Vanderbilt Law Review

Volume 29
Issue 1 *Issue 1 - January 1976*

Article 2

1-1976

Judicial Policy-Making and Information Flow to the Supreme Court

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* This article was prepared in large part during 1974 and 1975 while the author participated in a broader study with Professors Arthur S. Miller and Jerome A. Barron, both of the National Law Center, The George Washington University. That study was funded under a research grant from the National Science Foundation. The author wishes to express his gratitude to Professors Miller and Barron for their invaluable assistance in the preparation of this article. Additionally, the author would like to thank J. Woodford Howard, Jr., Fred Kort, and Glendon Schubert for reviewing and commenting on the manuscript. Responsibility for the views expressed herein, however, is solely that of the author. Interpretations and conclusions should not in any way be attributed to other individuals, to the National Science Foundation in particular, or to the federal government in general.

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INTRODUCTION

Particularly during the last two decades under the formal leadership of Chief Justices Earl Warren and Warren Burger, the United States Supreme Court has been widely recognized as a profoundly influential policy-making institution in several significant areas.[1] This recognition verifies the popular view that the law is in fact what courts do and what the judges say it is.[2] Knowledge of how the Justices actually reached most of these landmark decisions remains limited, however, principally because of the Court's long-standing, self-imposed tradition of secrecy as well as scholarly reluctance to abandon traditional conceptions of the nature of the judicial process. The purpose of this article is to suggest how the Court tends to make decisions in critical policy issues by analyzing and modeling information flow to the Justices in three leading constitutional cases—*New York Times v. Sullivan*,[3] decided by the Warren Court in 1964, and *Roe v. Wade*[4] and *Doe v. Bolton*,[5] announced by the Burger Court in 1973.

A few students of the judicial process, aware of the key policy-making function of the Supreme Court in the American governmental system, have sought to construct various types of models for describing, explaining, or predicting its decisions.[6] Rarely, however,

1. *See generally* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968); A. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT (1971); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964); Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-1969*, 60 CORNELL L. REV. 743 (1975); McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229 (1965); Mason, *The Burger Court in Historical Perspective*, 89 POL. SCI. Q. 27 (1974); Swindler, *The Court, the Constitution, and Chief Justice Burger*, 27 VAND. L. REV. 443 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971). See also the group of outstanding articles on the Warren Court appearing in 67 MICH. L. REV. 223-358 (1968).

2. *See, e.g.*, O. HOLMES, THE COMMON LAW 35 (1881); Holmes, *The Path Of the Law*, 10 HARV. L. REV. 457, 461 (1897). *See also* Chief Justice Hughes and Mr. Justice Frankfurter quoted in A. MASON & W. BEANEY, THE SUPREME COURT IN A FREE SOCIETY 1 (1968).

3. 376 U.S. 254 (1964).

4. 410 U.S. 113 (1973).

5. 410 U.S. 179 (1973).

6. See the discussion of judicial models in C. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES (1974); Rigby & Witt, *Bibliographical Essay: Behavioral Research*

have these models emphasized the flow of information as policy-related input to the members of the Court. Instead, emphasis usually has been placed on the Court's outputs—the decisions that impact upon everyday life and the workings of our legal, political, social, and economic systems. Additionally, previous models have not expressly relied upon concepts such as those found in communication or information theory.[7] Modeling of judicial information flow, a crucial component in the Supreme Court's policy-making process, therefore remains largely in the unexplored frontiers of judicial research.

As one observer has pointed out, the time is right for developing models of judicial policy-making and the judicial process from perspectives that have been heretofore virtually ignored,[8] despite the availability of related studies providing a factual basis for model experimentation. A recent study by two law professors, Arthur S. Miller and Jerome A. Barron, which examines in detail the information flow process to the Supreme Court in *Times*, *Roe*, and *Doe*, and derives a number of propositions based upon those case studies,[9] provides a unique opportunity for building new information-

in Public Law, 1963-1967, 22 WEST. POL. Q. 622 (1969); Sheldon, *Structuring a Model of the Judicial Process*, 58 GEO. L.J. 1153 (1970); Ulmer, *Mathematical Models for Predicting Judicial Behavior*, in MATHEMATICAL APPLICATIONS IN POLITICAL SCIENCE III 67 (J. Bernd ed. 1967). Of course the complexity of different models varies greatly. On the one hand is the traditional verbal model of Supreme Court policy-making. *See, e.g.*, G. SCHUBERT, THE FUTURE OF THE NIXON COURT 13-14 (1972). On the other hand is the exceedingly complex mathematical model. The sophistication of mathematical models is illustrated by the work of Professors Fred Kort and Glendon Schubert. *See, e.g.*, G. SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974); G. Schubert, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1956-1963 (1965); Kort, *Regression Analysis and Discriminant Analysis: An Application of R.A. Fisher's Theorem to Data in Political Science*, 67 AM. POL. SCI. REV. 555 (1973); Kort, *A Nonlinear Model for the Analysis of Judicial Decisions*, 62 AM. POL. SCI. REV. 546 (1968); Kort, *Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions*, 28 LAW & CONTEMP. PROB. 143 (1963); Kort, *Content Analysis of Judicial Opinions and Rules of Law* in JUDICIAL DECISION-MAKING 133 (G. Schubert ed. 1963).

7. *See* Schubert, *Judicial Process and Behavior, 1963-1971*, 3 POL. SCI. ANN. 96 (1972); Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 318 (1964). For works which are more or less illustrative exceptions to this generalization see Ulmer, *The Discriminant Function and a Theoretical Context for Its Use in Estimating the Votes of Judges*, in FRONTIERS OF JUDICIAL RESEARCH 335 (J. Grossman & J. Tanenhaus ed. 1969); Shapiro, *Decentralized Decision-Making in the Law of Torts*, in POLITICAL DECISION-MAKING 44 (S. Ulmer ed. 1970). For a study of information flow in the Eighth Circuit Court of Appeals see Carp, *The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC'Y REV. 405 (1972).

8. Fiorina, *Formal Models in Political Science*, 19 AM. J. POL. SCI. 133, 147 (1975).

9. Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 62 VA. L. REV. 1187 (1975) [hereinafter cited as Miller & Barron].

oriented models of judicial process and policy-making.

This article is intended as an exploratory step toward filling the gap in the literature by synthesizing the fragmentary knowledge relating to judicial information flow. It attempts to advance the dialogue initiated by Professors Miller and Barron by providing a number of components necessary for an adequate model; it seeks also to suggest additional considerations necessary for a more useful model and thus for a continuing systematic inquiry into the information flow process. Results of the Miller-Barron article supply the background for the work reported here. *Times, Roe,* and *Doe* and the Miller-Barron findings are considered in the first two sections respectively. Conclusions from these sections are then used to desigu an elementary inductive model of information flow to the Justices. This basic model is next expanded to include the entire judicial system and its environment—information flow to, through, and back to Court members. On balance, therefore, the exploratory model finally developed is of necessity eclectic in nature. It contains both inductive and deductive elements, the former based upon explorations into specific cases, the latter founded on additional theoretical models.[10]

I. FACTS, FINDINGS, AND POLICY-MAKING

The two major lines of Supreme Court cases that receive primary attention in this article and that of Professors Miller and Barron[11] involve both Warren Court policy-making (*New York Times v. Sullivan*) and Burger Court decisions (*Roe v. Wade* and *Doe v. Bolton*). Case facts (as types of information) and Court findings (reflecting apparent interpretations of information) in these decisions must be recounted here because of their importance in understanding the Miller-Barron article, and in constructing and explaining a model of Supreme Court information flow.

In *Times*,[12] the Warren Court announced a landmark first

10. Appeudix A summarizes related results of a questionnaire survey of law and political science professors concerning questions of information flow to the Supreme Court.

11. The authors originally intended to examine information flow in four other constitutional areas: racial segregation, economic due process, search and seizure, and trial by jury. See the introductory footnote to Miller & Barron, *supra* note 9.

12. For treatments of *Times* see, e.g., Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and the Law of Libel: A Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964); Pierce, *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965); 52 CORNELL

amendment decision in the case law concerning constitutional protection of freedom of expression. In so doing, the Court modified the traditional rules of libel by imposing constitutional standards upon them and demonstrated its capacity to formulate policy without adhering to "neutral principles" of constitutional decision-making.[13] The respondent in *Times* was L.B. Sullivan, one of three city commissioners elected by the voters of Montgomery, Alabama. Sullivan, in a civil action brought in an Alabama court, argued that critical comments appearing in a paid editorial advertisement in the March 29, 1960, issue of the *New York Times*, had libeled him through accusations of misconduct aimed at the Montgomery police, for whose conduct he was officially responsible. He argued that the accusations were directed toward him even though he was *not* specifically named.[14]

Some of the allegations made by the advertisement were subsequently shown to be erroneous, and others accurately portrayed events that occurred prior to the date that Sullivan became city commissioner.[15] At trial, the jury found for Sullivan and awarded him general damages because, under the Alabama rule, the advertisement's accusations were found to be "libelous per se," false, and printed with malice by the newspaper.[16] The Supreme Court of Ala-

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L. REV. 419 (1967); 78 HARV. L. REV. 201 (1964); 113 U. PA. L. REV. 284 (1964); 18 VAND. L. REV. 1429 (1965); 51 VA. L. REV. 106 (1965).

13. *See generally* Kalven, *supra* note 12, particularly at 192, referring to Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Consider also: Jerome A. Barron's comment that *Times* "is an example of judicial law making; but it is incomplete law making," J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA 11 (1973); Samuel Krislov's assessment that "[t]he political usage of the First Amendment lies at the root of the New York Times v. Sullivan decision . . . ," S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 34 (1968); Willard Pedrick's view that *Times* "represents a distinct departure from past constitutional development, it surmounts rather than interprets some language of the Constitution, and it does all of this to adopt a rule of law rejected by a heavy majority of state courts called upon to consider the matter," Pedrick, *supra* note 12, at 587; and Arthur Berney's remark that "the Court in Sullivan clearly failed to seize upon the narrowest constitutional grounds available in reaching its decision," Berney, *supra* note 12, at 17.

14. 376 U.S. 254, 258 (1964).

15. *Id.* at 258-59.

16. A critical distinction exists between the awarding of general damages (under which malice is presumed) and punitive damages (under which actual malice must be proven). This distinction, and the fact that it was not embodied in related jury instructions, was summarized by the Court as follows:

> The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous *per se*, "the law . . . implies legal injury from

bama affirmed the decision, denying the claims of the *Times* based upon the first and fourteenth amendments.

Mr. Justice Brennan's majority opinion in *Times* addressed "for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[17] The Court ruled that the advertisement appearing in the *Times* fell within the protection of the first amendment's guarantee of freedom of speech and press.[18] It was not a "commercial" advertisement in the customary sense;[19] rather, it was an "editorial advertisement" that "communicated information, expressed opinion, recited grievance, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[20] Such advertisements perform an extremely useful function in facilitating political expression in American society, according to Brennan's policy-making premise:

> Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.[21]

Underlying assumptions of this line of reasoning are that the protection of editorial advertising under the first amendment will

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the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages—as distinguished from "general" damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

Id. at 262-63.

17. *Id.* at 256.

18. The Court was unanimous in *Times*, but in addition to Justice Brennan's opinion were concurring opinions authored by Justices Black and Goldberg, both of which were joined by Justice Douglas. These three members of the Court generally felt that *Times* did not go far enough toward guaranteeing the right of public criticism of elected officials' conduct. Indeed, they concluded that this was an absolute right. *See id.* at 296, 298.

19. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

20. 376 U.S. at 266.

21. *Id.*

promote the exchange of diverse political and social views, stimulate public debate over momentous questions, provide some form of public access to the media, and ultimately contribute to placing a more informed electorate in a better position to hold their elected officials accountable.[22] In the words of Justice Brennan, "[w]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[23] The problem is where to strike a balance between fundamental competing constitutional values—to regulate maliciously libelous statements—while at the same time not weakening the capacity for wide-ranging discussion of public questions.[24]

The remaining issue was whether the *Times* advertisement forfeited constitutional protection because certain claims made therein were false and supposedly defamatory in nature.[25] The Warren Court answered in the negative, that "[i]njury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error."[26] Moreover, a dilution of this constitutional right similarly is unwarranted even in a situation in which a combination of falsity and defamation is evident in sharp criticism of a public official.[27]

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22. For literature on the right of access see J. BARRON, *supra* note 13; Barron, *Access—The Only Choice for the Media*, 48 TEXAS L. REV. 766 (1970); Barron, *An Emerging First Amendment Right of Access to the Media*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?* 48 TEXAS L. REV. 783 (1970).

23. 376 U.S. at 270. Justice Brennan later explained why the Alabama rule specifically "dampens the vigor and limits the variety of public debate." *See id.* at 279. He never explained, however, the factual foundation, if any, behind the assertion that the Court's ruling in *Times* would specifically promote "uninhibited, robust, and wide-open" public debate over important policy issues. Apparently this is another example of what Professors Miller and Barron label "untested and unproven" assumptions. Miller & Barron, *supra* note 9, at 1231.

24. Compare Justice Brennan's statement in Rosenblatt v. Baer, 383 U.S. 75, 86 (1966):

> Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation.

25. 376 U.S. at 271.

26. *Id.* at 272.

27. *Id.* at 273. Going outside the formal flow of information to the Court, Justice Brennan interpreted the first amendment's historical meaning and explained how tbis new standard related to a chief lesson learned from the constitutional debate surrounding enforcement of the Sedition Act of 1798. 1 Stat. 596. Brennan observed: "Although the Sedition Act was

Award of general damages to Sullivan by the Alabama courts was thus reversed because actual malice by the *Times* was not reflected in the published criticism of Sullivan's performance.[28] Under the Alabama ruling, potential critics would be forced into a position of self-censorship—whether or not their beliefs were correct—because they would have to prove such accusations in court, or because they would incur large expenses in doing so.[29] Hence, in the oft-quoted words of the Court:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[30]

The Court thus not only rejected Sullivan's assertion that the *Times* advertisement criticized his performance as police commissioner, but also promulgated broad new guidelines for libel.[31]

Despite the so-called strict constructionist, conservative legal philosophies of the four Nixon appointees,[32] the Burger Court in *Roe v. Wade* and *Doe v. Bolton* displayed a capacity to legislate broad social policy in a fashion strikingly similar to that manifest in the *Times* decision of the Warren Court.[33] Texas statutory provisions

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never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276. This led Professor Kalven to remark that "[t]his is heady doctrine. The Court has never before been quite so candid about its use of history." Kalven, *supra* note 12, at 193.

28. Weighing the standard established in Edwards v. South Carolina, 372 U.S. 229 (1963), Speiser v. Randall, 357 U.S. 513 (1958), and Pennekamp v. Florida, 328 U.S. 331 (1946), the Court decided in *Times* that:

> [T]he proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law . . . .
>
> . . . The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom."

376 U.S. at 285-86.

29. *Id.* at 279.

30. *Id.* at 279-80.

31. *Id.* at 288-92.

32. See Nixon's separate descriptions of Justices Burger, Blackmun, Powell, and Rehnquist in *Public Papers of the Presidents of the United States: Richard M. Nixon 1969*, at 392, 396 (1971); 7 WKLY. COMP. OF PRES. DOCS. 1431-32 (1971); 6 WKLY. COMP. OF PRES. DOCS. 523 (1970); N.Y. Times, Oct. 22, 1971, § 1, at 24, col. 2-3; Wash. Post, Oct. 22, 1971, § 1, at 1, col. 7; N.Y. Times, Nov. 3, 1968, § 1, at 79, col. 3-4; Wash. Post, May 9, 1968, § 1, at 1, col. 4.

33. Unlike the ruling in *Times*, the Court was unable to decide these cases unanimously. Justice Blackmun spoke for the seven-member majority in both cases, but White and

pertaining to abortion challenged in *Roe* were essentially like those operative in most other states at that time, making it a crime to procure or attempt an abortion unless, based upon a physician's advice, it would save the mother's life.[34] An unmarried, pregnant resident of Dallas County, known by the pseudonym Jane Roe,[35] initiated a federal class action suit in March, 1970, seeking a decla-

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Rehnquist dissented with opinions in each case, criticizing their colleagues for making sweeping new policies. Burger and Douglas also wrote concurring opinions in both cases. Justice Stewart submitted a concurring statement in *Roe*, while joining Blackmun's majority opinion in *Doe*. For literature analyzing *Roe, Doe*, and related matters see, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Heymann & Barzelay, *The Forest and the Trees*: Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765 (1973); O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337; Sherain, *Beyond* Roe *and* Doe: *The Rights of the Father*, 50 NOTRE DAME LAW. 483 (1975); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); 74 COLUM. L. REV. 237 (1974); 61 GEO. L.J. 1559 (1973); 87 HARV. L. REV. 75 (1973); 51 N.C.L. REV. 1573 (1973); 47 TEMPLE L.Q. 715 (1974); 26 VAND. L. REV. 823 (1973); 60 VA. L. REV. 305 (1974).

34. TEXAS PENAL CODE ANN. tit. 15, ch. 9, arts. 1191-94, 1196 (1961), provided for the following:

> Article 1191. Abortion
>
> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature hirth thereof he caused.
>
> Art. 1192. Furnishing the means
>
> Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
>
> Art. 1193. Attempt at abortion
>
> If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall he fined not less than one hundred nor more than one thousand dollars.
>
> Art. 1194. Murder in producing abortion
>
> If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.
>
> Art. 1196. By medical advice
>
> Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

35. Justice Blackmun's opinion assumed the reliability of available information concerning Ms. Roe's personal situation:

> Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

410 U.S. at 124.

ratory judgment to the effect that these provisions were unconstitutionally broad infringements of privacy, and requesting an order enjoining the Dallas County district attorney from their enforcement.[36]

The federal district court concluded that the ninth (through the fourteenth) amendment of the Constitution bestowed a "fundamental right of single women and married persons to choose whether to have children"[37] and that the abortion statutes of Texas were unreasonably vague and violative of individual rights under the ninth amendment. The three-judge district panel, however, refused to grant Roe the declaratory and injunctive relief which she sought, causing her to file a petition for certiorari with the Supreme Court.[38] Constitutionally, the most important claim by petitioner on appeal was that a woman has an absolute right to an abortion—at any time, regardless of the reason, and in whatever way she chooses. The counterclaim of the respondent was that recognition and protection of prenatal life constitutes a "compelling state interest"[39] which can therefore be regulated.

Mr. Justice Blackmun's now famous opinion, speaking for six of his brethren, "demonstrated anew the Court's ability to make daring innovations in constitutional law."[40] It first held that *Roe* involved a case or controversy to which the Court's jurisdiction extended, and that the appellant had standing to appeal the case. Specifically, the Justices found exception with "[t]he usual rule in federal cases that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action was initiated."[41] The majority rejected the old rule because "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."[42] Essentially, Justice Blackmun declared that the biological characteristics and time frame involved in human preguancy pre-

36. Roe's case was consolidated hy the three-judge district court with two related actions, one taken by a licensed practicing physician, the other by a childless married couple. *See id.* at 120-22.

37. *Id.* at 122, quoting the district court decision.

38. *See* 28 U.S.C. § 1253 (1970). *See also* Justice Blackmun's comments, 410 U.S. at 123.

39. *See* 410 U.S. at 153-56.

40. Epstein, *supra* note 33, at 159. For a harsher assessment of the Court's policy-making in the *Abortion Cases* see Ely, *supra* note 33, at 928, 935-37, quoted at *infra* note 49.

41. 410 U.S. at 125. That Roe was in fact pregnant when her suit was originally filed seems to have been assumed by the Justices.

42. *Id.*

sented a "classic justification"[43] for bypassing this customary standard for mootness—and for establishing a quite different criterion.[44]

Justice Blackmun next addressed the central question of a woman's right to terminate her pregnancy if she so chooses. To answer this question he delved substantially into information concerning the historical, social, and legal background of abortion, explaining that related state criminal laws in effect throughout most of the United States had their origins in statutory law of the last half of the nineteenth century.[45] Prior to that time American statutes regulating termination of pregnancies during the early time frame were considerably more liberal, giving greater discretion to the woman with respect to the abortion option, but over the years anti-abortion attitudes had become increasingly reflected in state law.[46]

Justice Blackmun reasoned that the guarantee of privacy, while not specifically mentioned by the Constitution, included "fundamental" personal rights or those "implicit in the concept of ordered liberty."[47] As such, privacy rights have received Supreme Court recognition in regard to marriage, procreation, contraception, family relationships, and child rearing and education.[48] Influenced by medical and social—as opposed to strictly legal—information, the Court declared that, based on its broad interpretation of the due process clause, this privacy doctrine was to be extended to cover a woman's decision to have an abortion:

> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State

43. *Id.*

44. For discussion and critique see Epstein, *supra* note 33, at 160-67.

45. *See* 410 U.S. at 129-47. This survey of the history of abortion and related law included ancient attitudes toward abortion; the Hippocratic Oath; the common law; English statutory law; American law; and the positions of the American Medical Association, the American Public Health Association, and the American Bar Association. *See id.* at 130-47. It is unclear, however, how this survey relates to the essence of the *Roe* ruling "for at no point [does it] lend support for the ultimate decision to divide pregnancy into three parts, each subject to its own constitutional rules." Epstein, *supra* note 33, at 167.

46. Blackmun's reading of medical and legal history revealed that these laws had been attributed to or justified by three factors: that they discouraged illicit sexual behavior (an argnment not relied upon by Texas); that they protected the life of the pregnant woman (particularly since antiseptic techniques were not widely utilized during the nineteenth century); and that they gnarded prenatal life (a premise often strongly opposed by those challenging criminal abortion statutes). *See* 410 U.S. at 147-52.

47. *Id.* at 152, quoting Palko v. Connecticut, 302 U.S. 319 (1937).

48. *See* 410 U.S. at 152-53. *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

would impose upon the pregnant woman by denying this choice altogether is apparent.[49]

This "fundamental" right is not absolute, however. Under the policy formulation in *Roe*, a woman is not guaranteed an abortion "at whatever time, in whatever way, and for whatever reason she alone chooses."[50] Where the state has a "compelling interest," it retains the power to regulate abortions so as to protect health, medical standards, and prenatal life.[51] The Court therefore concluded, "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[52]

In defining the troublesome concepts arising from this point, the Burger Court deeply entered the policy-making arena, enunciating new rules applicable to extremely controversial, value-laden, and sensitive subjects.[53] First, the Court held that the reference to "person" in the fourteenth amendment does not extend to an unborn child, contrary to the appellee's contentions and to the beliefs of many religious groups.[54] Secondly, the majority dodged the age-

49. 410 U.S. at 153. Note, however, that "*Roe* suggests an inference . . . neither . . . from the intent of the framers, or from the governmental system contemplated by the Constitution—in support of the constitutional right to an abortion." Ely, *supra* note 33, at 928. Or put more strongly:

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue . . . or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-a-vis the interest that legislatively prevailed over it. [citation omitted] And that, I believe . . . is a charge that can responsibly be leveled at no other decision of the past twenty years. At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Id. at 935-37. Professor Ely qualifies this last sentence, however, arguing that *Roe* involves policy-making comparable to that 68 years earlier in Lochner v. New York, 198 U.S. 45 (1905). *See* Ely, *supra* note 33, at 937-43. *See also* Tribe, *supra* note 33, at 5-15; Miller & Barron, *supra* note 9, at 54-56. *Compare* 61 GEO. L.J. 1559 (1973).

