1948

Book Review. The Roosevelt Court by C. H. Pritchett

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BOOK REVIEWS


The most spectacular contribution made by Professor Pritchett’s previous articles on the Court, culminating in this book, has been the application of statistical devices to appraising the work of the Court. Never has Constitutional Law been reduced to such a counting as Pritchett gives it here. He reports the number of times each justice dissented, the frequency of his agreements with each of his brethren, and his votes for or against particular values Pritchett designates. He does not make everybody happy—Pritchett with tongue-in-cheek meekness acknowledges that his previous publications have “not been a cause of unalloyed satisfaction to all members of the present Court.” This is understandable. It must be infuriating to see one’s most passionate and philosophical prose reduced to a digit under the heading “pro government” or “anti government,” and Pritchett drops decisions into slots with the dispatch of a bus driver dropping coins into the change container on his belt.

The sub-totals of his calculating device are organized into chapters which discuss the significant developments of the last ten years in such fields as economic regulation, civil rights, and administrative law. But although the accumulation of numerical data provides the most conspicuous novelty of Professor Pritchett’s approach, his insight and understanding give the book its greatest value. Pritchett accepts in part at least the deprecation of another observer who said that “counting is perhaps the lowest form of scholarly activity.” But counting is far from being a low form of scholarly activity whenever the category selected reveals a new analysis of the subject matter, and when thinking follows the striking of balances.

Pritchett’s real accomplishment is that in addition to knowing how to accumulate data, he knows how to use it. His last two chapters on the alignments and issues of the New Deal Court are a penetrating insight into the real intellectual and philosophic controversies among the justices. He disposes conclusively of the doctrine propagated by Professors Powell and Schlesinger that the present Court is divided between activists (Black and Douglas) and practitioners of self-restraint (Frankfurter and Jackson), and identifies with great clarity the areas in which each of these four justices finds it his duty to acquiesce in the policies of other branches of government. Pritchett’s readers will be driven to the conclusion that policy making is a prerogative used and enjoyed not by one or two but by nine members of the Supreme

† Associate Professor of Political Science, University of Chicago.
Court of the United States; and those readers should gain new perception of the particular policies to which the individual justices subscribe. Pritchett's comprehensive understanding of his subject makes this the best publication on the current Court.

Since Pritchett began his work some years ago he has had a host of imitators and followers, of whom this reviewer will readily admit to being one. The result is that almost everyone working in the field of Supreme Court study has become a sort of one-scholar census taker after his own fashion. The Law Week and the newspapers as well as the professors deluge their readers with tables showing the number of times Justice A has agreed with Justice B; or the number of times one justice has voted in a particular manner as compared with his brethren. It may be well to pause a moment—before some overly enterprising newspaper man publishes a table on the number of notes exchanged among justices during oral argument at a given term—to consider the value and the limitations of these statistical methods as applied to the study of the Supreme Court.

Pritchett himself is fully cognizant of the limitations on the device he has developed and makes no false pretensions for it. He is extremely restrained in his claims. He does contend that when all of the agreements and disagreements among judges at a given term are reduced to their numerical frequency, some conclusions may be drawn as to the intellectual alliances on the Bench; and he does conclude that when votes are categorized as pro or anti civil rights, one may draw some conclusions concerning the basic philosophy of the individual justices.

The statistical method of judicial study is useful in answering three types of questions: (1) How often have particular justices agreed with each other? (2) How often has any given justice voted “for” or “against” some particular social group or value, as “for labor,” “for government,” “for civil rights”? and (3) How often have the views of a particular justice prevailed as measured by his frequency in the majority, or prevailing, group? Some of the limitations of the method inhere in the questions it answers. The details, beyond the obvious, of frequency of agreements are probably more interesting than important. The second question will be challenged by those who contend that it should not be asked—that justices do not vote “for” or “against” these groups or objects at all, but simply decide cases. The third is open to the challenge that frequency in majority may be a measure of satisfaction with results, but is certainly only a fragmentary measure of influence.

It is the division of votes into “pro government,” “pro civil rights,” and so on which most infuriates Pritchett’s critics. If a justice wrestles half the night with his problem, and finally resolves it as he thinks he is compelled to by considerations of legislative history, precedent, and logic, there is something objectionably cavalier in the pigeonhole consignment. It is like telling the lover who is certain that his girl is the sweetest and his passion the deepest in the world that the whole thing is so much biology.

