THE RHODE ISLAND SUPREME COURT: A WELL-INTEGRATED POLITICAL SYSTEM

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AUTHOR'S NOTE: *I wish to express my deep appreciation to the members of the Rhode Island Supreme Court: Chief Justice Thomas Roberts, and Associate Justices Thomas Paolino, William Powers (since retired), Alfred Joslin and Thomas Kelleher. This study could not have been conducted without their active and generous co-operation. The Justices were promised anonymity and that promise has been respected throughout this article. Quotations for which sources are not provided may be taken to be the language of an individual Rhode Island Justice, as best as I was able to reproduce it. I have allowed myself the luxury of minor editorial license inside quotation marks only insofar as was necessary to produce grammatical sentences.*

Richard Fenno (1962: 315) has suggested that: "[I]f one considers the main activity of a political system to be decision making, the acid test of its internal integration is its capacity to make collective decisions without flying apart in the process." In the context of the Congress, Fenno (1962: 310) defined committee integration as: "the degree to which there is a working together or a meshing together or mutual support among its roles and subgroups. Conversely, it is also defined as the degree to which a committee is able to minimize conflict among its roles and its subgroups, by heading off or resolving the conflicts that arise. A concomitant of integration is the existence of a fairly consistent set of norms, widely agreed upon and widely followed by the members."

This article seeks to explain the fact that Rhode Island Supreme Court Justices almost never disagree with one another (at least not in public)—that in Fenno's terms, the Rhode Island Supreme Court gives evidence of a high degree of integration. An explanation of this phenomenon will, it is hoped, contribute to our understanding of state supreme courts, the significance of which for the study of the legal process is now clearly appreciated.[1] In addition, this case study of one state supreme court faces the theoretically important question of how scholars should conceive of courts. Finally it contributes to the attempt to develop general theory concerning the behavior of small groups.

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The principal source of data is a series of interviews with the five members of the Rhode Island Supreme Court, which took place between January and May, 1970. The interviews ranged from one and one-half to two and one-half hours, and I was able to interview most of the justices more than once. Judicial interviews were supplemented by interviews with members of the court's staff, with members of the bar, by extensive personal observation of oral argument, and by recourse to the usual published sources.

EVIDENCE OF INTEGRATION

Compelling evidence for the proposition that the Rhode Island Supreme Court is a well-integrated political system comes from the rate of dissent. Between December 1964, and October 1967, the court decided 445 cases — 402 with opinion, and 43 per curiam.[2] During this period, a total of 25 dissenting *votes* and 5 concurring *votes* were cast. The 13 dissenting *opinions* and two concurring *opinions* appeared in 3.7% of the total number of cases decided with opinion.[3]

The interview data provide further evidence of judicial integration. The justices place a high value on their ability to reach agreement, and stress their capacity to get along well together. Two of them used the identical phrase to explain the importance of internal harmony: "You spend more time with your colleagues than with your wife." Therefore, one must learn to "disagree without being disagreeable." Another spoke of the "camaraderie" within the court. "We don't like to be offensive."

The justices were asked to indicate the qualities they would look for if they were picking the next member of their court. Their responses reveal the importance they attach to this "camaraderie." One justice spoke of a judge he had known on another court: the man was a "legal genius" and a "real work horse"; but, because his personality was "horrible," he would not be a desirable member of the Rhole Island Supreme Court. A colleague commented in a similar vein: "Far more important than genius is the simple ability to get along with others." One justice responded that "a good temperament" effects the work of the court: "You're living with four men." Still another justice said that he would look for a "competent workman with the right disposition." He explained why "the right disposition" is important for a member of a collegial court: As a judge you are required to "pick your brothers' opinions apart." It is there-

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fore crucial that it be understood that this is not personal criticism.

The court's internal harmony is made evident by what is undoubtedly the most intriguing aspect of its decision-making process—a procedure which sharply differentiates this court from the United States Supreme Court: *Opinions are assigned to individual justices on a random basis prior to oral argument.* That is, before a given case is decided, a "round robin" procedure determines who will speak for the court.[4]

Prior to 1965, there was no discussion of cases after oral argument. The justice to whom a case had been assigned worked without guidance from his colleagues, wrote his opinion, and circulated it for comment. At present, the justices hold a daily post-argument conference to review the cases just concluded. The man to the left of the opinion writer speaks first, and the discussion continues around the table with the author speaking last. Thus he has the benefit of his associates' opinions. I was told that a consensus is usually reached in conference.[5] It sometimes happens that the man to whom a particular case is assigned will "trade off" with another. This would happen if a justice felt that he were out of step with the court's thinking, but it is said to be very infrequent.[6]

Once the author has produced a draft, he circulates it and receives comment from the other justices. It is at this point that differences between the justices, if any exist, are most likely to come into play. The justices freely acknowledge that there is more disagreement within the court than is revealed by published dissent. A justice who is unable to convince his colleagues of the merits of his position may acquiesce in silence rather than dissent. The draft opinion is discussed at a Tuesday conference, but there may have been discussion between justices prior to the conference: "You try to iron things out before you get into conferences where you have to fish or cut bait."

