

BOOK REVIEWS

THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947. By C. Herman Pritchett. New York: The Macmillan Co., 1948. Pp. xvi, 314. \$5.00.

A reader with a curious turn of mind might find inspiration in the Bible for an alternative title to Pritchett's interesting statistical study of the Supreme Court since 1937, and call it Numbers and Judges. In ten chapters the author counts, tabulates, arranges, checks, and cross-checks the nonunanimous opinions of the Court. The text is arranged under such puckish labels as "The Multiplication of Division," "The Right to Go Left," and "Rudder and Bowsprit," which, although not typical of the mood, are representative of the tone which frequently appears. To paraphrase a metaphor quoted by the author,¹ the light touch in his treatment of serious subjects sometimes produces a falsetto where organ tones would have been more appropriate. But these aspects of the work are perhaps matters of taste. It should be judged on the basis of the two principal characteristics that serve to distinguish it from other studies of the judicial process: its use of statistics and its view of the Court as a political institution. These will be considered in order. Although Pritchett's work is a bold and praiseworthy effort to advance a much needed development of quantitative method in social science, the conclusion to which this reader regretfully comes is that the statistical analysis fails to count much that is very significant, and the political analysis lacks adequate theory.

The author says at the outset that he is undertaking to study the politics and values of the Roosevelt Court through the nonunanimous opinions handed down by the judges. The reason that the author chooses to count nonunanimous opinions is that a "unanimous judicial decision throws little light upon what Walton Hamilton calls 'deliberation in process' . . . A unanimous opinion is a composite and quasi-anonymous product, largely valueless for purposes of understanding the values and motivation of individual justices."² Nonunanimous opinions, however, remove the veil of mystery from the quasi-anonymous obscurity of the composite unanimous opinion. At the least nonunanimous opinions give a tug at the veil, for "the fact of disagreement demonstrates that the members of the Court are operating on different assumptions, that their inarticulate major premises are dissimilar, that their value systems are differently constructed and weighted, that their political, economic, and social views contrast in important respects."³ Admitting so much, the reader wonders whether the numerical count is the important thing, rather than a qualitative analysis of the different assumptions, the competing value systems, and the political, economic and social views expounded. It is the count, however, and not the assumptions which is the centerpiece of Pritchett's discussion. It is the quantities and not the contents of the nonunanimous opinions that are offered to the reader as the principal fare of the text. This concentration on the statistical aspect of decision-making permits the reader to conclude that Justice Murphy must be twice as much attached to freedom of speech as Justice Black, and six times as attached as Justice Frankfurter. Murphy is rated 100 per cent on freedom of speech, Black, 50 per cent, and Frankfurter, 17 per cent.

Each case is assumed to be equal to every other case for purposes of counting. The

¹ P. 50.

² P. xiii.

³ *Ibid.*

author does not weight any cases. All are of the same size, density, weight, texture, and tensility. The statistical method, however, is valid only if the things counted are comparable with each other. If they are not substantively and qualitatively comparable, to count them in categories reduces their common characteristic to the single aspect of numerability. Asparagus tips and second basemen are comparable to each other only in that the formal mathematical properties of the integer one apply to them. From a study of asparagus tips and second basemen in their mathematical relations, one can draw mathematical conclusions only, since this is the only characteristic they possess in common. Exercises like this shed no light on such questions as why the second baseman missed a double play ball, or why the asparagus grows like a hatrack unless it is firmly constrained. Holmes and Brandeis do not become identical because they appear together in dissent.

Although the purely mathematical properties of nonunanimous opinions should lead the author only to mathematical conclusions, he imports a substantive content into the equations to which his figures lead him. This is done *vi et armis*, as the old trespass cases used to say, since the properties of the numbers used can only be mathematical, and any nonmathematical property must originate in a nonmathematical frame of inquiry. Thus, to say that the number six is yellow, is to join to the mathematical characteristics of the number six, a quality of visible phenomena, distinct from number. Or, to say of any recurrent union of justices that they are "conservative" or "liberal" is to invest their number with the qualitative judgment which the adjectives import. But the formulation of the qualitative judgment does not emerge from the number. The conclusion that the *three* dissenters in the *Butler* case of 1936 were "liberal" does not emerge with helpless inevitability from the number three, but from a judgment about public policy to which the number three is irrelevant.