50. 410 U.S. at 153.

51. *Id.* at 154.

52. *Id.*

53. As Justice Blackmun observed:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, all are likely to influence and to color one's thinking and conclusions about abortion.

Id. at 116.

54. *See id.* at 158.

old query of when life in fact begins,[55] but ruled nevertheless that the broadly stated Texas statutory provision abridged the rights of pregnant women who were only able to secure a legal abortion when their lives actually were endangered.[56] Thirdly, and most importantly, the Court fashioned a controversial standard for conditions under which a state may or may not regulate abortions to protect a woman's health and "potential life." In a carefully worded policy proclamation that swept aside the abortion laws of most, if not all,[57] states and created the legal concept of three trimesters of pregnancy, Justice Blackmun announced that the state has a "compelling interest" at

> . . . approximately the end of the first trimester. This is so because of the now-established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.
>
> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[58]

Briefly stated, during the first trimester of pregnancy the abortion decision is totally in the hands of the woman and her physician; during the second trimester the state may regnlate abortion procedures in the interest of maternal health; and during the third trimester the state's "compelling interest" is so strong (because the fetus is then viable) that it may prohibit an abortion (unless necessary to protect the woman's health or life).[59] Because such fine distinctions necessarily were absent from the Texas statute—since Justice Blackmun had just declared them to be the law of the land—the

55. *Id.* at 159.

56. *Id.* at 162, 164.

57. *See* Tribe, *supra* note 33, at 2.

58. 410 U.S. at 163-64. See Ely, *supra* note 33, at 924-26 for an effective critique of the Court's "viability" and "compelling state interest" doctrines. *See also* Tribe, *supra* note 33, at 4, 27-8.

59. *See* Justice Blackmun's summary, 410 U.S. at 164-65.

state's abortion law was ruled unconstitutional under the fourteenth amendment's due process requirements.

The companion case of *Doe v. Bolton*[60] involved a 1968 Georgia criminal abortion statute,[61] more liberal and specific than those in most states, fashioned after the Model Penal Code of the American Law Institute.[62] Georgia's provisions established abortion as a crime punishable by one to ten years imprisonment, except that a licensed physician could abort when his "best clinical judgment" suggested that a pregnancy (1) would endanger the woman's life or impair her health "seriously and permanently," (2) would result in the birth of a child with "a grave, permanent, and irremediable mental or physical defect," or (3) was caused by forcible or statutory rape.[63]

Apart from these requirements, such a physician-approved abortion was deemed noncriminal only when a number of additional criteria were met. These included the requirement that the woman be a Georgia resident; that the "physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery . . . who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons enumerated above";[64] that the abortion be conducted in a hospital licensed by the State Board of Health and holding accreditation from the Joint Commission on Accreditation of Hospitals; that the attending physician receive advance approval from the hospital's abortion committee; and that certifications be forthcoming of any rape said to have occurred.[65] Differing greatly from the Texas statute, the Georgia law nevertheless established a wide range of procedures and standards that had the cumulative effect of discouraging women from seriously considering and pursuing the abortion option.

Against this background a married, pregnant, indigent woman—identified as Mary Doe—challenged the Georgia law in federal court in April 1970.[66] As in *Roe*, the plaintiff requested a

60. 410 U.S. 179 (1973).

61. GA. CODE ANN. §§ 26-1201 to -1203 (1968), reprinted in 410 U.S. at 202-05.

62. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962), reprinted in 410 U.S. at 205-07. At the time of the *Doe* decision, the ALI proposal was operative in roughly a dozen states. 410 U.S. at 182.

63. 410 U.S. at 183.

64. *Id.* at 203.

65. For details concerning all of the above requirements see *id.* at 202-05.

66. Her suit was joined by 23 other persons and two nonprofit Georgia corporations. For district and Supreme Court decisions regarding the claims of these other plaintiffs see *id.* at 186, 188-89.

declaratory judgment that the abortion provisions were unconstitutionally restrictive and sought an injunction prohibiting enforcement. Doe claimed an abortion was necessary in her case for financial and physical reasons: she was financially unable to support a child and, in any event, had been informed by a physician that an abortion would be less dangerous to her health than giving birth to the child.[67] During the eighth week of pregnancy, however, her application to the abortion committee of an Atlanta hospital was denied because state guidelines failed to provide for abortions for charity patients.[68] This meant, Doe insisted, that her only alternatives were to bear the child or to break the law by seeking an illegal abortion. Her class action suit claimed that this situation abridged her rights guaranteed under the first, fourth, fifth, ninth, and fourteenth amendments, and that the Georgia statute was unconstitutionally vague. The district court ruled that Doe's rights of privacy and "personal liberty" were denied because the Georgia statute specified merely three circumstances under which an abortion could be approved.[69] On the other hand, upholding the remainder of the statute and denying injunctive relief, the court observed that the state possessed the power to regulate "the manner of performance as well as the quality of the final decision to abort" so as to protect the woman's health and the "potential of independent human existence."[70] As in *Roe*, plaintiff appealed to the Supreme Court for further relief and also pursued her attack on portions of the Georgia statute upheld by the lower court.

Unlike *Roe*, the *Doe* case chiefly concerned the constitutional acceptability of narrowly written statutory provisions regulating standards and procedures for abortions. Applying and extending the activist policy announced in *Roe*, Justice Blackmun's majority opinion addressed Doe's contentions: "undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection."[71] For the threshold issue Justice Blackmun referred to the holding in *Roe*, decided on the same day, that abortion statutes containing provisions regulating the decision whether to abort during the first trimester of pregnancy amounted to an unconstitutional infringement of a woman's pri-

67. *Id.* at 185.
68. *Id.*, n.7.
69. *Id.* at 186. *See* text accompanying note 63 *supra*.
70. *Id.* at 187, quoting Doe v. Bolton, 319 F. Supp. 1048, 1055, 1056 (N.D. Ga. 1970).
71. *Id.* at 189.

vacy.[72] On the vagueness issue the Court rejected the view that physicians would be less inclined to approve abortions because the Georgia statute required that an abortion be "necessary."[73] Further, Justice Blackmun explained that accreditation by the Joint Commission on Accreditation of Hospitals was not required for a facility to meet adequate standards to perform abortions, and "that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy [under *Roe*], is also invalid."[74]

On a related but more noteworthy procedural due process issue, the Justices held "that the interposition of the hospital abortion committee [to approve an abortion] is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician."[75] The last due process question similarly was answered in favor of the appellant, striking down the requirement that an abortion must be approved by two additional licensed Georgia physicians.[76] Georgia's residency requirement also was deemed unconstitutional under the privileges and immunities clause,[77] for it denied medical services to non-Georgia residents entering the state to seek abortions.[78] Finally, the Court decided that since the accreditation, approval, and confirmation stipulations of the Georgia abortion statutes had been declared unconstitutional, it was no longer necessary to answer the question whether the Georgia procedure denied equal protection of the laws by discriminating against the poor.[79] On the whole, then, as in *Times* and *Roe*, the Justices legislated policies that overruled actions of state legislatures and that, further, revolutionized the Supreme Court's own prior doctrinal trends.

II. THE "PRELIMINARY INQUIRY" OF PROFESSORS MILLER AND BARRON

For nearly twenty years Arthur S. Miller has been a crusader seeking to dispel lingering myths and erroneous interpretations con-

72. *Id.* at 189-91. *See* notes 47-52 and accompanying text *supra*.

73. *Id.* at 191-92. United States v. Vuitch, 402 U.S. 62 (1971), suggested the answer to the question, according to the majority opinion. There the Court ruled that "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.* at 72. Thus, in *Doe*, Blackmun wrote that "[t]his conclusion is equally applicable here. Whether, in the words of the Georgia statute, 'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely." 410 U.S. at 192.

74. 410 U.S. at 194-95.

75. *Id.* at 198.

76. *Id.* at 199.

77. U.S. CONST. art. 4, § 2.

78. 410 U.S. at 200.

79. *Id.* at 200-01.

cerning the role, functioning, and impact of the United States Supreme Court. A similar theme emerges from his collaboration with another provocative scholar, Jerome A. Barron, in their critical, yet constructive, article *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*.[80] The authors periodically explain that they are attempting to lay to rest persistent mythology which, in fact, the "sophisticated members of the bar and of the general public have long seen through . . . ."[81] Their analysis of Supreme Court information flow and policy promulgation, however, extends well beyond this objective.

Through their examination of *Times* and the *Abortion Cases*, Professors Miller and Barron demonstrate that the process of informing the judicial mind in prominent constitutional cases is far more complicated than is suggested by the traditional conception of the adversary system. The "orthodox model,"[82] which they interpret for the most part as corresponding to the Blackstonian view,[83] is simply that "an appellate judge refers to briefs and records, to answers gleaned from questions asked during oral argument, and to 'strict' judicial notice."[84] During the procedure of finding and applying legal standards, virtually no room exists for "creativity" or judicially made law.[85] This, Miller and Barron say, is sheer fantasy.

A. Operational Premises

Customarily accepted operational premises underlying the adversary process at the Supreme Court level are crucial to an understanding of the Miller-Barron article, which painstakingly documents the fact that several of these premises are inapplicable to the selected cases.[86] One elementary assumption is that a "case or controversy" must be involved before the Supreme Court will accept an issue for decision, and that therefore the Court does not act as a "self-starter." Indeed, "the threshold requirement of the existence of a 'case' or 'controversy' is basic to the assumption of authority by all United States courts."[87] It follows that the Justices have no

80. Miller & Barron, *supra* note 9.

81. *See id.* at 1187-90.

82. *Id.* at 1187-89.

83. *See* 1 W. BLACKSTONE, COMMENTARIES, discussed at *infra* note 180. For a defense of the Blackstone view see Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62-70 (1965).

84. Miller & Barron 1187.

85. *Id.*

86. These assumptions or premises are generally discussed at *id.*, 1187-93. Ten are enumerated at *id.*, 1188-89.

87. Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 94 (1935).

power to rule on hypothetical questions and that they will consistently refuse to issue advisory opinions.[88] They instead decide only narrow legal issues based on the specific record from a lower court, closely following precedent and refusing to legislate broad new social policy.[89]

Another operational presumption is that the United States Supreme Court relies completely on the lower court as a fact-finder and on counsel to present the adjudicative facts of a case, pertinent authoritative law, and the legal questions at issue. The Court, at least in theory, cannot perform these functions; it must utilize judicial notice sparingly, and "has no machinery for discovering, without the aid of the parties, matters of fact which are disputable and disputed."[90] Logically, this means that the adversary system will produce the most relevant information pertaining to a case because it "places the burden on the parties and competitive relationship motivates each to find all the law and facts."[91] Therefore, as a case proceeds through the judicial system and ultimately reaches the Supreme Court, traditional thought holds that adequate and reliable data will have been brought to light. Frankfurter and Hart have explained this point in the following manner:

> The Court's sense of its position and function as an appellate tribunal leads it to emphasize not only the necessity of adequate data but of data already explored and sifted by trial and intermediate tribunals. This insistence rests not merely upon administrative consideration of the pressure of business. It rests also upon awareness of adjudication as a process, as a process in which the deliberation of successive tribunals serve to illuminate final judgment and in which particularly "the special knowledge of local conditions" possessed by local tribunals may be indispensable.[92]

The Court's functioning is further assumed to be rational in

88. *See* Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

89. *See, e.g.*, Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934).

90. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944). Thus, according to conventional thought, "it cannot he questioned that in the United States the primary responsibility and control over almost all phases of the judicial process continue to reside in the parties." J. COUND, J. FRIEDENTHAL, & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 1 (1968). More to the point, Professor Reich has written: "Courts have no sources of information other than the records before them, and judges have no special knowledge to assist them in evaluating information of a social and political nature if they were able to obtain it." Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 740 (1963).

91. W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 5 (1968). Stated differently, "it is the lawyer's duty to call the court's attention to authorities that it might otherwise overlook." C. AUERBACH, L. GARRISON, W. HURST, & S. MERMIN, THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES 193 (1961).

92. Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 96 (1935).

nature.[93] This idea in turn is based upon the theoretical competence of lawyers and Justices participating in the decisional process. Counsel who argue cases before the Court are thought to be capable of handling a wide range of subjects—legal, social, or technical in nature—with approximately the same competence.[94] The Justices also are thought to be capable of dealing with the myriad of complex questions argued before them.[95] Moreover, the supposition is that "[t]he defects, if any, of a trial judge may be cured or corrected by the judge of the appellate courts; those of the judges of the court of last resort must be assumed not to exist."[96]

Equally as important, the adversary system supposedly minimizes the possibility that the Justices will reach a premature decision based upon their initial understanding of the case and the applicable law, or upon their own personal points of view. The orthodox model thus essentially adheres to the philosophy that members of the Supreme Court "act as justice blindfolded, with strict impartiality and without personal preferences or predilections affecting their decisions."[97] To more traditional thinkers this means that the Justices decide according to "the law," suggesting that only one legal principle is applicable to the point in question. As Miller and Barron chide, "[t]he law, thus, is not created anew in each constitutional decision, but pre-exists."[98] All the foregoing operational assumptions regarding the adversary process culminate in the belief that "truth" emerges from the collision of competing ideas and arguments in a court of law. For this reason "[t]he most important aspect of the adversary system is the claim of truth-finding upon which it rests."[99]

Most, if not all, of these assumptions periodically have been questioned or attacked by students of the legal process. Professors

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93. Morgan, *supra* note 90. As Lon Fuller has observed:

> In the end, the justification for the adversary system lies in the fact that it is a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as the lot of humanity will admit.

Fuller, *The Adversary System*, 47 in TALKS ON AMERICAN LAW (rev. ed. H. Berman ed. 1971). *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

94. Miller & Barron, *supra* note 9, at 1188.

95. *Id. But see* Reich, quoted at note 90 *supra*.

96. Morgan, *supra* note 90, at 270.

97. Miller & Barron 1188.

98. *Id.* at 1189.

99. J. SIGLER, AN INTRODUCTION TO THE LEGAL SYSTEM 121 (1968). Or in the words of two political scientists, "The theory is that if each side follows this self-serving strategy [in an adversary proceeding], the truth will emerge." W. MURPHY & C. PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 317 (1961).

Miller and Barron suggest, however, that the Blackstone model retains some viability.[100] Through an analysis of three major constitutional decisions, they proceed to report evidence that contradicts the traditional conception of decision-making by and information flow to the Supreme Court. Their efforts provide considerable support for six propositions regarding information flow, each of which is utilized in this article for constructing models of the Court's informing process.

B. *Propositions Regarding Information Flow*

(1) Proposition Number One

First among these propositions is that in constitutional cases "[t]he Supreme Court tends to ignore narrow 'adjudicative' facts and to focus on larger, more general problems."[101] After carefully analyzing information inputs in *Roe* and *Doe*—records, briefs, and oral arguments—and comparing them to the Court's final decisions, Miller and Barron conclude that Justice Blackmun clearly was seeking to establish a broad new judicial policy.[102] In so doing, the Court deliberately chose to address these cases on general grounds of the constitutionality of state statutes regulating the availability of legalized abortions, rather than on the narrow issue of the district courts' decisions to deny injunctive relief.[103] Justice Blackmun's principal emphasis was neither on the narrow facts in the *Abortion Cases*, nor on those particular litigants, nor on the cases as class actions. Instead, and contrary to the view expressed in the Georgia brief,[104] the majority essentially issued an advisory opinion "by

100. Miller & Barron 1188-90. The authors believe their conclusion applies not only to traditional or conservative jurists and attorneys, but also to their academic colleagues in law and political science, although all groups know in fact that the Blackstone model falls short of reality.

101. Miller & Barron 1193. In some litigation at the Supreme Court level, this tendency seems in part to explain the "appellate transformation of cases" from relatively routine questions in lower courts to ones of major constitutional significance at the apex of the judicial hierarcy. *See* R. RICHARDSON & K. VINES, THE POLITICS OF FEDERAL COURTS: LOWER COURTS IN THE UNITED STATES 127-29 (1970). The proposition was also given support at the time of Mr. Justice Douglas' resignation from the Court when one of his law clerks noted "how Douglas would go through a draft opinion and take out specific facts and legal points quite deliberately in hopes that the opinion would be interpreted broadly and lead to further change in the law." MacKenzie, *The Defender of Dissent*, Wash. Post, Nov. 16, 1975, § 1, at 3, col. 2.

102. Miller & Barron 1193. Indeed, the Court "treated the cases as open invitations to write broad, 'advisory' opinions setting forth a legislative prescription to cover not only the particular litigants . . . but all women who become pregnant." *Id.* Compare this assessment to those cited at notes 40, 49, & 73 *supra*.

103. Miller & Barron 1193. *See also* notes 38, 70 and accompanying text *supra*.

104. See the selections from the Georgia brief cited in Miller & Barron 1195-96.

going far beyond the facts of a case to attempt to settle cases not then before the Court."[105]

In broadly ruling that during the first trimester of pregnancy a woman and her physician should have complete control over the basic decision with regard to an abortion, Justice Blackmun was delegating governmental power to that woman and doctor, while simultaneously ignoring highly pertinent, narrow adjudicative facts relating to the particular appellant.[106] Related delegations of power were made by the Court to the states concerning the second and third trimesters of pregnancy, but again based upon the general problem emerging in the minds of the Justices, as opposed to the narrow adjudicative facts specifically presented in records, briefs, and oral arguments.[107]

According to Professors Miller and Barron, *New York Times v. Sullivan* is a similar illustration of Supreme Court policy-making

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105. *Id.* at 1193. More specifically:

> The *Abortion Cases* were appeals from three-judge courts; but those appeals could easily have been dismissed because of mootness or other grounds of nonjusticiability. It is obvious that the Court wanted to rule on abortion, and further, to rule broadly, and that it found in Ms. Roe and Ms. Doe two parties who, although they had won declaratory relief in the lower courts, nonetheless were permitted to appeal because they did not get everything they had asked for. That they didn't get that specific relief from the Supreme Court either is wryly amusing—but they did obtain a sweeping advisory opinion.

Id. at 1197. The authors explain that the Supreme Court, in fact, has discretionary power to issue advisory opinions, and that the exercise of that power is "neither novel nor frequent." *Id.* at 1193.

106. Nowhere in the Court's opinion is there an indication of how long Ms. Roe had been pregnant; it accepted "as true" both that she existed and was pregnant when the suit was brought to test the Texas anti-abortion statute, and that she was unmarried and unable lawfully to secure an abortion. According to the Texas brief, "[n]either the Appellants nor the Appellee offered any evidence" at the hearing before a three-judge federal court convened to adjudge the constitutionality of the Texas statute. [citation omitted] . . .

> The conclusion is inescapable: Narrow "adjudicative" facts in the *Roe* case were not considered important insofar as they dealt with the status of the person seeking to invalidate the Texas law. The Court went even further: It slid over an argument of mootness, because "our law should not be . . . [so] rigid" as to proscribe adjudication because of the normal 266-day human gestation period. [citation omitted] Ms. Roe, in other words, was important to the trimester decision only because a pregnant woman was necessary to bring the action; once brought, the details of her condition became irrelevant.

Id. at 25, citing the Brief for Appellee, Roe v. Wade, at 4, and 410 U.S. at 125.

107. Medical history was not cited by Justice Blackmun in *Doe*:

> Contrary to *Roe*, the Court in *Doe* was content merely to cite no history or other "authority"; it did not set forth precisely why the Georgia statutory provisions were invalid. We are left to assume that the "compelling interest"/due process rationale in *Roe* covers the different situations in *Doe*. As Justice Rehnquist asserted in his dissenting opinion, the Court used equal protection analysis to cover a due process decision—something new under the Constitutional sun.

Id. at 1196.

that rests upon judicial premises extending considerably beyond the adjudicative facts of the case to a more general policy question. In preparing to argue the appeal for the New York Times, "Professor Herbert Wechsler, like a careful advocate, wrote his brief . . . to allow the Supreme Court to hold simply that the first amendment does not permit a conclusion that libel per se has occurred when the plaintiff, a government official, has not been named and there was no intent to injure him."[108] But, to the surprise of the litigants, the Court avoided a decision on this relatively limited ground, and it neglected to emphasize—for purposes of policy—the narrow fact that Sullivan was not named in the Times advertisement. Expanding upon views mentioned but not accentuated in petitioner's and amici briefs,[109] the Court instead extended its ruling to defamation of all public officials, regardless of whether they were named or unnamed in a media account. Therefore, contrary to traditional conceptions of Supreme Court policy-making and information flow, Miller and Barron determine that "the statement of law and policy in *New York Times Co. v. Sullivan* was far broader than the facts of the case required."[110] Indeed, they argue, the Court in *Times* and *Roe* actually "(a) ignored adjudicative facts; (b) was not interested in the litigants *qua* litigants, but only as a means to an end; (c) stated a general, as distinguished from a specific, norm; and (d) thus became in fact a 'self-starter.' "[111] Clearly, at this early stage in their article, the Miller-Barron attack on the traditional model of judicial information flow and decision-making is solidly launched.

(2) Proposition Number Two

As suggested by the first proposition, the second asserts that "[t]he bar treats the Court much like a legislative committee. A variety of major premises are offered on the basis of their virtue as policy rather than of their authoritative character as law."[112] Put in

108. *Id.* at 1197.

109. "The *Times* did not seek the extension of first amendment protection against libel to all elected public officials, whether named or unnamed. But the brief did introduce the powerful idea that allowing Sullivan to recover would in fact revive the law of seditious libel, in a manner sufficient to cause the Court to give wider protection than the *Times* sought." *Id.* at 1198.

110. *Id.* at 1197. *See id.* at 1199-1208 for the second proposition advanced by Miller and Barron, which also relates to this conclusion.

111. *Id.* at 1199.

112. *Id.* The value of this portion of the Miller and Barron study was suggested in a remark ventured by Professor Kalven over a decade ago in connection with *Times*:

> A careful comparison of the brief and the opinion of the Court would itself be a profitable enterprise. At various critical points, the opinion echoes the carefully precise

different terms, in seminal constitutional cases counsel stress far-reaching and largely unsubstantiated "legislative facts" furnishing the foundation for alternative judicial policies,[113] rather than stressing the rule of law or narrow "adjudicative facts" derived from the individual case under consideration. The Justices even occasionally encourage or guide counsel's presentation of alternative policies during oral argument, as if they were legislators conducting congressional hearings. From these policy alternatives the Justices may then choose the one most consistent with their own conceptions of what the Constitution requires, conditioned by the preferences of other Court members and any judicial bargaining that occurs prior to the final decision's announcement.