One justice reported that he gets a reaction to about half of his draft opinions (mostly concerning language, or suggestions of citations to be put in or taken out). In a "substantial number" he has "substantial changes. . . . Once in a great while there is a shift of writers." Argument over a draft can become heated, but one justice claimed that it is invariably cordial. Argument is said to take the form of a "rational explanation of the rule of law." A strong effort is made to achieve unanimity: discussion in the conference may be directed at "getting a man to

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come aboard." Thus the interview data very strongly indicate that consensus is the goal in decision making.[7]

It has been reported (Sickels, 1965; Hahm, 1969) that on some courts, random opinion assignment, coupled with the relatively automatic acceptance of the judgment of the author, leads to minority decision-making — that is, the "majority opinion" is supported by less than a majority. This does not appear to be the case in Rhode Island. The justices insist that, while an individual may fail to record a dissenting vote, the opinion published always represents the view of the majority.[8] Random opinion assignment prior to oral argument is possible because of the high rate of agreement within the Rhode Island Supreme Court. In the vast majority of cases which come before them, the justices perceive that the choice of the author is essentially of no consequence. The decision-making process of the Rhode Island Supreme Court is marked by a high degree of substantive agreement. In addition, the social norms within the court promote harmony. By Fenno's standard, the court is an extremely well-integrated system.

WHY INTEGRATION?

Four important characteristics which help to explain the extent to which the Rhode Island Supreme Court is a well integrated system are:

1. The existence of a common perception of the court's goals and tasks, and of the methods by which they are to be achieved;
2. The nature of the cases which come before the court;
3. The environment in which the court operates; and
4. The justices' commitment to their job.[9]

Consensus as to Goals, Tasks, and Methods

The justices of the Rhode Island Supreme Court discuss their role in terms of reviewing what was done elsewhere, *i.e.,* in the Rhode Island trial courts. They are basically rule-oriented rather than outcome-oriented. Their task, as they claim to see it, is to guarantee that the correct rule of law was utilized in the proper manner by the court below. "The function of the Rhode Island Supreme Court," one justice told me, "is to decide whether a trial judge committed error under the law, as it stands." The court of last resort of Connecticut, he pointed out, was once known as the Supreme Court of Errors. When he first came to the Supreme Court, it took him a while to realize that

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his function was not to do "justice here, but to see that justice had been done somewhere else."[10]

The rules by which the justices measure the performance of the lower courts are derived from three principal sources — the federal Constitution, state statutes, and the judge-made rules drawn from prior cases. The justices' perception of their role varies according to which of the three is involved. In particular, the degree of creativity which they recognize in the judicial function depends on the source of the law.

When the federal Constitution is invoked, the Rhode Island justices view themselves as members of an inferior court, which must follow as precisely as possible the dictates of the United States Supreme Court: "It is the way of the state appellate courts to defer to the United States Supreme Court on constitutional matters."[11] The justices in Rhode Island do not speak of creativity in the constitutional sphere, even in areas in which the Supreme Court has not yet spoken: their task is to await orders from above, and to follow them diligently.[12] Said one justice: "You don't go further than the United States Supreme Court."

It would be a mistake to equate this position with a naive or mechanistic conception of the nature of constitutional law. A majority of the Rhode Island justices would probably agree with one justice's description of the Constitution as a "living, breathing, elastic document," meant to be construed as such — but not by their court! In constitutional matters, they see themselves as an intermediate appellate court, whose task is to apply the U.S. Supreme Court's rules — whatever they may think of them — to the Rhole Island legal system.

As a result of this role perception, differences in constitutional theory—and the justices do differ on constitutional questions—are not permitted to affect the harmony within the court. Since it is not within their power to be creative in constitutional matters, questions of constitutional philosophy are, by definition, irrelevant. Furthermore, although the odds that a decision by any lower court will be reviewed in Washington are very small, this role perception promotes compliance with the Supreme Court's wishes. A strong internalized norm requiring compliance with the United States Supreme Court in federal constitutional matters is probably a better guarantee of such compliance than is the fear of reversal.[13]

The justices express a common perception of how they are to approach statutory interpretation: their task is to carry out

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the will of the legislature. They have a sophisticated sense of what this entails: several of them spoke of "filling the interstices" in statutes. And they are aware that interpretation tends to be subjective. "Subconsciously you say, 'this is what I would have meant if I were in the legislature.' Here's where your own predjudices come in." But despite this, when a statute is involved, they view themselves as the handmaidens of the legislature. Or at least they ought to be. "To say that we don't legislate is blind. We do. But we shouldn't defeat legislative intent." Another justice continues, "We're a state court. Our duty and function is not to make the law. We do once in a while, [but] we're supposed to carry out the law made by the legislature."

