Institutional Games and the U.S. Supreme Court. By James R. Rogers, Roy B. Flemming, & Jon R. Bond, eds. Charlottesville, VA: University of Virginia Press, 2006. Pp. xix+335. $60.00 cloth.

Reviewed by Mark A. Graber, University of Maryland

Game theorists are declaring victory in their battle to influence public law studies, and they are not leaving. Baum praises "[s]cholars who do formal work" for "provid[ing] a series of insightful and nonobvious ways of thinking about courts" (p. 263). Shepsle congratulates the "tribe of modelers" "who have mastered both the theoretical tools and substantive knowledge" necessary for vital new insights into judicial politics (pp. xiii–xiv). The essays in *Institutional Games and the U.S. Supreme Court* warrant that approval, but also the caution flags Baum and Shepsle raise in their concluding and introductory essays, respectively. All scholars of public law, regardless of their methodological preferences, have something to learn from the anthology Rogers, Flemming, and Bond have put together, just as the authors in the anthology still have much to learn from all scholars of public law, regardless of their methodological preferences.

The pervasiveness of strategic action in judicial politics unites the various essays in *Institutional Games*. Courts act strategically when determining whether and how to decide cases. Lawyers and interest groups act strategically when determining when to litigate and whether to appeal. Elected officials act strategically when determining what policies to enact and whether to sanction courts that strike down their handiwork. Scholars seeking to understand and explain judicial behavior must, therefore, elaborate how the structure of the federal judiciary, litigation practices, and the behavior of elected officials constrain and enable legal policymaking. Several essays clearly demonstrate how anticipated reactions structure constitutional politics. Zorn's model of legal behavior (pp. 55–6) suggests that courts influence policy both when justices declare legislation unconstitutional and when elected officials refrain from passing measures they believe justices will declare unconstitutional. Vanberg's fine essay observes that the frequency with which judicial decisions striking down legislation are implemented may be explained by justices tending to hand down decisions declaring laws unconstitutional only when good reasons exist for believing elected officials will respect those decisions. "[T]he impact of the enforcement problem," he astutely declares, "will not necessarily be reflected in actual attempts at evasion" (p. 89). Witness, for example, the various judicial maneuvers that prevented constitutional tests of Lincoln Administration policies while the Civil War raged.

Ordinary judicial behaviors, several essays conclude, may have hidden strategic roots. Bueno de Mesquita and Stephenson explain

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why U.S. Supreme Court justices interested in good legal policy may work within existing doctrine, even when they think previous precedents erroneous. Their insightful essay correctly observes that lower federal court justices are less likely to misapply a well-established series of precedents than the new, single precedent that is established whenever a series of precedents is overruled. "[T]he development of lines of cases," de Mesquita and Stephenson understand, "can communicate a legal principle better than any individual case could" (p. 209). By maintaining slightly inferior precedents, Supreme Court justices practically guarantee only slightly inferior legal policy in the lower federal courts, avoiding the significant probability that many lower court justices will frustrate higher court ends by misapplying new precedents. Judicial deference to legislatures is another legal practice that may serve strategic ends. Smart justices, Rogers's essay claims, might sometimes sustain legislation they believe mistaken on the ground that majorities in large bodies are more likely to make correct decisions than majorities in smaller bodies. Even if Rogers speaks too strongly when he asserts that "[t]he idea that legislatures aggregate information as well as aggregate preferences is potentially able to account for judicial deference in a fashion better than any existing alternative" (p. 38), his analysis provides reasons for thinking that the Condorcet Jury Theorem may complement and enrich existing explanations of judicial restraint.

Institutional Games should attract the attention of all public law scholars, even though the work is not likely to instantly bring harmonic convergence to the disparate wings of the field. Some minor issues of presentation may annoy those with other perspectives on judicial behavior. Several essays take for granted that "justices are policy-seeking political actors" (p. 4), even though that assertion may not be necessary for most models presented in the anthology. A good case can be made that justices have good reasons for acting strategically whether their goal is making good policy or following the law. Both of these ends may require the sort of sophisticated behavior well documented by the authors in this collection. Although he uses different terminology, Zorn's distinction between "dependent" and "independent" courts serves as a nice starting place for exploring the extent to which more policy- and more legally-oriented justices (or justices with different legal theories) might engage in different forms of strategic behavior. More than a few unnecessary Greek letters also dot the landscape, although the vast majority of essays are quite readable for the uninitiated.

Many essays might have been improved had the authors immersed themselves more broadly in the public law field. Several essays assume that "a group faced with the decision whether or not to litigate will do so only when it expects to win" (p. 51). The law

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and society literature points to numerous reasons why legal mobilization promotes a political movement's goals even when a favorable judicial decision is unlikely. The Supreme Court has historically considered a great many appeals from indigent persons convicted of crimes, few of whom are deterred by the low probability of success. With rare exceptions, capitally sentenced prisoners always appeal their trial verdict, regardless of anticipated outcome. Thinking about when litigants seek to have higher courts review a lower court decision may improve some formal models of the appeals process. Consider the hypothesis that higher courts are more likely to review and take seriously appeals from the category of litigants who tend to appeal only when there is a high probability of success.

Broader knowledge of the public law field, this and other examples suggest, will likely produce even better game theoretical insights. Consider Martin's interesting statistical analysis (p. 19), which concludes that the Supreme Court in constitutional cases responds strategically to the president, but not Congress. Martin may be correct, but another explanation for his finding is that presidents who appoint justices have a greater influence on judicial preferences than the senators who confirm justices. Recent scholarship suggests that post–New Deal presidents sought to nominate justices who were committed to liberal notions of racial equality, but that Presidents Franklin D. Roosevelt, Harry S. Truman, and Dwight D. Eisenhower did not consistently seek justices committed to free speech. Congressional majorities may have had different preferences during the 1940s and 1950s. Greater judicial agreement with the president may reflect these shared commitments, rather than strategic choices. Needless to say, both statistical analysis and more formal models that seek to elaborate on the distinction between race cases and free speech cases are likely to provide fascinating insights that will benefit the entire public law field. Certainly, if the quality of essays in *Institutional Games* is any indication, a great many people in political science have a good deal to learn from each other.

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European Ways of Law. Towards a European Sociology of Law. By Volkmar Gessner and David Nelken, eds. Oxford, United Kingdom: Hart Publishing, 2007. Pp. xiv+393. $95.00 cloth.

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"Can there be such a thing as a European sociology of law, and if so, what does it involve?" This is the key question that underlies

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