Both in briefs and in oral argument, counsel for the plaintiff in *Roe* displayed a keen understanding of the policy-making options open to the Court and, in fact, how the Court at times legislates in landmark constitutional cases. A thorough reading of briefs and arguments thus leads Professors Miller and Barron to view Roe's counsel as "really lobbying the Court."[114] For example, counsels' brief provided a comprehensive appendix that reproduced a large body of related social, legal, and medical publications, a table depicting the types of statutory provisions regulating abortions throughout the nation, professional groups' proposals, state and federal judicial rulings pertaining to abortions, and instances where medical and social science data have received judicial notice.[115] Much data concerned broad legislative, not narrow adjudicative, facts.[116] Additionally, Roe's attorneys candidly observed that regulation of abortion is particularly susceptible to predisposition, and openly encouraged the Supreme Court to take judicial notice of

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language of the brief and the structure of the Court's argument reflects the structure of argument in the brief.

Kalven, *supra* note 12, at 192 n.6. *See also* S. KRISLOV, *supra* note 13, at 63.

113. For literature relating to "legislative facts" see, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 15 (1958); Alfange, *The Relevance of Legislative Facts in Constitutional Litigation*, 114 U. PA. L. REV. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

114. Miller & Barron, *supra* note 9, at 1202. *See also id.* at 1204, where assertions of an amicus brief take on the appearance of a "pressure group activity." While Roe's counsel exhibited a great deal of sophistication in approaching the Justices, such is not always true. Indeed, in *Roe*, as in many other cases, the competence of counsel varies in large measure. *Id.* at 1199. That there is significant variance in counsels' abilities and sophistication in the way they present their arguments has been evident in such landmark cases as Gideon v. Wainwright, 372 U.S. 335 (1963), and Baker v. Carr, 369 U.S. 186 (1962). Nevertheless, say Miller and Barron, "the pretense is otherwise: the operational assumption of the adversary system presumably is that lawyers are of roughly equal competence." Miller & Barron 1199.

115. *Id.* at 1200-01, quoting Brief for Appellants, Roe v. Wade, 410 U.S. 113 (1973).

116. *See id.* at 1201-04.

relevant data provided in the brief.[117] Consistent with the traditional conception of the adversary process,[118] counsel asserted that these data had "been carefully sifted in order to present the most directly relevant materials. *It is the hope of the parties that these materials will be of use to the Court in reaching an informed and just decision.*"[119]

To Miller and Barron, the notion that introduction of these data would contribute to a just decision can only be predicated on the view that "the attorneys [were] . . . [c]ognizant of other times when the Court judicially noticed extra-record facts . . . relevant only to the larger, more general questions of the case."[120] The invitation to the Court to take judicial notice of information in the brief's appendix underscores, they say, the idea that Roe's counsel were aware of other instances in which the Court recognized facts outside the record.[121] Further, it is instructive that counsel presented to the Court a large volume of information that was pertinent not

117. *Id.* Of course Justice Blackmun was well aware of the fact that personal attitudes affect one's views on the regulation of abortions. *See* Blackmun quoted at note 53 *supra*. Likewise, the Court did take broad judicial notice of certain medical and social "facts" in *Roe* and *Doe*. This led Blackmun's "strict constructionist" colleague, Chief Justice Burger, to remark in his concurring opinion: "I am somewhat troubled that the Court had taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts." 410 U.S. at 208.

118. *See* Frankfurter & Hart, quoted in text accompanying note 92 *supra*. *See also* the models discussion at notes 220-34 and accompanying text *infra*.

119. Miller & Barron 1200-01. The question arises whether the data were also "carefully sifted" at the trial court level. They should have been, according to the orthodox model of information flow. But witness the following remark appearing in the amicus brief presented to the Court by two planned parenthood groups: "[We] believe that [we] can provide the Court *facts* about contraceptive failure, unwanted births, and abortion which will not otherwise be presented." Quoted at *id.* 1202.

120. *Id.* at 1201. Rather than presenting narrow adjudicative facts in their amicus brief, the National Abortion Coalition, the American Association of Planned Parentbood Physicians, and the Planned Parenthood Federation of America, Inc., introduced broad legislative facts for the Court's consideration. *See id.* at 1201-03. This occurrence received the following evaluation from Miller and Barron:

> The reference to "facts" in these excerpts is obviously not to adjudicative facts as they emerge after being introduced at trial under the rules of evidence. Rather, they are legislative facts, often presented at a level of fiat assertion unaccompanied by supporting data.

Id. at 1203.

121. *Id.* at 1201. Such activities may of course be essential for wise judicial policy. *See* Karst, *supra* note 113, who observes at 77: "[T]he court's legislative function requires it to be informed on matters far beyond the facts of the particular case. These 'legislative facts' of broader application need illumination so that the court can make the best possible prediction of the effects of its decision." Professor Alfange agrees: "[I]t is not only manifestly feasible for the Court to examine legislative facts, but such an examination is often altogether indispensable to sound constitutional adjudication." Alfange, *supra* note 113, at 678.

to Roe specifically but to the broader issues involved.[122] Certainly, then, counsel behaved as if they were "before a legislative committee, . . . asking the Supreme Court to make new social policy, rather than to rule in accordance with 'the law' . . ., [and seeking] to influence what they admitted were 'predispositions' prevalent about abortion."[123]

The second hypothesis is equally substantiated by an examination of *Times*. The Court could have handed down at least seven different narrow rulings applicable to libel claims.[124] Instead, however, the Justices proclaimed a sweeping, revised doctrine of actual malice. An explanation for this instance of judicial policy-making, according to Professors Miller and Barron, rests upon information exchange between Herbert Wechsler and the Justices during argument. "At oral argument Professor Wechsler apparently sensed the Court's willinguess to fashion a first amendment rule broader than the rule he had suggested in his brief."[125] This, they argue, obviously contradicts the assumptions of the Blackstone model regarding judicial information flow and decision-making.[126] Indeed, it indicates that in the formulation of new constitutional doctrine a "tacit agreement" exists among members of the bar and the Court that a variety of policy options should be explored, resulting in "a process of subtle and sophisticated joint policy-making . . . by counsel and the Justices."[127] Unfortunately, many of the policy alternatives

122. Miller & Barron, *supra* note 9, at 1200-01.

123. *Id.* at 1201. Similar conclusions flow from an inspection of amici curiae briefs prepared by various pro-abortion groups. *See id.* at 1201-04. See also the historical analysis of the use of amici briefs in highly controversial policy issues in Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

124. Miller & Barron 1205-06. As before, these seven approaches emerge from an examination of Wechsler's briefs and oral argument.

125. *Id.* at 1205. As evidence the authors refer to this interesting exchange between Justice Goldberg and Professor Wechsler:

> Mr. Justice Goldberg: Mr. Wechsler, your basic position, if I understand it correctly, is that under the First and Fourteenth Amendments no public official can sue for libel constitutionally and get a verdict with respect to any type of false or malicious statement made concerning conduct, his official conduct?
>
> Mr. Wechsler: That is the broadest statement that I make. But I wish in my remaining time to indicate what the lesser submissions are, because there are many that must produce a reversal in this case.

Quoted at *id.*

126. *See id.* at 1207.

127. *Id.* at 1205. See also the discussion of policy-making by "judge and company," *id.* at 1216-17.

The American Civil Liberties Union's amicus brief displays its belief that in *Times* the Court could well establish an expansive new rule of libel:

> In recognition of the problems raised by alleged libels about public officials, many courts have evolved specific modifications of the general law to meet the realities of the public official situation and to protect First Amendment rights. They have done this on a

presented to the Justices in *Times, Roe*, and *Doe* were virtually devoid of empirical verification. This lends support to Professor Louis H. Mayo's hypothesis "that some of the most critical Supreme Court decisions require very little data—only a strong ethical idea."[128]

(3) Proposition Number Three

Proposition number three, in large measure the most unique thus far, follows from its predecessor: "New doctrine at times is urged on counsel by the Court, rather than the reverse; as a result a shift may occur from a limited position in briefs to a broad position during oral argument."[129] In *Times*, Miller and Barron point out, Mr. Justice Stewart initially suggested during oral argument the doctrine that ultimately was handed down by the Court.[130] Herbert Wechsler's original argument in fact had been considerably more narrow, but during Justice Stewart's questioning he discerned the hint from the bench and substantially broadened his position.[131]

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variety of different theories: some have defined the substantive law as calling for more extreme accusation to justify a holding of libel per se as to a public official; some have obliterated the extremely tenuous distinction between fact and comment and permitted "fair comment" on public officials whether based on facts truly stated or not; some have held the presumptions of damage and malice inoperative as to public officials; some have in effect shifted the burden of proof to the plaintiff; and some have tended to exonerate by a finding of "substantial truth."

Quoted at *id.* at 1207. This statement was framed in the political, not strictly legal, context of the Court's policy-making responsibility to guarantee that citizens are free to "speak their minds" regarding officials' public conduct. *Id.* at 1207. A similar political goal was pursued in the *Roe* case, that is, to overrule the anti-abortion laws existing throughout the states. *Id.* at 1199. See, e.g., the legislative facts asserted by the Planned Parenthood Federation of America, Inc., and the American Association of Planned Parenthood Physicians, discussed at *id.* 1202-03.

128. Professor Mayo is quoted at *id.* 1199.

129. *Id.* at 1208. This proposition, too, may partially explain the "appellate transformation of cases." *See* note 101 *supra*. In a related sense, it may lead to the "complaint among lawyers . . . that they sometimes have trouble identifying the case they tried below as the one being described in the appellate opinion." Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*,39 LAW & CONTEMP. PROB. 150, 151 (1975).

130. Miller & Barron 1208-09. Related suggestions were made by Justice Goldberg in *Times*. *See id.* at 1205. This conclusion was not, however, verified through examination of the oral argument in the *Abortion Cases*. *See id.* at 1199-1203.

131. *Id.* at 1209. According to Miller and Barron:

When Justice Brennan asked whether there were any limits to criticism of official conduct which would fall outside the protection of the first amendment, Wechsler replied by emphasizing the opportunity the case presented to the Court to state a new rule. He conceded that his position in the briefs that an award of damages for defamation concerning official conduct to a public official was equivalent to seditious libel was legally and historically not impregnable, and that the constitutionality of the Sedition Act of 1798 had never been specifically ruled on by the Court. But he used the ambiguity in the law as a springboard for the formulation of new doctrine . . . .

Once again challenging basic assumptions of the adversary process,[132] the authors write:

> The difficulty with this process is that it is too subtle. . . . If the Court wanted to establish a new first amendment privilege to protect the media against libel suits by elected public officials, that intention should have been communicated to the parties. The Justices should have assured that all parties would be able to respond fully and fairly to such a novel and fundamental issue. That, surely, would have been a more direct, even more honest, way of proceeding. And it would have comported with the essence of the adversary system.[133]

(4) Proposition Number Four

Professors Miller and Barron introduce an hypothesis central to their theme: in the Supreme Court policy-making process "[t]he integrity of non-legal (and other) data is frequently not subject to test or challenge by the losing party."[134] Since the advent of the Brandeis brief,[135] utilization of non-legal data frequently has characterized Supreme Court policy-making and information flow. Perhaps the most famous illustration of the use of social science data arises in *Brown v. Board of Education*,[136] in which Chief Justice Warren's majority opinion drew upon Gunnar Myrdal's analysis of the psychological effects of segregation upon black children.[137] Consideration by the Justices of reliable and pertinent social science data, in itself, however, does not disturb Miller and Barron.[138] They

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Id. at 1209-10. *See also* note 27 *supra*.

132. *See* notes 89, 90, 94 and accompanying text *supra*.

133. Miller & Barron 1210-11.

134. *Id.* at 1211.

135. The Brandeis brief was first utilized in Muller v. Oregon, 208 U.S. 412 (1908). For discussions of the Brandeis brief, and for the pros and cons of its usage, see generally P. FREUND, THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE 150-54 (1961); P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 87-97 (1972); Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROB. 50-56 (1975).

136. 347 U.S. 483 (1954).

137. *Id.* at 495 n.11, citing G. MYRDAL, AN AMERICAN DILEMMA (1944).

138. As is evident from the data in Appendix A *infra*, there exist great differences of opinion over this point. But many scholars and judges seem to agree with Miller and Barron. *See, e.g.*, Judge Craven, *supra* note 140, who writes at 151: "The role that the social sciences ought to play in the judicial decision-making process is, of course, the same as the role of any other science, whether medical, electronic, or atomic. In short, all sources of human information and knowledge properly contribute to the determination of facts." *See also* P. ROSEN, *supra* note 135, at 114-17; Hazard, *Limitations on the Uses of Behavioral Science in the Law*, 19 CASE W. RES. L. REV. 71 (1967); Kaplan, *Behavioral Science and the Law*, 19 CASE W. RES. L. REV. 57 (1967); Rosenblum, *A Place for Social Science Along the Judiciary's Constitutional Frontier*, 66 NW. U.L. REV. 455 (1971).

The real problem, of course, is that reliable and pertinent data were not always forthcoming or utilized in the cases examined. This provides an interesting contrast between the *Abortion Cases* and Lochner v. New York, 198 U.S. 45 (1905). *See* Miller & Barron, *supra* note 9, at 1227-28.

are concerned instead with how the Justices choose from a range of conflicting social science findings, and they are uneasy over the fact that such data are not always presented and debated by counsel. In short, non-legal data that fail to emerge during adversary proceedings should not be recognized through judicial notice as supporting a Justice's opinion announced months after formal proceedings have concluded.[139]

Yet according to the authors this is precisely what happened in the *Abortion Cases*. For example, Justice Blackmun's opinions relied in part on articles written by Professor Cyril Means, who had "a definite point of view on the abortion controversy . . . as a member of Governor Rockefeller's commission appointed to review New York's abortion laws."[140] Justice Blackmun similarly accepted as factual—but misleadingly interpreted—a medical text's assessment of the point at which a fetus becomes viable, a debatable issue at best.[141] Although crucial to the assumptions and standards announced in the *Abortion Cases*, in neither instance were these data directly subjected to strict evaluation and refutation. The Court based its opinion on only one school of thought.[142] In effect, when

139. The authors note that in some cases, e.g., Terminello v. Chicago, 337 U.S. 1 (1949), and Erie v. Tompkins, 304 U.S. 74 (1938), "the situation worsens, with the Court rendering decisions on *issues* not briefed or argued by either party." Miller & Barron 1226.

140. Miller & Barron 1213. The two articles are Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

141. Justice Blackmun said, "[w]hen criminal abortion statutes were first enacted, the procedure was a hazardous one for the woman," citing [at 410 U.S. 148 n.43] page 19 of C. Haagensen and W. Lloyd, *A Hundred Years of Medicine* (1943). The difficulty with Blackmun's opinion is that he states conclusions about medicine with a certitude the data does not support. For example, he observed that viability of a fetus usually occurs at 28 weeks but may occur as early as 24 weeks; however, the source he cites for this statement actually says that viability can vary between fetal weights of 400 grams (20 weeks gestation) and 1000 grams (28 weeks gestation) . . . . The importance of establishing fetal viability, according to Justice Blackmun, is that this is the point where the state has a "compelling interest" in the protection of potential life.

Miller & Barron 1212-13.

142. Related examples emerge from an examination of *New York Times v. Sullivan*. For instance:

> The strength of the historical parallel in terms of the 18th-century consequences on freedom of expression of a seditious libel prosecution, as compared with the 20th-century consequences on freedom of expression of a civil defamation suit for damages, is examined at no place in the briefs, argument, or record with any rigorous comparative historical perspective. Furthermore, the authenticity of the historical texts discussing the Alien and Sedition Law cited by the Times' counsel is nowhere subjected to critical examination by opposing counsel. Historical texts which might not he permitted to be introduced in evidence at trial for any purpose thus are permitted to create an illusion of authority

the Court acts as a fact-finder by liberally employing judicial notice, "the lawsuit is in fact retried in the appellate court but without benefit of counsel."[143] Surely this aspect of "Lochnering"[144] raises serious questions concerning procedural due process,[145] with the Court simply informing itself in the process of forging new policy.[146]

(5) Proposition Number Five

Another proposition suggested by the earlier ones is that "[n]ew doctrine enunciated by the Supreme Court may emanate partly from within and partly from without the Court's institutionalized information process."[147] As one among several examples, the trimester distinction for regulating abortions was not advanced through either the briefs or oral arguments in the *Abortion Cases*.[148] Miller and Barron therefore observe that "[t]hat legislative scheme arose from the Justices themselves."[149] Drawing upon and expanding the traditional conception of judicial notice, the Court became a third party in the informing procedure. Likewise, the far-reaching actual malice doctrine emerging from *New York Times v. Sullivan* largely flowed from the policy-making operations and internal means of informing used by the Court.[150]

(6) Proposition Number Six

The final proposition supports parallel conclusions by numerous commentators on the judicial system, yet contradicts the orthodox concept of adversary proceedings. This proposal is that "[t]he Justices bring certain predilections, sometimes known and sometimes unknown, to the decisional process."[151] Whereas the Justices

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and authenticity before the Supreme Court by virtue merely of citation and quotations in the brief.

Id. at 1214.

143. *Id.* at 1216. Or as similarly put by another writer, when an appellant "loses a case because of a judge's *in camera* frolic beyond the material presented in the record and briefs, he may well have been deprived of his day in court." Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term*, 57 GEO. L.J. 55, 63 (1968).

144. Ely, *supra* note 33, at 944.

145. *See* Miller & Barron 1218. The authors elaborate upon this argument at *id.* 1226-27.

146. *See id.* at 1218. In particular, see the discussion of independent research conducted by the Justices, at *id.* 1215-16. *See also* Miller & Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFFALO L. REV. 799, 819 (1973).

147. Miller & Barron 1218.

148. *See id.*

149. *Id.*

150. *See id.* at 1218-22.

151. *Id.* at 1222. For similar conclusions see, e.g., B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); M. COHEN, LAW AND THE SOCIAL ORDER (1933); J. FRANK, COURTS ON

of the Supreme Court are active participants in the process of information flow in landmark decisions, they furthermore may be "the most important of the participants,"[152] and "the most important fact-finders."[153]

Thus in the *Abortion Cases* Justice Blackmun drew upon several sources of information to substantiate the point of view that an unborn child is not a "person" within the meaning of the Constitution.[154] Although Justice Blackmun plainly stated that the Court would not answer the question of when life commences,[155] Professors Miller and Barron say that essentially he did.[156] Rather than being an "arbiter" of legal controversies in the classic sense, the Supreme Court is "a political actor," a legislator, whose members are guided by subjective preferences.[157] The authors nevertheless acknowledge that the evolution of the Court's policy-making functions may be a natural result of the inability of lawyers, in most cases under the current adversary system, to present relevant, policy-oriented data to the Court.[158] They further concede that perhaps the myth of neutrality that surrounds the Court performs some useful purpose in that it facilitates the maintenance of that institution's formal legitimacy within the American constitutional system.[159]

TRIAL (1949); S. NAGEL, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE (1969); C. PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 (1948); G. SCHUBERT, THE JUDICIAL MIND REVISITED, *supra* note 6; G. SCHUBERT, THE JUDICIAL MIND, *supra* note 6; Danelski, *Values as Variables in Judicial Decision-Making: Notes Toward a Theory*, 19 VAND. L. REV. 721 (1966); Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Schuhert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 LAW & CONTEMP. PROB. 100 (1963); Tanenhaus, *Supreme Court Attitudes Toward Federal Administrative Agencies, 1947-1956—An Application of Social Science Methods to the Study of the Judicial Process*, 14 VAND. L. REV. 473 (1961).

152. Miller & Barron 1225.

153. *Id.* at 1226.

154. 410 U.S. at 158. *See* note 54 *supra* and accompanying text.

155. 410 U.S. at 159. *See* note 55 *supra* and accompanying text.

156. Miller & Barron at 1225:

> But if, as Blackmun says, there is a wide divergence of thinking on the question, by saying the judiciary could not provide the answer, in fact he did provide the answer. Like the maid in Byron who "whispering 'I will ne'er consent'—consented," Justice Blackmun, saying "we cannot do it," did it. The constitutional concept of a person that encompasses corporations now excludes unborn children. That is a matter of philosophy, not of logic.

157. *Id.* at 1223-25.

158. *See id.* at 1223.

159. *Id.* at 1229. But it is not completely clear that Miller and Barron accept the promulgation of general norms, as in *Times*, *Roe*, and *Doe*, as a legitimate function of the Court. *See id.* at 1228-33.

C. *Critique of Miller and Barron*

The specific objectives of Professors Miller and Barron must be kept in mind in assessing their contribution to the literature. Theirs is a "preliminary inquiry," a pilot study designed to stimulate further research. In this sense they deserve a great deal of credit for their ground-breaking work in an important but neglected area. Miller and Barron discuss quite clearly what they find to be key elements within the informing process; they conceptualize information flow as a process within a broader judicial environment; and they detect what amounts to a partial framework for a theory of information flow to the Supreme Court. Moreover, they address not only how the judicial mind was informed in these three landmark cases, but also explain what *ought* to be the traits of the informing process—including openness, the responsibility of the Justices to "know what is knowable," the relevance of information flow in a revised impression of the adversary process, and the safeguards needed to insure due process of law.[160]

One should bear in mind further that the Miller-Barron analysis is not meant primarily to quarrel with the substance of *Times, Roe*, and *Doe*. Rather, their article suggests that in these cases the adversary system at the Supreme Court level did not function as traditionally conceived, that in fact there were both formal and informal information flows to the Justices, and that due process may be denied when the Court draws upon information not open to challenge during normal adversary proceedings. Nor are the authors voicing opposition to the Court's performing a policy-making role in the American governmental system. Instead, they are concerned that the Court's structure and procedures should guarantee the greatest integrity to the informing process and that the most valid information possible should be applied to the formulation of judicial policy. Under the Blackstone, or traditional, conception of the judicial process this is impossible. Yet if one accepts the policy-making model, the information-flow process may be substantially improved.

Professors Miller and Barron acknowledge some of the limitations of their article. They realize that further research will be required to support fully some of their tentative findings.[161] Although the authors carefully examine formal information flows to the Su-

160. *See id.* at 1189-91, 1233-45. The safeguards suggested by the authors at 1233-45 are not, however, viewed as panaceas, but only as steps in the right direction.