Virtually all of the justices attempted to explain their function by referring to one or more recent cases in which they had ruled that statutes achieved results to which they were personally opposed:

> There was no way to construe this as covered by the statute. The five of us thought the legislature meant to cover this [but had failed to do so] but you can't do this with a statute — any more than with a will. If the will says "my nephew Edward," you can't take it to mean "my nephew George" even if that's what the guy meant. We couldn't have reached any other conclusion. If we did, you can forget about what the legislature said in every case.

As noted below, one of the Rhode Island justices is critical of the United States Supreme Court for interpreting constitutional language to meet changing circumstances. Is this ever a problem when his court interprets statutes? "Unless I am very dense, it hasn't happened here." Such a view of the judicial function which minimizes the possibility of creativity or development, renders differences between judges relatively unimportant, and thus promotes harmony within the court.

When they are confronted with cases involving judge-made rules — and only in this instance — the Rhode Island justices are prepared to innovate. This is not to be done lightly — there is a strong presumption in favor of stability. The court is committed to the doctrine of *stare decisis*. The justices all agree that frequently it is more important that the law be settled, than that it be settled correctly. Especially with regard to commercial and property law — cases involving contracts, wills, and trusts — men act on the assumption that the rules will remain stable. The consequence of the "ad hoc" is "bad law which redounds to the loss of most people." But when a judge-made rule — especially if it is an old one — produces undesirable results, the court is

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prepared to change it. In doing so, it will be influenced by similar action in other jurisdictions.[14]

It is not suggested that the foregoing describes how the Rhode Island Supreme Court actually decides cases; we do not have access to its conferences. Rather, this is how the justices describe what they are doing. What is significant is, first, that there is a very strong consensus as to the proper role of a Rhode Island justice, and, second, that they articulate a conception of the judicial role which is to a significant extent non-creative, and which provides minimal opportunity for individual differences to come into play.[15]

Nature of the Cases

"Great cases, like hard cases, make bad law" (*Northern Securities Co. v. United States* (1904); Holmes, dissenting). Most of the cases which come before the Rhode Island Supreme Court are neither "great" nor "hard." They are of concern only to the immediate parties, and *are rarely vehicles for broader questions.* "We just don't get jazzy constitutional law cases," explained one justice. "Few of our cases raise gutsy questions." In the course of a discussion of conflicting legal philosophies, one justice remarked: "We don't get the opportunity to put these theories into practice." In his view, "the law is a living thing meant to serve the public." But, he immediately explained, "We don't get many cases to show this kind of thing." I was told that they almost never receive a so-called "Brandeis Brief."

In the absence of an intermediate appellate court, the Rhode Island Supreme Court is not able to restrict the flow of business coming to it, as do the United States Supreme Court and some state high courts. Two consequences of this situation are a heavy work load, and a highly uneven pattern of cases coming before the court.

A complaint common to all of the justices is that they hear too many cases: "Once you start in October you're on a treadmill." The court decides approximately 200 cases with opinion each year, so that each justice writes about 40 opinions. In addition, they must act on various procedural matters.[16] The justices claim that they are not able to devote as much time as they would like to individual cases, that the press of business makes it difficult to consider writing a concurring or dissenting opinion, and that much of their reading in legal periodicals and the advance sheets of other jurisdictions must be put off until the summer recess.

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As the single appeals court in the state, the Supreme Court confronts a varied docket.[17] During one morning session which I attended the court heard appeals in an obscenity case, argued by counsel for a major out-of-state publisher, which was probably destined for the United States Supreme Court; and a second case involving a Fourth Amendment defense against the seizure of evidence by the state police. But in other cases, the justices were asked to reverse the Superior Court and award $175 in damages against a tavern whose allegedly unwholesome lemon meringue pie had led to intestinal distress, and to prevent a local authority from requiring the removal of abandoned automobiles from a vacant lot. As one justice put it: "We really get too many cases that don't belong in the highest court of a state. *Maybe 50% shouldn't come up*. The lawyers had to know that we could do nothing but affirm." The routine nature of most of the cases before them — the repetition of "the same operations with respect to the same subject matter year after year" is an important source of stability within the court.[18]

In his discussion of the House Appropriations Committee, Fenno suggested that committee members view themselves as a "business" rather than a "policy committee" — thus avoiding controversial programmatic concerns. The same phenomenon seems to operate within the Rhode Island Supreme Court. To the extent that the cases which come before it do not call for creative policy-making, the potential for controversy is avoided. It was from this perspective that one Rhode Island justice contrasted his court with the federal Supreme Court: "The U.S. Supreme Court gets the worst cases."