In an obscure page⁴ the author rejects the adjectives "liberal" and "conservative" in favor of "left," "right," and "center." He says that in accordance with normal usage, "left" will designate the more "liberal" side of the Court and "right" will designate the "conservative." But, he warns that "the terms are to be construed in a strictly relative sense indicating direction of deviation away from the majority view of the Court at any given time, and are not intended to convey any fixed connotation or impute the possession of any definite set of political principles."⁵ It would seem here that the warning eats up the usage. By this standard, McReynolds, Sutherland, Butler, and Van Devanter were to the "left" of the Court in the Labor Cases of 1937, because they deviated away from the majority view of the Court at this given time. It is difficult to see how their "leftish" position on this (to them) melancholy occasion can be construed as being "in accordance with normal usage." In brief, left and right for Pritchett mean liberal and conservative, unless they mean dissent and majority. After the reader has settled this paradox in his mind, however, bafflement greets the discovery⁶ that the 1937-1938 Court was in the hands of a majority (which means the right wing) which was made up of center and left wing members.

The confusion created by these classifications is well illustrated by the way in which they are used. The author says at one place, "With four Roosevelt appointees on the Court, and constituting its entire left wing, the general leftward direction of the Court's movement began to be evident."⁷ But since left means deviation from the majority, it would appear that the left had moved into the dissent until it became the majority when it became the right. The metaphorical confusion is also labyrinthine. For example, although "Roberts definitely committed himself to the right wing," Black continued "to play rather deep in left field."⁸ We learn that the right wing has an "outer fringe,"⁹

⁴ P. 34.⁵ *Ibid.*⁶ P. 35.⁷ P. 36.⁸ P. 37.⁹ P. 38.

although no mention is made of an inner fringe. The light seems to be bad where these wild metaphors dwell, for Frankfurter could maintain "his position only faintly to the left of center."¹⁰ Roberts was in even more of a gloom, since he had to take "up McReynolds' torch on the far right . . ."¹¹ Despite his disclaimer that left and right do not refer to any definite set of principles, the author freely uses the customary newspaper connotations, as in the statement that Stone opened his career in the Court on the far left, and closed it on the far right.¹² The evidence adduced to support this statement is the fact that Stone was frequently in the minority in both periods. This deviation from the majority should have permitted him to close his career on the left as he began it, if indeed the author of the *Cement* case of 1925 began it there.

One may wonder whether the statistical method as it is used in this book does more than document the obvious, when it doesn't obscure it. Readers of the opinions of the Supreme Court since 1937 know that it has tended to split often. Of what value is it to know the frequency distribution of these disagreements without knowing and evaluating the disagreements themselves? Can the statistical method aid in making this evaluation? It does not seem to have helped very much in the instant text. This does not mean that some effort isn't made to make such appraisals. The point is that a slide rule won't help. The total result is a little like the baseball averages. We know how the judges batted but it is never very clear what kind of ball they have been hitting nor, at some points, what the game is. Or, without making any invidious comparisons, the statistical part of Pritchett's book is a kind of judicial Kinsey Report in which the objective fact of making common causes is elaborately investigated, but in which the manifold and subtle influences of mind and feeling that influence the choices made by judges are ignored.

The author seems aware of the limitations of his method, and in fact he throws away his slide rule whenever he considers the plight into which the Court has got itself. In Chapter Ten, "The Plight of a Liberal Court," there is no evidence that the author relies at all upon the statistical method.

