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Between 1900 and 1968, the Senate had refused to confirm an appointee to the Supreme Court on only one occasion. Then, within a two year period, the Senate twice refused to confirm an appointment: Associate Justice Abe Fortas, nominated as Chief Justice in 1968, was never acted upon because of a Senate filibuster, and his name was withdrawn; and Judge Clement Haynsworth, whose nomination provoked a great deal of debate and controversy, was ultimately rejected by the Senate by a vote of 55 to 45. These two incidents marked a distinct change from the traditional custom of Senatorial acquiescence to Presidential appointees. In this article Professor Beiser suggests that the basis for the Haynsworth and Fortas incidents is the growing conflict over the role of the Supreme Court. This conflict, he argues, is also important in understanding the internal workings of the Supreme Court and the Court's relationship to the President, Congress, the lower federal courts, and the public.

I. INTRODUCTION

The Senate's refusal to confirm the nomination of Judge Clement Haynsworth to the Supreme Court, following close on the heels of President Johnson's inability to have Justice Fortas confirmed as Chief Justice, is an event of considerable significance to students of the judiciary. Between 1930 and 1968, twenty-three men joined the high court. While some of these appointments aroused a measure of controversy, in no case was the outcome in doubt. Suddenly, within a period of just over one year, two nominations were defeated. The rejection of any Presidential nomination is a newsworthy event, but the Fortas and Haynsworth cases are of major importance beyond the immediate question of who will comprise the Supreme Court.

One peculiarity of the debate surrounding the Haynsworth nomination is worthy of particular attention. Indeed, it appears that *two debates* were carried on simultaneously. On the one hand, there

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was articulate opposition to Judge Haynsworth on the basis of his presumed policy preferences. Such groups as the A.F.L.-C.I.O. and the N.A.A.C.P. obviously felt that Haynsworth's confirmation would not be in their self-interest. They cited his previous decisions to demonstrate that he harbored unkind feelings towards Negroes and workingmen. The nomination was said to be the payoff of the famous "Southern strategy."

At the same time, repeated attempts were made to impugn the ethical propriety of Haynsworth's conduct as a sitting judge. It was alleged that he had ruled in cases in which he should have disqualified himself, including cases in which he had a financial stake in the outcome. If he were not personally dishonest the argument ran, then at least he showed a remarkable insensitivity to the high moral standard which we expect of our judges.

The dual nature of the debate should not be viewed as a case of the standard practice of using every conceivable argument to achieve one's end—of throwing everything including the kitchen sink at one's opponent. Undoubtedly those opposed to Haynsworth's confirmation were happy to employ any argument which would win them a vote in the Senate. But there was more to it than that. The debate in the Senate was conducted on two distinctly different levels. If properly understood, this fact provides the key to the Fortas and Haynsworth controversies as well as to the understanding of the position of the Supreme Court in current American political life. Before examining the Haynsworth case in detail, however, a discussion of the sociological concept of role will provide useful tools.

II. THE CONCEPT OF ROLE

"A recurrent theme of the sociology of occupations is the effect of a man's work on his outlook on the world. Doctors, janitors, lawyers, and industrial workers develop distinctive ways of perceiving and responding to their environment."[1] Similarly, those of us who come into contact with these people develop distinctive ways of perceiving them. That is to say, a man's occupational status may define

1. J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 42 (1967). Skolnick provides a useful bibliography of the role theory literature. Works which utilize this approach with respect to the judiciary include: T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE (1964); Vines, *The Judicial Role in the American States: An Exploration*, in FRONTIERS OF JUDICIAL RESEARCH 461 (J. Grossmen & J. Tanenhaus eds. 1969); and Glick, Judicial Role Perceptions and Behavior, 1966 (unpublished Ph.d. thesis in Tulane University Library).

the way he thinks about and acts towards the outside world, and similarly, it may define the way the outside world deals with him. Sociologists use the term role to describe the pattern of shared expectations which defines this relationship.

Consider the following example.[2] If we tell our neighbor that we know for a fact that at this very moment his wife is in a closed room with another man, that she is removing her clothes, and that he is about to come into physical contact with her, we are likely to witness a violent reaction. But if the man turns out to be the woman's physician, who is preparing to undertake a medical examination, no one in our society would raise an eyebrow. Now why should this be so? Why are we perfectly content to have our wives, mothers, and daughters undress in the presence of normal, virile males, with no sense that modesty, decency, or privacy is being violated? Clearly this is not a function of the nature of the men involved: we do not conceive of doctors as eunuchs. Rather, it is a function of our perception of the *role of the physician*. The context—the physician in his office—defines a set of values, norms, and expectations on the part of both the doctor and his patient in a way that our sense of decency is not offended. Take the same human being out of his white jacket, put him in lounging pajamas in his apartment, and we would be outraged were our wife (or mother or daughter) to join him.

Consider a second illustration of the same phenomenon. If a college student came back from a political protest covered with blood, and reported that the "pigs" had beaten him without provocation, many in our society would believe him. If the demonstrator reported that the mayor had deliberately set the police on him because he disapproved of the student's radical views, his assertion would not seem completely beyond the realm of possibility. But if this same student asserted that the campus physician had refused to treat him—or was treating him improperly—because of his political views, most radical students would not take his assertion seriously. This is true despite the fact that the medical profession is widely regarded as holding conservative political and social views. Again, our conception of the *role of the physician* involves certain norms and values which we believe to be strong enough to control behavior.

Note that by "role" we are not speaking of poses, or shams. We fully expect the doctor to heal the sick, although he is repulsed by the patient's social views. We fully expect the doctor to treat his shapely

2. I am indebted to Professor Claud Sutcliffe of Williams College for this illustration.

young patient solely as a clinical specimen, although he is a perfectly red-blooded male.

We have spoken of the "role of the physician." Strictly speaking, we should refer to the "role of physician and patient," for both of our illustrations deal with the expectations surrounding a relationship between two or more parties. The concept of role, as we have developed it, involves four distinct phenomena: 1) the physician's self-perception of his proper behavior; 2) the patient's self-perception of his proper behavior; 3) the physician's perceptions of the patient, and his expectation as to how the patient will act; and 4) the patient's perceptions of the physician, and his expectations as to how the doctor will act. The doctor-patient relationship works well in our society because these four sets of expectations are congruent and mutually reinforcing. The doctor's medical training and professional socialization have all pointed in one direction: view the patient dispassionately. There is no competing model. No one in our culture urges the doctor to view his patient as a sex symbol or as a political target. Similarly, the patient's entire experience, at home, in school, and in his peer group, has pointed in one direction: it is decent and proper to conduct one's self in this manner in the doctor's examination room. The key point is that doctors and patients are not torn by conflicting norms as to how they should behave, and in our society, the norms for doctor and the norms for patient mesh exactly. It is crucial that the patient who is disrobing view what she is doing as completely proper, and have the confidence that the physician is reacting to her in a certain way. (Our fourth category, above.) It is not enough that the doctor internalize the norm that a patient's beauty or politics are irrelevant; it is necessary that the patient believe that the doctor is not admiring her figure; that he believes the doctor views the wounds clinically, and does not ask whether the police were justified in administering them.

Imagine the consequences to the doctor-patient relationship if in our society there were divergent conceptions of the proper role of the physician. Suppose it were widely perceived that some physicians consider it proper to obtain sexual gratification while examining patients. Suppose further that some churches preached that it was indecent for a woman to undress in the presence of any man, even her doctor. Suppose when our wife went for her checkup, we did not know which camp the doctor belonged to. Even if the doctor were convinced in his own mind that the traditional values were proper, imagine the restraints on his action if he could not rely on the patient's confidence in his total indifference to her as a romantic object.