161. *Id.* at 1226.

preme Court in these leading constitutional cases, they are aware that their propositions are at this time applicable only to those policy decisions. They understand, too, that it is questionable to assume that in those decisions the Court considered certain data relevant simply because they were cited by the Justices.[162] A few deficiencies, however, are not formally conceded by Miller and Barron.[163]

Perhaps the most telling criticism is that they select three relatively unrepresentative constitutional cases from which to develop propositions and then use the derived propositions to attack the outdated Blackstone model. Of course, the authors assert that the Supreme Court is far from the objective institution that the Blackstone model suggests, one meticulously weighing all data formally presented in prominent constitutional cases and announcing a decision consistent with that data. But why study information flow in decisions in which the Court went out of its way to utilize judicial notice liberally and to make sweeping new policy? As Professor Mayo suggests, to reach their decision in these cases, the Justices may have had little need for data, but merely a "strong ethical idea."[164] If the authors accept the view that the Supreme Court does and should make policy in certain cases, without strictly heeding the information presented to them, why underscore the due process argument? In so doing Miller and Barron imply that it *is* important what information is introduced to the Court and challenged during adversary proceedings. Furthermore, given the view that in some cases the Justices make law by drawing upon their personal predilections, backgrounds, and experiences, the authors should not be disturbed by the Justices' extensive reliance upon legislative facts during the informing process. In instances in which the Justices are free to announce broad new policies, they should pay attention to all reliable facts, adjudicative or otherwise, in order to formulate the wisest policy.[165]

162. In some instances this might be a plausible assumption, but such is not the case here. In fact, much of Justice Blackmun's long historical account of attitudes toward abortions and their regulation, extending back to ancient times, has little bearing on the policy handed down in *Roe* and *Doe*, particularly the trimester distinction for determining the point of compelling state interest. The authors clearly anticipate this weakness by conceding that "the judicial opinion is at best an imperfect instrument for revealing the data and premises considered by judges to have been important in reaching their decisions." *Id.* at 1192.

163. Since the author participated with Professors Miller and Barron in the larger study providing the background for both of these articles, he must also accept equal responsibility for the forthcoming weaknesses in that research.

164. *See* note 128 *supra* and accompanying text.

165. Another minor question is whether the authors understood these cases so well

Although most of their propositions generally are sound, based upon evidence from these cases, it seems that Professors Miller and Barron overly generalize a few points. One proposition, for example, is verified only by their examination of *Times*, not by an examination of the other two cases. Also, they periodically overstate, perhaps for emphasis, their indictment of the traditional conception of the adversary system. To illustrate, few students of the judicial process continue to accept the notion that members of the Supreme Court "act as justice blindfolded, with strict impartiality and without personal preferences or predilections fed into their decisions."[166] This assumption, to the extent that it lingers, is rarely stated so boldly.[167] Indeed, at least since the time of Cardozo's Storrs Lectures,[168] most Court observers have recognized that the personal attitudes of judges weaken their "strict impartiality." Similarly, the sixth proposition of Miller and Barron—that the Justices' decisions are affected by their own predilections—is hardly new, as they are aware. Nevertheless, at a time when statistical voting behavior studies tend to be chiefly responsible for demonstrating this proposition, it is refreshing and reassuring to read a nonquantitative study that furnishes direct support for it.

To point out potential limitations or weaknesses in this pioneering article is not to deny its substantial value. Professors Miller and Barron lay a convincing "preliminary" foundation for what should become an entire new line of study into the judicial informing process. Still, it would have been even more impressive had they attempted to answer a number of additional questions. Have these informing and policy-making traits of Supreme Court process developed since the advent of the Warren and Burger Courts, or were they present earlier? Beyond the information flows that affected outcomes in these cases, in what specific ways may these new policies also have been influenced by the social, political, economic and ethical backgrounds of the Justices?[169] Given the fact that certain

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before commencing their formal study that they knew a priori the conclusions they would reach. If this is so, then the authors' "propositions" are largely foregone conclusions and must be distinguished from hypotheses, which by definition must be conceived prior to a study and then be disproved or not. In any event, in order to promote greater confidence in their propositions, the authors should have inspected more than three cases. This they recognize, too, for it was their original intention. *See* note 11 *supra*.

166. Miller & Barron 1208-11.

167. *Cf. Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958), and Lon Fuller's conditional view that a judge's ruling "must be as objective and as free from bias as it possibly can." Fuller, *supra* note 93, at 34.

168. B. CARDOZO, *supra* note 151.

169. More specifically, even if Supreme Court policy is at times activated through the

Justices were prone to deciding these cases liberally, and that others leaned toward the status quo, was information in briefs and arguments principally presented by counsel to sway the Court's "swingmen"? Would more comprehensive and reliable information flows have substantially affected the Court's decisions in these cases? Do innovative Supreme Court policies typically reflect most of the data presented to the Justices? Is it indeed possible to know how the judicial mind is informed at any particular time? How is one to determine what information is in fact critical to a specific decision? Presumably the authors would suggest further research to provide answers to these questions.

III. TOWARD A MODEL OF INFORMATION FLOW TO THE SUPREME COURT

A basic assertion of this article is that thinking in terms of a model facilitates an understanding of information flow to the Supreme Court. Simply defined, a model approximates a replica of something in the real world, with all major component parts included in the representation and with relationships between those parts suggested. A model is, moreover, a representation that ultimately serves some descriptive, explanatory, or predictive purpose.

Since the research reported here is empirically supported by only three major constitutional cases, the author claims no development of a highly technical model exactly corresponding to the actual way in which the judicial mind is informed in all Supreme Court decisions. Indeed, heeding the warning of Mr. Justice Frankfurter that this process of informing the minds of judges is exceedingly complex,[170] this study provides only a tenative, exploratory model.

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liberal application of judicial notice, that leaves the residual question of why the Justices decided on these particular policies rather than others. To understand fully the policy-making process in these cases, the authors could have delved into the details of the Justices' backgrounds, experiences, and predilections, an approach that would go further toward actually explaining why the Court handed down these policies. Although Miller and Barron recognize that backgrounds, attitudes, and experiences affected these decisions, they fail to tell the reader *how*. How, for instance, did Justice Blackmun's past connection with the Mayo Clinic, or his basic religious identification and beliefs, affect his opinions in *Roe* and *Doe*? Information exchange among the Justices or the politics of judicial bargaining were also of import in all likelihood, although this is virtually impossible to verify.

170. During oral argument in Brown v. Board of Education, 347 U.S. 483 (1954), Justice Frankfurter is recorded to have remarked:

> . . . in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses. How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of competent writers.

Frankfurter quoted in ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN

Also heeding the advice of political scientists and law professors responding to a questionnaire distributed during 1974,[171] an attempt has been made to keep the models as simple as possible.[172] Others will be required to extend this work—to test the model and to construct more detailed ones based on a larger and more representative number of case studies.

An understandable approach to explaining the final model proffered herein is to trace the step by step model-building procedure, from an elementary to a more refined representation of the flow of information to the Supreme Court. To begin, a trio of concepts must be included in such a structure: *information input, information conversion, and information output*. Since the focus here is upon information flow to the Supreme Court in the *Abortion Cases* and *Times*, input is the most crucial of these and will be the recurring theme. Yet in order to present information input in its proper context, conversion and output cannot be ignored or excluded because the three processes are inevitably interrelated.

Although the concept will be refined later, for present purposes information input may be viewed as any facts, records, opinions, briefs, or arguments received by one or more of the Justices that pertain in any manner to a case decided on the merits by the Supreme Court.[173] Conversion, a process about which knowledge is limited because of Court secrecy,[174] involves the Justices' taking available information, weighing it, and subsequently agreeing on a decision.[175] Output, by contrast, is evident when the Court publicly

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v. BOARD OF EDUCATION OF TOPEKA, 1952-1955, at 63 (L. Friedman ed. 1969).

171. *See* Appendix A *infra*.

172. For a discussion of the nature of models and their usefulness see Appendix B *infra*.

173. As discussed at text accompanying notes 176-203, 213-19, 235, 239 *infra*, and as shown in Figure 10 *infra*, inputs may include briefs; opinions and records from lower courts; oral arguments; the Justices' predilections, backgrounds, and experiences; judicial notice; independent research by the Justices and their clerks; news reports; law reviews and legal treatises; and information acquired through personal contacts or experienced sources. This is clearly a broader conception of Supreme Court information than often appears in the literature. *See, e.g.*, J. EISENSTEIN, POLITICS AND THE LEGAL PROCESS (1973), who observes at 177 that "[t]he trial record, which along with briefs and oral arguments provides the information upon which the Court's formal opinions are based, is made in . . . lower courts." *See also* notes 89-93 *supra* and accompanying text. Moreover, contrary to this conception, no assumption is made here that these orthodox sources provide the Justices with the information upon which policies are founded. In fact, in the *Abortion Cases* and *Times* these sources of information were of limited influence on the Court's ultimate rulings. *See generally* Section II of this article.

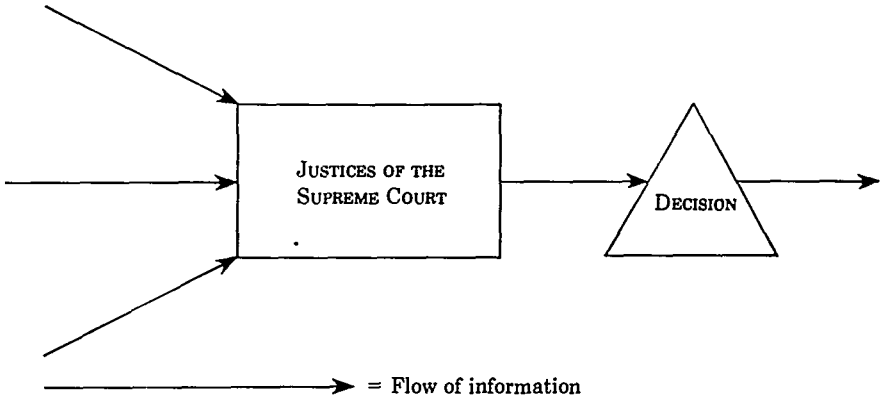
174. For an analysis of secrecy on the Court see Miller & Sastri, *supra* note 146. For a recent journalistic account see Totenberg, *Behind the Marble, Beneath the Robes*, N.Y. Times, Mar. 16, 1975, § 6 (Magazine), at 15, 58, 60, 63-67.

175. During the conversion state of the legal-policy decision process, information may

announces and explains its decision. These cardinal aspects of the information flow process at the Supreme Court level, entailing information to, through, and from the Justices, are shown in Figure 1.

This scheme shows that data from different sources, through one or more channels, are relayed to the Court, presumably are brought to the attention of Court members, and may be reflected to some degree in the Justices' decision. But, of course, the model is too simplistic to be of value. It accords with the schoolboy version of the judiciary but does not deal with the complexities of the process.

FIGURE 1
SIMPLE INPUT-CONVERSION-OUTPUT CONCEPT

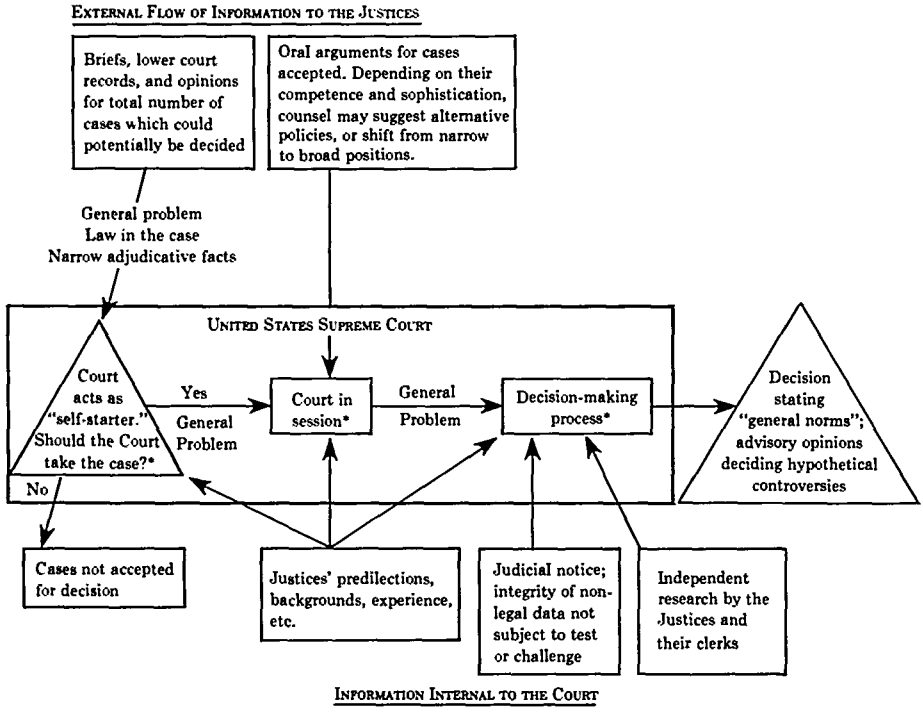


be considered in terms of its comprebensiveness, adequacy, validity, and reliability. *See, e.g.*, Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Productive Function*, 33 GEO. WASH. L. REV. 318, 361 (1964), citing Lanzetta & Kanareff, *Information Cost, Amount of Payoff, and Level of Aspiration as Determinants of Information Seeking in Decision Making*, 7 BEHAVIORAL SCI. 459, 460 (1962):

> The "adequacy of information" question permeates the whole decision-making function and tends to increase in difficulty with the complexity of the problem. The question is posed concerning the nature and quality of the information which must be acquired before a decision can be made with confidence. Of course, the information which will satisfy a criterion of desirable reliability may not be obtainable under any circumstances. If available, however, a "rational" decision maker must "be guided by the value of the information as well as its cost in choosing whether to invest in information acquisition or not." But how "value" is to be assigned to possibly relevant information raises an extremely complicated question.

See also the example presented in F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 309 (1928), and the discussion of Alfange, *supra* note 113, at 641. At this stage, however, the Justices also interpret information in view of their personal backgrounds, experiences, attitudes, and values. *See* Fignre 2 *infra*. For a survey of the literature relating to the conversion process see S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM ch. 5 (2d ed. 1976).

FIGURE 2
MODEL OF INFORMATION FLOW TO THE SUPREME COURT
BASED ON THE *Abortion Cases* AND *New York Times v. Sullivan*



*At this point there may occur varying degrees of information exchange among the Justices.

In expanded form, however, these conventional input-conversion-output concepts are useful in presenting Figure 2. Again, that model is based upon the Miller-Barron analysis of *Times* and the *Abortion Cases*, and therefore upon the six resulting propositions. Stressing input, Figure 2 indicates that both external and internal flows of information come to the Court, as explained in proposition number five.[176] To be sure, in the cases examined much

176. *See* notes 147-50 *supra* and accompanying text. For a general discussion of internal and external inputs see J. SIGLER, *supra* note 99; Miller & Sastri, *supra* note 146, at 819-22; Sigler, *A Cybernetic Model of the Judicial System*, 41 TEMP. L.Q. 398, 408-13 (1968). However, it should be noted that there are differences in Sigler's conception of internal and external inputs and those adopted here.

data came to the Court from traditional external sources—from counsels' briefs and arguments.[177] But contrary to the widely accepted notion of how the judicial mind is informed, arguments and briefs in *Roe* and *Doe* failed to provide data relating to the central concept—the trimester code of permissible abortions—adopted in the Court's decisions.[178] Likewise, the actual malice doctrine announced in 1964 was never specifically briefed and argued by Herbert Wechsler, attorney for the New York Times.[179]

External flows are thus shown in Figure 2 as consisting of two principal elements, but these do not receive the strong emphasis suggested by the Blackstone conception.[180] The first external flow consists of briefs by attorneys for the litigants, lower court records, and opinions for the total number of cases that the Court has discretion to decide. The acceptance of amicus curiae briefs also is a special means whereby the Justices allow additional external flows of information to be presented with a resulting tendency to increase the likelihood that a wide range of viewpoints will come to the forefront. In all these instances, as described in the first proposition,[181] the Justices (and their clerks) receive written information

177. *See, e.g.*, notes 115-17 *supra* and accompanying text.

178. *See* note 148 *supra* and accompanying text. Nor did that concept come from lower court records. This provides support for the related conclusion of Professors Richardson and Vines: "[w]ith the major portion of its docket, the Supreme Court was acting entirely alone in articulating its decisional values, without any recorded support from any of the judges who sat on the circuit courts or on the district courts." R. RICHARDSON & VINES, *supra* note 101, at 156.

179. *See* note 150 *supra* and accompanying text.

180. Writing in the eighteenth century, Sir William Blackstone asserted that judges "are the depositaries of the laws; the living oracles, who must decide in all cases of douht, and who are bound by an oath to decide according to the law of the land." 1 W. BLACKSTONE COMMENTARIES *69. Blackstone's conception, the judges find or declare rather than make law, has of course long been recognized by many commentators as an inaccurate way of portraying the policy-making process of the United States Supreme Court. Nevertheless, his ideas provide a contrast to the models presented herein, and a starting point from which one may view how some have thought Supreme Court Justices inform themselves in cases brought for decision. According to Blackstone, major sources of judicial information include customs, "maxims," and "the law of the land" as reflected in prior recorded judicial decisions. Judges are obligated to apply previous decisions and to "declare" the law according to precedent. This concept of decision-making is exceedingly important to the classical model of judicial information flow, for judges do not rely on their personal backgrounds and views of what is "right" for society in a particular question. Nor is there provision in the Blackstone model for informational input via legal research by the judges or their clerks (except as to precedent), for the influence of legal treatises, for the gaining of information through informal personal contacts, or for what is now referred to as "social science data." Judges instead rely on their own knowledge, understanding, and experience with reference to their predecessor's decisions. The major exception is that courts may deviate from precedent when it was in fact "not law," that is, when it clearly conflicts with custom, reason, or "the divine law."

181. *See generally* notes 101-11 *supra* and accompanying text.

concerning a broad problem, the law in the case, and narrow adjudicative facts. Of these, the general problem appeared of most concern to the Justices in *Times, Roe*, and *Doe*; they were far less interested in the narrow facts and prior legal standards.[182]

Although litigants are sometimes "politically relevant sources and carriers of demands and information,"[183] the specific status of the litigants in these cases was of little import to the Justices.[184] Accordingly, they seem to have approached these issues with a full recognition that they were about to formulate new, exceedingly important rules of law. It is here, as shown in the model, that the Court may essentially act as a "self-starter," contrary to the traditional conception,[185] by answering the question: "Should this case be accepted for decision?"[186] If the answer is no, as is usual, the case is ejected from the decisional process.[187] If the answer is yes, then the information, particularly that which concerns the general problem, becomes an input into the formal case hearing. In answering this question the Chief Justice plays a strategic role; he is most responsible for examining writs for certiorari—by far the greatest source of

182. *See* notes 106 & 110 *supra* and accompanying text.

183. S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 4.

184. *See* notes 106 & 111 *supra* and accompanying text.

185. In the words of Mr. Justice Jackson, the Court "has no self-starting capacity and must await the action of some litigant so aggrieved as to have a justiciable case." R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 24 (1955).

186. This determination is normally made on a tenative, individual basis without formal consultation among the Justices. *See* Brennan, *Inside View of the High Court*, N.Y. Times, Oct. 6, 1963, § 6 (Magazine) at 35, 100. However, the decision to accept a case where a lower court conflict occurs is an important part of the Court's policy-making process. Professor Howard's findings are pertinent here:

> [W]e cannot leap to the conclusion that the Supreme Court was basically supportive of original tribunals. . . . [T]he Justices supported whoever agreed with them in whatever interested them in appeals. . . . [T]he Supreme Court was less interested in resolving intracircuit disagreements per se than in resolving the policy disputes with which those disagreements correlated. In other words, Supreme Court review of the three courts of appeals in this period was less the resolution of lower court conflicts than "applied politics"—securing the supremacy of highly selective policy values irrespective of levels.

Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y REV. 33, 49 (1973). *See also* G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR ch. 4 (1959).

187. More specifically, petitions for review are read and screened by the Justices (with the assistance of their clerks) for purposes of discussion at conference. If no Justice feels that the case warrants conference time, it is dropped from the information flow process. Hence, "[t]he vast majority of cases, having aroused no Justice's interest, automatically go on what is known as 'the dead list' and are denied further consideration." Totenberg, *supra* note 174, at 58. According to the "rule of four," at least four Justices must agree that a case on the conference list deserves Court review before the appeal actually becomes an integral part of the informing process—a part of the process by virtue of the fact that it is placed on the calendar and is to be decided. *See generally* Leiman, *The Rule of Four*, 57 COLUM. L. REV. 978 (1957).

potential decisions—and for orally presenting them at the Court conference.[188]

Normally, some four to six months after the original petition, oral arguments—the other major external source of information—enter the picture, as shown in Figure 2.[189] Compared to briefs, records, and opinions, oral arguments involve a different channel of communication: usually a thirty minute to one hour period of face-to-face information flow during which "communication links are bilateral"[190] between each counsel and the individual Justices. Figure 2 also reflects the concept that during argument counsel vary greatly as to competence and sophistication in influencing the Court's decision.[191] That more competent and sophisticated advo-

188. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in THE FEDERAL JUDICIAL SYSTEM: READINGS IN PROCESS AND BEHAVIOR 147, 149 (T. Jahnige & S. Goldman eds. 1968). The Chief Justice's role was strengthened by the Court's adoption of a "special list" under Charles Evans Hughes. David Danelski provides the following insightful analysis of the special list and its relationship to the decisional process:

> If the Chief Justice decided that a petition for *certiorari* was frivolous or ill-founded and therefore did not merit conference discussion, he placed it on a "special list" which was circulated to the Associates. Upon request, any case on the special list would be transferred to the regular take-up list, but cases remaining on the special list were automatically denied *certiorari* without discussion. Hughes disposed of about 60 percent of the petitions for *certiorari* via the special list, and rarely did a Justice challenge his lists. Challenges were also relatively rare during Stone's Chief Justiceship.

Id. at 150. *See also* note 234 *infra*. For a more recent discussion, with changes that have been made since Warren Burger's appointment as Chief Justice, see S. Wasby, The Supreme Court's Docket, Discretionary Jurisdiction, and Judicial Behavior Studies (paper delivered at the 1975 Annual Meeting of the Midwest Political Science Ass'n, to appear in S. WASBY, CONTINUITY AND CHANGE: FROM THE WARREN COURT TO THE BURGER COURT (1976)).

189. For a discussion of the role of the oral argument in the informing process *see, e.g.*, Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 CORNELL L.Q. 6 (1955). While oral argument has traditionally been held strictly to an allotted one hour for each side, the length of argument has been known to extend from thirty minutes to a number of hours, depending on the complexity and importance of the issues. *See* H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 192 (3d ed. 1975).

190. G. SCHUBERT, JUDICIAL POLICY MAKING: THE POLITICAL ROLE OF THE COURTS 130 (2d ed. 1974).

191. *See* note 114 *supra*. It is amusing to note Chief Justice Stone's candid comments on the striking shortcomings of some attorneys arguing cases before the Supreme Court. Alpheus T. Mason has reported these comments in the following terms:

> When he grumbled, his spleen was vented on the highly paid lawyers, the prima donnas of the bar, whose arguments often obfuscated what they should have clarified. "Damn it," he would say, "that opinion I just wrote will make more for the petitioner's lawyer than I get paid for a whole year's work on the Court. If I'm going to have to keep on doing all the work on these complicated cases which the lawyers don't understand and don't give me any help on, I think I'll go back to practice and write the briefs instead of the opinions. If I have to do the attorneys' work for them, I might as well get paid accordingly."