Between January and May, 1970, roughly the period of my interviews, the Rhode Island Supreme Court published opinions in 60 cases.[19] All were decided unanimously. The cases can be sorted into the following categories:

Category	Cases
Commercial and Property Law (mortgages, trusts, title to property, breach of contract)	13
Zoning (and related matters)	10
Criminal Appeals	6
Automobile Insurance Cases	6
Procedural Appeals	6
Workman's Compensation	5
Insurance Claims (non-auto)	5
Family Law	2
Negligence	1
Extradition	1
Municipal Pensions	1
Total	56

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The questions raised by these 56 cases appear to have been significant to no one other than the parties.[20] The remaining four cases were of broader interest, to varying degrees. In one, the court modified the rule under which attorneys may organize to practice in the state, a matter of general concern to the profession. A second dealt with the state constitution's requirement as to the form of legislative action needed to transfer title to public land, briefly delaying work on a public park until the legislature could pass a remedial statute by the requisite ⅔ vote. (It did so almost immediately.) In a third, the court refused to grant an advisory opinion to the General Assembly on the constitutionality of a previously enacted statute, holding that under the state constitution only the Governor could request such an opinion. In the fourth case (*Becker v. Beaudoin,* 1970), the court reversed its previous rule and abolished sovereign immunity for municipalities. It applied the change prospectively, allowing a four-month interval to enable the legislature to act to create municipal immunity, if it chose to do so. The opinion carefully demonstrates that the heavy weight of opinion in many other jurisdictions favors the change of this rule.

Taken by itself, the volume of cases would not appear to be enough to explain the absence of dissent. Obviously, the press of business does not prevent a dissenting vote; a justice needs time only if he wishes to file a separate opinion. One justice who is quite proud of several dissenting opinions he wrote years ago explained that he wouldn't have time to write them today: "If you're going to dissent, you have to do it well." This explanation makes particular sense in light of the prevailing consensus within the court. It assumes that agreement is the norm. Since dissent is unusual, it requires a very careful justification.[21]

While the routine nature of the cases seems to promote harmony, this process is also facilitated by the justices' consensus as to goals and methods. A Rhode Island justice views his function as guaranteeing that the correct rule was applied to a concrete case. The cases he reviews almost never involve challenges to the rules per se, and have limited impact on a few people. What would be the point of a dissent which would not help the parties to the case, and which would have no effect on the law? "I can think of at least 25 cases I joined in but did not agree. But to dissent solo would be of no help to the party, and had no chance of challenging a body of law." "What is a dissent unless it's going to improve the law?" "A dissent is futile; if you can't get the other four, why bother?"

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Judges who held a different perception of their role might be expected to react differently when confronted with these same cases. Conversely, one wonders whether the Rhode Island justices could have developed their consensus as to goals, tasks and methods if they were responding to different stimuli. Two factors appear to be interrelated: considered together, consensus as to goals and methods, and the kinds of questions confronting the court, provide the basic explanation for the infrequency of dissenting and concurring opinions.

Environment

"Rhode Island is a compact, chummy little state." And this fact has its impact on the Supreme Court. "It is inconceivable that a man would be elevated to this court by the Grand Committee who was not known personally to the other members of the court. . . . Since you know the people personally before they're on the court, you're slower to make a name for yourself. . . . Maybe in other states people are less likely to compromise."[22] One member of the court reports that he has known two of his colleagues for over 40 years each. At one time, he knew the name of every member of the bar — but this is no longer possible.

The justices' work patterns maximize informal contact. They all live within easy driving distance of Providence. Their offices are adjacent, and there is a considerable amount of office-hopping. They frequently lunch together, attend civic functions together, and see each other at weddings and wakes. Several of the justices contrasted their situation with that of those state supreme courts where justices do not reside in the same city, and where there is limited contact between them.[23]

It may be that the size of the court has an impact on the quality of social interaction. One Rhode Island justice would not like to see his court expanded to seven men, despite the need for a reduction in individual case loads, because "more men means more disagreement." He indicated that some judges he knows on seven-man courts have complained about the lack of harmony. Finally, one should note the relative stability of the court's membership: Chief Justice Roberts and Justices Paolino and Powers have served together since 1958;[24] Justice Joslin joined them in 1963; and Justice Kelleher was selected in 1966.

Quite possibly the social setting of Rhode Island and the court's internal logistics help explain how the justices came to share a common perception of their roles and tasks. In addition

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to promoting general norms of harmony and courtesy, one sees how the atmosphere in which the court functions would be conducive to an extremely effective socialization process.

Commitment

The justices of the Rhode Island Supreme Court are serious, dedicated men. They have a sense of purpose, take pride in their work, and seem to derive satisfaction from it. They have a strong feeling of responsibility: the buck stops here. Like skilled craftsmen, the justices are pleased when they produce what they consider to be a good opinion: "At the trial level you can say 'Damn it, this isn't fair. I'll do X and let "upstairs" worry.' But 'upstairs' has to put it in writing and give reasons."[25]

The justices share a common style — that of hard work. A justice has to be willing to take his work home from the office and to work on weekends. When asked about the type of man they would pick as the next member of the court, they emphasized the need for a hard worker.[26]

In addition, the justices have made an *exclusive* commitment to their court. Upon assuming the bench, they terminated their business and many of their organizational contacts. Several even spoke of their social isolation. They are critical of judges who permit themselves to become involved in controversial extra-judicial matters, presidential commissions, for example.[27] While it would be a mistake to view them as cut off from the world, the sense of propriety which they feel with respect to their positions sets them apart to some extent from other men, and this increases their identification with each other and with the court. Morris Janowitz (1960: 175) has shown how "social isolation has helped the military profession to maintain its distinctive characteristics and values." Perhaps it is not straining the point to say that a similar phenomenon affects the Rhode Island justices.[28]