Statistics to one side—Pritchett says of the Court in one place that it is a judicial body "predominantly engaged in hearing public law controversies, and its judges have an opportunity to influence public policy which seems shocking to those familiar with the more limited scope for judicial discretion found in the legal systems of most other countries."¹³ It is from the point of view of the political scientist, then, rather than the lawyer that the Supreme Court is observed by Pritchett, a fruitful way of viewing the work of the judges, and one not enough used, unfortunately. This approach, as Pritchett says, brings into the scope of inquiry the "social and psychological origins of judicial attitudes and the influence of individual predilections on the development of law."¹⁴ To this, it may be added that other objects of inquiry are also relevant to a political study of the judicial process. In particular, it is important to know how the Court as a political institution has affected and now affects the fundamental distribution of power in the American society. Moreover, a thorough political approach may usefully concern itself with the political obligations of the judges as holders of the public power. Although Pritchett intersperses the text with comments about the personal predilections of judges, and essays tentative sociological explanations about their behavior, the reader misses the absence of a comprehensive political organizing idea that will help to combine the numerous shrewd insights, which are otherwise in the nature of a miscellany. The Court, as Pritchett recognizes, "is a political institution performing a political function."¹⁵ The text does not disclose a systematic political theory that will help to interpret and clarify what this institution does, and what its function is.

¹⁰ *Ibid.*¹¹ P. 39.¹² P. 43.¹³ P. xi-xii.¹⁴ P. xi.¹⁵ P. xiii.

The absence of adequate theory troubles Pritchett's analysis of two principal aspects of the Court's work: the reason for its change of view after 1937, and what may be called the ambivalent approach to cases involving economic regulation and those involving civil liberties. As to the first, Pritchett suggests that geography may have produced the conservative characteristics of Van Devanter, Sutherland, McReynolds, and Butler. They grew up and made great careers for themselves out of the pioneer life of the frontier. Such propositions are dubious and the frontier thesis has been riddled if not sunk in the last twenty years by such writers as Wright, Hacker, Dierson, and Hayes. If it is an explanation of the conservatism of the four justices, it should also serve to explain Floyd B. Olson, radical former governor of Minnesota, who grew up in the same community as Butler, and Andrew Jackson of Tennessee, who made a career on the frontier when it really was one, and considerably before the arrival of McReynolds. As for Van Devanter, he represented the Wyoming point of view on matters of conservation and Indians, but relatively little else, and Sutherland was born in England. Of the new members of the Court, appointed after 1937, the most consistently liberal bloc, according to Pritchett, is Black of Alabama, Murphy of Michigan, and Douglas from the state of Washington. None of them originated or built a career in Boston, New York, or Philadelphia, although exposure to an "Atlantic" influence was the common characteristic of pre-1937 left and center blocs. If geography explains the line-up of the justices before 1937, it fails to explain it after, and must therefore be rejected as an explanation of the shift in view.

Pritchett himself suggests two criteria "for judging the Court's competence in its political role."¹⁶ The first is the representative quality of its decisions. The second is the ability to distinguish "those constitutional limitations which are necessary conditions for the healthful operation of a free democratic society, from limitations which have no firmer basis than custom or class advantage or vested interest."¹⁷ The Court before 1937 was unrepresentative (in the sense that it was out of step with the country), and it had not distinguished those constitutional limitations which are the necessary conditions for the healthful operation of a free democratic society from other kinds. Since the beginning of the Republic, the Court has survived as an integrated part of the American political process because over periods of time it has made itself representative. The process generally speaking has been a slow one. If it is true that the Court follows the election returns it has done so at a discreet distance. Its difficulty in 1935-1937 was that it was following the election returns of 1900. When it realized that the cost of this willful behavior might be the integrity of the Court itself, it became representative. Or more specifically, Roberts and Hughes changed from one side of the Court to the other to make a new majority. In short, the change took place because the judges found it no longer possible to hold out against the plain desire of the electorate for social and economic legislation as reflected in the programs and policies of their representatives in the Congress and the White House.

One of the functions that the 1937 Court had to perform, speaking politically, was to clear the way for legislation hitherto impeded by the decisions of the Court itself. By Pritchett's count, there were thirty-two precedents directly or unmistakably overruled between 1937 and 1946, including two precedents set by the post-1937 Court itself. The number was great because the pre-1937 Court had set up formidable barriers to the establishment of the authority of the Federal Government in the fields of social service and economic regulation. Of this considerable traffic in the disposal of unwanted precedents, Pritchett says, "The compulsion exercised by the principle of stare decisis is the compulsion of the beaten track. . . . All things considered, the Roosevelt Court has

¹⁶ P. 20.