Stone quoted in A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 317 (1956).

cates occasionally will suggest alternative policies to members of the Court was illustrated in proposition number two.[192] In *Times* a Columbia University Law School professor, highly trained and experienced in the subtleties of Supreme Court practice and decision-making, presented the Court with a wide range of policy alternatives. He was opposed by a capable Alabama attorney, who nonetheless was far more traditional in his approach to the Justices and who had accumulated nowhere near the same amount of experience arguing before the Supreme Court.[193]

Further, depending upon how oral argument develops, counsel may shift from a narrow to a broad policy position, also as depicted in Figure 2. This tendency, which was most evident in *Times*, as explained in proposition number three,[194] occurs when Justices indicate a willinguess to consider a broader holding than one that would naturally follow from counsel's main line of argument.[195] In the libel decision, then, Professor Wechsler attentively perceived the Justices' cues during argument and broadened his position to encompass what ultimately became a newly expanded principle of actual malice.[196]

Internal information, as well as external, may have a key effect on the decision of the Court to take a case, on how oral argument proceeds, and ultimately on the holding reached by the Justices. As expressed in proposition number six, one internal source falls under the general rubric of the Justices' predilections, backgrounds, and experiences.[197] These considerations may influence the flow and interpretation of information at each stage shown in Figure 2, as they apparently did when Mr. Justice Blackmun concluded in the *Abortion Cases* that a fetus was not a "constitutional person."[198] Similarly, prior to the final decisional process, a Justice's background, attitudes, and experience may combine in such a way as to affect a colleague's decision on whether the Court should in fact

192. *See* notes 112-27 *supra* and accompanying text. For an interesting interpretation of why counsel offer varying types of arguments to the Court see J. CASPER, LAWYERS BEFORE THE WARREN COURT (1972).

193. *See* note 133 *supra* and accompanying text.

194. *See* notes 129-33 *supra* and accompanying text.

195. *See* notes 130 & 131 *supra* and accompanying text.

196. *See id.*

197. *See* notes 151 & 157 *supra* and accompanying text. Prominent studies touching upon these variahles are listed at note 151 *supra*. Others include H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (1974); D. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964); J. SCHMIDHAUSER, THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES (1960). *See also* Justice Blackmun's implicit recognition of some of these factors in the *Roe* decision, as quoted at note 53 *supra*.

198. *See* note 54 *supra* and accompanying text.

accept a particular case for review.[199] Another internal source is independent research by the Justices and their clerks, which often adds a different dimension of informational input that is reflected in the Court's decision.[200] Still another related and increasingly important source, analyzed in proposition number four[201] and included in Figure 2, is a vastly expanded use of judicial notice.[202] In short, all of these internal sources of information may influence written and oral communications among the Justices during the policy-making and opinion-writing processes.[203]

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199. In other words, a Justice may present the information in a case so persuasively that his colleagues will agree to accept it, despite weak or unpersuasive briefs. As put by one Court observer:

> Occasionally, when there are not enough votes to grant review, one Justice will write a dissent from the refusal to hear the case. And here the game gets really interesting, for it is not unusual for the dissent to be so persuasive that the other Justices change their minds. The briefs in a case are often so poor that the Justice's dissent provides the only available serious presentation of the case.

Totenberg, *supra* note 174, at 58. Likewise, during the opinion writing process, a dissenting Justice's presentation of information and arguments may be so convincing as to entice a majority of the Court to his way of thinking. *See* H. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 31-32 (2d ed. 1969).

200. On independent research by the Justices see, e.g., Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1295-96 (1952). For the role of the Justices' law clerks in research and the information flow process see Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74-75.

Rehnquist's comments are particularly interesting. Writing fifteen years before his appointment to the Supreme Court, and four years after serving as a clerk for Justice Robert H. Jackson, Rehnquist emphasized the key role of the clerks in processing and condensing information presented in petitions for certiorari:

> In Justice Jackson's office, the petitions for certiorari which were scheduled to be discussed at the next conference of the Justices were split between the two clerks. Each clerk would then prepare memoranda on the petitions assigned to him. These would include the facts of the case, the law as declared by the lower courts, and a brief summary of previous cases involving the same point. They concluded with a recommendation by the clerk either that the petition be granted or that it be denied. Aided by this data, the Justice himself would then study the petitions in order to determine his vote. I believe that a procedure substantially similar to that just outlined was followed in the offices of a majority of the other Justices during the time that I was a clerk.

Id. at 74.

201. *See* notes 134-46 *supra* and accompanying text.

202. However, judicial notice is not considered by many observers to provide an acceptable basis for judicial decisions. In the words of Frankfurter and Landis:

> [C]ourts support legislative policy by drawing on information based on common knowledge or in books of reference. Courts use such material on their own initiative on the theory of "judicial notice." But this is a tenuous basis for informing the judicial mind. It places an undue burden of independent investigation on judges who are limited in their facilities and still more limited by the pressure of business.

F. FRANKFURTER & J. LANDIS, *supra* note 175, at 313-14.

203. Illustrative and insightful is former Justice Tom Clark's discussion of communications among the Justices during the opinion writing stage:

> In the average case an opinion requires three weeks' work in preparation. When the author concludes that he has an unanswerable document, it is printed in the print shop

IV. Expanding and Refining the Supreme Court Model

Thus far the construction and explanation of this model of Supreme Court information flow has been oriented toward information coming *to* the Court, as suggested by the study of Professors Miller and Barron. As mentioned in the introduction, the preceding section is therefore generally inductive in nature, resting upon the functioning of the adversary system in *New York Times v. Sullivan*, *Roe v. Wade*, and *Doe v. Bolton*. By contrast, the present section is designed to go beyond the analysis of Professors Miller and Barron by incorporating deductive, theoretical elements into the evolving model. These additions are derived primarily from three modeling or theoretic approaches—systems theory, communication-information theory, and schema theory. By adding these elements one can more easily understand and analyze information flow *to*, *through*, and *from* the United States Supreme Court. Ultimately this line of thought will lead to the formulation of further propositions to be tested, and to suggestions as to unexplored areas of research into Supreme Court information flow and policy-making.

A. Incorporating Elements from Systems Theory

Each of the six propositions derived from the Miller-Barron study of *Times* and the *Abortion Cases* is plainly manifested in the basic inductive model. Against this background the task is now to introduce more complete representations of information flow to, from, and back to the Supreme Court, again with the focus on input. These structures go past the inductive model in Figure 2. To refine that model, the concepts first considered are *information environment* and *feedback*. They can be understood most readily through a brief explanation of systems analysis.

Since David Easton first popularized systems analysis as a framework for political research,[204] scholars have proposed that it or

in the Supreme Court building and circulated to each of the Justices. Then the fur begins to fly. Returns come in, some favorable and many otherwise. In controversial cases, and all have some touches of controversy, the process often takes months. The cases are often discussed by the majority both before and after circulation. The final form of the opinion is agreed upon at the Friday conferences. Of course, any Justice may dissent or write his own views on a case. These are likewise circulated long before the opinion of the majority is announced.

Clark, *Internal Operation of the United States Supreme Court*, 43 J. Am. Jud. Soc'y 45, 51 (1959). *See also* Clark, *Inside the Court*, in The Supreme Court: Views from Inside 45, 49-50 (A. Westin ed. 1961); Brennan, *Inside View of the High Court*, *supra* note 186.

204. D. Easton, A Framework for Political Analysis (1965); D. Easton, A System Analysis of Political Life (1965); Easton, *An Approach to the Analysis of Political Systems*, 9 World Pol. 383 (1957).

highly related approaches be used as a means for exploring the judicial process.[205] It provides a macroscopic conceptual scheme of heuristic value, through which one may view the Supreme Court's receipt of information from its total environment by means of feedback mechanisms. In short, systems analysis may be adopted to illuminate the totality of the Court's information flow process.[206]

FIGURE 3
BASIC SYSTEMS MODEL

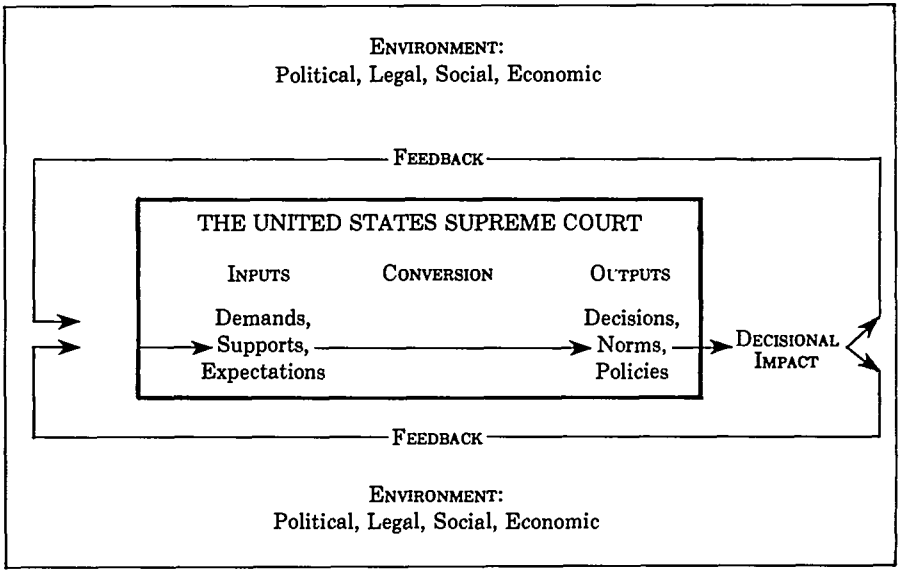


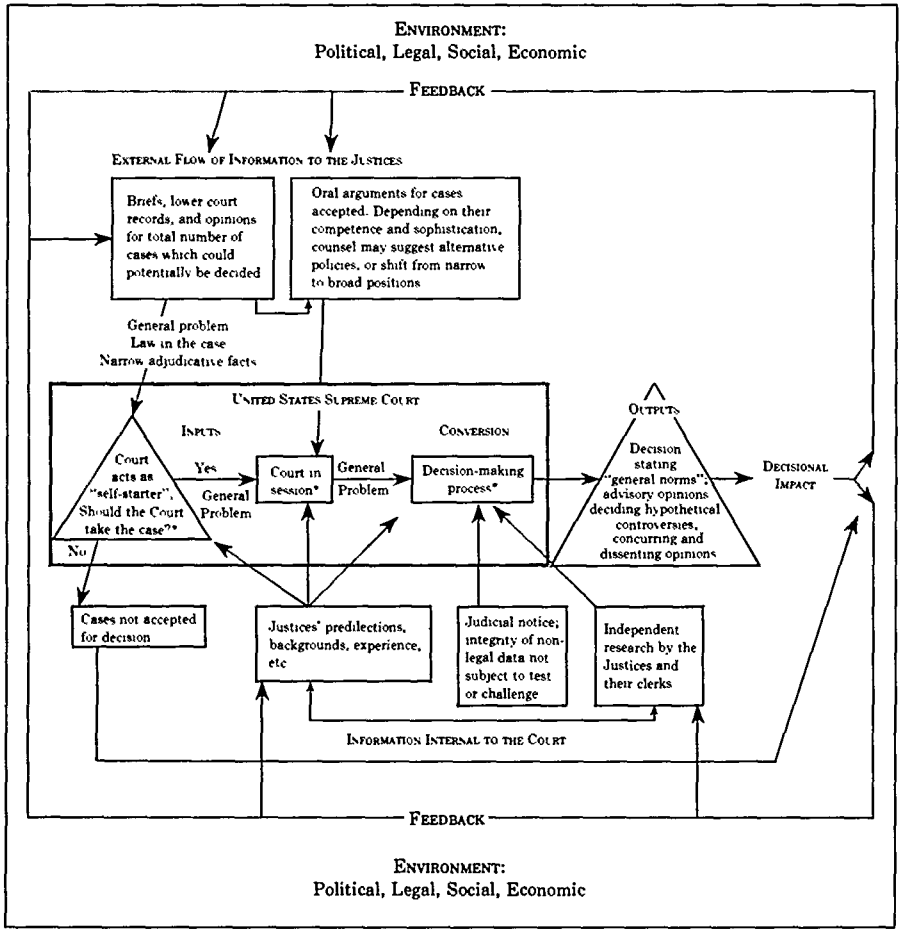
Figure 3, the broadest presented to this point, is a modified systems model showing the Court as a subsystem of the entire American legal-political-economic-social system. The Court is, in

205. S. GOLDMAN & T. JAHNIGE, *supra* note 175; T. Jahnige & S. Goldman, *supra* note 188, at 1-4; W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 32 (1964); G. SCHUBERT, *supra* note 190, at 140; Becker, *Judicial Structure and Its Political Functioning in Society: New Approaches to Teaching and Research in Public Law*, 29 J. OF POL. 302 (1967); Goldman & Jahnige, *Eastonian Systems Analysis and Legal Research*, 2 RUTGERS-CAMDEN L.J. 285 (1970); Goldman & Jahnige, *Systems Analysis and Judicial Systems: Potential and Limitations*, 3 POLITY 334 (1971); Grossman, *A Model for Judicial Policy Analysis: The Supreme Court and the Sit-In Cases*, in FRONTIERS OF JUDICIAL RESEARCH 405 (J. Grossman & J. Tannenhaus eds. 1969); Nagel, *A Conceptual Scheme of the Judicial Process*, 7 AM. BEHAVIORAL SCIENTIST, Dec. 1963, at 4; Sigler, *A Cybernetic Model of the Judicial System*, *supra* note 176, at 398.

206. For an assessment of the strengths and weaknesses of judicial systems analysis see S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 292-93. They conclude that judicial systems analysis is quite useful for organizational and heuristic purposes, but of little value for prediction and measurement.

other words, surrounded by an environment. As illustrated in *Roe, Doe*, and *Times*, that environment includes state laws and practices, and broad questions which of necessity contain political, ethical, economic, and social implications, in addition to constitutional ones.[207] Thus the Court does not function in a vacuum, and occurrences within its environment significantly influence the flow or type of information going to the Court. Interactions normally characterized by the flow of information, occur between the judicial subsystem and its environment.

FIGURE 4
SYSTEMS-ORIENTED MODEL OF
JUDICIAL INFORMATION FLOW



*At this point there may occur varying degrees of information exchange among the Justices.

207. *See generally* Sections I and II *supra* of this article.

In Figure 4 a number of information traits identified in the analysis of *Times* and the *Abortion Cases* (presented in Figure 2) are combined with elements of the systems model (presented in Figure 3). Figure 4 indicates that the Justices receive external information input—customarily called demands, supports, and expectations in systems terminology[208]—in the form of briefs, records, opinions, and arguments. Internal information flows and inputs are evident when Court members exchange ideas in oral or written form, take judicial notice, conduct independent research, or when they filter information through their own attitudes, backgrounds, and experiences. The final ruling is then communicated to the Court's environment, impacting with various formal and informal aspects of the American system, as it did upon the press in *Times* and upon abortion practices in *Roe* and *Doe*.[209] The impact of these decisions in turn may result in new information coming to the Court through feedback mechanisms in the form of records, opinions, briefs and arguments, as seen for example in the case of *Gertz v. Robert Welch, Inc.*[210] A feedback or interactive process also may exist among the components of external and internal information flows. For instance, briefs or lower court opinions and records clearly influence oral arguments. Likewise, a Justice's predilections, background, and experience may affect the results of his independent research or his exercise of judicial notice.

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208. *See* S. GOLDMAN & T. JAHNIGE, *supra* note 175, at ch. 4.

209. For major studies dealing with the Court and its environment see generally J. SCHMIDHAUSER & L. BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945-1968 (1972); R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY (1971); M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (1968); Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086 (1973). For works specifically involving the impact of Court decisions see THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (2d ed. T. Becker & M. Freeley eds. 1973); S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970); Miller, *On the Need for "Impact Analysis" of Supreme Court Decisions*, 53 GEO. L.J. 365 (1965). Also note that, as shown in Figure 4, when the Justices refuse to accept a case, that refusal may also have an impact on the Court's environment, as does a case accepted and formally decided.

210. 418 U.S. 323 (1974). This feedback process has heen described by Goldman and Jahnige as follows:

> The outputs return "to haunt the system" by stimulating behavioral responses by members of the political system. These responses are fed back to the authorities (this is called "information feedback") through various formal and informal channels. The impact, existence of compliance or noncompliance, or the changes in the level and kind of support, or of attempts to limit the authorities and redefine the boundaries of the system, are all communicated to the judicial authorities through these channels.

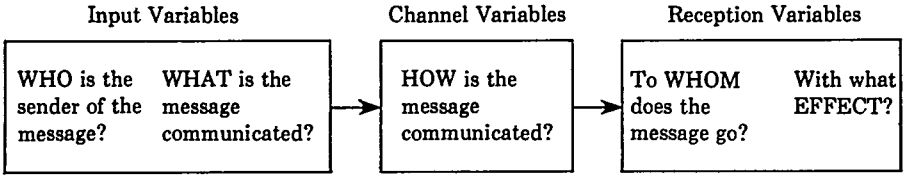
S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 7.

B. *Some Contributions of Communication and Information Models*

The broad boundaries of an exploratory model have been outlined thus far. Now the emphasis again becomes information input to the Court. Communication and information models are valuable for further understanding this.[211] The next step in the model-building procedure is an explanation of the potential contribution of communication and information theory, followed by the addition to Figure 4 of appropriate concepts from the literature.[212]

Fundamentals of communication models have been stated in several ways, but most of the rudiments are summarized by Harold Lasswell's conceptual question: who says what, through which channel, to whom, with what effect?[213] Figure 5, in simplified form, reflects the gist of this approach. In large measure, this structure is congruent with Figure 4, though the concepts are more specialized.

FIGURE 5
BASIC COMMUNICATION CONCEPT



In external information flows, the lawyers are the senders of the message. Information communicated includes that respecting the broad problem, the law in the case, and narrow adjudicative facts. As for the channel variables, messages are sent in written form in briefs, lower court opinions and records, but orally through argument before the Justices. In terms of reception, information is

211. *See* Schubert, *supra* note 7.

212. In addition to works cited henceforth, the following discussion is generally based on R. ACKOFF & F. EMERY, ON PURPOSEFUL SYSTEMS 179-95 (1972); D. BARNLUND, INTERPERSONAL COMMUNICATION: SURVEY AND STUDIES (1968); M. DE FLEUR & O. LARSEN, THE FLOW OF INFORMATION (1958); K. DEUTSCH, THE NERVES OF GOVERNMENT (1966); R. GOLDMAN, CONTEMPORARY PERSPECTIVES ON POLITICS 48-81 (1972); D. JAROS & L. GRANT, POLITICAL BEHAVIOR: CHOICES AND PERSPECTIVES 329-42 (1974); K. SERENO & C. MORTENSEN, FOUNDATIONS OF COMMUNICATION THEORY (1970); Deutsch, *Communication Theory and Political Integration*, in THE INTEGRATION OF POLITICAL COMMUNITIES 46 (P. Jacob & J. Toscano eds. 1964).

213. Lasswell, *The Structure and Functions of Communication in Society*, in THE COMMUNICATION OF IDEAS 37 (L. Bryson ed. 1948). See also Mayo & Jones, note 175 *supra*, at 398-417 for an application of this basic framework to the predictive function.

mainly relayed to the Court as an institution in the early stages of the case. After it is accepted for decision, data regarding the case go principally to the Justices sitting en banc during oral argument. The effect of messages on Court members varies as to the Justices receiving them, as was shown in the *Abortion Cases* and *New York Times v. Sullivan*.[214] The data's effect, if at all indicated by variances in interpretation, was substantially different on Justice Rehnquist's restrictive view than on Justice Blackmun's far broader interpretation in the abortion issue, for instance.[215]

Less is known about the Court's internal flow of information than about external data coming to it, but works like that of Alpheus T. Mason on Chief Justice Stone[216] provide the basis for some plausible speculations. In terms of the input variable, any one of the Justices may initiate a message to any one of his colleagues, usually after oral argument, when generally "every justice participates at each and every stage of every opinion."[217] Information flows may also go to Court members from clerks and staff. Messages may pertain to the law in the case, narrow adjudicative facts, relevant nonlegal data, the decision whether to take judicial notice of related facts, or findings based upon independent research by the Justices and their clerks.

There is a likelihood, however, according to proposition number one,[218] that such internal information flows will center around the general problem presented in a case. Critical considerations might include the following: What are the boundaries of the problem? What impacts would alternative decisions have on the American legal system, politics, and government, economic and social processes, business and industry, etc.? Would any of these alternative rulings create major problems for the Court in the future? Which of the possible decisional paths should be eliminated from considera-

214. *See generally* Section II of this article *supra*.

215. *See* note 33 *supra*. *See also* Miller & Barron, *supra* note 9, at 1196.

216. A. MASON, *supra* note 191. A number of other prominent articles and hooks written by or about Supreme Court Justices also provide sporadic insights. *See, e.g.*, Brennan, *Working at Justice*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT (A. Westin ed. 1963); Brennan, *supra* note 186; Clark, *Internal Operation of the United States Supreme Court*, *supra* note 202; C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890 (1939); J. FRANK, JUSTICE DANIEL DISSENTING (1964); W. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910 (1950); C. MCGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER (1963); A. MASON, BRANDEIS: A FREE MAN'S LIFE (1946); A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE (1964); D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER (1954); M. PUSEY, CHARLES EVANS HUGHES (2 vols., 1951); C. SWISHER, ROGER B. TANEY (1935); C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1930); A. Westin, *supra* note 203.

217. H. ABRAHAM, *supra* note 189, at 32.

218. *See* note 101 *supra* and accompanying text.

tion because of their likely future implications? Given the facts and law in the case, how should the Court publicly explain or justify its ruling? What alternative decisions would insure a larger and more cohesive Court majority? Channels for internal information flows would be chiefly through personal judicial contacts or memoranda. Again, messages would go to any other Court member with varying effects, depending on such variables as individual Justices' experiences, predilections, and backgrounds.[219]

A fundamental assumption of the adversary process is that, by the time a case reaches the Supreme Court, the pertinent data are "already explored and sifted by trial and intermediate tribunals."[220] In the appellant's brief in *Roe v. Wade*, social science and medical data with regard to abortions were said to have been "carefully sifted in order to present the most directly relevant materials."[221] This process continues, however, at the Supreme Court level in what is termed *information processing* and *condensation* in Figure 6. There the model is conceived in terms of an inverted cone into which varieties of information flow.[222] Information is collected through different channels, processed and condensed, with redundant, irrelevant or untrustworthy communications discarded before conversion.