The thesis of this paper is that such a conflict in role perceptions lies behind the interesting debate over Judge Haynsworth's nomination. It is also asserted that *conflicting perceptions of the proper judicial role* are a primary ingredient of the situation in which the Supreme Court operates today.

III. THE JUDICIAL ROLE—CONFLICTING INTERPRETATIONS

Just as the status of physician evokes specific attitudes and behavior patterns on the part of those occupying the position, and those interacting with him, so too does the status of judge. The judge must be fair, honest, impartial, uninvolved with the litigants, and so on. In sum, he must personify Justice blindfolded, holding the balance for all to see. Justice Frankfurter once stated, "a judge worth his salt *is in the grip of his function*." He continued:

> The intellectual habits of self-discipline which govern his mind are as much a part of him as the influence of the interest he may have represented at the bar, often more so. . . .
>
> To assume that a lawyer who becomes a judge takes on the bench merely his views on social or economic questions leaves out of account his rooted notions regarding the scope and limits of a judge's authority. The outlook of a lawyer fit to be a Justice regarding the role of a judge cuts across all his personal preferences for this or that social arrangement . . . .[3]

Perhaps as a result of the adversary system of justice, the American intellectual tradition conceives of the judge in his courtroom in much the same way we think of a referee in a prize fight. The referee's function is to call a "fair" fight. He must neither take sides nor bet on the outcome of the fight. He must harbor no prejudices regarding the race of either of the fighters. He must be totally indifferent to the outcome of the fight; his only concern is that the process through which the outcome is determined is a proper one. This philosophy pervades the cannons of ethies which we apply to judges.

There is a strong similarity between the expectations associated with the physician and those associated with the judge. Both are supposed to ignore the fact that his patient (the accused) is pretty, or black, or radical. The ideal judge on the "Late Show" is the Southern aristocrat, who, despite his upbringing, overcomes the prejudices of his community, and frees the innocent Negro. In the film *Judgment at Nuremberg*, the German judges are held up to scorn precisely because they allowed extraneous considerations—politics and religion—to

3. Frankfurter, *The Judicial Process and the Supreme Court*, in COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 31 (1961) (emphasis added).

determine the outcome of trials. In short, our idealized conception of the proper role of the judge is one which *eliminates the human element.* Even a Nazi, if he is an honest judge, should act fairly towards a Jew. When the cartoonist wishes to demonstrate that "justice" is not being done, he has the statue peek out from under her blindfold. Hence the motto, "Ours is a nation of laws, not of men."

The association of this set of beliefs and expectations with the role of judge is extremely functional for the smooth operation of our legal system. Judges—like doctors—make decisions which have tremendous consequences for the lives of people with whom they come into contact. If the judge who is about to sentence a prisoner to a long jail term honestly believes that he is not acting as a human being—his personal views are not the reason for the punishment being inflicted—he will sleep better that night. If those about to receive sentence believe that "the law," rather than this particular human being is depriving them of their liberty, they are more likely to bow gracefully. It is functional for the Southern judge in the "Late Show" movie to be able to say to his neighbors: "It is not that I favor Negroes. But Justice must be done. I had no choice. I am only the handmaiden of 'the law,' and I had to act this way." If his neighbors share his conception of the role of the judge, they will acquiesce. Again, the four sets of expectations are involved in this example: 1) the judge's self-perception of the judicial role; 2) the prisoner's perception of his own role (or the general public's perception of its role; 3) the judge's perceptions of the prisoner (or general public) and his expectations regarding his (their) reactions to him; 4) the perception of the judge held by the prisoner or general public, and their expectations regarding his behavior. When these four patterns of expectations are congruent, there is a stable judicial role, and the movie ends on a happy note. But if these expectations are incongruent—if the public views the judge as a Northern-interloper, who freed the accused because he is "soft on niggers," or if the prisoner views the judge as a "cracker"—then the legal system is less likely to function smoothly, and we can expect a lynching party, or a jail break.

In general, the role of the judge as impartial arbiter does not appear to be seriously questioned in America. Occasional instances of judges who accept bribes are treated as aberations. How then can we speak of conflicting perceptions of the proper judicial role? The model of the judge as boxing referee implies more than fairness and impartiality. Boxing referees do not establish policy. They enforce the rules which someone else—the boxing commission—has created. The

conception of the judge as referee lies behind the assertion that "judges do not make law." This assertion is a strong component of the traditional American conception of the role of the judge. The mechanistic view of the legal system—"slot machine jurisprudence"—is part of our received wisdom. It would not be difficult to demonstrate that this view was widely held until the latter part of the 19th century.[4] But this aspect of the role of the judge has now been sharply challenged, in part by the writings of the legal realists (Holmes, Morris Raphael Cohen, Jerome Frank to name only a few), and, perhaps most significantly, by the traumatic experience of the Hughes Court's attack on the New Deal and the reaction it engendered. "But plainly, I think, this Court must have regard to the wisdom of the enactment," asserted Justice McReynolds, dissenting in *Nebbia*.[5] "[T]he only check upon our own exercise of power is our own sense of self-restraint," thundered Justice Stone, dissenting in *United States v. Butler*.[6] The human element in the judicial process was revealed for all to see.

The debate which grew out of the Court packing fight as to the proper role of the Court in the area of public policy is present today.[7] There are those who argue that judicial policy making is completely proper, and that judges should consciously and deliberately implement their policy preferences: "The suggestion we make is for a *Teleological jurisprudence, one purposive in nature* rather than 'impersonal' or 'neutral.'"[8] Others argue for neutrality, or judicial self-restraint.[9] The literature is voluminous, and little would be achieved by repeating it here. The point is that there is currently no generally accepted model of how, and when, and under what conditions judges should make policy. This paper does not attempt to provide such a model. Rather, it seeks to demonstrate that (1) this conflict was at the basis of the Fortas and Haynsworth incidents, and (2) that this conflict has

4. Chief Justice Hughes used the label "self-inflicted wounds" to describe situations in which the Court's role as a creator of public policy was made obvious by badly handled cases. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). William Howard Taft, as President, insisted on the use of a constitutional amendment to institute an income tax, refusing to ask the Court to reverse Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601 (1895), precisely because of his concern with the Court's public image in this regard.

5. Nebbia v. New York, 291 U.S. 502, 556 (1934) (dissenting opinion).

6. United States v. Butler, 297 U.S. 1, 79 (1936) (dissenting opinion).

7. A useful discussion of the literature will be found in M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT ch. 1 (1964).

8. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 684 (1960).

9. *See, e.g.*, L. HAND, THE BILL OF RIGHTS (1958). *But see* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

significant behavioral consequences in at least four areas: the relationship between the Supreme Court and other public officials, especially the President and the Congress; the internal operation of the Supreme Court; the relationship of the Supreme Court to the lower courts; and, finally, the relationship between the Supreme Court and the public.

IV. The Significance of Conflicting Conceptions of Judicial Role: The Court, The President, and the Congress

A. Fortas and Haynsworth

On October 20, 1969, President Nixon called a special news conference devoted exclusively to the defense of his nomination of Judge Haynsworth. The President's statement, and his responses to questions constitute an excellent indicator of the dual nature of the debate surrounding Haynsworth, and demonstrate that in fact the role of the Court was at issue. Mr. Nixon began with a case by case, detailed refutation of the charges of impropriety which had been leveled against the nominee. He argued that in every instance which had been cited by Haynsworth's opponents the judge had acted with complete integrity. He had not sat on any case in which he ought to have disqualified himself. He had not gained personally from any of his rulings. In short, he had been a model referee. The fact that President Nixon chose to refute these charges in such detail indicates clearly that he accepted the grounds of the argument as legitimate; that is, he agreed that if it could be shown that Haynsworth were guilty of conflict of interest, he ought be rejected. This, for Mr. Nixon, was a reasonable criterion by which to measure a judge.

