

(especially Pothier), up to the deliberations of Napoleon's codifying commission. A convenient starting point in the study of the German Code might be the bitter controversy between von Savigny and Thibaut over the principle of adopting a code for Germany, to be followed by the attack of von Gierke and the Historical School on the draft Code and Stammler's final effective rebuttal. A suitable introduction to the study of the code of Soviet Russia would be Reisner's post-Revolutionary arguments (following Petrazycki) for abrogation of the private law legislation of the old regime in favor of an intuitive law of the workers' class; and then the official retreat to enactment of the series of positive law codes still in force could be examined. This somewhat limited recourse to the historical method has a distinct advantage over Professor Lawson's predominantly Roman law-oriented approach. The former would allow an ultimate appraisal of the relative advantages and disadvantages of concretizing a nation's legal principles in the systematized, rationalized form that a code involves, not merely from the rather alien standpoint of the Anglo-American common law systems, but within the context of modern Continental code jurisprudence itself.

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CIVIL LIBERTIES AND THE VINSON COURT. By C. Herman Pritchett. Chicago: University of Chicago Press, 1954. Pp. xii, 297. \$5.00.

IN Charles Herman Pritchett the University of Chicago has a political scientist who follows the term-in and term-out work of the United States Supreme Court much more closely than all but perhaps a few lawyers and more painstakingly than most academic scholars in the law schools. This description, let it be said at once, is not intended in any way as a reflection on lawyers or teachers of law, but as a high compliment to Professor Pritchett. For it was he who eight years ago gave us *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*. Now we have as a kind of successor rather than sequel, his new study of the Supreme Court's postwar work, *Civil Liberties and the Vinson Court*.

The two titles suggest an important difference in scope. *The Roosevelt Court* dealt with the Supreme Court's disposition of the cases of the decade 1937-1947. It reviewed the whole of the Supreme Court's case grist—including the fields of federal regulation, state regulation, taxation, civil rights generally and procedural protection in criminal prosecutions. But *Civil Rights and the Vinson Court*, as the title indicates, centers on those cases arising from conflicts between some unit of government and the citizen in the exercise of the human liberties that are proclaimed in the Bill of Rights.

Professor Pritchett applies a sound limitation in his new volume. In devoting

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himself to the civil liberties cases he recognizes the overriding importance of the human rights issues in the work of the Supreme Court during the years following World War II. No other area came close to it in either significance or public interest. Nor did any other area involve so many controversial members of the national society. There were teachers objecting to special loyalty oaths, religious zealots utilizing public address equipment, radicals advocating their social and political views, workmen involved in labor disputes, aliens caught in deportation proceedings, witnesses summoned before legislative hearings, members of racial minority groups demanding equal opportunities as citizens, protestants against censorship in its varied forms, and persons suspected, accused or convicted of crimes. All these and others became the principals in civil rights contests with governmental authorities at local, state and national levels—contests that finally reached the Supreme Court for argument and decision.

It does not simplify too much to say that in almost every instance the background was that "noblest of human concepts,"¹ liberty under law; and the essential question was, as *The New York Times* so succinctly phrased it on the day the Supreme Court first met with Earl Warren as Chief Justice, "How much liberty and how much law?"²

In his treatment of these civil rights cases under Harry S. Truman's appointee as Chief Justice, Professor Pritchett continues the kind of study he developed in his review of the preceding decade (actually there is an overlap of about a year). He describes and analyzes the main cases and the issues raised in them. He discusses the judicial personalities involved. And he draws up tables of the Justices' positions to illuminate the trends in our constitutional law. Since this tabular, or "box score," presentation of the work of the Supreme Court has brought him no little criticism from some judges and constitutional commentators, it is only fair to let Professor Pritchett explain his purpose and method.

His approach began to take form, the author tells us, when in 1940 he was struck by what seemed to be a peculiar combination of Justices who had joined in a dissenting opinion. He began to wonder what it was in that case and in the background and the experience of the dissenting Justices that led them to disagree with the majority of the Court on the issue raised. He decided that it might be worthwhile to examine the actual patterns of disagreement among the Justices, over a period of several terms. What he found "supplied a challenge to discover explanations for the voting behavior of the Justices."³ Out of his investigation came the Pritchett plan of "presenting the record on judicial divisions."⁴ Seeking to clear himself of the charge of disrespect for the judiciary, he says:

1. P. ix.

2. *N.Y. Times*, Oct. 5, 1953, p. 26, col. 1.