The issue is too complex for more than a statement of conclusions here. My own conclusion is with Pritchett’s: The vote in one or two hard cases does not necessarily reflect a cast of mind, but judgment
in a sizable group of cases, if consistently of one direction, does reveal a justice’s policy. When we find that in disputed cases Justice Murphy almost always votes in favor of a claimed civil liberty, and that Chief Justice Vinson very rarely does, we may conclude that there are basic differences of opinion between the two on the proper scope of civil rights or on the propriety of their judicial protection. The weakness with the device is that it maximizes the importance of what is at most one factor in the process of decision.

Pritchett has thus devised a method which contributes to the answers of questions worth asking, but it is not a method by which an IBM machine can be used as a substitute for scholarship, a fact which some of Pritchett’s practitioners forget. Two problems arise:

1. Cases are frequently too slippery to be put in pigeonholes. Take the matter of recording agreements. Justice A writes the opinion of the Court, Justice B concurs in the result on grounds completely independent, and Justice C dissents because of a procedural detail which has nothing to do with the merits. Who has agreed with whom? Or take that much used category, “pro civil rights.” Who would allocate with assurance the position of the justices in *Screws v. United States*? And when does a case go into the “economic” category and when the

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1 325 U. S. 91 (1945), in which the Court split every which way on an interpretation of the Civil Rights Act of 1870.

Statistical computations based on “agreements” are rendered difficult not only because in some cases it is difficult to tell which justices are in agreement, but also because of the difficulty in knowing when to count companion cases as one and when as two, and when to list *per curiam*. Presumably as a result of these difficulties, statisticians purporting to present exactly the same data may reach quite different results. Pritchett, p. 247, and Stokes in the Washington Post, August 17, 1947, p. 6B, reprinted in Frank, *The United States Supreme Court: 1946-47*, 15 U. of Chi. L. Rev. 1, 40 (1947), each present tables on the percentage of agreement among justices in non-unanimous cases at the 1946 term. If these were simple calculations, their figures would presumably be identical. The following table shows the differences in the percentages recorded for the same things by Pritchett and Stokes. It will be noted that there was no difference between the two in only one out of 36 possible instances.

*Differences Between Percentages of Agreement in Non-Unanimous Cases, 1946 Term, as Reported by Pritchett and Stokes*

<table>
<thead>
<tr>
<th>Vinson</th>
<th>Black</th>
<th>Reed</th>
<th>Frankfurter</th>
<th>Douglas</th>
<th>Murphy</th>
<th>Jackson</th>
<th>Rutledge</th>
<th>Burton</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0</td>
<td>6</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>1</td>
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<tr>
<td>1</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>7</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td>1</td>
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<tr>
<td>6</td>
<td>1</td>
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<td>1</td>
<td>4</td>
<td>4</td>
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<td>4</td>
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<tr>
<td>2</td>
<td>7</td>
<td>4</td>
<td>5</td>
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<td>1</td>
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<td>4</td>
<td>2</td>
<td>8</td>
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<td>3</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td></td>
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</tbody>
</table>
"civil rights" category if, like *Kotch v. Board of Comm'rs*, it stands on the border between the two?

A major vice of the statistical method is that the reader is dangerously likely to accept the capsulated knowledge in the omniscient columns of figures without realizing how dubious was the compiler's judgment on which the figures were based. The statistics are no better than the scholarly comprehension of their compiler, and he must be cautious indeed. His questions should be reserved in footnotes, and the most dubious cases should be set aside altogether.

2. To this writer, the least satisfactory aspect of Pritchett's method is the practice of treating all cases on a plane, without allowance for the fact that they differ in significance. Justices *A* and *B* disagree on the most important case of the year, involving some extraordinarily fundamental principle, and in another case agree on an utterly insignificant point. The calculating machine treats these as one agreement and one disagreement, and the practice, run through a term's work, gives a misleading impression.

