephenson we are given a novel interpretation of precedent as a mechanism by which higher courts communicate doctrine clearly to lower courts in a world otherwise fraught with interpretive uncertainty.

Informational models, of which the papers above are instances, have elicited growing interest among institutional modelers. There was a tendency in the literature on legislatures of the 1980s and 1990s to partition explanations into those that are information-based and those that are preference-based (Shepsle and Weingast, 1995, Chap. 1). Possibly because the technology was more primitive a decade or more ago, modelers felt compelled to choose one approach or the other, and even to advocate the superiority of one or the other. Increasingly it has been possible to blend the two approaches, and students of courts seem better equipped than some of their forebears to skip over the intermediate position of advocating exclusivity for one approach or the other.

It is clearly important to focus on both preferences and beliefs. Institutions aggregate both preferences and information. Strategic actors make use of the latter in participating in the former. A situation is an equilibrium when an actor’s beliefs are fulfilled – so that he or she has no incentive to alter beliefs – and, in light of these fulfilled beliefs, he or she cannot, by modifying behavior, improve the outcome vis-à-vis personal preferences. The difficulty is in exactly how to specify the mechanisms by which information is transmitted and processed, and thus how beliefs are updated. We tend to treat these issues in a fairly primitive manner. We have moved away from early social choice and game-theoretic formulations that assumed complete and perfect
information. But we still lack a very general formulation of the kinds of uncertainty that judicial agents encounter.

Let me briefly take up two additional topics that will continue to attract the attention of those modeling judicial phenomena.

**Agency models.** Many of the papers in this volume make use of an agency metaphor – specified in a huge variety of ways. Lower courts are agents for courts higher in the judicial hierarchy. Courts are agents for legislatures. Legislatures and executives are agents of courts (implementing their policies, or not). Judges are agents of an enacting legislative coalition and, indirectly, of interest groups (enforcing their intentions). Sometimes the metaphor illuminates, but sometimes it obscures. The terms are slippery in many contexts, at least in part because an institutional environment consists of a complex of connections, and a particular analysis tends to isolate only some of them.

I have no problem with an agency-theoretic approach that abstracts from some of this complexity in order to shine the light brightly on a specific feature. I simply urge some self-awareness on this score. The identity of “principal” and “agent” in some of the original theoretical developments of this model (Jensen and Meckling, 1976; Fama, 1980; Grossman and Hart, 1983) derived from one of two considerations. In the theory of the firm – and especially in the debate over the separation of ownership and control – the principal is the “residual claimant” and the agents are factors employed by the principal to maximize this residual. In the contract-theoretic literature, the principal is the designer of the contract – in effect, the creator of a game form – and the agents are those who can accept or reject whatever is on offer. These and other principles may be employed to sort out who is whom in the principal-agent metaphor. Typically, the principal is a pro-active first-mover, whereas agents are reactive last-movers, making their choices in light of earlier moves. In a complex setting, like a separation-of-powers institutional arrangement, different actors assume different roles, the games in which they are engaged are intertwined, and most analyses are partial equilibrium at best. This is the nature of the beast – and awareness of this should modify interpretations and temper conclusions.

**Judicial careers.** Part of the ambiguity over judicial preferences to which I alluded earlier is, in my view, derived from ambiguity about judicial ambition and sense of career. In a static analysis of a particular decision or class of phenomena, judicial preferences may be *stipulated*, often without doing much damage to the analysis. But judges, like politicians generally and even scholars, presumably think ahead – how will this action now affect me then? how far down the road is “then”? how much do I discount the benefit “then” relative to the costs I bear now?
Myopic maximizing in accord with a stipulated objective function and subject to a variety of possibly binding constraints, fails to take this inter-temporal dimension into account. Fenno (1978) writes about legislators in the *expansionist* and *protectionist* phases of their careers. Schlesinger (1966) and Rohde (1979) write about *static* and *progressive* ambition. Judges have careers, too, and coming to terms with their ambitions is, perhaps, the single largest issue in terms of its likely spillover effects on the theoretical questions entertained in this collection. I expect that deep inside the judicial field, out of the view of interlopers like me, empirical work on just these issues is proceeding apace. It would benefit theoretical work immensely to bring empirical insights to bear on the issues of career and ambition.

The papers of this volume are fresh and exciting. They begin interesting theoretical conversations about the institutional world that judges and their courts find themselves. They are not the last word – and this is part of what makes them so good.
References