But then the President changed the subject. Senators who did not question Haynsworth's ethics, had announced that they would vote against confirmation because they disagreed with his political views. Here the President did not take issue with the substance of the charge. Rather, he argued that it is not proper to take the prospective Justice's political philosophy into consideration:

> Now I will go to something a little more fundamental because this involves the decision as to what Senators should consider as they determine whether they confirm a judge for the Supreme Court, or, for that matter, any court.
>
> . . . [O]ne Senator . . . said he did not raise any question with regard to Judge Haynsworth's impropriety charges, but that he simply disagreed with his philosophy on certain matters—civil rights and labor law.
>
> That is a ground which a Senator can give for rejecting, perhaps, Judge Haynsworth. *I do not believe it is a proper ground.* I would agree with those Senators, many of whom are now opposing Judge Haynsworth, who, in the

> [Thurgood] Marshall confirmation, categorically said that a judge's philosophy was not a proper basis for rejecting him from the Supreme Court.[10]

To consider the nominee's political philosophy was to include an element which, in Mr. Nixon's view, was irrelevant:

> It is not proper to turn down a man because he is a Southerner [Judge Parker], because he is a Jew [Justice Brandeis], because he is a Negro [Thurgood Marshall], or because of his philosophy.[11]

How is it that Mr. Nixon equated concern with a potential Justice's political philosophy with racial, religious, or sectional prejudice? The point, obviously, was that just as Brandeis's religion was not related to his ability to be a distinguished judge, just as Parker's regional background and Marshall's race would not effect their behavior as judges, so too, Judge Haynsworth's philosophy was simply not germane to his ability to function as a proper judge. That is, Mr. Nixon's conception of the judicial role is one in which the political philosophy of the judge does not come into play. He made this quite explicit:

> It is the judge's responsibility, and the Supreme Court's responsibility, to interpret the Constitution and interpret the law, and not to go beyond that in putting his own socio-economic philosophy into decisions in a way that goes beyond the law, beyond the Constitution.[12]

President Nixon's insistence during the 1968 campaign that we needed judges rather than politicians on the Supreme Court and his pride in his decision to elevate experienced judges to the Court are indications of the same underlying perception of the Court's role.

We may conceive of all possible understandings of the role of the Supreme Court as lying on a continuum. At one extreme is the traditional mechanistic view—"judges do not make law"; at the other end, the totally instrumentalist interpretation: the only interesting question in a law suit is which policy wins. The former position is process-oriented; the latter, outcome-oriented. It is not possible to locate any individual on this continuum with mathematical precision. But clearly, in comparison with the majority of the Warren Court, President Nixon falls on the traditional side of the continuum. Whatever an in-depth interview might show concerning his reaction to legal realism, his model of the proper judge has been violated by what he considers to be the Warren Court's proclivity for policy making. His differences with the Warren Court, and his attempts to modify it, grow out of this difference in perception of the proper judicial role.

10. N.Y. Times, Oct. 21, 1969, at 34, col. 3 (city ed.) (emphasis added).
11. *Id.* col. 5.
12. *Id.* col. 4.

The fact that the Senate debated Judge Haynsworth at two levels—some were concerned with ethical considerations, others were concerned with policy questions—indicates that different perceptions of the judicial role are held by different Senators. Those Senators who chose to deal exclusively with the policy issue have clearly come to view the Court's functions in "realist" terms. What is most interesting about the Haynsworth debate is the large number of Senators who, almost 40 years after legal realism made its mark in philosophical circles, still adhere to the old models. They will vote against Haynsworth because he is not a fair referee; they refuse to talk about him as a potential rule-maker.

Justice Fortas's encounter with the Senate one year earlier provides further evidence of the same phenomenon. The thrust of much of the attack on Fortas was that he had violated propriety by serving as a policy advisor to President Johnson while sitting as an Associate Justice. The questions put to Fortas when he testified before the Senate Judiciary Committee indicate clearly that there are Senators who hold very traditional views concerning the judge as lawmaker, and they pressed Fortas in precisely these terms:[13]

> Senator Eastland:
> Is it your view that the words of the Constitution . . . retain their original meaning, or do you believe that provisions of the Constitution . . . should be reassessed and reinterpreted by the Court in light of changing social and economic conditions?
> Senator Eastland:
> To what extent and under what circumstances do you believe that the Court should attempt to bring about social, economic or political changes?[14]
> Senator Ervin:
> Well don't you agree with me that law would be destitute of social value if the law—if the Supreme Court is going to indulge habitually in overruling prior decisions?
> Senator Ervin:
> Do you agree with me that one of the objectives the Founding Fathers had in view when they wrote and ratified the Constitution was to keep impatient Congresses, impatient Presidents, and impatient Supreme Court Justices within the spheres allotted to them by the Constitution?
> . . . .
> Do you also agree with me that another purpose of the Constitution, which is in harmony with that purpose just mentioned, was to establish for this nation a Government of laws rather than a Government of men?[15]

And so it went.

13. N.Y. Times, July 17, 1968, at 24, col. 2 (city ed.).
14. Note Fortas's answer to this question: "Zero. Absolutely zero." *Id.* col. 3.
15. One of Senator Ervin's questions dwelt on the 1958 resolution of the Conference of

B. *Court, President, and Congress: Broader Implications*

There is considerable evidence that at least some members of national political elites share a traditional perception of the role of the judiciary which has been significantly offended by the behavior of the Warren Court. In 1958, Senator Eastland asked G. Harrold Carswell, a nominee for a federal district judgeship in Florida, to stand and give a sworn answer to the following question:

> Do you, in contemplation of the necessity of taking an oath to support and defend the Constitution of the United States, understand that such oath will demand that you support and defend the provisions of Article 1, Section 1, of the Constitution, that "all legislative power herein granted shall be vested in a Congress of the United States . . ." and that therefore you will be bound by such oath not to participate knowingly in any decision to alter the meaning of the Constitution itself or any law as passed by the Congress . . . ?[16]

The candidate so swore. Governor George Romney of Michigan, while seeking the Republican presidential nomination, ended a campaign visit to New Hampshire in January, 1968, with a call for the appointment of "better men" to the Supreme Court. "They should stop using the Court to reflect their own social viewpoints . . . ." Mr. Romney charged that the Court "has been legislative" in some decisions.[17] The bitter confrontation between the Congress and the Court in the mid 1950's was couched in precisely such language. During Senate Judiciary Committee hearings on the Jenner Bill, which would have severely limited the appellate jurisdiction of the Supreme Court, the following colloquy took place:

> Chairman: "In other words, isn't that expression, and those holdings, an amendment to the Constitution? That is what they are doing, is it not?
> Senator Jenner: "That is exactly right."
> Chairman: "Amending the Constitution."
> Jenner: "Judge-made law."
> Chairman: "And doing that in violation of their oaths of office."[18]

The past fifteen years have been marked by a series of congressional and presidential attempts to slap down the Supreme Court. The Butler-Jenner Bills and Judge Smith's H.R. 3 (which failed by only one vote in the Senate!) were attempts to reverse the Supreme

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State Chief Justices, which Ervin took to be a criticism of the Supreme Court for "changing the meaning of the Constitution." *See* note 44 *infra.*

16. W. MURPHY & C. PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 73 (1961).

17. N.Y. Times, Jan. 18, 1968, at 28, col. 3 (city ed.).

18. *Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 25 (1957).