I have tried, in publications of my own, to compensate for this factor by restricting the statistical analysis to cases which are of substantially the same weight in significance, and to some extent my own work overlaps as well as follows Pritchett's. Differences result. For example, my own analysis of the 1946 term was restricted to the choice, confessedly arbitrary, of the 37 most important cases, while Pritchett's book covers the entire product of the term in non-unanimous cases. In the left hand column are Pritchett's figures, and those on the right are mine.\(^3\)

### Percentage of Agreement, 1946 Term, Between Particular Justices

<table>
<thead>
<tr>
<th></th>
<th>All cases</th>
<th>Selected cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black-Douglas</td>
<td>68</td>
<td>72</td>
</tr>
<tr>
<td>Black-Frankfurter</td>
<td>35</td>
<td>20</td>
</tr>
<tr>
<td>Black-Jackson</td>
<td>40</td>
<td>15</td>
</tr>
<tr>
<td>Murphy-Rutledge</td>
<td>77</td>
<td>80</td>
</tr>
<tr>
<td>Frankfurter-Jackson</td>
<td>71</td>
<td>79</td>
</tr>
</tbody>
</table>

It will be noted that while some of the percentages are very nearly the same, some are so markedly different as to cause basic differences in appraising the data. For example, Black is quite frequently in agreement with Frankfurter and Jackson—on the least important cases only. Frankfurter and Jackson were in appreciably more solid agreement on the most significant cases than they were on the remainder.

\(^2\) *330 U. S. 552 (1947)*, interpreting an act under which only the descendants of a certain group might hold pilot positions.

\(^3\) *Frank, supra* note 1, at 40-41; for the writer's data on the 1947 term, see *Frank, The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1 (1948). If, as would be perfectly reasonable, one challenges the theory of comparative importance on which the cases are selected, then of course the figures in the second column have no validity.
PERCENTAGE OF DISENTS, 1946 TERM

<table>
<thead>
<tr>
<th></th>
<th>All cases</th>
<th>Selected cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vinson</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td>Black</td>
<td>20</td>
<td>39</td>
</tr>
<tr>
<td>Reed</td>
<td>12</td>
<td>16</td>
</tr>
<tr>
<td>Frankfurter</td>
<td>23</td>
<td>27</td>
</tr>
<tr>
<td>Douglas</td>
<td>20</td>
<td>31</td>
</tr>
<tr>
<td>Murphy</td>
<td>24</td>
<td>42</td>
</tr>
<tr>
<td>Jackson</td>
<td>19</td>
<td>29</td>
</tr>
<tr>
<td>Rutledge</td>
<td>30</td>
<td>49</td>
</tr>
<tr>
<td>Burton</td>
<td>15</td>
<td>22</td>
</tr>
</tbody>
</table>

The extent to which the 1946 term was a year of failure for the views of Justices Black, Douglas, Murphy, and Rutledge, and particularly the latter two, is considerably more obvious from the second column that it is from the first. The first column would leave the impression that the views of Justice Frankfurter at the 1946 term prevailed less often than those of his brethren Black or Douglas; but the second column shows this to be untrue in the more significant issues.

This is no criticism of Pritchett, who did not set out to classify the cases. It is a reminder, however, that reasonable differences of approach in collection of statistics will give radically different results and interpretations. If my own selection were further refined to particular areas, drastic changes would follow.

If Pritchett had merely invented his statistical device and published it to the world, the huzzahs for his book would not be so loud. The statistical device as applied to the Supreme Court is somewhat like the income tax—there are obvious times and vantage points from which its nuisance value outweighs its blessings. But the shrewdness with which he has passed beyond his data into the heart of his materials means that his book will be essential to any student’s serious study of the Court and the Constitution for some years to come.

JOHN P. FRANK

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On its title page, the work recites itself to be “The Authorized Biographies of the Men and Women Who Lead Labor in the United States and Canada and of Those Who Deal With Labor—together with a Glossary of Labor Terminology edited by Dr. John R. Steelman—a

* Assistant Professor of Law, Indiana University Law School.

† Public panel member, National Labor Board, Region II.

‡ Vice-president, International Labor Press.

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The figures in the left hand column are calculated from Pritchett’s table, p. 44, using a denominator of 142 opinions for the term. Those in the right hand column are calculated from Frank, The United States Supreme Court: 1946-47, 15 U. or Chi. L. Rev. 1, 40 (1947), using as the denominator the number of “major” and “important” cases in which each justice participated.