In view of the vast amounts of information going to the Justices and their burdensome caseloads,[223] the purpose of processing and condensation is of course to prevent "demand input overload"[224] and to facilitate the Court's reaching a decision.[225] Holdings are then

219. *See* the discussion of Proposition No. 6 at notes 151 & 157 and accompanying text *supra*.

220. Frankfurter & Hart, text accompanying note 92 *supra*. But, of course, this does not mean that intermediate courts simply pass pertinent data on to the Supreme Court without making policy in many instances. The United States Courts of Appeals, for example, do not function "merely to screen, filter, and apply federal law so that the Justices may innovate. As courts of last resort in the overwhelming majority of cases, they *make* national law residually and regionally." Howard, *supra* note 186, at 50.

221. Brief for Appellants, *Roe v. Wade*, quoted in Miller & Barron, *supra* note 9, at 1200.

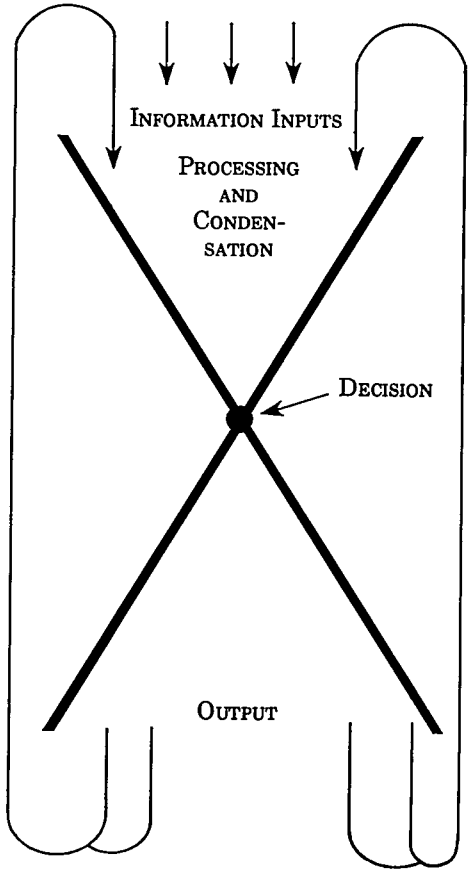
222. This idea was suggested for this study by Professor Thomas A. Cowan, Rutgers University School of Law, Newark. Inverted cones are used to emphasize the concepts of processing and condensation.

223. *See* notes 265 & 268 *infra* and accompanying text.

224. *See* S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 110-11.

225. The concept of "processing" is used in other models. *See, e.g.*, T. Jahnige & S. Goldman, *supra* note 188, at 4. For the general processing of writs of certiorari, as an illustration, see Tanenhaus, Schick, Muraskin, & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111 (G. Schubert ed. 1963). For a recent analysis of the Court's caseload, its processing and screening, see Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. OF LEGAL STUDIES 339 (1974). *See also* the recommendations of the so-called Freund Committee in FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

FIGURE 6
SIMPLIFIED PROCESSING-CONDENSATION MODEL



communicated to the outside world, and information returns once more to the Court through feedback loops.[226] In future instances when the Court accepts related cases for decision, this information may again be processed and condensed for further rulings.[227] Through this figure one also may better comprehend the usefulness

226. *See* text accompanying notes 204-06, 209-10 *supra*.

227. Note, however, that it is relatively rare that the Court has this opportunity. As one law professor observed during the course of this study, "so long as issues have to be brought to the courts rather than be initiated by the courts, does this not necessarily mean that the feedback loops will always be delayed, distorted, and generally unreliable in terms of placing the judiciary in the position to make appropriate corrections to past decisions?" Questionnaire response by Professor Louis H. Mayo, The National Law Center, The George Washington University. *See also* Wells & Grossman, *The Concept of Judicial Policy-Making: A Critique*, 15 J. PUB. L. 286, 306 (1966).

of a model.[228] It helps us visualize a complex process within a small amount of space and suggests the hypothesis that there may exist a major time lag between the Court's ruling and the time when it may again act as a self-starter by having an opportunity to make related policy. Moreover, during this time lag it is entirely possible that information distortion will occur.[229]

Another fundamental concept of communication theory, and one closely associated with processing and condensation, is *information screening*. While processing refers here to organizing and recording information, condensation results from the screening process and the memoranda written to the Justices by their clerks summarizing data that may be considered by Court members in particular cases.[230] As explained earlier, external information input means any petitions, opinions, records, facts, or arguments coming to the attention of the Court in a case before it (or potentially to come before it) for decision.[231] When information is passed in this general fashion from an individual, group, or organization to one or more of the Justices, the process of communication occurs, provided that the message received has essentially the same meaning to both the sender and the receiver.

During this processing and condensation, and before most information is seriously considered by Supreme Court members, it undergoes some type of screening, perhaps best illustrated by the handling of writs for certiorari by law clerks.[232] Condensation is evident, however, at other stages of the information flow process. Although not specifically shown in the models, oral argument may be viewed as an example of a Court procedure used to screen and condense information. As John Schmidhauser has written, "[i]f counsel fulfills his role properly in oral argument, he performs a substantial service by assisting the Court in getting to the heart of the matter swiftly; if he performs incompetently, he wastes the Court's valuable time."[233] In Figure 7 the processing-screening-condensation procedure is artificially separated into distinct stages, improving upon the preceding structure.[234]

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228. *See* notes 285-87 *infra* and accompanying text.

229. *See, e.g.*, S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 250-57.

230. *See* note 200 *supra*.

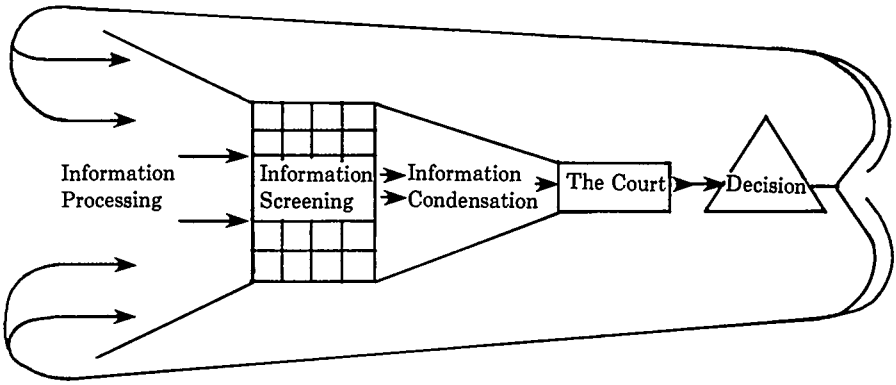
231. *See* note 173 *supra* and accompanying text.

232. *See* note 200 *supra*. Of course, prior to the time that a case reaches the Court, lower courts also perform the basic screening function. This in fact is a basic underlying cause of current controversy over the need for a National Court of Appeals. *See* note 265 *infra*.

233. J. SCHMIDHAUSER, *supra* note 197, at 138.

234. Literature on details of processing, screening, and condensing of information to and within the Court is reasonably meager, but there are a few examples. For a general

FIGURE 7
INFORMATION PROCESSING-SCREENING-CONDENSATION



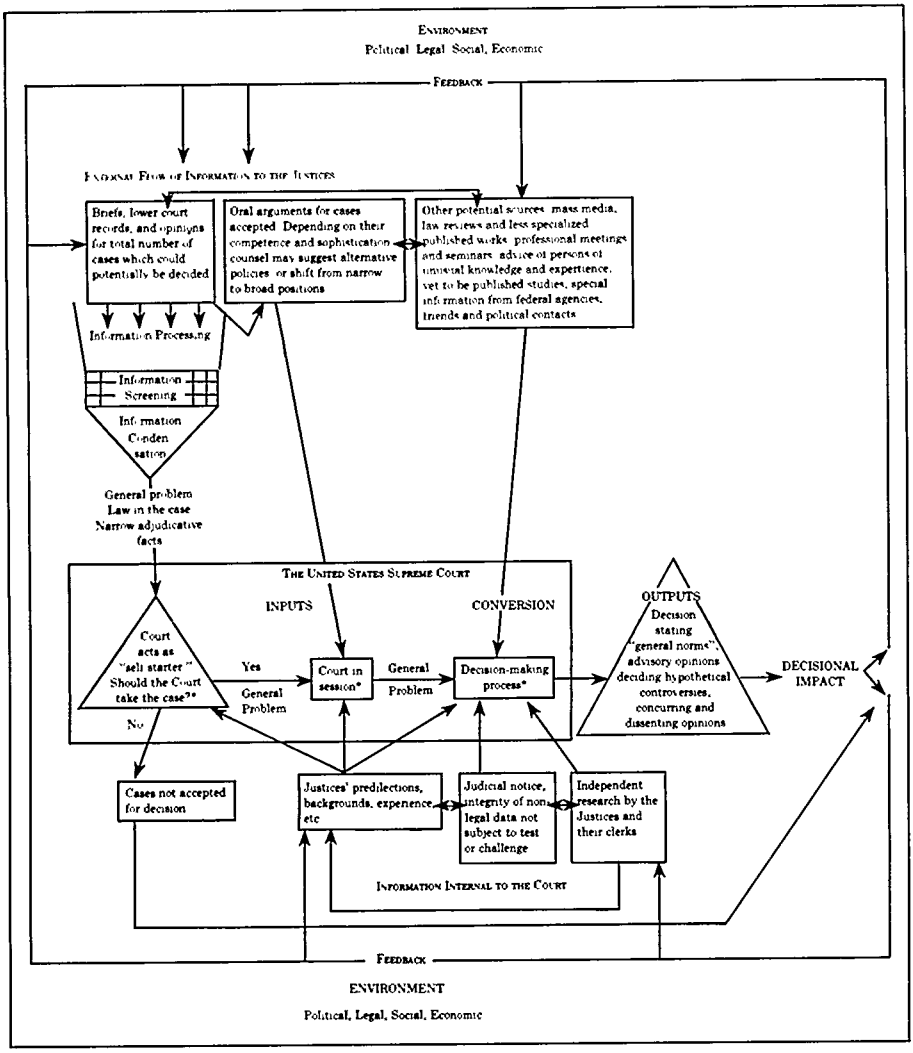
This portion of the model is next added to Figure 4, yielding a more thorough overview of the information flow process in Figure 8. Note, too, that Figure 8 includes other possible external sources of information (as well as possible interactions or feedback processes between those sources and those previously discussed). Specifically, the new sources listed in the third box account for the likelihood that in some cases the Court may receive information through atypical means and from unorthodox sources, such as means and sources other than those normally coming up through the adversary system in the form of lower court opinions and records, briefs, and oral arguments.

A number of illustrations of "atypical" information flows to the Court may be drawn from the questionnaire data.[235] First are the

discussion of the entire process from the time of appeal to the final Court decision see J. SCHMIDHAUSER, *supra* note 197, ch. 6. For the general sifting of cases before decision see R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 276-92 (2d ed. 1954). For the strategic role of the Chief Justice in handling petitions for certiorari see Danelski, *supra* note 188. For a more specialized aspect of screening see the discussion of the Solicitor General's interface with the Supreme Court in Griswold, *Rationing of Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975). Dean Griswold observes that in cases which a federal agency or federal official has lost in lower court but wants to appeal to the Supreme Court, "[i]n effect, the Solicitor General does most of the screening which is done in other cases by the Supreme Court, for he tries to take to the Court only cases which, based upon his close observation of the work of the Court, he thinks that the Court will accept." *Id.* at 344. See also the analysis of screening in Rehnquist, *supra* note 200; Casper & Posner, *supra* note 225; FEDERAL JUDICIAL CENTER, *supra* note 225. For reference to experimentation with screening at the U.S. Court of Appeals level see Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1127 (1973); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257.

235. *See* Appendix A *infra*. In an earlier article on judicial secrecy, Professors Arthur Miller and D. S. Sastri alluded to a number of additional instances of "unorthodox" information flow and procedures. *See* Miller & Sastri, *supra* note 146, at 821.

FIGURE 8
TENTATIVE MODEL OF INFORMATION FLOW
BASED ON FIGURES 4 AND 7



*At this point there may occur varying degrees of information exchange among the Justices.

more conventional and obvious ones: the mass media; law reviews; books and less specialized legally oriented works available to the public generally; professional meetings and bar association seminars.[236] Examples of genuinely "atypical" sources of external information might include cases when Justices unofficially seek the advice of persons of unusual knowledge and experience regarding a certain question. For instance, one respondent to the questionnaire noted that at the time of *DeFunis v. Odegaard*[237] a law professor at a nearby university was said to have "received a query about the LSAT from 'the Supreme Court' and that after reading Douglas' dissent, he thought he could identify the source of the query." As another example, an anonymous respondent, who refused to specify cases for reasons of confidentiality, observed that Court members receive "[t]hrough law clerks (generally) working through still third persons, . . . unpublished manuscripts and studies, sometimes statistical studies, on pending matters."

Justices also have been said to receive special data from federal agencies and their officials. Thus one professor of law observed: "I understand (but do not know of my own knowledge) that in the *Roth* case the Solicitor General's office sent over to the Court a box full of samples of hard core pornography seized in the mails. This box was not part of the record."[238] Beyond that, Court members may maintain close associations with friends and political contacts with strong views on questions related to those decided by the Court.[239] One illustration relayed by a law professor was that a Nixon appointee to the Court, who "was an intimate of the White House," personally "went over to congratulate Nixon on the decision to bomb Cambodia." The same Justice "was a voice on the Court denying [certiorari] to the various anti-Vietnam cases." A more recent example, but perhaps one of questionable authenticity, is John Dean's allegation that Chief Justice Warren Burger and former President Nixon were said to have discussed whether the federal courts would force the surrender of the Watergate tapes.[240]

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236. For discussion of the Court's past reliance upon some of these sources see S. GOLDMAN & T. JAHNIGE, *supra* note 175, ch. 7; D. GREY, THE SUPREME COURT AND THE NEWS MEDIA (1968); P. ROSEN, *supra* note 135; Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term*, 57 GEO. L.J. 55 (1968); Newland, *Legal Periodicals and the United States Supreme Court*, 7 KAN. L. REV. 477 (1959).

237. 416 U.S. 312 (1974).

238. The reference is to Roth v. United States, 354 U.S. 476 (1957).

239. See the examples supplied in MURPHY, *supra* note 205, at 147-49.

240. *See Dean Says He Heard That Nixon Was Confident on Tapes Issue*, N.Y. Times, Jan. 15, 1975, § 1, at 16, col. 3. *But see* Wash. Post, Jan. 18, 1975, § 1, at 4, col. 5. According to one report, Burger was also one of only three Justices who voted against the Supreme Court

These hypotheses relating to unorthodox external flows of information follow: when general issues are involved, Justices are more likely to seek a broader range of information from atypical sources than they do in specific cases, when more reliance is placed on orthodox sources.[241] When a case before the Court is exceedingly controversial, or if it could have a great impact upon American society generally, the Justices may seek out additional unorthodox sources of information upon which to base their decision.[242] Future research should endeavor to substantiate such hypotheses, notwithstanding that these attempts would of necessity be partly based on hearsay from those closest to the Court. To be sure, first-hand knowledge is both scarce and confidential on information flows to the Justices of the Supreme Court.

C. *Adding Schema Theory*

A principal aspect of information flow is the internalized processing of that information by the Justices themselves. This aspect has been referred to thus far only generally in terms of Court members' personally construing information in view of their own attitudes, backgrounds, and experiences.[243] Of course, there is much more to it than this, and "schema theory," as recently developed by Robert Axelrod,[244] seems to hold some promise as one way of conceptualizing this facet of information-flow processing by members of the Supreme Court. Though little is known about the internal thought patterns of past and present Justices, except for what they have been willing to reveal through their own writings and personal papers,[245] schema theory at least provides a broad way of conceiving

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accepting United States v. Nixon, 418 U.S. 683 (1974). *See* Totenberg, *supra* note 174, at 58. Once the case was accepted, however, Burger assigned himself to be the opinion writer and his first draft "met with a wholly negative response" from his brethren. *Id.* at 67.

It should further be noted that historically there have occurred atypical flows of information from the Justices to the outside environment. Perhaps the most widely cited examples are the leaks of information by Mr. Justice Curtis to a national newspaper and by Mr. Justice Catron to President-elect Buchanan, both concerning the Court's unannounced decision in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). *See* J. SCHMIDHAUSER, *supra* note 197, at 117, 119; C. SWISHER, ROGER B. TANEY, *supra* note 216, at 488-89, 495-502.

241. Hypothesis suggested in the questionnaire response of Bradley C. Canon, Professor of Political Science, University of Kentucky.

242. *See* Table 4 in Appendix A *infra*.

243. *See* note 151 *supra* and accompanying text.

244. Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POL. SCI. REV. 1248 (1973).

245. *See, e.g.*, A. MASON, *supra* note 191; W. MURPHY, *supra* note 205; Danelski, *Conflict and Its Resolution in the Supreme Court*, 11 J. CONFLICT RESOLUTION 71 (1967); Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968); Ulmer, *Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices*, 35 J. OF POL. 286

probable patterns of decisional thinking from the standpoint of information processing. The word "schema" connotes a perception of reality, a concept of how things work. As employed here, it describes an individual Justice's conception of what the law is—or what it should be. Put otherwise, given a Supreme Court Justice's schema he receives new information from various sources and attempts to interpret it in light of his existing information.[246]

Axelrod's schema model, shown in Figure 9, thus depicts in flow-chart fashion how a Justice may receive and process new information. At the risk of oversimplification, and for purposes of the exploratory model, Axelrod's schema theory may be broadly interpreted in the following manner. Receiving information (such as that in a writ of certiorari or an oral argument before the Court) at point 1, the Justice usually knows the source and type of information involved. He internally processes the message to point 2, answering the question: "Is there already an interpretation of this case?"[247] If the answer is affirmative (box 3), the Justice then determines whether the most recent information is congruent with the old. Consideration is given to what the Court had previously held in these questions, or what special factors might suggest the desirability of distinguishing or even overruling precedent. If the new information, as interpreted by the Justice, does seem generally to correspond with the old on this issue, as often happens, his processing of the information is comparatively simple. He advances to point 11, where his confidence in the prior information is enhanced, and—with perhaps minor adjustments—his decision (communication to his colleagues and then to the larger Court environment) is for the most part expected and consistent with prior rulings. By contrast, if the answer is negative in box 3, the Justice weighs the credibility of past information versus the most recent and determines which one of them is not credible (points 5 and 6). If the new

(1973); Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties*, 1937-1971, 1 FLA. ST. U.L. REV. 131 (1973).

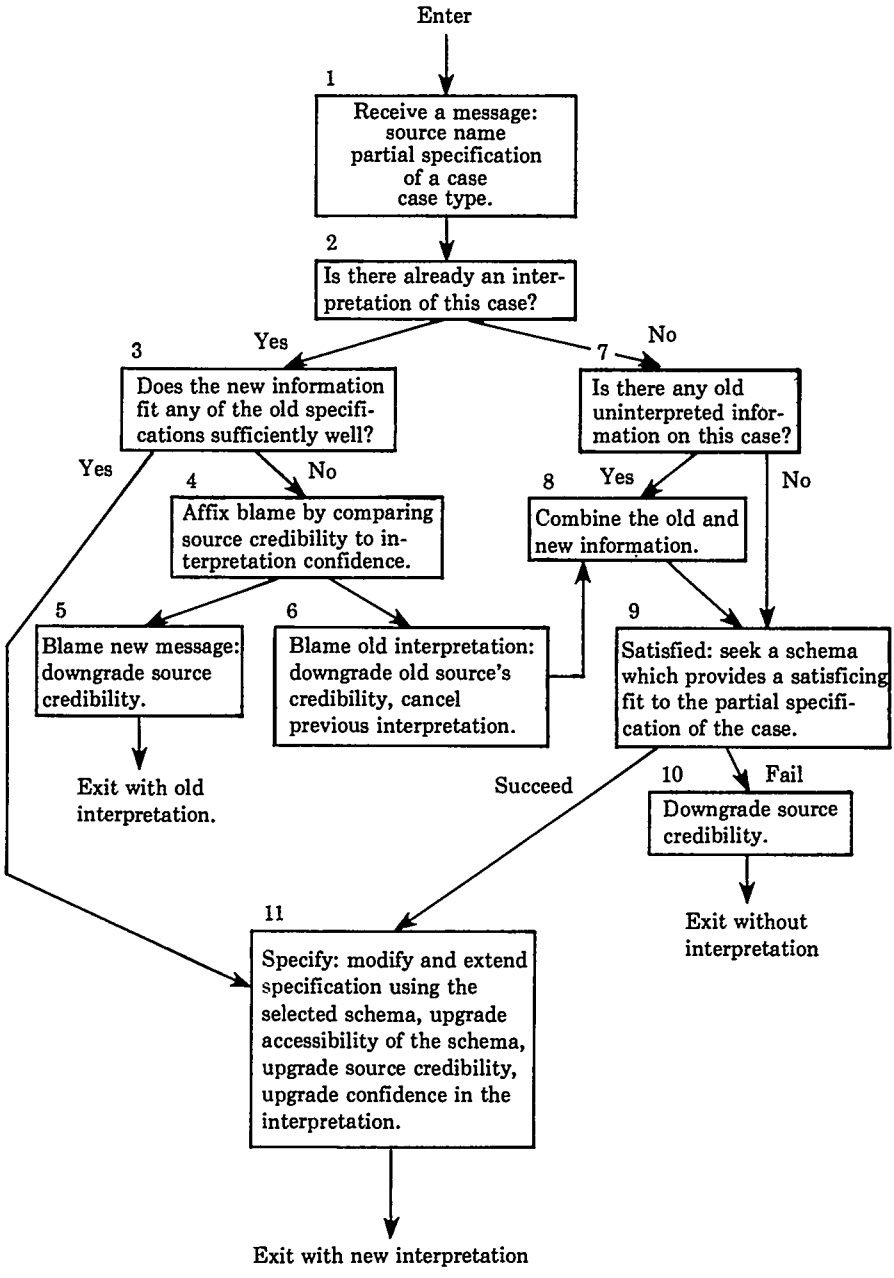
246. More specifically, in the words of Axelrod, schema theory:

> is about how a single person observes and makes sense out of a complex environment. Therefore it describes the perceptual and cognitive processes of a single person; it does *not* describe the functioning of a small group, let alone a social movement or a government. Furthermore, it describes how a person processes information and tries to make sense out of it, but it does not describe how he makes policy decisions.

Axelrod, *supra* note 244, at 1249.

247. *Id.* at 1251. For the sake of simplicity, notice that the use here of Axelrod's model is largely commonsensical and necessarily oriented toward basic legal concepts. Thus, his more sophisticated concepts and definitions are not adopted. As an illustration, Axelrod defines "case" as "a specific instance in time." *Id.* at 1250. His question, however, is borrowed here, using "case" in the normal legal sense.