DIVISION WITHIN THE COURT

An important conceptual question raised in the literature is whether the integration of small groups can best be understood in terms of processes internal to the group, or external to it. For example, it might be suggested that since Rhode Island Supreme Court justices are all selected by the state legislature, and since a small state presents a relatively limited pool of candidates for judicial posts, it is natural that the level of disagreement will be very low. That is to say, the integration of the Rhode Island Supreme Court might be attributed to the char-

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acteristics of the men who are chosen to serve as judges, and to their pre-judicial experiences, rather than to the pressures of a common institutional setting after they don the robe.[29]

During the course of the interviews, the justices were asked a number of open-ended questions which sought to identify their attitudes and values. It would be both presumptuous and incorrect to assume that, on the basis of one or two interviews, it is possible to identify the parameters of a judge's philosophy. However, one may demonstrate that they disagree significantly with respect to judicial philosophies and policy preferences. This being the case, the high degree of integration within the court must be attributed primarily to internal rather than external factors.[30]

Differences between the justices quickly became apparent when I asked questions concerning the role of the United States Supreme Court, with particular regard to constitutional law. One justice, who identified with Mr. Justice Harlan, felt strongly that the Constitution should be interpreted in light of the times in which it was written. It is not appropriate, he believed, for the Supreme Court to reinterpret the document in terms of changing conditions. The right to amend belongs to the people, not the courts. If a court misconstrues a statute, in his view, the legislature can reverse it, but if it misconstrues the Constitution, its ruling can be upset only with great difficulty:

> The liberal approach wants to keep the people up with the times. This is very dangerous. The Constitution would mean what five men say it means. Which five men? If you stick with the clear language of the Constitution you'd be on safer ground. Let the people change it if it doesn't work.

His concern flows from his basic democratic commitment and is very similar to the position expounded by the late Judge Learned Hand in *The Bill of Rights* (1962). It is not surprising that he felt that, had be been a member of the Warren Court, he would have dissented frequently.

The other members of the Rhode Island bench are more favorably disposed to the Warren Court's constitutional policies (though to varying degrees). One went so far as to wonder "if we would exist as a nation today if it were not for the Warren Court." They do not share their colleague's objection to the process of updating the Constitution:

> Courts have always been responsive to the times. You can't set the clock back. [The latter was presumably a reference to the

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> Carswell nomination.] The Constitution is a living, breathing elastic document. Constitutional law should be settled right, not just settled.[31]

One justice quoted "Mr. Dooley" — "The Supreme Court follows the election returns" — and continued:

> [Strict construction] is not the answer. Law must be viable. The Court is an instrument of social policy—no if's, and's, or but's. . . . Everybody's values intrude: so do the strict constructionists'.

To another, the call for a strict constructionist was offensive because it was a tacit request for "political representation" on the Court. "The [U.S.] Supreme Court wasn't intended to reflect the policies and philosophies of the people. If you're a natural law man, you believe in the great principles."

Discussion of particular decisions of the Warren Court suggested that the Rhode Island justices differ on policy matters. For example, one was critical of *Brown v. Board of Educ.* (1954) on substantive grounds. The Court should have reaffirmed *Plessy v. Ferguson* (1896) and demanded true equality of funding, etc. *Brown* has done "real harm" — witness the pressure for bussing of school children.[32] Other justices approved of *Brown*. One Rhode Island justice spoke of the need to support the police; he is sympathetic to their difficult task. Another told me that he knew what happened to poor kids in the back rooms of station houses.

Considering the range of their opinions, the potential for conflict and division clearly exists within the Rhode Island Supreme Court. One supposes that if these five men — as a group — became Justices of the United States Supreme Court, the unanimity which they exhibit would quickly disappear. That is to say, their behavior on this lower court would probably be a very poor basis for predicting their behavior on the U.S. Supreme Court. The fact that the Rhode Island Supreme Court is such a well-integrated system despite philosophical and substantive differences among the justices is compelling evidence of the behavioral significance of the four factors discussed earlier: (1) consensus as to goals and methods; (2) the nature of the cases coming before the court; (3) the environment in which they operate; and (4) the justices' commitments to their job. They function as intervening variables, separating the particular characteristics of the individual justice from the judicial decision.