Court's decisions in the field of internal security. The Becker Amendment to nullify the school-prayer decision came within a hair's-breadth of ratification.[19] Senator Dirksen's attempt to reverse the apportionment decision is well known. Finally, President Nixon chose to make the Supreme Court a major campaign issue in 1968, as had Senator Goldwater in 1964.

Undoubtedly, the substance of the decisions of the Warren Court—especially in the area of race relations—has a good deal to do with the enemies it has developed. But it also appears that one component of the opposition the Court aroused was the lack of congruence between the active role taken by the Court and the perceptions of the proper judicial role held by significant members of the legislative and executive branches. Criticism of the Court by Presidents and congressmen has occurred frequently throughout its history. What is interesting about the current situation is that the controversy involves both the output of the Court and the legitimacy of the process by which it reaches its decisions.

It is important to recognize that several of the anti-Court bills of the 1950's came closer to passage than did President Roosevelt's Court-packing plan despite the furor over the judicial attack on the New Deal. Indeed, it appears likely that had the Court not backed down in the face of congressional pressure, it would have been subjected to restrictive legislation.[20] The assault on the Hughes Court took place at a time when the traditional model of the judge as neutral referee was generally accepted.[21] Conservatives rallying around the Court could appeal to a conception of the independent judiciary which was likely to ring responsive chords in many places. If it is correct to say that one important aspect of the furor surrounding the Warren Court results from its perceiving of its role in a way which differentiates it from other national political elites, one consequence is that the Court has abandoned (perhaps unavoidably) one of its prime defense mechanisms. Furthermore, until such time as a model of the Court's role as a policy maker wins general acceptance among political elites, the Court is likely to remain a center of controversy.

19. Beaney & Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475, 502 (1964).

20. *See* W. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 246 n.17 (1964).

21. This seems to be true, strictly speaking, but there is no empirical evidence to demonstrate it.

V. CONFLICTING ROLE PERCEPTIONS: JUDGE V. JUDGE

A. The Supreme Court Divided

Many have interpreted the history of the Supreme Court since 1937 in terms of the competition between Justices with differing perceptions of the Court's proper role. The men for whom the Court-packing fight was most traumatic were probably the Justices sitting on the Supreme Court. The Roosevelt appointees who joined them had lived through this period as members of the President's administration. Thus it is not surprising that vibrations of that battle ran through the business of the high Court for many years. It is important to recognize that the questions opened by the 1937 conflict remain unanswered to this day and are still the source of considerable division within the Court.

If the New Deal Court-packing situation made the Justices acutely aware of the political nature of their position, it did not provide a model of proper judicial behavior which all could comfortably accept. It asked questions: subsequent Justices have provided competing answers. Justice Frankfurter's well known commitment to judicial self-restraint is a prime example. The divergence between the approaches of Justice Jackson and Justice Murphy, which resulted in acrimonious strife within the Court, is a second illustration.[22]

The Haynsworth and Fortas incidents took place against a background in which the Justices themselves were still fighting the 1937 fight as to the proper role of their Court. Much of the divisiveness within the Warren Court reflects differences in emphasis along the continuum between process-orientation and outcome-orientation. The first reapportionment case provides a convenient articulation of this tension.[23] In the majority opinion, Justice Brennan drew upon Chief Justice Marshall in *Marbury v. Madison* for the following statement of the role of the Court:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.[24]

In his dissent, Justice Harlan suggests a very different conception of the role of the judge:

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22. Regarding Justice Frankfurter, see Grossman, *Role Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter*, 11 J. PUB. L. 285 (1962). The Murphy-Jackson feud is dealt with in J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968). *See also* James, *Role Theory and the Supreme Court*, 30 J. POLITICS 160 (1968), which compares Justices Douglas and Jackson.

23. Baker v. Carr, 369 U.S. 186 (1962).

24. *Id.* at 208.

> [O]ne need not agree, as a citizen, with what Tennessee has done or failed to do, in order to deprecate, as a judge, what the majority is doing today. Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.[25]

Perhaps the most fascinating example of cleavage within the Court resulting from divergent conceptions of the judicial role is the increasing disagreement between Justices Black and Douglas, both widely regarded as extreme defenders of civil liberties, concerning the newly emerging right to privacy.[26] Justice Black is well known for his rigid insistence that the Bill of Rights be taken literally and that its precepts be treated as absolutes.[27] What few have realized is that his approach reflects his perception of the judicial role, and is as much a reaction against McReynolds and Sutherland as was Justice Frankfurter's self-restraint.[28] Black defends his literalness on the grounds that this is the only way to eliminate judicial policy making in the field of civil liberties. If, as he argues, the Bill of Rights leaves the judge no discretion, his personal philosophy cannot enter into the picture. On the other hand, if a balancing test is employed (such as the "clear and present danger" standard) the judge may fall into the trap of legislating.[29]

Justice Douglas, on the other hand, accepts a more creative role for the judiciary. He is concerned with

> natural rights . . . [which] have a broad base in morality and religion to proteet

25. *Id.* at 339-40. Note the parallel with our discussion of the role of the physician: one need not, in his role as a citizen, agree with Tennessee in order to resist temptation in his role as a judge.

26. J. Woodford Howard has demonstrated that Justice Black has remained much more consistent over time than is generally realized. Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968). *See also* J. HOWARD, *supra* note 2.

27. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

28. The received wisdom is illustrated by the following: "Justices Douglas and Black appear to be playing a sort of 'public defender' role. Clearly, their voting patterns in civil liberties cases merely substantiate what their written words have so well stated: They believe justice and not law to be the primary concern of the Supreme Court." Grossman, *supra* note 22, at 298.

29. *See* Black, *supra* note 27. Justice Black's literalist leap of faith, however desirable as good civil libertarian policy, is no longer historically tenable. *See* L. LEVY, LEGACY OF SUPPRESSION (1960). I have not studied Black's career in sufficient detail to know whether this position was consistently held, or whether it is a position to which he reverted in his advanced years. Obviously, his opinion for the Court in the Japanese internment case, Korematsu v. United States, 323 U.S. 214 (1944), is not in accord with this approach. Note, however, that in Dennis v. United States, 341 U.S. 494 (1951), Black did not join Douglas's dissent which employed a balancing technique.

> man, his individuality, and his conscience against direct and indirect interference by government. Some are written explicitly into the Constitution. Others are to be implied. *The penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied from the very nature of man as a child of God.*[30]

In 1965, in the Connecticut birth control case, a majority accepted Douglas' conception of the role of the Court in civil liberties cases. The Justices are not to be limited to the specific language of the Constitution:

> In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.
>
> . . . .
>
> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[31]

Indeed, three Justices went even further than Douglas, insisting that the ninth amendment[32] protected "basic," "fundamental," and "deep-rooted" rights, which the Justices would identify and enforce.[33]

Justice Black's dissent[34] did not rest on his substantive judgment of the value of the asserted right to privacy—"I like my privacy as well as the next one . . . ." Rather it was his conception of the role of the Court which was at stake:

> I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.
>
> . . . .
>
> Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking. . . . If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be "the collective conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. . . .
>
> . . . .
>
> The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe . . . will be bad for the courts and worse for the country.[35]

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30. W.O. DOUGLAS, THE RIGHT OF THE PEOPLE 89 (1958) (emphasis added). Douglas denies to the Court any such role in economic matters.

31. 381 U.S. at 483, 484.