3. PRITCHETT, *THE ROOSEVELT COURT* xi (1948).

4. *Ibid.*

"I have been sorry to learn that my pursuit of this interest has not been a cause of unalloyed satisfaction to all members of the court. [One of my friends] . . . has been predicting gleefully that I would wind up before the bar of the Supreme Court on a contempt charge. I hope it will be obvious that I am *amicus curiae*, with a deep respect for the judicial process and a great sympathy for the court. It is my view that the Supreme Court inevitably acts in a political context, and that the greatest danger to the court and from the court comes when that fact is inadequately realized."⁵

Whether or not Professor Pritchett has discovered all the factors that account for majority or minority positions, he has assembled data out of which patterns of Supreme Court behavior most assuredly emerge. After studying the Pritchett tables it is difficult to see how anyone could seriously argue that the personnel of the Supreme Court has no bearing on the outcome of the cases. His data shows, for example, that before 1935, the proportion of Supreme Court decisions in which there were dissents had regularly stayed under 15 per cent.⁶ By 1940, after the first five Roosevelt Justices had been appointed, the dissent percentage had risen to 28. Then year by year the figure climbed rather steadily until in 1952 it reached an astonishing 81 per cent.⁷

Dissent runs heavier in the makeup of some Justices than in others, as is clear from Professor Pritchett's table on the dissenting records of the Justices in the 1946-1952 terms, expressed in percentages. Here it is:⁸

<u>Justice</u>	<u>1946</u>	<u>1947</u>	<u>1948</u>	<u>1949</u>	<u>1950</u>	<u>1951</u>	<u>1952</u>
Rutledge	30	22	29	—	—	—	—
Murphy	24	23	27	—	—	—	—
Douglas	21	28	34	30	38	34	51
Black	21	23	24	33	39	42	37
Frankfurter	23	25	27	32	24	22	27
Jackson	20	25	33	27	19	18	22
Reed	12	14	16	16	12	22	10
Burton	14	22	18	8	14	13	10
Vinson	9	13	18	2	6	14	18
Minton	—	—	—	5	14	18	14
Clark	—	—	—	0	10	1	6

The Justices' dissenting records, of course, reflect something more than differing degrees of disputatiousness. A subsequent table suggests the relationship between dissents in general and their positions when the Supreme Court divided in civil liberties cases. In a total of 113 such nonunanimous cases in the seven Vinson terms, these Justices voted in favor of the claimed civil right as follows:⁹

5. *Id.* at xiii.

6. P. 20.

7. P. 21.

8. P. 184.

9. P. 190.

Murphy	100 per cent
Rutledge	96 " "
Douglas	89 " "
Black	87 " "
Frankfurter	61 " "
<i>Court average</i>	35 " "
Jackson	31 " "
Clark	24 " "
Burton	22 " "
Vinson	14 " "
Minton	14 " "
Reed	13 " "

When the two tables are taken together it is evident that the Justices who dissented most frequently also most frequently took the side of the person who claimed that his rights had been invaded by a governmental authority. Although the individual rankings are not precisely the same in both tables, it is clear that there are definite groupings within the Court.

Beyond a shadow of doubt, Justices Murphy, Rutledge, Black and Douglas constituted, when they sat together, the solidest support for civil rights our highest Court has ever had. Professor Pritchett recognizes this by his designation of them as "The Four."¹⁰ There was strength in a steady number that fell just one short of a majority. In the first place, "The Four" required the Supreme Court to hear many cases that otherwise would not have been accepted for argument. Then, after these cases were accepted for argument, "The Four" were frequently joined by at least one other Justice to make a majority. Sometimes it was Reed. Sometimes it was Frankfurter. And sometimes it was Jackson. The point is that as long as Justices Murphy, Rutledge, Black and Douglas were together it took only one other Justice to make a 5-to-4 majority in favor of the citizen and his claimed right.

Professor Pritchett's statistics show how true this was—and how quickly it changed with the passing of Justices Murphy and Rutledge from the high bench. In the 1946, 1947 and 1948 terms, when "The Four" were together, there were respectively 26, 26 and 35 decisions on a 5-to-4 basis. After Murphy and Rutledge died and were succeeded by Clark and Minton, 5-to-4 decisions fell off in the 1950, 1951 and 1952 terms respectively to 15, 11 and 9.¹¹ With "The Four" cut to half strength, many cases that would have been accepted for argument in the earlier period were passed by. And when only one other Justice joined Black and Douglas in a civil rights case, the result was no longer a majority but a rather lonely three-Justice dissent.

It was this later Court that decided *Dennis v. United States*,¹² the case that put the judicial imprimatur on the first round of Communist convictions under the Smith Act. With Murphy and Rutledge gone and no one else to join

10. C. X.

11. P. 21.

12. 341 U.S. 494 (1951).

Black and Douglas, the convictions were upheld 6-to-2, with Clark not participating. Had Murphy and Rutledge still been on the Court the decision might have been different. Who can say that "The Four" would not have been able to persuade one other Justice to join them in deciding against the application of the Smith Act?