Fred Greenstein's comprehensive review of the personality and politics literature includes a thoughtful discussion of condi-

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tions under which personal variability is likely to affect political behavior. Greenstein (1969: 50) cites numerous studies which conclude that "ambiguous situations leave room for personal variability to manifest itself. As Sherif puts it, 'the contribution of . . . [factors peculiar to the actor] increases as the external-stimulus situation becomes more unstructured.'" But "[t]he completely new situation in which there are no familiar cues" almost never confronts the Rhode Island justices. Quite the opposite is true. Greenstein also asserts (1969: 51) that "the opportunities for personal variations are increased to the degree that political actors lack socially standardized mental sets which might lead them to structure their perceptions and resolve ambiguities . . . . Personality variations will be more evident to the degree that the individual occupies a position free from elaborate expectations of fixed content" (1969: 56). Again, this is not the situation confronting a member of the Rhode Island Supreme Court. Finally, he notes (1969: 53) that, "to the degree that individuals are placed in a group context in which their decision or attitude is visible to others, personal variation is reduced." The context of decision-making in the "chummy little state" — the social factors associated with this residential court — appear to be of this sort.

This study confirms Sheldon Goldman's (1969: 217) suggestion that "[c]onsensual case situations are characterized for the most part (but not exclusively) by the institutional/role restraints compelling the subordination of personal values . . . ." The integration of the Rhode Island Supreme Court appears to be a function of factors internal to, rather than external to, the small group setting.

CONCLUDING OBSERVATIONS

The late Robert McClosky (1960) reminded us that one who studies the American Supreme Court must constantly be aware that he is studying a court — that it is a supreme court — and finally that it is American. McClosky's insistence that each of the three terms is significant applies also to this study of the Rhode Island Supreme Court.

Portions of the analysis in this article are explicitly related to characteristics of Rhode Island — the "chummy little state." Any case study suffers from the serious limitation that one does not know whether he has identified characteristics of judicial behavior which are common to many state courts, or peculiar to one. For that reason, it is particularly gratifying to note that

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Canon and Jaros' studies (1970; 1971) of *all* state courts of last resort (based on aggregate data and a variety of elegant statistical techniques) have identified the presence or absence of an intermediate appellate court as the most significant determinant of dissenting behavior. Statistical studies of this sort are extremely useful because they make generalization possible. Descriptive case studies help us understand the nature of the connections indicated by the statistics. The combination of the two approaches would seem necessary if we are to develop a thorough understanding of the behavior of the state courts. At present, the data simply do not exist which would permit us to say with any degree of confidence whether the discussion of the judicial role in the Rhode Island setting applies to other state supreme courts as well.

This study — and those of Canon and Jaros — is limited temporally as well. We may not assume that the behavior of the present court is identical with that of the Rhode Island Supreme Court of 15, 50, or 150 years ago. Indeed, should data prove to be available, comparative analysis across time would be worthwhile.

There has been a tendency in recent years to minimize the distinctions between decision-making in courts and in other institutions. While the identification of common aspects of decision-making is important — my own heavy reliance on Fenno's study of a congressional committee is an example — one must not ignore the differences. The facts that the institution under study is a state court — that it is an appellate court rather than a trial court — and that it is the appellate court of last resort, are important, at least insofar as a study of the Rhode Island Supreme Court is concerned. The role perceptions of the justices, their specific task orientation, and the nature of the material with which they deal, are behaviorally significant consequences of the fact that these five men sit as a state supreme court, not as a legislature, nor as a commission, nor as the Rhode Island Superior Court. Finally, this study underscores the utility of the approach taken by Canon and Jaros, (1970; 1971) in treating dissent as a characteristic of courts rather than of individual judges.

It is indeed interesting that Fenno's discussion of the House Appropriations Committee provides better analogues to the Rhode Island Supreme Court than does Walter Murphy's (1964) leading study of decision-making in the United States Supreme Court. The two courts deal with different material. The outlooks of the jus-

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tices on these two courts diverge in major respects and they function in distinctive social contexts. Thus, it is hardly surprising that the judicial process in Providence differs greatly from that in Washington: clearly we cannot base our understanding of state supreme courts on studies of the highest federal court. In the case of Rhode Island, and perhaps other states as well, models drawn from the United States Supreme Court are inadequate.[33]

Important aspects of the behavior of the Rhode Island Supreme Court result from its position as an appellate court. It seems appropriate to emphasize the distinction between appellate courts and trial courts, at least until it is shown that this distinction is not significant. It may well be that the status "judge" includes a variety of kinds of political actors, who must be carefully sorted out.

The present framework of analysis was employed because it appeared to make sense for this court. The focus is one which might provide the basis for a comparative study of state supreme courts: one would wish to compare and contrast courts in terms of three variables suggested by Fenno:

1. The extent of their integration;
2. The factors which enhance or inhibit their integration;
3. The consequences of varying degrees of integration.[34]

The last of the three is probably the most significant. In terms of its impact on public policy, the Rhode Island Supreme Court appears strongly to support the status quo. One wonders whether this is a necessary corollary of a high degree of integration? Further research may demonstrate whether state supreme courts whose justices perceive of their roles in more creative terms are less well integrated.

The practice of ending a research paper with the call for future hard work is almost a cliché. Yet in this area, one has little choice. Whether this particular framework is to be utilized or not, there is unquestionably a need for continued systematic study of the state courts of appeals.

NOTES

[1] Ground-breaking studies of state supreme courts by Nagel, Schubert and Ulmer are reprinted in Schubert (1964). Particularly relevant to this paper are major studies of state supreme courts conducted by Glick and Vines (1969, 1971) and by Canon and Jaros (1970, 1971).