FIGURE 9
AXELROD'S SCHEMA MODEL



Source: Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POL. SCI. REV. 1248, 1251 (1973).

information's reliability is undermined, then the Justice accepts the old interpretation. On the other hand, if the old information is found to lack credibility, the Justice combines it with the new information at box 8.[248]

Now return to box 2. If the answer was that no prior interpretation exists in this case, then information processing by the individual Justice follows another path. If there is "old uninterpreted information on this case,"[249] it is combined with the most recent (point 8) and a fresh schema emerges. If there is not, then the Justice has even more discretion in making a decision, since he is not required to take into consideration past credible information. When this new schema "succeeds,"[250] the Justice is then able confidently to communicate a new interpretation to his colleagues. When it "fails,"[251] then essentially he is unable to make a decision in the case, because his individual information processing fails for one reason or another.[252]

Figure 10 integrates the individual information processing aspect with Figure 8, completing the exploratory model of information flow to, through, and from members of the United States Supreme Court.[253] Although provisional, it is of assistance in further describing and explaining how the Justices make public policy based upon a certain quantum of information. And it is a valid model in the sense that "[i]ts 'validity' depends . . . upon its utility in furthering fruitful research or in increasing our understanding of reality."[254]

248. *See* Axelrod's discussion *id.*

249. *Id.* at 1251.

250. *Id.*

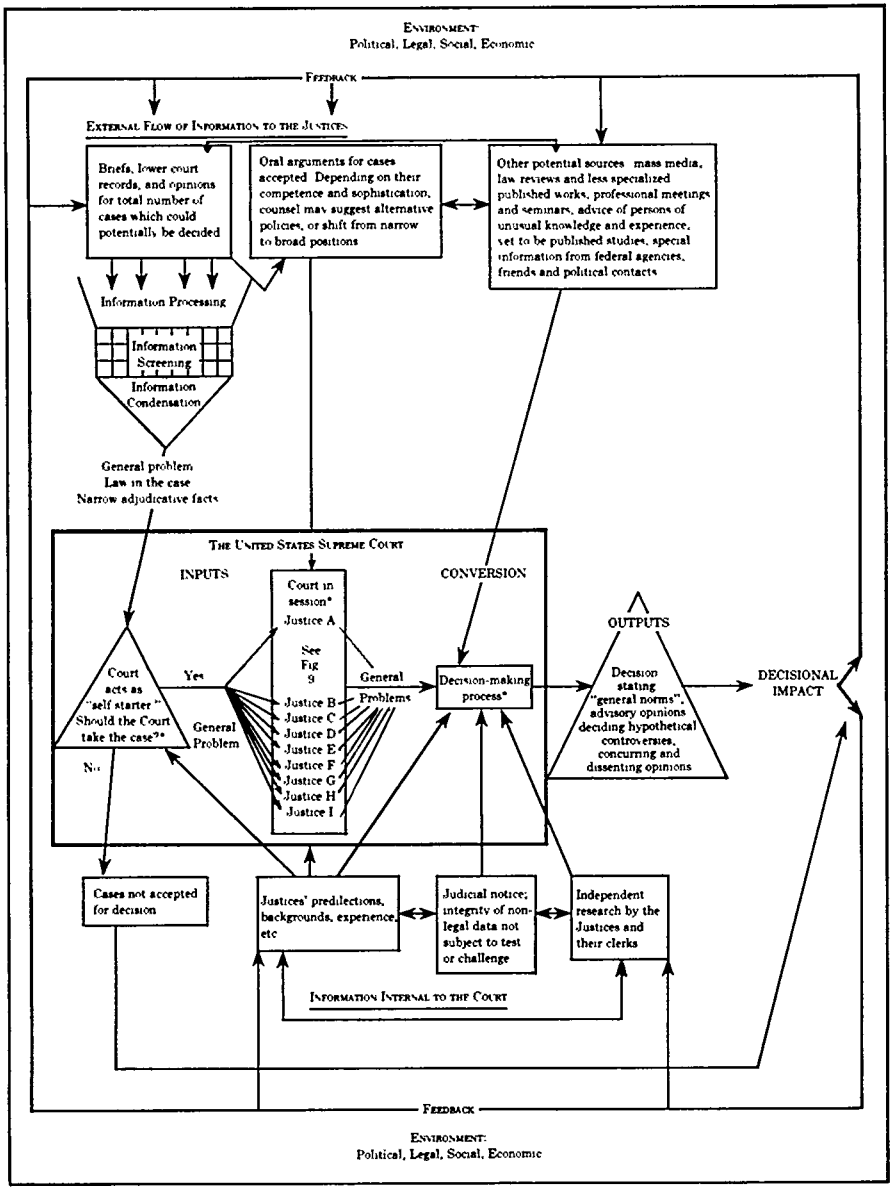
251. *Id.* at 1250.

252. *See* Axelrod's discussion *id.*

253. The schema model is included under the input-oral argument-court in session portion of Figure 8, for here is where much of the information processing by each Justice presumably takes place. This is not to preclude the possibility, however, that a similar process occurs when a Justice decides whether the Court should initially accept the case, or as he participates in the policy-making process after oral argument.

254. W. MURPHY, *supra* note 205, at 32.

FIGURE 10
AN EXPLORATORY MODEL OF
JUDICIAL INFORMATION FLOW



*At this point there may occur varying degrees of information exchange among the Justices.

V. Additional Propositions and Future Research

The flow of information to the Supreme Court is an essential feature of that institution's operation and substantially influences its policy-making process. Although Figure 10 is based largely on a detailed study of only three major constitutional decisions, plus three bodies of general theory, it nevertheless illustrates the potential utility of a model for contributing to an understanding of the Court.[255]

That structure, within a limited amount of space, helps one to visualize the overall information flow process at the Supreme Court level, rather than in a piecemeal fashion—such as emphasizing only external or internal information flows or, even more narrowly, their component parts. It organizes ideas, events, and data pertaining to that process. It suggests likely relationships between strategic variables; for instance, the effect of information inputs on a Court decision may be strengthened or weakened by the Court's procedural rules, institutional traits, or by the backgrounds and predilections of the Justices. Finally the model may be interpreted to suggest propositions that go beyond those examined by Miller and Barron, and that therefore may deserve future investigation.

A. Illustrative Hypotheses

Professors Miller and Barron assert that their propositions generally hold for *Roe, Doe*, and *Times*. This article, with a few stated exceptions,[256] accepts those propositions as reliable. Additionally, their analysis of the *Abortion Cases* and *Times*—in combination with the models developed here—seems to indicate additional, related hypotheses or propositions that could be fruitfully explored by future research. This study has provided or suggested a number of hypotheses throughout, of which some were conceived during the case studies, some offered by insightful questionnaire responses, a few generated from the exploratory model in Figure 10, and still others derived from cited research. While a number of variables are involved, each of these hypotheses pertains to judicial information flow, broadly defined. The basic communication model in Figure 5 provides useful organizing concepts for presenting these illustrative hypotheses, although admittedly they do not always fit neatly into these conceptual categories. A more systematic statement of these hypotheses appears below.

255. See the discussion of how models may be employed for useful purposes in Appendix B *infra*.

256. See the evaluation presented notes 163-68 *supra* and accompanying text.

1. *WHO is the sender of the message? (Source of information)*

—When general issues are involved, Supreme Court Justices are more likely to seek and receive a broader range of information from a variety of sources than in narrow cases, in which they tend to rely more on orthodox sources of legal information.[257]
—When a Supreme Court decision is likely to have a profound impact on American society, the Justices of the Court inform themselves through both orthodox and unorthodox sources so as to have available the most adequate, reliable, and timely information upon which to base their decision.
—In some instances the Supreme Court has an inadequate opportunity to check the sources of information relied upon by litigants and the conclusions derived from those sources.
—When sources of information are not or cannot be thoroughly checked, the Court may nevertheless rely upon that data if the pressures from its environment are so strong as to require authoritative policy from an "apolitical" institution.

2. *WHAT is the message communicated? (Content)*

—Social science data seems to have more influence in areas of new judicial policy, as opposed to when a long line of legal precedents exists.
—"Continued denial of certiorari with respect to a given subject will decrease the number of cases filed concerning that subject."[258]
—A Supreme Court opinion unpopular with a large portion of the population will generate more negative information flow back to to the Court than will one that is generally accepted and complied with.
—The variety of information presented to the Court is a direct function of the impact a particular decision may have on society.

3. *HOW is the message communicated? (Process of communication)*

—The kind of information made available to the Court, to the extent that information is reflected in sources such as briefs and lower court records, will vary with the type of lawyer arguing the case.[259]

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257. Hypothesis suggested in the questionnaire response of Bradley C. Canon, Professor of Political Science, University of Kentucky.

258. S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT, *supra* note 209, at 247.

259. Hypothesis derived from J. CASPER, *supra* note 192.

—When information is communicated to the Supreme Court through typical means, it may undergo varying degrees of processing, screening, and condensation prior to reaching the Justices.
—When unorthodox information reaches Supreme Court Justices, it does so through indirect channels, thus avoiding the normal processing-screening-condensation procedure.
—Although atypical flows of information are not processed, screened, and condensed in the traditional sense, they may nevertheless significantly affect judicial policy-making.

4. *To WHOM does the message go? (Recipients)*

—The more atypical the type of information being communicated to the Justices, the greater the likelihood that it will go through fewer and more covert channels.
—Assuming that counsel feel they can predict how most of the Justices will vote on a particular issue, they will direct their strategy in briefs and arguments toward the "swingmen" on the Court in order to win those votes, based upon their understanding of those Justices' backgrounds, attitudes, and experiences.
—When contrasted with more typical cases, considerably more exchange of information and views occurs among the Justices in major constitutional cases—informally through Court memoranda, over the telephone, or through face-to-face discussions during the opinion writing process.

5. *With what EFFECT (Information's influence on the decision)*

—Information coming to the Court influences the Justices in the determination of whether or not to decide a case.
—Occurrences in the Court's environment may influence the Justices to disregard certain facts and argnments that conflict with what they feel is "right" for the society, the economy, or the political system at a particular time.
—The Supreme Court relies upon information and data used in the lower court record according to the extent to which that information supports its own policy preferences, and depending on the prestige of the lower court or judge within the judicial system generally.
—When an important case is before the Court, the Justices will take more time to weigh the information, and will more fully explain and document their holding.[260]

260. Hypothesis suggested in tbe questionnaire response of Henry J. Abraham, Professor of Political Science, University of Virginia.

—When information is transmitted to the Court, it is viewed by the Justices not only with respect to the possible impact of future alternative decisions, but also with respect to the impact of prior decisions in such issues.
—The Supreme Court may utilize its policy-making power in stating broad standards in order to prevent a future multitude of cases and the accompanying influx of information.
—In cases when the Justices possess intense feelings as to how a case should be decided, they may totally ignore information presented in briefs and arguments that contradict that view, but draw upon other data similarly presented to support their preconceived notions.
—During the opinion writing process, the Justices not assigned to author the opinion pay little attention to the specific information relied upon in opinion drafts, instead giving primary notice to whether the opinion's thrust is generally in the direction they support.

B. Suggested Lines of Future Research

To the extent that these hypotheses are related and later shown to be valid, a theory of Supreme Court information flow may be forthcoming. At this time, however, the hypotheses vary in importance, comprehensiveness, relatedness, the extent to which they are obvious or have been examined, and their ability to be operationalized, quantified, measured, and thus tested. The hypotheses nevertheless suggest that future research should proceed along at least three general but distinct lines. One should concern model testing, another should relate the model to specific problems of the Supreme Court, and a third should address the more technical question of assessing and improving the Supreme Court's information retrieval system.

First, the model should be tested and further refined. This could be achieved through qualitative analysis such as that in this study, or through quantitative methods such as those involved in multivariate analysis.[261] Quantitatively, the objective would be to measure accurately the sources and effects of different types of information in a larger number of Supreme Court decisions. Fred Kort's use of regression analysis and discriminant analysis may pro-

261. For an introductory discussion of multivariate techniques see W. MURPHY & J. TANENHAUS, THE STUDY OF PUBLIC LAW 205-12 (1972). *See also* H. BLALOCK, JR., SOCIAL STATISTICS (1960); W. BUCHANAN, UNDERSTANDING POLITICAL VARIABLES (1969); G. TINTNER, ECONOMETRICS (1952).

vide some insights in this respect. In a 1973 article his purpose was to discover "whether or not the Supreme Court's acceptance of the fact that the defendant was not advised of his right to counsel in an involuntary confession case depends on the appearance of the fact in the lower court records and appellate briefs."[262] Essentially, Professor Kort applied these two techniques in examining the presence and apparent influence of types of information ("facts") presented in lower briefs and records. These facts may or may not have ultimately come to the attention of the Justices in thirty-two confession rulings announced between 1936 and 1964. Most importantly for future research, Kort noted that "[a] similar inquiry can be made, of course, with regard to any other fact."[263] Kort's research in this sense is directly relevant to future quantitative studies of judicial information flow. By using multivariate techniques, such research would test relationships between information variables through causal analysis.[264]

The second line of future inquiry should involve the application of the model to Supreme Court problems; for example, the current case overload. Using this illustration, the refined model could be employed to indicate where and how Supreme Court information flow could be modified to ease the pressures of the escalating growth of docketed cases.[265] The concept being advocated is this: while there clearly exists an increasing *case overload* at the Supreme Court level, an equally valid means of analyzing the problem is in terms of *information overload.* This is a logical approach since the growth of the Court's case load is only part of its problem. The other

262. Kort, *Regression Analysis and Discriminant Analysis, supra* note 6.

263. *Id. See also* Kort's other articles cited at note 6 *supra.*

264. *See, e.g.*, H. BLALOCK, JR., CAUSAL INFERENCES IN NONEXPERIMENTAL RESEARCH (1964); S. KILPATRICK, QUANTITATIVE ANALYSIS OF POLITICAL DATA (1974); Kort, A Special and a General Multivariate Theory of Judicial Decisions (unpublished revision of a paper originally presented at the 1974 Annual Meeting of the American Political Science Ass'n).

265. For accounts of the Court's case overload and possible solutions see, e.g., A. BICKEL, THE CASELOAD OF THE SUPREME COURT—AND WHAT, IF ANYTHING, TO DO ABOUT IT (1973); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE ch. 2 (1975); Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Burger, *supra* note 234; Casper & Posner, *supra* note 225; Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401 (1960); Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973); Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Griswold, *supra* note 234; Poe, Schmidt, & Whalen, *A National Court of Appeals: A Dissenting View*, 67 Nw. U.L. REV. 842 (1973). Of course much of this recent debate has centered around the proposed creation of a National Court of Appeals which would perform a major screening function for the Supreme Court.

part is that each additional case may create a drain on the Justices' time by stimulating multiple flows of information to the Court as an institution, to its staff and law clerks, and then to the Justices. These increases in information come from external sources, but also generate further internal flows, thereby contributing to the "rationing of justice,"[266] just as is true with case overload. In the final analysis, a refined model of judicial information flow could be useful in indicating where the Court's procedures should be slightly changed, basically altered, or completely modified to promote an effective and efficient flow of information to the Justices. Thus the model could facilitate thinking concerning "the abstract properties of alternative institutional arrangements."[267] Through this approach it should then be possible to stimulate support for appropriate changes and, thus in the long-run, "to conserve a scarce resource in the judiciary, the unexpandable time of the nine justices of the Supreme Court of the United States."[268]

A third area for investigation, which is indirectly related to this study, should concern the application of computer-based information retrieval systems to the courts. Chief Justice Earl Warren was aware of some of the early potential in these developments in 1966 when he observed: "It seems to me there is a definite need for

266. Griswold, *supra* note 234. Dean Griswold explains this concept in the following terms:

> What has been happening is that as the number of cases filed has steadily increased, the Court has been forced to make its cut a higher and higher point on the overall list. This means inevitably that cases which would have been regarded as worthy of review fifty or twenty years ago cannot be heard today. In other words, they must be rationed out.

Id. at 340-41.

267. Fiorina, *supra* note 8, at 147.

268. Cannon, *Administrative Change and the Supreme Court*, 57 JUDICATURE 334 (1974). To be sure, attempts are being made to conserve the Justices' time. Although change in the judicial process at the Supreme Court level has traditionally been slow, the creation in 1972 of a new position—the administrative assistant to the Chief Justice—was a milestone development. Mark W. Cannon, the first professional administrator to hold that post, has since his appointment been able to modernize a few aspects of the Court's institutional functioning. In the area most relevant to this article, Cannon recently observed that sometime in the near future, perhaps during 1976, "the docket records of the Court will be processed through an efficient information and management system." Cannon, *An Administrator's View of the Supreme Court*, 22 FED. BAR NEWS 109, 110 (1975). Moreover, Cannon is looking toward ways to overcome "the inadequate resources for assisting the Justices as they process a caseload almost four times as great as it was when Brandeis sat on the Court." *Id.* at 111. One means of accomplishing this objective is through the adoption of a career legal staff. Moving in this direction, Chief Justice Burger and Mr. Justice White have recently substituted an experienced lawyer for one of their law clerk positions. *Id.* at 112. *See also* Cannon, *The Federal Judicial System: Highlights of Administrative Modernization*, 12 CRIMINOLOGY 10 (1974); Wasby, *supra* note 188, at 3. Although these innovations are helpful, they do not, however, alleviate many of the problems resulting from information-related inadequacies.

thorough analysis and study of the mechanics—in its physical aspects—of carrying on the business of our courts. I am led to this belief by the accomplishments of new data processing methods employed in other fields. . . ."[269] With regard to the Supreme Court, there is a need to analyze its information systems and their general updating. Pertinent questions that might extend the findings of this study could include the following. What types of information do the Justices ideally need in a variety of cases? How may these needs be met through technological innovations? What advantages or disadvantages would accrue from the use of a sophisticated information system to meet these needs? Is there, in fact, resistance to a more sophisticated information system at the Supreme Court level? If so, why? Is there general judicial conservatism toward change; resistance to altering the Court's procedures; fear of loss of control; or are opponents of such a system simply uninformed as to the problems it could solve?[270] This entire area of computer application to legal information-flow processes has received increasing attention over the last decade and should continue to do so.[271]

VI. CONCLUSION

The flow of information to the United States Supreme Court is an indispensable, distinctive characteristic of the American judiciary that has been virtually ignored, in the systematic sense, by students of the legal process. This information-flow process is composed of multiple aspects that contribute to the complexity and discretion of the Court's policy-making role and to the mythology that surrounds it as a goverumental institution. To be sure, the Court at times decides cases based strictly upon the record, briefs, and oral arguments presented to the Justices. The assertion here, however, is that in major constitutional cases in which the Justices choose to formulate new broad social policy—as in *New York Times v. Sullivan*, *Roe v. Wade*, and *Doe v. Bolton*—a number of other

269. Address by Earl Warren, Annual Meeting of the American Law Institute, Washington, D.C., May 18, 1966, at 9, quoted in Chartrand, *Systems Technology and Judicial Administration*, 52 JUDICATURE 194 (1968).

270. For a more detailed treatment of this question see E. ADAMS, COURTS AND COMPUTERS (1972). Note especially ch. 9 where the author elaborates upon the position that "[p]rogress in applying technology in the courts has often been retarded by the many unfounded ideas surrounding both machines and the law." *Id.* at 117.

271. *See generally* E. FRIESEN, E. GALLAS, & N. GALLAS, MANAGING THE COURTS (1971); H. ZEISEL, H. KALVEN, JR., & B. BUCHHOLZ, DELAY IN THE COURT (1959); Adams, *The Move Toward Modern Data Management in the Courts*, 23 U. FLA. L. REV. 250 (1971); Freed, *Computers in Judicial Administration*, 2 LAW & COMPUTER TECH., July 1969, at 19; Halloran, *Judicial Data Centers*, 2 LAW & COMPUTER TECH., Apr. 1969, at 9; Kleps, *Computers and Court Management*, 53 JUDICATURE 322 (1970); Tamm, *Are Courts Going the Way of the Dinosaur?* 57 A.B.A.J. 228 (1971).

things may happen. The Justices may liberally pick and choose from the totality of information brought to their attention, or they may entirely disregard it on specific critical points that supply the premises underlying important constitutional policy. At times they encourage counsel to present a spectrum of policy options and may actually suggest that counsel extend his argument to broader constitutional grounds. They are known to conduct additional independent research on their own, often with the assistance of their law clerks, which results in policy premises complementing, supplementing, or radically differing from those emerging from the adversary process. The Justices, as major fact-finders, periodically recognize some of this information through the liberal utilization of judicial notice, a practice that clearly may be affected by the Justices' backgrounds, experiences, and attitudes. They may also neglect to acknowledge that they are in fact taking notice and simply declare expansive policies that have the authority of law but are not thoroughly tested through adversary proceedings.

These considerations, among others, have been weighed in constructing an exploratory model of Supreme Court information flow. Portions of that final model, based upon the "preliminary" revisionist findings of Professors Arthur S. Miller and Jerome A. Barron, are essentially inductive in nature. Deductive aspects of the model were then selectively added from systems theory, communication-information theory, and schema theory. One key point, however, requires underscoring: the present article is not designed to provide the ultimate model of information flow to the Justices of the Supreme Court in all constitutional cases. Rather, it is intended to be tentative, suggestive, and exploratory—but, in any event, hopefully controversial. In the final analysis, the overall effort will prove worthwhile only to the extent that it stimulates further thought and the development of more refined models by others interested in judicial process, Supreme Court policy-making, and information flow. With this in mind, a number of propositions have been suggested that may prove testable through future research. Ultimately, quantitative analysis should be applied carefully to the information flow process, models should be operationalized to the point of actually contributing solutions to very real problems faced by the Supreme Court, and the Court's information retrieval system should be objectively assessed for its efficiency and effectiveness in support of the policy-making function. If these objectives are accomplished, the process of informing the judicial mind will become better understood by the academic community, thoughtful and concerned citizens, and even the Justices who make future policy within the inner chambers of the Supreme Court.

APPENDIX A

ACADEMIC VIEWS RELATING TO SUPREME COURT INFORMATION FLOW

Since a paucity of work had been published specifically addressing the subject of information flow to the Supreme Court, a questionnaire was designed during 1974 requesting the opinions of law and political science professors on certain relevant points and asking how the larger study could be made useful to their disciplines. These questions were included:

1. What have been, to your knowledge, the principal ways in which Justices of the Supreme Court have *typically* informed themselves on issues brought before them for decisions? More specifically, what have been the ordinary sources of information and the usual means whereby it has been communicated?[272]
2. What illustrative cases are you aware of where Supreme Court Justices have gained, through atypical means, information pertaining (directly or indirectly) to cases decided by the Court?
3. Our major objectives include: (a) identification and analysis of information flow in six prominent lines of Supreme Court decisions; (b) the development of the early stages of descriptive models of information flow to the Court; and (c) the generation of information flow hypotheses for future research. Which of these themes would you consider to be the most fruitful lines of inquiry? What other objectives would be useful to pursue?
4. At this time, we are weighing the possibilities of utilizing such approaches as systems theory, communication/information models, and "schema theory" (*see* Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POL. SCI. REV. 1248 (1973)) in developing models of judicial information flow. Of these models or bodies of theory, which would you consider to be most suitable for describing the flow of information to the Supreme Court? Why? What other models or theories might be worth exploring in this project?
5. With regard to the flow of information, how should or could the adversary system be modified to improve its functioning and to facilitate the fulfillment of its purposes in constitutional adjudication at the Supreme Court level? What should be the role of social science data at the Supreme Court level? What revisions in Supreme Court practice would be necessary to integrate the social science factor into the work of the Court?