32. U.S. CONST. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

33. 381 U.S. at 486 (Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring).

34. *Id.* at 507 (Black, J., joined by Stewart, J., dissenting).

35. *Id.* at 511, 519-20, 521.

Black explicitly drew the connection with the pre-Roosevelt Court, insisting that the majority's approach was not different from that of Justices who had used a "natural justice" conception of the due process clause to set aside economic legislation of which they did not approve. To Black, "[t]hat formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights."[36]

Two years later, civil-libertarian Black was in the seemingly anomalous position of sole dissenter in a case in which the Court held that obtaining evidence by means of electronic eavesdropping on a telephone conversation violated the fourth amendment. Once again, it was Black's conception of the role of the Court which caused him to differ from his colleagues:

> My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.
>
> . . . .
>
> I will not distort the words of the Amendment in order to "keep the Constitution up to date" . . . . It was never meant that this Court have sueh power, which in effect would make us a continuously functioning constitutional convention.
>
> . . . .
>
> Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.[37]

Will this debate as to the proper role of the Court continue as new Justices replace those who directly experienced the jurisprudence of the Four Horsemen? During oral argument in a recent case, counsel stressed the consequences for poor denominations were the Court to hold tax exemptions for religious institutions unconstitutional. Chief Justice Burger was quoted by the press to the effect that he was concerned with the constitutional questions—and not with the impact of the decision on public policy. That was for others to deal with. Particularly if President Nixon succeeds in appointing a fair number of Justices who share his conception of the Court's proper role, we can expect this issue to constitute a significant dimension of the conflict behind the purple curtain.

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36. *Id.* at 522.

37. Katz v. United States, 389 U.S. 347, 364, 373, 374 (1967) (Black, J., dissenting).

B. *The Supreme Court and the Judicial Bureaucracy*[38]

Political scientists have become increasingly aware of the restrictions which political bureaucracies impose upon those in leadership positions. Even presidential orders are not self-executing, and to a considerable extent, a President's success depends on his ability to persuade, rather than command, members of the government to further his policy goals.[39]

Similarly, students of the judiciary have come to realize that the Supreme Court is dependent on a bureaucratic structure of lower courts to translate its pronouncements into concrete action. "The Constitution may be what the Supreme Court says it is, but a Supreme Court opinion means, for the moment at least, what the district judge says it means."[40] Short of outright refusal to follow a decision by a higher court—which does happen from time to time[41]—lower court judges have considerable discretion as to how they will interpret the signals which are flashed to them in judicial decisions. Should *Brown v. Board of Education* be applied to public beaches and golf courses? Should *Miranda v. Arizona* be applied to juvenile trials? Did the Supreme Court in *Reynolds v. Sims* wish to extend the principal of "one man, one vote" to city councils? Dozens of illustrations can be suggested, and a substantial body of literature now exists which demonstrates the ability of the lower courts to enhance or restrict the impact of the Supreme Court's decisions.[42]

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38. The term is taken from W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

39. R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP (1960). The following statement by Franklin D. Roosevelt, generally considered to be a "strong" President, illustrates Neustadt's thesis: "The Treasury is so large and far-flung and ingrained in its practices that I find it almost impossible to get the action and results I want . . . . But the Treasury is not to be compared with the State Department. You should go though the experience of trying to get any changes in the thinking, policy, and action of the career diplomats . . . . But the Treasury and the State Department put together are nothing compared with the Navy. The admirals are really something to cope with . . . . To change anything in the Navy is like punching a feather bed. You punch it with your right and you punch it with your left until you are finally exhausted, and then you find the damn bed just as it was before you started punching." *Id.* at 42. Arthur Schlesinger Jr. reports that President Kennedy found much the same burcaucratic resistance. A. SCHLESINGER, A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE (1965). "It was a constant puzzle to Kennedy that the State Department remained so formless and impenetrable. He would say: 'Damn it, Bundy and I get more done in one day in the White House than they do in six months in the State Department.' Giving State an instruction, he remarked, is like dropping it in the dead letter box." *Id.* at 406.

40. J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 21 (1961).

41. *Id. See, e.g.*, Williams v. Georgia, 349 U.S. 375 (1955).

42. *See, e.g.*, THE IMPACT OF SUPREME COURT DECISIONS (T. Becker ed. 1969); W. MURPHY, *supra* note 38; J. PELTASON, *supra* note 40.

Walter F. Murphy has suggested four conditions that must be met if the Supreme Court is to be successful in overcoming bureaucratic resistance to its leadership:

> The first condition is an unambiguous commitment [by the Supreme Court] to a policy, an unambiguous commitment unambiguously stated. The second condition is that the publicity attached to the commitment is so widespread that evasion or resistance would be discovered and thwarted. Third, the judge or judges expected to apply the policy must have the authority and power to do so and be reasonably safe from political reprisal for actually carrying out the Court's decision. Fourth, there should be no doubt about the Court's authority to hand down any particular decision or to formulate the general policy involved; that is, all the technical requirements of jurisdiction and standing to sue should be met.[43]

It appears that the response of a lower court judge to a Supreme Court edict will vary with his conception of the legitimacy of that decision. In the language of Murphy's fourth condition, "there should be no doubt about the Court's authority to hand down any particular decision . . . .," the term "legitimacy" should be conceived of in psychological rather than legal terms. What is important is the lower court's perception that a particular decision was an appropriate one for a court to make. The technical rules of standing to sue and jurisdiction are of major significance in so far as they are related to such perceptions. That is to say, a primary component of the Supreme Court's ability to obtain compliance and support from the lower courts is the extent to which its actions are consistent with their understanding of the role of the judge in our society.

While systematic empirical data are not yet available, there is increasing evidence that a discrepancy existed between the Warren Court's perception of its role and the role perceptions of many lower court judges. This discrepancy was in terms of process-orientation versus outcome-orientation that was previously discussed. In August, 1958, the Conference of State Chief Justices adopted by the overwhelming vote of 36 to 8 a resolution that was sharply critical of the Supreme Court. Given the tremendous support the resolution received, it is difficult to attribute it to reaction against the substance of any particular decision—e.g., Southern resistance to *Brown v. Board of Education*. The resolution stated:

> We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. . . . In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

43. W. MURPHY, *supra* note 38, at 93.

> We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seems to us primarily legislative powers. . . . We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the *almost unlimited policy-making powers which it now exercises.* It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government—the Supreme Court—should attain the immense, and in many respects, dominant, power which it now wields.
>
> . . . .
>
> It has long been an American boast that we have *a government of laws and not of men.* We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. . . .
>
> . . . .
>
> [Recent actions of the Supreme Court] cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, *strictly judicial* powers and by *eschewing, so far as possible, the exercise of essentially legislative powers* when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise.[44]

Clearly, the actions of the Supreme Court were not consistent with the state chief justices' conception of the proper judicial role.[45]

A recent study dealing with judicial role perception successfully interviewed 26 of the 28 sitting judges of four state supreme courts.[46] Distinguishing between a "law-interpreter orientation" and a "law-maker orientation," the authors found that more than half of the judges adhered to the traditional model, rejecting the notion of the judge as law-maker. They concluded: "Many state supreme court judges simply have not been influenced by the more innovative and sophisticated statements of the law-maker and pragmatist roles in the legal writings."[47]

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44. Reprinted in *Resolutions of the State Chief Justices*, in COURTS, JUDGES & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 618 (W. Murphy & C. Pritchett eds. 1961) (emphasis added).