[2] Memorandum opinions and orders excluded. A detailed discussion of Rhode Island procedures and structures will be found in Beiser (1971).

[3] Based on all cases with opinion reported in Volumes 99, 100, 101 and 102 of the *Rhode Island Reports*. Seven of the thirteen were solo dissents; a second justice joined the dissenter in six cases. Six individual dissent-

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ing votes without opinion were cast. One concurrence was solo; one was joined by a second justice; and two concurring votes were cast without opinion.

A comparative study of the states in this regard (Sickels, 1965) put Rhode Island in the group of states where dissent was least likely. Sickels demonstrates that the extent of dissent varies greatly from state to state, and in contrast with the United States Supreme Court. See also Glick (1971: Chapter 5). Similarly, the rate of dissent varies greatly among the federal Courts of Appeal. Goldman (1966: 377) found that there were dissenting opinions in more than 11% of the cases in three circuits, while in four others the rate was less than 3.6% — a lower rate of dissent than was present in this set of Rhode Island cases.

[4] The assignments are kept secret, so that counsel are not able to gear their arguments to a specific judge. One might expect that the justice to whom a case had been assigned would dominate the questioning in his case. My impression is that this is not so; as an observer in court over several months I was unable to determine which justice would write the opinion in a particular case.

[5] It should be stressed that we are totally dependent upon the justices' accounts of what occurs in the conference room. A justice's subjective perception of what transpired is not necessarily a perfect replication of the objective situation. I have made every effort to obtain corroboration of important points from a number of the justices. The text explicitly indicates instances in which a generalization rests on the assertions of a single justice.

[6] More common are switches when no substantive issue is involved. For reasons of propriety, a justice who does not feel the need to disqualify himself may not want to write the opinion — for example, in a case in which his former law clerk is of counsel.

[7] There is no indication that the chief justice is more than the first among equals. Under the recent court reorganization, he was made the administrative head of the state court system, but it remains to be seen what this change will amount to. In terms of influence within the court, all of those interviewed agree that the chief justice's impact is a function of his personal characteristics: he enjoys no more influence than he would as an associate justice. This is not surprising, since he does not control opinion assignment, and in the initial daily conference, he does not enjoy a strategic position.

[8] Conversations with attorneys in Providence have not given me any reason to question this.

[9] This analysis borrows heavily from Fenno's (1962: 311-15) study of the House Appropriations Committee.

[10] Glick and Vines identified four orientations held by the state supreme court judges they interviewed: ritualist; adjudicator; policy maker; and administrator. Traces of each of these orientations can be found in the responses of the Rhode Island justices. The administrator role, which Glick and Vines found to be the least common, is a central theme of the justices' responses in Rhode Island. See Vines (1969: 468).

[11] Sheldon Goldman (1968: 476) identified a similar attitude among some federal Court of Appeals judges: "The Courts of Appeals are just messenger boys for the Supreme Court."

[12] One justice suggested that in the past, when the fourteenth amendment doctrine of incorporation had been applied less frequently, this was not so.

[13] Note, however, that in Rhode Island this norm co-exists with a general — though by no means complete — satisfaction with the decisions of the United States Supreme Court. One wonders whether it could persist were this not so. Recent research which stresses the possibility of lower court independence because of the small number of decisions actually reviewed by the Supreme Court includes that of Richardson and Vines (1970: 175) and Dolbeare (1969: 373).

[14] One justice told me that this is a fairly recent phenomenon: "The old court would never change a rule. That's for the legislature. We have adopted the philosophy — 'Change court-made rules'."

[15] Glick and Vines explored the role perceptions of supreme court judges in Louisiana, Massachusetts, New Jersey, and Pennsylvania. Only in New

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Jersey did a majority of the judges speak of policy-making as an aspect of their functions. In the other three states, the overwhelming majority of the judges did not refer to policy-making as part of the judicial role. See Vines (1969: 486 ff.). Some consequences of conflicting conceptions of the judicial role are discussed in Beiser (1970).

[16] By way of comparison, during the 1968 term, each Justice of the United States Supreme Court wrote an average of nine opinions of the Court. The Justice's total work load was a function of his proclivity to concur or dissent. Taking only separate opinions into account, individual output varied widely: Justice Brennan wrote only 14 opinions and Chief Justice Warren 17; while Justice Harlan wrote 54 opinions and Justice Black 49. The average Justice wrote 33 opinions (including dissents and concurrences) during the 1968 term. See *Harvard Law Review* (1969: 278). However, the workload on the Rhode Island Supreme Court appears to be lighter than on the United States Courts of Appeals. In 1963, in only one of the eleven circuits was the average case load per judge (cases with opinion) below 40. In four circuits, the average judge wrote 70 opinions. See Richardson and Vines (1970: 121).