Professor Pritchett is genuinely disturbed by the *Dennis* decision, as his many references to it make plain, for he has more references to it than to any other case decided by the Vinson Court. In one of them he says:

"What the Court actually did in *Dennis* was itself to supply, by the process of judicial notice, the missing links necessary to make the government's use of the Smith Act successful. The indictment was for teaching, and organizing a party to teach, Communist doctrine. The Court held that the defendants could be constitutionally convicted on such speech charges because actually they were guilty of much graver crimes, though the graver crimes were not charged nor was evidence presented to prove them. This is a matter of more than technical significance, for, by ratifying the government's victory in a Smith Act prosecution for teaching and organizing, instead of insisting that the Communist party be indicted for what it is, a conspiracy to overthrow the Government, the Court inevitably raised serious questions about the future scope of protection for freedom of speech and freedom of assembly."¹³

The Vinson Court's decisions came to be, so Professor Pritchett shows, those of Chief Justice Vinson and Justices Reed, Burton, Clark and Minton. To Black and Douglas finally went the role of strong dissenters. Meanwhile Frankfurter and Jackson became the least effectual members of the Court, for when added to Vinson, Reed, Burton, Clark and Minton they were not needed to make the new majority; when they were added to Black and Douglas they were still on the minority side. The lot of the brilliant Justices Frankfurter and Jackson was not a happy one.

Much of the time the Vinson Court was nourishing the notion that judicial review is, as Professor Pritchett puts it, "inherently undemocratic in character."¹⁴ And he finds the Court under the Vinson Chief Justiceship attempting to solve the problem of "who makes the rules for a society in a state of siege" almost entirely "within the tradition of the strong legislature-weak judiciary formula which Holmes developed for the quite different purpose of controlling judicial review over state economic legislation."¹⁵ The author continues:

"Actually the Vinson Court even refused to give full faith and credit to the one doctrine Holmes proposed which did have the potentiality of strengthening judicial review, the clear-and-present danger test. The *Dennis* decision preserved the test in form but applied it in such

13. P. 244.

14. P. 240.

15. *Ibid.*

a way as to make it quite unlikely that any legislative action could fail to meet its requirements."¹⁶

Since Professor Pritchett's new volume, like the first, makes substantial use of statistics on the Justices and their work, we will do well to allow him a final comment on his method. He quotes Mark De Wolfe Howe of Harvard Law School as doubting "whether the statistical analysis of Supreme Court opinions can, under any circumstances, be fruitful."¹⁷ He also cites The Washington Post's comment: "We hope that Mr. Howe's exposé of this shallow thinking about the judicial process will hasten the relegation of box scores to the sports pages—where they belong."¹⁸ Then Professor Pritchett says:

"Admittedly such statistical devices cannot be used as a principal reliance in explaining the decisions of the Supreme Court. A box score is no substitute for the process of careful analysis of judicial writing by trained minds using all the established methods for coaxing meaning out of language. The results of such analysis can be presented only in more language, not in mathematical symbols. There is no method 'by which an IBM machine can be used as a substitute for scholarship.' But when all this is said, a place remains for a properly prepared box score used to highlight or summarize or put in shorthand form findings which support and give additional meaning to the results of more orthodox inquiry."

". . . [The voting record of the Justices in nonunanimous civil liberties cases] then cannot be accepted as an index of personal attachment to libertarian values on the part of the Justices. These votes were cast not in their personal but in their judicial capacity and represented their resolution of situations where many legitimate values may have been competing for attention. What the table does establish is the degree to which each member of the Court found it desirable or possible *as a judge* to prefer libertarian values over others present in their proceedings."¹⁹

Curiously enough this method has had support upon occasion, unintended no doubt, from jurists who are known to have criticised it sharply. When change in the composition of the Supreme Court led to the overturning of the *Trupiano*²⁰ search decision in *United States v. Rabinowitz*,²¹ Justice Frankfurter dissented with a striking protest. He said:

"It is not as though we are asked to extend a mischievous doctrine that has been shown to hamper law enforcers. We are asked to overrule decisions based on a long course of prior unanimous decisions, drawn from history and legislative experience. In overruling *Trupiano* we overrule the underlying principle of a whole series of recent cases, based on the earlier cases. . . . Even under normal circumstances, the Court ought not to overrule such a series of decisions where no mischief flowing from

16. *Ibid.*

17. P. 189.

18. *Ibid.*

19. Pp. 189-91.

20. *Trupiano v. United States*, 334 U.S. 699 (1948).

21. 339 U.S. 56 (1950).

them has been made manifest. Respect for continuity in law, where reasons for change are wanting, alone requires adherence to *Trupiano* and the other decisions. *Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.*"²²

And that says, at least to this layman, that we may learn something by putting all the *Rabinowitz* cases together and seeing how and through whom they add up.

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22. *Id.* at 85-86. (Emphasis added.)

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