¹⁷ Pp. 21-22.

strayed very little from it . . ."¹⁸ This conclusion would seem to follow from the evidence only with reluctance. *All* things would not seem to have been considered in the judgment that the overruling of thirty-two precedents in eleven years or so is not abnormal. This period might usefully have been compared with corresponding periods of the past. The guess may be ventured that, "all things considered," the Roosevelt Court showed a marked increase in overrulings over any similar period in the past, for its *political* function was to reconcile previous judicial interpretations of the Constitution with the new popular demand for social services and economic regulations, and the task was a great one. One may properly think of the Roosevelt Court in this period as engaged in the job of amending the Constitution judicially. It sat more as a convention than a court or a legislature. Pritchett adds that it has not denied the value of precedents or ignored society's psychological security. But *stare decisis* can be applied only when the fundamental pattern of political power is clear and there is no dispute over the principal structure. The Court in this period has been groping to define the outlines of that structure and the shape of that pattern. And it is in this that the clue to the multiple opinions must be sought and may be found.

As Pritchett well points out, the detractors of the Roosevelt appointments were prepared to criticize them as rubber stamp judges, but came to criticize them for too frequent dissents, and a seeming inability to make up their minds. As he further observes, however, "Basically, the dissents and the concurrences which characterize the Roosevelt Court reflect the conflicts of a society faced with unprecedented new problems of public policy and the deadly earnest in which the Court is considering proposed solutions."¹⁹ This is the key to the post-1937 Court, it seems to me. It is to be wished that Pritchett had taken this as his text and expounded on it in the space he devotes to numbers. Such an exposition would have made a strong contribution to the literature of constitutional theory and politics. But the author's keen insight is hidden away at the end of some remarks about dissents and concurrences. The statistical apparatus adds nothing to the verification of this hypothesis about the post-1937 Court. The most that the statistical data do is clutter up the text with tables. As indicated above, they afford no insight into the subtle complexity of the choices which the judges must make in finding methods of conciliating the conflicts of a society faced with unprecedented new problems of public policy.

The lack of adequate theory—to repeat—troubles Pritchett's analysis of the significance of the crisis of 1937. It also prevents him from properly evaluating the new role of the Court in dealing with social and economic legislation on the one hand, and civil liberties cases on the other. He points out in the chapter on "Economic Regulation and Legislative Supremacy" that the Roosevelt Court has adopted the Holmes philosophy of legislative supremacy where the question concerns the power of the Federal Government to supply social services and economic regulation. This new attitude, as he says, has resulted in "an almost unbroken record of upholding congressional interpretations of federal regulatory powers."²⁰ The Court has also sought to "give the same kind of leeway to the states by adopting a lenient attitude in applying the standards of the federal Constitution to state economic legislation."²¹ It has also tended to allow the Congress to settle conflicts of jurisdiction in these fields by statute,²² although its enthusiasm for legislative supremacy has abated somewhat since its first years.²³

With respect to civil liberties, however, it is the judiciary that has become supreme and not the legislature. Indeed the judges act upon the presumption that legislation dealing with civil liberties is unconstitutional, in contrast to the assumption that legisla-

¹⁸ P. 69.¹⁹ Pp. 52-53.²⁰ P. 72.²¹ P. 77.²² P. 83.²³ P. 90.

tion dealing with social services and economic regulation is valid. Pritchett's explanation is that "the Roosevelt Court no more than its predecessors has been willing to yield to legislative judgments which challenge its primary values."²⁴ The implication is that the pre-1937 Court liked property rights and the Roosevelt Court is indifferent to them. Contrariwise, the Roosevelt Court likes civil rights and asserts its power to protect them. If you happen to like people, you become a civil liberties man. If you happen to like property, you support its claims and interest. This does not seem to be very helpful in defining the political function of the Court and the political obligation of the judges as members of a free democratic society.

It is difficult to assess these aspects of the work of the judiciary without having in mind some political principle against which they can be measured. In fact the dilemma of the ambivalent judicial choice is one of the most persistent problems of democratic political theory, for it involves one's views about majority rule and minority rights. Are the different assumptions made by the Court with respect to social service and economic regulation statutes as against civil liberties statutes consistent with each other? Superficially they appear not to be. Indeed, they appear to contradict. Justice Frankfurter sometimes seems to desire to resolve the evident contradiction in favor of legislative supremacy. Other Justices—like Black—employ the ambivalent approach but fumble for a theoretical basis that justifies judicial intervention against statutes regulating civil rights. In some of Black's opinions this basis seems to be a disguised modern version of natural law doctrines.