[17] The extent to which a court's policy making opportunities and capabilities are enhanced by its ability to manipulate the contents of its docket is discussed by Schubert (1970: 141-42). The relationship between judicial consensus and a court's inability to control its docket has been suggested by Goldman (1969: 221) and by Canon and Jaros (1970, 1971).

[18] Compare Fenno's (1962: 312) discussion of the House Appropriations Committee in this regard. See also Vines' (1969: 468) discussion of the ritualist role.

[19] Based on all Rhode Island cases reported in Volumes 261, 262, 263 and 264 *Atlantic Reporter 2d,* including per curiams, but excluding memoranda.

[20] The term "significant" as employed in this discussion refers to the case's impact on other than the immediate parties. Some lawsuits are of great importance to the litigants—for example, if a large sum of money is involved—but are of no concern to outsiders. No issue of law or public policy is raised. Other lawsuits may not have a profound impact on the parties but may be of great concern to the body politic.

One can conceive of a patient whose medical problem has been referred to a major researcher at a leading university hospital. The patient is delighted to hear the doctor say: "This is a routine case, of no consequence whatever." Unfortunately for the patient, the doctor does not mean he will recover. A "case" which is of "no consequence' to the advancement of medical science may be profoundly significant to the patient. Similarly, a case which is of little or no significance to the development of the law may greatly affect the lives and fortunes of the litigants.

[21] This discussion supports the finding of Canon and Jaros (1970, 1971), that the presence of an intermediate appellate court affects the rate of dissent in a state supreme court primarily through its impact on the kind of cases the court hears, rather than through quantity control.

[22] The justice's hypothesis that particular characteristics of judicial behavior may be a function of a state's political or social culture is suggested several places in the literature. See Dolbeare (1969) and Glick and Vines (1969).

[23] The importance of these procedural considerations has been suggested by Adamany (1969: 63). Goldman (1968: 480) discusses the significance of cordial personal relations off the bench for good working relations among federal appeals judges.

[24] Justice Powers retired in 1973.

[25] This justice was very conscious of the written opinion as a constraint on the discretion of his court.

[26] Fenno (1962: 314) writes that "the particular style of hard work is one which increases group morale and group identification twice over. By adopting the style of hard work, the Committee discourages highly individualized forms of legislative behavior, which could be disruptive within the Committee. It rewards its members with power, but it is power based rather on work inside the Committee than on the political glamour of activities carried on in the limelight of the mass media. Prolonged daily work together encourages sentiments of mutual regard, a

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sympathy and solidarity. This *esprit* is, in turn, functional for integration on the Committee." His description is directly applicable to the Rhode Island Supreme Court.

[27] One outside activity which the Rhode Island justices cite favorably is the Seminar for Appellate Judges conducted at New York University; four of the five have participated. Apparently, a considerable amount of "shop talk" about pending cases takes place among the judges — including members of the United States Supreme Court — who are in attendance. The communications function of this conference, and other such off-bench activities, deserves further investigation.

[28] See in general, Janowitz (1960: Part IV). Possibly also applicable to the judiciary is Janowitz' (1960: 177) observation that "in a free enterprise society, the military profession cannot compete with the private sector in monetary rewards for its elite members. Professional commitments therefore depend on the persistence of a style of life." A Rhode Island justice earns considerably less than does a successful Providence attorney. I was told that occasionally Rhode Island lawyers had declined appointments to the bench—including the Supreme Court—because they were unwilling to sustain the financial loss.

[29] A useful recent discussion of the concept of integration, and of the relevant literature, is found in Dodd (1971).

[30] By tradition, the court consists of three Democrats and two Republicans.

[31] He was contrasting constitutional decisions with the kind of cases his court decides, where the converse should hold true.

[32] This is not the justice who was compared with Judge Learned Hand.

[33] In an aside to his study of the federal Courts of Appeals, Goldman (1966: 377) cites Murphy (1964) and observes: "It is not unreasonable to assume that judicial strategy, bargaining, persuasion, and the like are at work in the process of fashioning a decision, and that these are relevant variables explaining differences in the rate of dissent between circuits." I would have assumed the same about the state supreme courts before undertaking this study. But in Rhode Island, these are not relevant variables—at least not insofar as interviews with sitting justices can provide an accurate picture of the internal dynamics of the court. There are striking similarities between the Rhode Island justices' description of their function and Benjamin Cardozo's descriptions in his *The Nature of the Judicial Process* (1921). Cardozo delivered his Storrs Lectures while he was a member of the New York Court of Appeals, not the United States Supreme Court.

[34] Among the ingredients of committee integration reported by Fenno were three which do not appear in Rhode Island: (1) specialization; (2) reciprocity (following from specialization); and (3) the perceived need for unity against an outside threat. The third has been shown to operate within the United States Supreme Court; perhaps one or more of the three will be present in other state courts. See Murphy (1964). Fenno suggests that the impact of party groups on appropriations decisions is limited by the high degree of committee integration. Adamany's (1969) comparison of the impact of party on the Michigan and Wisconsin supeme courts, drawing on studies by Schubert and Ulmer, is consistent with this hypothesis.

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