45. Specific features of recent Supreme Court decisions that the state chief justices pointed to included the failure to abide by stare decisis, especially in the reversal of previous cases; the rarity of unanimous decision in constitutional cases; the frequency of 5-4 splits; and the inability to muster a majority in support of any one opinion in several cases. *Id.* at 620.

46. Vines, *supra* note 1. The 4 states were Louisiana, Massachusetts, New Jersey, and Pennsylvania.

47. *Id.* at 476. *See also* Glick, *supra* note 1, at 94: "Legalists supporting the law-maker view evidently are still innovators who do not have a large following among judges currently on the courts."

Responses of the judges to several of the interview questions provide fascinating confirmation of this proposition:

> [Precedent] is very important. The United States Supreme Court doesn't think so, but I do. If there's any change to be made in the established jurisprudence, it's up to the legislature to make that change.
>
> *Stare decisis* . . . is like a dodo bird. It's almost extinct. The United States Supreme Court judges forget their proper function, and they consider themselves a super-Congress . . . .[48]

Reactions of two Louisiana Supreme Court judges to the school desegregation decision reflect the incongruity of their perceptions of the judicial role, and their perceptions of the Supreme Court's action:

> The U.S. Supreme Court . . . didn't follow its own jurisprudence in the 1954 case. They went off on some doctrine that had been established by some foreigners. They didn't cite any decision to support their conclusions.
>
> I didn't consider those [non-legal, sociological] factors whatever. But the U.S. Supreme Court decides cases on things like books written by a Scandinavian communist.[49]

The importance of adherence to precedent in the eyes of state judges was also brought out in a study of the Hawaiian judiciary, based on interviews with 22 sitting judges.[50] The judges were handed a rating sheet listing a series of factors that might influence a judicial decision, and asked: "How influential do you believe the following factors to be in your deciding a case?" The judge was asked to rank the several factors in accordance with the significance he attached to them. One factor would reflect precedent-orientation: "Precedent, when clear and directly relevant." Four others may be said to reflect a situation or outcome-orientation: "My view of justice in the case; what the public needs, as the times may demand; common sense; and what the public demands." Six of the twenty-two judges indicated that they believed the existence of clear, directly relevant precedent to be the single most important factor in their decisions. Eleven considered one of the other factors equally important, but listed clear precedent as belonging in the first position. Only five of the twenty-two said they believed some factor(s) other than clear, directly relevant precedent to be the most important factor in a judicial decision.

One need not accept these responses as accurate descriptions of how the judges actually decide cases. But it seems fair to treat them

48. *See* Glick, *supra* note 1, at 173.

49. *Id.* at 182.

50. Becker, *A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations*, 60 AM. POL. SCI. REV. 677 (1966).

as a manifestation of the judge's role perception—his view of how a case ought to be decided.

A study of the reactions of lower court judges to the Supreme Court's apportionment decisions identified negative responses of federal district and state supreme court judges based on a traditional perception of the judicial role.[51] One manifestation of this grew out of an interesting side issue raised by the reapportionment decisions. What is the status of a malapportioned legislature? Can it function, even to the limited extent of replacing itself? Obviously, a situation or outcome-oriented court need not concern itself with this rather "academic" point. No court would allow a state's legislature to cease to exist. But if judges do not make law; if a statute that violates the Constitution is null and void *ab initio*;[52] if it is the Constitution, rather than the judge, which voids the statute, then it is indeed difficult to say that an institution which rests on unconstitutional statutes can continue to function after a court has ruled on the constitutional question. Many lower court judges, both state and federal, wrestled with this problem. In six states, apportionment provisions were voided *prospectively* to avoid a threat to the continued existence of the legislature.[53] Several courts, including the federal district court[54] to which *Baker v. Carr* had been remanded, refused to take final judicial action until after the state legislature had provided for its reapportionment for fear that once the court had spoken, the power of the legislature to act would be called into question.

The discussions of the technical doctrine of *de facto* status and the concern with the logical implications of the decisions in this regard, which are found in many lower court opinions, are absent from the Supreme Court's apportionment decisions. It appears that the

51. *See* Beiser, *The Status of a Malapportioned Legislature*, 72 DICK. L. REV. 553 (1968).

52. *See, e.g.*, Norton v. Shelby County, 118 U.S. 425 (1886).

53. *See* Beiser, *supra* note 51, at 565. Note that prospective invalidation, with which we have become familiar in recent years, was widely considered to be most exceptional at that time. Writing in 1958, Professors Hart and Sacks asserted that "contrary to what has sometimes been supposed, the Supreme Court of the United States seems never to have sanctioned the practice of prospective overruling in the judicial elaboration of federal law." H. HART, JR. & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 630 (1958). A note in the *Yale Law Journal* in 1962 concluded that the "use of prospective overruling by a federal court should be deemed prohibited by the case and controversy requirement of Article III of the Constitution." Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 951 (1962). Recent Supreme Court decisions which declined to apply constitutional rulings retroactively include Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

54. Baker v. Carr, 206 F. Supp. 341 (M.D. Tenn. 1962).

possibility that judicial decisions invalidating legislative apportionments might impair the ability of state legislatures to act never seriously troubled the Justices of the post-*Baker* Supreme Court,[55] despite the extensive attention which it received in some lower courts. The decisions upholding the power of malapportioned legislatures to act must be justified in terms of necessity; they are inconsistent with the traditional model of judges discovering and applying pre-existing law.[56] It seems reasonable to conclude that at least some lower court judges conceive of their roles in different terms than do the Justices of the Supreme Court, or at least the majority which set the tone of the Warren Court.

Indirect support for the hypothesis that the lower judiciary has not uniformly accepted the role of law-maker may be drawn from a study of the state constitutional conventions in Maryland and New York held in 1967. Judges served as delegates to both conventions, and it is possible to compare the attitudes of the judge-delegates with those of the other delegates on the basis of two sets of in-depth interviews.[57] It was discovered that in both states, judges were much more likely to perceive of constitutional matters in idealistic terms than were non-judges, including other lawyers. The judges insisted that constitutional conventions were other-than political, that they were (or at least that they should be) above politics. The conclusion that "judges perceive their function when dealing with constitutions in other than political terms" is consistent with, though of course it does not prove conclusively, the suggestion that they believe that constitutional law "is not as political as everything else."

In order to compare the role perceptions of the Justices of the Supreme Court with those of the members of the judicial bureaucracy, one should ideally interview the Justices and the lower court judges. This has not yet been done, in part because of the traditional assumption that judges could not be interviewed. But the data presented above indicate that a traditional role perception—whose principal components include precedent-orientation, and the belief that judges

55. See, however, Justice Frankfurter dissenting in Baker v. Carr, 369 U.S. 186, 329-30 (1962): "A federal court cannot provide the authority requisite to make a legislature the proper governing body of the State of Tennessce. And it cannot be doubted that the striking down of the statute here challenged . . . would . . . deprive the State of an effective law-based legislative branch." Justice Harlan, who joined this opinion, did not raise the issue in later cases.

56. For a discussion of this theory, see Beiser, *supra* note 51, at 556-63.

57. This discussion is based on Edward N. Beiser, Judicial Attitudes and Judicial Behavior: A Study in Role Perception (paper presented to the Northeastern Political Science Association, Nov. 1969).

should not determine public policy or be concerned with policy questions—is held by at least a portion of the judicial bureaucracy. If this is so, a Supreme Court which appears to be policy-oriented, which is not reluctant to overturn precedent, and which does not pay careful attention to conventional forms, is likely to stir up discontent among the lower court judges and minimize its ability to obtain willing compliance from them.