A theoretical framework which resolves this dilemma should supply a workable formulation of the obligation of the citizen, and therefore, of the judge, in a free democratic society. To achieve such a formulation, it is necessary first to recognize a distinction between "policy" and "right." Policy deals with alternative choices of behavior and lends itself to judgments about prudence, sagacity, desirability, feasibility, and the like. As when we say that it is better policy to keep taxes low when the economy is relatively inactive than to keep them high. In matters of policy, no democratic theory will deny that these choices are to be made by the generality of the people, or by representatives of this generality, who may be called to account for their votes on such issues. And the way in which policy is changed is for a new majority to be formed which thinks that it should be changed.

Every society functions on the basis of a set of postulates that permits it to survive as a society. Democratic societies so function on the premise that majorities must be permitted to come and go. In a democratic society the franchise is not exhausted with one cast of the ballot that produces a majority. Majorities assume the responsibility of organizing the public power and formulating policy only on the condition that they will do nothing to prevent a new majority from succeeding them. If these conditions did not exist, the society would stultify itself. New majorities are formed when men press for changes in policy and persuade others to join them in sufficient number. This is possible only if men are free to speak, to meet, to write and print, to consult and caucus with their representatives, to traffic in ideas. These forms of activity are "rights." That is to say, they may be exercised without permission, and may be asserted against attempts to infringe them.

All of the members of a democratic society must follow the declarations of the majority as to policy. In these matters all presumptions must be made in favor of the validity of the legislation. No one has a "right" to resist these declarations of policy. Unions have no "right" to refuse to obey the Taft-Hartley Act just as employers had no "right"

²⁴ P. 136.

to refuse to obey the National Labor Relations Act of 1935. The "right" of both is to form a new majority which will accept and put into effect a new policy of labor relations.

With respect to the fundamental conditions of a democratic society, however, the obligation of the members of that society is different. If the sitting majority undertakes to prevent the formation of new majorities by restricting the fundamental freedoms, it is the obligation of all members of the society to resist this invasion. In fact it is an obligation of individual members of the *majority* to resist this invasion.

So far as the judges are concerned, they possess the same rights and obligations as other members of the society. With respect to matters of policy it is their obligation to permit the fulfillment of the desire of the majority. Hence the presumption in favor of the legislature in the field of social service and economic regulation. But it is their obligation as members of the society to resist invasions of rights which would tend to prevent the formation of new majorities. Hence the presumption against the validity of statutes regulating civil liberties. This formulation of the principle of political obligation is, of course, over-simplified, because of space limitations, and many qualifications would have to be made. But it provides a working theory for dealing with the principal aspects of the Court's work in the last dozen or so years.

Pritchett adverts to some of these matters in his last chapter. He seeks to answer the question why the "liberals on the Roosevelt Court [fell] apart after a few brief terms of unanimity,"²⁵ and he says that there are three reasons which may be suggested apart from personal incompatibility: modern liberalism is not a consistent philosophy; the liberal judicial tradition is a divided one because Holmes was interested only in rules of judicial behavior while Brandeis was interested in programs; and it is easier to develop a consistent position when out of power than when in power. Then follows a discourse on liberalism and judicial pragmatism, economic liberalism, liberalism and individual rights, and activism versus self-restraint. In all of this, Pritchett uses the word "liberal" in confusing ways, so that it is never quite clear what he is getting at. He mixes up bits of Schlesinger and Commager, with applications of Frankfurter and other judges, and winds up with a remarkably inconclusive statement on the political obligations of judges. He says that a "policy of judicial activism sponsored by a liberal court is no more consistent with the democratic process than a like conservative policy, unless the negation of legislative decisions is limited to countering assaults on authentic principles of liberty and dignity which must be maintained as essential conditions of a free society."²⁶ That is, the judges shouldn't nullify legislation unless it touches civil liberties. The rationale for this conclusion is not to be found in statistics.

EARL LATHAM.

Amherst College.

²⁵ P. 264.

²⁶ P. 286.