272. Another point originally included in the questionnaire, but of no direct relevance here because of the wide distribution of responses, was: "Please make any additional comments on any aspect of this project."

6. Finally, in this study it is obvious that we are focusing on cases which illustrate major revisions in the law which have been accomplished by the Supreme Court. What, if any, differences are there in the way the Court informs itself when it decides cases which result in fundamental social change and when it makes less controversial interpretive decisions?

During the following weeks 175 questionnaires were distributed to students of the Supreme Court throughout the nation. Approximately two-thirds (117) of these went to law professors, one-third (58) to political scientists. Forty-one replies were received from the survey effort, yielding a response rate of 23.4 percent. Of the twenty-eight respondents who identified themselves, eighteen were law professors and ten were political scientists.

This appendix presents and interprets the more important data collected from the questionnaire responses.[273] Two points, however, require particular emphasis: the sample is not scientifically random and the data are not always sufficient in quantity for statistical tests. Thus, conclusions are tentative and there is no reason to believe that the views expressed in these questionnaire responses necessarily reflect the views of law professors and political scientists generally. Yet, with this fact in mind, the data are presented as an appendix, for they are quite interesting and suggest directions for possible future research.

In presenting the data the procedure will first be to discuss it in terms of total responses, and then in terms of opinions voiced by members of the two disciplines who identified themselves. These tables reflect data on several topics, introduced in the following order: the use of social science data for policy-making by the Supreme Court (Table 1); the need for structural changes at the Supreme Court level to insure the availability of more complete, valid, and reliable information (Table 2); atypical sources of information available to the Justices (Table 3); the differences in the way the Court informs itself in decisions that are likely to be controversial or to have a major impact on American society, as opposed to those that in all likelihood will not (Table 4); and, finally, the use of and familiarity with models as they relate to Supreme Court information flow (Tables 5, 6 and 7).

273. For a more general but somewhat related study of academic attitudes of political scientists interested in judicial behavior, judicial process, and public law see Schubert, *Academic Ideology and the Study of Adjudication*, 61 AM. POL. SCI. REV. 106 (1967).

TABLE 1
ACADEMIC ATTITUDES TOWARD
THE SUPREME COURT'S USE OF SOCIAL SCIENCE DATA*
(N = 33)

	Law Professors	Political Scientists	Anonymous	Totals
Generally appear to think the Supreme Court should regularly consider social science data wherever related to a particular policy question	7 (21.2%)	8 (24.2%)	6 (18.2%)	21 (63.6%)
Generally appear to think the Supreme Court should *not* consider social science data on a regular basis	8 (24.2%)	0	4 (12.1%)	12 (36.4%)
Totals	15 (45.4%)	8 (24.2%)	10 (30.3%)	33 (100.0%)

*Percentages are rounded and calculated according to total responses. When percentages are calculated according to disciplines, without consideration of anonymous responses, differences in the views of law professors and political scientists are siguificant at the .02 level. See the reference cited at note 275 for the use of the chi square test.

Academic views toward the Supreme Court's use of social science data are the focus of Table 1.[274] Sixty-three point six percent (63.6%) of all respondents generally thought that the Court should regularly consider social science data when it clearly is related to a particular policy question, whereas 36.4 percent did not favor the consideration of social science data on a regular basis. When anonymous responses are ignored, all responding political scientists favored the Court's use of social science data, but less than half of the responding law professors concurred. This difference is statistically significant,[275] and is evident in typical responses to the question. Political scientists were prone to observe that social science data "should be used as the basis for judicial policy—to provide information permitting a better informed judgment," or that "social scientists [should] be able to present their data to the court (on the court's invitation) in both written form and orally explicated." On the other hand, law professors were more apt to display a basic skepticism and distrust of social science data, saying, for example, "It is useful for courts, . . . not as definitive guidelines for decisions but as more or less organized general information, thoughtful gossip,

274. *See* question 5 *supra*.

275. Two tests, the chi square and the Fisher exact test of siguificance, were used to test the statistical siguificance of differences in views expressed by political science and law professors. For an explanation of these tests and when they may be applied see S. SIEGEL, NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES 96-104, 175-79 (1956).

low level social statistics or head-counting, and the like," or even more strongly, "social science data is too imprecise, too subject to the bias of those who compile it, too open to attack, and too subject to change radically over a relatively short time period, to provide a viable basis on which to decide constitutional principles."

TABLE 2
ACADEMIC ATTITUDES TOWARD STRUCTURAL CHANGES AT THE SUPREME COURT LEVEL TO INSURE MORE COMPLETE, RELIABLE, AND VALID INFORMATION*
(N = 22)

	Law Professors	Political Scientists	Anonymous	Totals
Generally appear to favor structural changes at the Supreme Court level	6 (27.3%)	4 (18.2%)	5 (22.7%)	15 (68.2%)
Generally appear to oppose structural changes at the Supreme Court level	2 (9.1%)	4 (18.2%)	1 (4.5%)	7 (31.8%)
Totals	8 (36.4%)	8 (36.4%)	6 (27.3%)	22 (100.0%)

*Percentages are rounded and calculated according to total responses. When anonymous responses are disregarded, the Fisher exact test of significance shows that differences in the opinions of political scientists and law professors are not statistically significant.

Table 2 addresses the question whether the respondents favored structural changes in the adversary system at the Supreme Court level to insure more complete, valid, and reliable information upon which to base judicial decisions.[276] Of twenty-two replies, 68.2 percent favored structural changes; 31.8 percent appeared generally to oppose them. The data were also examined from the standpoint of disciplines, not total responses. Perhaps surprisingly, the finding is that three-fourths of the law professors seemed to advocate structural change, while only half of the political scientists did so. Although most law professors seemed either to advocate structural changes or to maintain open minds, political scientists appeared more cautious and frequently responded "I favor no particular drastic reform."

Responses regarding "atypical" flows of information to the Supreme Court appear in Table 3.[277] Of eighteen respondents, one-third expressed the view that atypical information included extrajudicial experience or the expertise of the Justices, 27.8 percent said that such information was obtained from governmental officials or agencies, and 38.9 percent observed that it came from trusted or

276. *See* question 5 *supra*.
277. *See* question 2 *supra*.

TABLE 3
SELECTED TYPES OF "ATYPICAL" INFORMATION
MENTIONED IN RESPONSES TO QUESTION 2*
(N = 18)

	Law Professors	Political Scientists	Anonymous	Totals
Extrajudicial experience or expertise of the Justices	2 (11.1%)	3 (16.7%)	1 (5.6%)	6 (33.3%)
Obtaining unusual information from governmental officials or agencies	2 (11.1%)	0	3 (16.7%)	5 (27.8%)
Information from trusted or experienced persons, political contacts, etc.	3 (16.7%)	1 (5.6%)	3 (16.7%)	7 (38.9%)
Totals	7 (38.9%)	4 (22.2%)	7 (38.9%)	18 (100.0%)

*Percentages are rounded and calculated according to total responses. When percentages are calculated according to the two disciplines, the Fisher exact test of significance reveals that the differences in opinion of political scientists and law professors are not statistically significant.

experienced persons or political contacts. It is interesting, too, that more anonymous respondents mentioned specific atypical sources of information than those who identified themselves. The confidential nature of some replies may have contributed to the failure of these respondents to divulge their identity. Table 3 also establishes that three of four responses from political scientists named extrajudicial experience or expertise of the Justices as types of atypical information, while replies from law professors were more evenly distributed among the three types of atypical sources mentioned.

Next are replies to the question: "What, if any, differences are there in the way the Court informs itself when it decides cases that result in fundamental social change and when it makes less controversial interpretive decisions?"[278] As Table 4 indicates, over half the total responses expressed the view that more information is usually necessary when the Court's decision will be likely to have a major impact on American society. Twenty-five percent of the replies suggested that the Court gives more time and attention to information in controversial areas that will have a major impact, and one respondent said that in controversial issues the Court presents more thorough explanations of its decisions and cites more authorities. Finally, three respondents perceived no major difference in the way the Justices inform themselves in controversial, as opposed to non-

278. Question 6 *supra*.

TABLE 4
RESPONSES TO QUESTION 6:

"What, if any, differences are there in the way the Court informs itself when it decides cases which result in fundamental social change and when it makes less controversial interpretative decisions?"*

(N = 20)

	Law Professors	Political Scientists	Anonymous	Totals
More information is usually necessary where the Court's decision will have a major impact	2 (10.0%)	5 (25.0%)	4 (20.0%)	11 (55.0%)
The Court gives more time and attention to information in controversial areas which will have a major impact	1 (5.0%)	3 (15.0%)	1 (5.0%)	5 (25.0%)
In controversial issues, the Court presents a more thorough explanation of its decision and cites more authorities	0	1 (5.0%)	0	1 (5.0%)
There is often *no* major difference in the way the Justices inform themselves in controversial as opposed to noncontroversial decisions	1 (5.0%)	0	2 (10.0%)	3 (15.0%)
Totals	4 (20.0%)	9 (45.0%)	7 (35.0%)	20 (100.0%)

*Percentages are rounded and calculated according to total responses. Application of the Fisher exact test of significance shows that the differences in opinion of political science and law professors are not statistically significant.

controversial, decisions. Focusing upon differences in reactions by law professors and political scientists to the same question, Table 4 indicates that 55.6 percent of the political scientists felt that "more information" is usually the primary distinguishing factor in how the Justices prepare themselves for an important decision. Half the responding law professors agreed.

The final three tables relate to models. Table 5 documents that nineteen respondents expressed an opinion on the value of social science models or, more specifically, on the usefulness of models for depicting the information flow process to the Supreme Court.[279] One point plainly emerges: while most replies were less than enthusiastic, nearly two-thirds of the respondents appeared to think

279. *See* questions 3 & 4 *supra*.

TABLE 5
ACADEMIC ATTITUDES TOWARD MODELING
THE INFORMATION FLOW PROCESS TO THE SUPREME COURT*
(N = 19)

	Law Professors	Political Scientists	Anonymous	Totals
Generally appear to think models would be valuable; or demonstrate a somewhat favorable attitude toward social science models	4 (21.1%)	6 (31.6%)	2 (10.5%)	12 (63.2%)
Generally appear to think models would *not* be valuable; or demonstrate a somewhat unfavorable attitude toward social science models	3 (15.8%)	2 (10.5%)	2 (10.5%)	7 (36.8%)
Totals	7 (36.8%)	8 (42.1%)	4 (21.1%)	19 (100.0%)

*Percentages are rounded and calculated according to total responses. The Fisher exact test of significance shows that the differences in opinions of political scientists and law professors are not statistically significant.

that a model of the information flow process would be valuable, or they evinced a somewhat favorable attitude toward social science models generally. When anonymous respondents in Table 5 are excluded, the data show that 75 percent of the political scientists favored the development of an information flow model, while 42.9 percent of the responding law professors generally felt that such a model would not be particularly valuable. Perhaps differences of opinion are best illustrated by two responses. The first is a political scientist with a favorable outlook, but with warnings: "DON'T OVERDO 'MODELS,' . . . define what you mean . . . . Simplicity here is a virtue." By comparison stands an indifferent remark from one law professor: "I am not particularly excited about [your developing models of information flow] . . . . Nevertheless, more power to you."

Table 6, with a small N of eleven, extends the findings of Table 5 by depicting academic preferences for specific types of models, based on positive responses in the preceding table.[280] Of eleven positive replies, five suggested that they favored the development of a communication-information model, one endorsed systems analysis, two favored some additional type of model,[281] and three voiced no

280. *See* question 4 *supra*. One positive response shown in Table 5 indicated no preference for any of the models mentioned in the questionnaire and thus is not included here.

281. One of these political scientists favored a "macro" model; the other supported the use of schema theory and multivariate analysis.

TABLE 6
ACADEMIC PREFERENCE FOR SPECIFIC TYPES OF MODELS*
(N = 11)

	Law Professors	Political Scientists	Anonymous	Totals
Generally appear to favor the development of a communication/information model	3 (27.3%)	2 (18.2%)	0	5 (45.4%)
Generally appear to favor developing a systems model	0	0	1 (9.1%)	1 (9.1%)
Generally appear to favor a model based on other than systems or communication/ information concepts	0	2 (18.2%)	0	2 (18.2%)
No preference stated	1 (9.1%)	1 (9.1%)	1 (9.1%)	3 (27.3%)
Totals	4 (36.4%)	5 (45.4%)	2 (18.2%)	11 (100.0%)

*Percentages are rounded and calculated according to total responses.

preference. Examined according to disciplines, with an even smaller N of nine, three law professors advocated a model based on information-communication theory, while one stated no preference. Of the five responding political scientists, two endorsed a communication-information model, two favored another type of approach, and one stated no preference.[282]

Lastly, Table 7 depicts academic familiarity with modeling approaches mentioned in the questionnaire.[283] Of the thirty-seven responses, 24.3 percent suggested a familiarity with systems analysis, 18.9 percent with communication/information models, and 5.4 percent with schema theory. On the other hand, between 16 and 19 percent of the replies noted an unfamiliarity with, or a lack of understanding of, each of these three approaches.[284] It is also interesting to observe that respondents not divulging their identity on the questionnaires were more likely to state that they were unfamilar with, or did not understand, these modeling approaches. When the

282. No test of statistical significance was employed here because of the small number of responses. It seems obvious, however, from viewing the data that there were no major differences in academic preferences for specific types of models. Note, though, that political scientists were more likely to suggest an approach not alluded to in the questionnaire.

283. *See* question 4 *supra*. By "familiarity" is meant a general awareness of these models, not necessarily a detailed understanding of them.

284. Of course there was no assumption that respondents who failed to comment on these modeling approaches were unfamiliar with them.

TABLE 7
ACADEMIC FAMILIARITY WITH MODELING APPROACHES SUGGESTED IN QUESTION 4*
(N = 37)

	Law Professors	Political Scientists	Anonymous	Totals
Respondents saying or suggesting they were *familiar* with systems analysis	3 (8.1%)	3 (8.1%)	3 (8.1%)	9 (24.3%)
Respondents saying or suggesting they were *unfamiliar* with or *did not understand* systems analysis.	1 (2.7%)	2 (5.4%)	3 (8.1%)	6 (16.2%)
Respondents saying or suggesting they were *familiar* with communication and information models	3 (8.1%)	3 (8.1%)	1 (2.7%)	7 (18.9%)
Respondents saying or suggesting they were *unfamiliar* with or *did not understand* communication and information models	1 (2.7%)	1 (2.7%)	4 (10.8%)	6 (16.2%)
Respondents saying or suggesting they were *familiar* with schema theory	0	2 (5.4%)	0	2 (5.4%)
Respondents saying or suggesting they were *unfamiliar* with or *did not understand* schema theory	2 (5.4%)	1 (2.7%)	4 (10.8%)	7 (18.9%)
Totals	10 (27.0%)	12 (32.4%)	15 (40.5%)	37 (100.0%)

*Percentages are rounded and calculated according to total responses. In distinguishing the views of law and political science professors, the chi square shows they were not statistically different at the .05 level.

data in the table are broken down according to disciplines, the findings are somewhat as expected: political scientists indicated a basic understanding of at least one of the three approaches, whereas four out of ten responses by law professors suggested no familiarity with any of these.

APPENDIX B

THE NATURE OF MODELS AND THEIR USEFULNESS

Before beginning the development of a model, answers should be suggested to a few basic questions regarding this study. First, why use a model to understand the Supreme Court, and more specifically, judicial information flow? To this the quick response is both simple and adequate: models are employed—consciously or unconsciously—in every aspect of our lives, in each function we perform. Although they may be unsophisticated, taken for granted, or not perceived as models per se, we usually think in terms of models, and they have proven useful.[285] A more thoughtful question might concern the goals which can be advanced through models that cannot be more easily undertaken through traditional modes of research. If the use of models is commonplace, what unique objectives do they serve? The answer is that models, or conceptual schemes, have long been employed by physical and social scientists for objectives that were otherwise difficult to attain.[286] The following are advantages:

(a) models help us visualize complex processes in an overall, rather than in a piecemeal, manner;
(b) they typically communicate complicated ideas within a very limited amount of space;
(c) they may uniquely facilitate organization of ideas, events, or data;
(d) they may reveal important relationships between variables;
(e) models frequently suggest hypotheses that may not previously have been conceived; and
(f) in some instances they assist in the ultimate scientific objectives of explanation, prediction, and verification.[287]

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285. In the words of Karl Deutsch:

> It seems clear . . . that we all use models in our thinking all the time, even though we may not stop to notice it. When we say that we "understand" a situation, political or otherwise, we say, in effect, that we have in our mind an abstract model, vague or specific, that permits us to parallel or predict such changes in that situation of interest to us.

K. DEUTSCH, THE NERVES OF GOVERNMENT 12 (1966).

286. *See generally* D. BARNLUND, INTERPERSONAL COMMUNICATION: SURVEY AND STUDIES (1968); Y. DROR, PUBLIC POLICYMAKING REEXAMINED (1968); A. KAPLAN, THE CONDUCT OF INQUIRY (1964); E. NAGEL, THE STRUCTURE OF SCIENCE (1961); THE PROCESS OF MODEL-BUILDING IN THE BEHAVIORAL SCIENCES (R. Stogdill ed. 1970); Brodbeck, *Models, Meaning, and Theories*, in READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 579 (M. Brodbeck ed. 1968).

287. Compare these points to the four functions of models discussed in K. DEUTSCH, *supra* note 285, at 8-9; S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 288-89. *See also* C.

An hypothesis underlying this study was that these potential contributions of models are not universally espoused in academic circles, regardless of their merit. This proposition was tested through a questionnaire to determine the extent to which law and political science professors support the idea of modeling the Supreme Court information flow process.[288] Broadly speaking, most of the respondents recognized the benefits of a modeling attempt. Of those replying to questions on modeling, nearly two-thirds appeared to think that models would be valuable, or at least voiced a rather favorable attitude toward social science models generally.[289] As might be supposed, however, political scientists maintain more favorable attitudes than law professors toward the need to develop models of judicial information flow.[290] Although this was neither a large nor a fully representative sampling of academic attitudes, these data suggest the likelihood that a sizeable portion of legal scholars do not consider seriously the use of models in their own personal research, despite the advantages of such an approach.

Since many scholars and commentators do not think in terms of models, a discussion of additional introductory aspects of modeling would be useful. Strictly speaking, a model should be isomorphic in nature—an abstraction or structure (such as a refined model airplane or automobile) basically identical in its component parts to that which it purports to represent.[291] Relationships among components also should be essentially the same as those in reality. All too often, however, models—particularly those in the social sciences—reflect a simplified version of "what is."[292] In other words, models are "simplified images of what we think life is really like."[293] Seldom is there an exact, one-to-one correspondence between the social science model and the reality upon which it is founded, simply because knowledge of social phenomena only is approaching a truly "scientific" stage, with verified findings supplying the basis for empirical generalizations.[294]

SHELDON, THE AMERICAN JUDICIAL PROCESS, *supra* note 6, at 9-15; Danelski, *Toward Explanation of Judicial Behavior*, 42 U. CINN. L. REV. 659, 665 (1973); Sheldon, *Structuring a Model of the Judicial Process*, *supra* note 6, at 1153-54.

288. *See* Appendix A *supra*.

289. *See* Table 5 in Appendix A *supra*.

290. *See id.*

291. *See* Brodbeck, *supra* note 286.

292. For some prominent examples of social science models see K. DEUTSCH, *supra* note 285; A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); D. EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965); J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944); W. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

293. J. PFIFFNER & F. SHERWOOD, ADMINISTRATIVE ORGANIZATION 59 (1960).

294. Models "cannot be expected to portray accurately every detail of a process or

Social science models also are relatively scarce and require further testing and refinement. Moreover, some writers insist that few, if indeed any, social science models are actually "models" in the sense of an isomorphism based upon empirical theories.[295] These social scientists believe, for example, that no models exist in the entire political science discipline. In the words of one student of methodology, "[t]his type of 'model'—an isomorphism between two empirical theories—is for all purposes nonexistent in political science; the reason is clearly the lack of any sound scientific theories of politics."[296] This assessment also holds for theories of judicial process and policy-making.

Apart from this, we must bear in mind that models or "premodels" reflect various orientation or form. They have been broadly classified by one authority as graphic, pictorial, schematic, mathematical, and simulated.[297] Others use different approaches to classification: structural or functional, linear or nonlinear, physical or abstract, mathematical or nonmathematical, causal or noncausal, verbal or symbolic, and so on. With respect to the judiciary, one recent study explained models according to decision-making, micro-group, role, macro-group, impact, and systems orientations.[298]

In terms of their sophistication, models may be primarily descriptive, explanatory, or predictive in nature.[299] That is, they may be used for identification and analysis, for answering "why" questions or, at the most refined level, even for forecasting what will occur in the future under given conditions. Of course, these three functions often overlap. Finally, in addition to variances in orientation and sophistication, models may differ in validity, flexibility, generality, significance, and internal logic.[300] These characteristics may in fact be more vital to a model's usefulness than its form or degree of sophistication. A simple, graphic, descriptive model may thus contribute as much or more to knowledge than one that is mathematical and predictive, provided that the descriptive model

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activity, particularly in social behavioral contexts. Their effectiveness is to be measured primarily by their analytical utility." Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 349 (1964).

295. A. ISAAK, SCOPE AND METHODS OF POLITICAL SCIENCE: AN INTRODUCTION TO THE METHODOLOGY OF POLITICAL INQUIRY 142-43 (rev. ed. 1975).

296. *Id.*

297. G. LIPPITT, VISUALIZING CHANGE: MODEL BUILDING AND THE CHANGE PROCESS 33 (1973).

298. C. SHELDON, THE AMERICAN JUDICIAL PROCESS, *supra* note 6.

299. Compare the studies cited at note 6 *supra*.

300. For the meaning of these terms and for discussion see R. GOLEMBIEWSKI, W. WELSH, & W. CROTTY, A METHODOLOGICAL PRIMER FOR POLITICAL SCIENTISTS 430-42 (1969).

is more valid, flexible, general, significant, and internally logical. In short, "the model need not satisfy the more difficult criteria—in particular, prediction and measurement—in order to be judged valuable."[301]

301. S. GOLDMAN & T. JAHNIGE, *supra* note 175, at 289.