Clearly, systematic research is called for before we can confidently assert that such a difference in role perceptions exists. But theoretically, there are at least two reasons which would lead us to suppose that it might. The first is a function of the bureaucratic phenomenon in general. If lower court judges perceive their role as requiring them to follow instructions from the Supreme Court, precedent and stability in the law will be particularly important. For if he is to follow the Court's instructions, a judge must be certain as to what the Court wants of him. Frequent deviations from stare decisis, per curiam opinions which do not contain explanations of how a decision was arrived at, and decisions which appear to vary with the times rather than with "the law" all serve to complicate this task greatly. Any bureaucratic inferior wishes his superiors to act in predictable patterns, and there is nothing peculiar about the lower courts in this regard.

Secondly, there is a characteristic of the American judicial system which would lead us to assume that Supreme Court Justices might perceive of their role differently than lower court judges perceive of theirs. Most boldly put, to a considerable extent it is the case that their roles are different. The Supreme Court and the lower courts perform different functions in our society, and to incorporate them within one judicial system creates a source of unavoidable tension. We have contrasted the perception of the judge as policy-maker with the judge viewed as impartial arbiter. Clearly, there are elements of both models in our judicial system. But the two are not found equally in all courts. The model of judge as referee makes most sense at the trial court level. Here indeed, the judge must be "justice" blindfolded. The private segment of the law—those aspects of a case which are of primary concern to the litigants—require the traditional model. Did A shoot B? Does C's will actually exclude D? Is E entitled to workmen's compensation under a particular set of circumstances? It is in such cases that "slot machine jurisprudence" can be said to make sense. Total impartiality and predictability are desirable goals in the mechanism which a society utilizes to resolve disputes between citizens, or between citizens and the government.

The litigant who says that he will take his case to the Supreme Court "no matter what" reflects a profound lack of understanding of the place of that Court in our system of government. For under the Judiciary Act of 1925,[58] the certiorari procedure gives the Court total control over its docket. Only a minute percentage of persons undertaking litigation can hope ever to appear before the high Court.[59] The Supreme Court undertakes to review those cases which are of importance beyond the particular litigants. It does not exist to provide "justice" to every Tom, Dick, and Harry. They have had their trials, and have had at least one appeal as a matter of right. They can take up the Supreme Court's precious time only if their cases raise policy questions of some significance.

That is to say, the just resolution of disputes between adversaries is a primary function of the lower courts. It is almost never the function of the Supreme Court. Many of the cases which come before lower courts are of concern only to those with a direct stake in their outcome. But for the Supreme Court, most cases are merely vehicles carrying policy questions.

Yet the Supreme Court as a national policy maker operates within essentially the same framework and under the same rules of procedure as does a trial court. The complicated questions of standing to sue, case and controversy, ripeness, and indeed, stare decisis itself, all follow from our view of the Court as arbiter.[60]

Since we apply the label "court" to institutions which perform essentially different functions, it would not at all be surprising if future research should confirm our hypothesis that the Justices and the lower court judges perceive of their roles in different terms.

VI. CONFLICTING ROLE PERCEPTIONS: COURTS AND THE PUBLIC

"How y'a gonna keep 'em down on the farm, after they've seen Paree?" runs the old song. Once the man on the street became aware of the findings of judicial realists and saw that behind the mystique of

58. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (codified in 28 U.S.C. §§ 1254-58 (1964)).

59. Approximately 10% of the petitions for certiorari are granted. Fewer than 10% of the decisions of the federal district courts are appealed to the courts of appeal.

60. This follows logically from the justification of judicial review utilized by John Marshall in Marbury v. Madison, 5 U.S. (I Cranch) 137 (1803). Marshall claimed the right to judge the constitutionality of an act of the Congress on the grounds that it was necessary if he were to settle the particular case before him. That is, judicial review was justified as being incidental to the normal judicial function of deciding cases and was legitimate only insofar as it was essential to the resolution of the case. Thus the Court's role as constitutional policy-maker became tied up in the procedures and rhetoric of its function as arbiter of disputes between private parties.

the judicial robe there was considerable discretion and significant policy making, would he be content to allow the courts to continue so to function? Many authors suggested that whatever scholars might say about the actual operation of the courts, if the general public were to lose its faith in "legal magic,"[61] the power of the judiciary, especially the Supreme Court's power of judicial review, would be severely circumscribed: "It would be fantastic indeed, if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth upon which its power rests."[62]

The public was understood to view courts in traditional, mechanistic, pr ɔess-oriented terms. The judiciary's legitimacy was felt to require that its actions correspond with the public's perception. A conflict between the popularly held model of proper judicial behavior and the activities of the courts would, it was said, detract from compliance with judicial decisions, and in general, weaken the courts' ability to act as policy makers.

Recent activities on both ends of the political spectrum might appear to suggest that in fact such a conflict in role perceptions has taken place, and to confirm the fears of those who urged the Court to trim its sails in accordance with the prevailing winds. The billboards demanding that we "Impeach Earl Warren" are evidence that the mystique has indeed worn thin. The virulent attacks to which the Supreme Court was subjected in the wake of its desegregation decisions may be said to reflect a reaction against judicial policy making.

One of the most interesting findings of the Kerner Commission's study into the causes of the urban riots of 1967 was that many ghetto dwellers had lost faith in the fairness of the judiciary. They simply did not believe that the courts were impartial arbiters, who dispassionately rendered justice to all, regardless of status. Rather, the judiciary was seen by many as part of the oppressive regime. The consequences of the loss of faith in the traditional model were glaringly apparent at the trial of the "Chicago Eight" (reduced to seven) before Judge Julius Hoffman. It is clear that the defendants did not perceive of their trial in the same terms as did the judge. They considered the court to be intimately tied into the political process, and hence viewed it as antagonistic rather than impartial. The open warfare between counsel and the bench, and between the litigants and the court which ultimately

61. The phrase is Jerome Frank's. J. FRANK, COURTS ON TRIAL 37-61 (1949).

62. M. Shapiro, *supra* note 7, at 27. *See also* R. JOHNSON, THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION MAKING FROM A NEW PERSPECTIVE 150 (1967), *reviewed,* Goldman, 62 AM. POL. SCI. REV. 1285, 1287 (1968).

resulted in the gagging of one defendant, are ample proof of the utility to the courts of the traditional model.

While it would be tempting to extend the analysis of this paper and suggest that the general public's response to the Supreme Court is to be understood in terms of conflicting role perceptions, current research strongly suggests that this is not the case. Systematic sampling of public attitudes regarding the judiciary is a recent phenomenon, but all published studies point in one direction: the general public is basically uninformed and unconcerned.[63] Over half of those responding to carefully drawn samples in 1964 and 1966 did not specify anything they liked or disliked about the Supreme Court.[64] Despite the tremendous significance of the Court's reapportionment decisions in 1964, and the extensive publicity they received, a minute percentage—just over five percent—mentioned them when asked to comment on the Court's activities later that year. In 1966, fewer than one percent of those interviewed about the Supreme Court mentioned the reapportionment decisions. There was greater public awareness of the Court's action in other areas—especially concerning the civil rights of Negroes, and school prayer. But here again, information about the Court was not widespread.[65]

If the public is ill informed as to the Court's decisions, it is even less aware of the Court's function as a constitutional policy maker. In 1966, over 60 percent of the public was unaware of the Supreme

63. The first systematic study of national attitudes toward the Supreme Court is currently being conducted by Professors Walter F. Murphy and Joseph Tanenhaus. Initial published reports of their work include: *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, in FRONTIERS IN JUDICIAL RESEARCH 273 (1969), and *Public Opinion and the Supreme Court: The Goldwater Campaign*, 32 PUB. OPINION Q. 31 (1968). A good collection of earlier public opinion data relevant to the judiciary will be found in Dolbeare & Hammond, *The Political Party Basis of Attitudes Towards the Supreme Court*, 32 PUB. OPINION Q. 16 (1968).

64. Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, *supra* note 63, at 279.

65. *Id.* One interesting result of the Murphy and Tanenhaus study is their discovery that most Negroes are not aware of the activities of the Supreme Court, despite the benefits that group has obtained from the Court: "to 57% of the Negroes in our sample, the Supreme Court was a cipher." *Id.* at 284. In a study of public opinion in Wisconsin, Dolbeare encountered a lack of awareness of the Court's reapportionment decisions which was virtually identical with the results of the national study. Dolbeare also found that in 1966, almost three-quarters of those interviewed in Wisconsin were not aware that the Supreme Court had handed down decisions related to the rights of defendants in criminal cases. This despite the widespread charge that the Court was handcuffing the police. Dolbeare, *The Public Views the Supreme Court*, in LAW, POLITICS AND THE FEDERAL COURTS 194, 200 (H. Jacob ed. 1967).

Court's constitutional role.[66] Approximately 27 percent of the 1966 respondents thought the Court was responsible for defining and maintaining the basic rules of the game, and also had some familiarity with its work. Of these, about three in ten responded negatively to the Court. That is to say, in 1966, fewer than ten percent of a random sample of the general public were both aware of the constitutional role of the Supreme Court and negatively disposed to it. It is quite clear, therefore, that we cannot speak of the Supreme Court as violating widespread public conceptions of the proper judicial role. Further exploration of public responses to the courts is necessary. But the following conclusion seems reasonable on the basis of present knowledge:

> Far from being likely to react against "judicial activism," the general public is more likely to be blissfully unaware of the Court's activity except in those rare instances when a decision cuts into its consciousness. In such instances, there seems to be little importance to any factor except that the Court acted on the matter . . . . [W]hat the Court did, rather than the niceties of its approach . . . [raises an issue] to public attention. No amount of careful attention to "neutral principles" would have affected reactions to [the school prayer] cases.[67]

One important caveat must be entered. We have considered the reaction of the general public. But the Court speaks to many different publics, and clearly they are better informed as to the Court's activities, and are more aware of its impact on public policy. To the extent that such specialized publics as the bar, law school faculties, journalists, and elected officials are opinion leaders, their perceptions of the proper judicial role, and their sense of outrage if their perceptions are violated, may constitute an important determinant of more diffuse public attitudes.[68]

66. Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes, supra* note 63, at 280-86.

67. Dolbeare & Hammond, *supra* note 63, at 30.

68. *See* Murphy & Tanenhaus, *Public Opinion and the Supreme Court: The Goldwater Campaign, supra* note 63, at 47. The reaction of the legal profession, and of the law school professors, to judicial law-making would appear to be a particularly interesting area for future research. Practicing lawyers have a considerable stake in judicial stability and regularity for the same reasons as do the lower court judges discussed above. Since law school professors spend a good deal of their time analyzing opinions from the point of view of identifying the *ratio decidendi* one might well expect them to react negatively to a court which was outcome-oriented rather than process-oriented. In a sense, both lawyers and law professors have a vested interest in the process, rather than in the outcome. These suggestions at present are entirely intuitive; there is considerable room for empirical research. Dolbeare's study in Wisconsin showed that there was a correlation between the extent to which people accepted the idea of mechanical jurisprudence, and their evaluation of the quality of the Court's performance. But given the very limited public awareness of the Court's activities, it is most unlikely that the character of the Court's decision making is related to the public's acceptance of the traditional myths. Dolbeare, *supra* note 65, at 209.

VII. CONCLUDING OBSERVATIONS

According to the Biblical account, Adam and Eve paid a heavy price for their decision to eat from the Tree of Knowledge. Their post-apple experience was much less carefree and content. Having taken the fateful bite, however, there was no way they could leave the real world and return to Eden. The judicial realists have forced the fruit of the Tree of Knowledge upon us all. Some have eaten more eagerly than others; some refuse to bite; and some, having bitten, long for an earlier, more innocent existence. The thrust of the present argument is that much of the contemporary controversy regarding the Supreme Court in diverse quarters can best be understood in terms of differential awareness of, or perhaps acceptance of, judicial policy making. It has been suggested that the concept of role is particularly useful to an understanding of this phenomenon. Without attempting to recapitulate the argument, two concluding observations are offered.

First, there are those who would dismiss the discussion of judicial role perception as mere "window dressing." They would accuse us of having been taken in by pious platitudes. The judge who speaks of self-restraint is taken to be a fraud, or at best, a fool. The President who attacks the Court for "legislating" is said to be a wolf in sheep's clothing, masking his debt to the South in convenient rhetoric. While such cynicism is undoubtedly appropriate in some cases, it may well lead us to throw out the baby with the bathwater. Our hardened cynic does not doubt for a moment that it is possible for the physician to separate his function as clinician from his activities as playboy. If a set of norms and values associated with a particular profession can repress or divert strong sexual passions, can they not also repress or divert policy-making passions? When a Felix Frankfurter tells us that "a judge worth his salt is in the grip of his function," rather than inviting our scorn, he should invite our careful empirical investigation. How does the judge conceive of his function? Can we demonstrate that in fact it influences him? Do different judges conceive of their functions in different ways? If so, how does their behavior differ? Do judges and other political elites conceive of the judicial function in different ways? What are the behavioral consequences of this? And just what does the word "grip" imply? Under what circumstances is the judge's role perception most compelling? Under what circumstances is he least bound by it? The studies reported in this paper have demonstrated that conceptions of judicial role can have behavioral consequences. To write them off as propaganda is to diminish our ability to understand the actual operation of the judicial system.

Secondly, if conflicting conceptions of the role of the judiciary are in fact at the heart of much of the controversy surrounding the Supreme Court, we can have every expectation that the Court will remain at the center of political storms for the foreseeable future. Judicial realism was a phenomenon of the 1920's and 1930's. We have passed the 30th anniversary of the Court-packing fight, but these events continue to cast a shadow which colors contemporary events.

Does the fact that we have not yet settled the issue mean that we cannot, or that we will not in the near future? After all, if society has achieved widespread agrcement as to the attributes of the ideal physician, can it not achieve a comparable consensus as to the attributes of the ideal judge? I suggest that no such consensus is likely to emerge.

Our conception of the "ideal" anything rests necessarily on fundamental value judgments. This is true regarding both doctors and judgcs. The model of the ideal physician rests on values which are generally accepted in our culture—that it is good to preserve life, for example. Hence it is not surprising that a particular set of behavior patterns for physicians is looked upon with favor. It is not that these patterns of behavior are value-free; rather they reflect values which are themselves widespread. Our conception of proper medical behavior is least helpful regarding those cases in which competing values are at stake: *e.g.*, euthanasia or abortion. An American physician who attempted to practice medicine in a culture in which many of his basic values were called into question—a culture which viewed it as inappropriate to save persons of certain castes or races—would quickly discover that there is nothing "given" or "natural" about western medical ethics, and that his perception of his role as a doctor was not at all value-free.

The doctor in this alien climate would be in precisely the position of the American judge. Divergent conceptions of the proper judicial role reflect basic divisions as to the values which ought to be stressed in our society.[69] Since we have no reason to expect these divisions to disappear, it seems most likely that the judiciary will continue to be a focal point of heated political dispute.

69. A useful discussion of the Supreme Court's position in a context of conflicting social values is found in Miller & Howell, *supra* note 8.